PATNA HIGH COURT

Bibhuti Bhusan Bose

Vs

National Coal Trading Co

A.F.O.D. No. 251 of 1960

(H. Mahapatra and G. N. Prasad, JJ.)

14.10.1965

JUDGMENT

G.N. Prasad, J.

1. This is an appeal by the defendant. The plaintiff a registered firm carrying on business at Katrasgarh, in the district of Dhanbad, instituted the suit for recovery of a sum of Rs. 16,500 from the defendant, as per account given in Schedule A of the plaint.

2. The case of the plaintiff is that the defendant a coal merchant at Calcutta, had transactions with the plaintiff since July 1950 for the purchase of coal through the plaintiff's agency. It was agreed that the price of all coal supplied by the plaintiff to the defendant would be paid to the plaintiff at Katras on presentation of bills and that in case of non-payment, the plaintiff would be entitled to charge interest at the rate of 12 per cent per annum. In pursuance of the above agreement, the plaintiff supplied coal to the defendant during the period 15th July 1950 to 26th June 1954 and also regularly submitted bills for all such despatches which were duly received by the defendant. The defendant used to make payments from time to time, either in cash or by cheque. The last payment was made by cheque on the 22nd January 1955. All supplies made to the defendant and all payments received from him were duly entered in the plaintiff's books maintained in the regular course of business. A sum of Rs. 15,365-6-3 was outstanding against the defendant, but it was not paid in spite of demand and pleader's notice. Hence the plaintiff instituted the suit on the 10th May 1957, claiming interest at the rate of 6 per cent per annum.

3. The defendant set up various pleas in defense. It was urged by him that the Dhanbad Court where the suit had been instituted had no jurisdiction to try the suit, inasmuch as no part of the cause of action arose the jurisdiction of that Court. According to the defendant, the contract between the parties was entered into at Calcutta through Munilal Jha, who was admittedly one of the partners of the plaintiff firm. There was no agreement to pay the price at Katras and all payments had to be made at Calcutta on presentation of the relative bills and railway receipts.

The defendant admitted that he had transactions with the plaintiff in his individual capacity up to December 1953, but he alleged that with effect from January 1954, the transactions took place between the plaintiff and a firm established on the 19th January 1954 under the name and style of the defendant, namely, Bibhuti Bhusan Bose, Sealdah Railway Siding, Wood Gola No. 7. There were two partners of this firm, namely, the defendant and Munilal Jha, who was also one of the partners of the plaintiff firm. The entire business of the defendant's firm aforesaid was in charge of Munilal Jha and it was his responsibility to make payments for the coal supplied by the plaintiff. The partnership between the defendant and Munilal Jha was dissolved on the 9th August 1954 and the entire stock of coal belonging to the said firm, which was valued at Rs. 40,000, was taken over by Munilal Jha. Upon these allegations it was pleaded that the present suit was bad for mis-joinder of causes of action as also for non-joinder of Munilal Jha. The further defense put forward was that the account produced by the plaintiff was not correct and that, in any event, a substantial part of the plaintiff's claim was barred by limitation. The defendant also challenged the plaintiff's claim for interest.

4. The trial Court overruled all these defense pleas, except the plea as to interest, and decreed the plaintiff's claim for the principal amount of Rs. 15,365-6-3. As to the claim for interest, the trial Court held that there was no agreement for payment of interest, but it further held that the plaintiff was entitled to interest with effect from 23rd September 1954, which was the date on which the plaintiff had served a notice of demand (Ex. 2) upon the defendant. The suit having been decreed as aforesaid, the defendant has preferred this appeal.

5. The first question which has been agitated before us is the question of jurisdiction of the Dhanbad Court. The case of the plaintiff in Para, 9 of the plaint was that the cause of action arose within the jurisdiction of Dhanbad Court where the coal had been delivered to the common carrier for the purpose of transmission to the defendant. As against this, it was alleged in Para. 20 of the written statement that the defendant had no concern with the colliery and no coal was ever delivered to the common carrier at his instance or to his knowledge. The fact, however, remains that the despatches of coal used to be made by the plaintiff by railway and the railway receipts along with the bills used to be handed over to the defendant. In the absence of any other material on the record, it must be presumed that the deliveries of the consignment used to be made to the defendant within the territorial jurisdiction of the Dhanbad Court, where the consignments were booked by rail for transmission to the defendant. I may refer in this connection to Section 36(1) of the Sale of Goods Act which provides that in absence of any express or implied contract between the parties, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced. Reference may also be made to Section 39 of the Act which lays down that where, in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer. Learned counsel for the appellant has not

been able to place before us any acceptable material to rebut the presumption arising from these two Sections of the Act which leave no room for doubt that the cause of action arose within the jurisdiction of the Dhanbad Court, since, the deliveries took place when the consignments in question were booked by rail for transmission to the defendant. The coal supplied to the defendant was in existence in the coal fields within the jurisdiction of the Dhanbad Court and the goods were booked by rail at places within the same jurisdiction and, therefore, the deliveries to the defendant were made within the same jurisdiction. Thus, there is no substance in the objection as to territorial jurisdiction raised on behalf of the appellant.

6. The second question urged before us was, that there was mis-joinder of causes of action. The contention put forward on behalf of the appellant was that two distinct causes of action had been lumped together in the suit, inasmuch as the liability for the dues of the plaintiff up to December 1953 was the personal liability of the defendant, whereas the liability for the dues for the subsequent period was the joint liability of the defendant and Munilal Jha, who had entered into a partnership with effect from the 19th January 1954 under a registered deed (Ex. K). In this connection it was further urged that the suit was liable to fail on account of non-joinder of Munilal Jha, who was a necessary party to the suit. It is true that a registered deed of partnership (Ex. K) was entered into between the defendant and Munilal Jha on the 19th January 1954 who, as the financing partner, was responsible for the adjustment and disbursement of all the liabilities of the firm to its creditor. But that was a matter entirely between the defendant and Munilal Jha. The plaintiff had nothing to do with the internal arrangement of this kind between the defendant and Munilal Jha. In his evidence, the defendant (D.W. 1) himself admitted that the plaintiff had nothing to do with the partnership business between him and Munilal Jha. He further admitted that he had nothing to show that the plaintiff firm had consented to the terms of the partnership between the defendant and Munilal Jha. Learned counsel for the appellant relied upon certain cheques (Exs. A series) and vouchers (Exs. F series) which indicate that it was Munilal Jha who had drawn some of the cheques in favour of the plaintiff and signed some of the vouchers as a partner of the defendant's firm. It was, therefore, urged that the plairitiff must have known that it was dealing with the defendant's firm and not with the defendant personally. But these documents are wholly insufficient to absolve the defendant from his liability towards the plaintiff. The evidence on the record shows that the plaintiff continued the despatches of coal as before in the name of the defendant. It has nowhere been suggested that the defendant had intimated to the plaintiff that he was no longer dealing with it in his individual capacity. It was, therefore, of no concern to the plaintiff to investigate whether Munilal Jha was making payments on behalf of the defendant personally or on behalf of the defendant's firm. The plaintiff was entitled to look to the defendant for its dues irrespective of whatever arrangement the defendant had made with Munilal Jha in connection with his coal business. Learned counsel relied upon a letter (Ex. E/2), dated the 31st March 1954, whereby the defendant intimated to the plaintiff firm the fact that he had entered into an agreement with Munilal Jha for payment of all his old liabilities and further requested the plaintiff to send him a statement of account which he would check up and confirm and advise Munilal Jha for making payment. But in this letter also the

defendant did not intimate to the plaintiff that he was no longer dealing with it in his individual capacity. Besides, upon the defendant's own case, the partnership between him and Munilal Jha came to an end in August 1954 and, therefore, by reason of Section 25 of the Partnership Act, the defendant was liable, both jointly with Munilal Jha and severally, for all acts of the firm done while he was a partner. Therefore, at the time when the present suit was instituted, it was open to the plaintiff to enforce its claim against the defendant individually, even assuming that for sometime in 1954, the dealings were with the defendant's firm. In this connection reference may also be made to a letter (Ex. 4/f), dated the 8th November 1954, which the defendant addressed to the plaintiff in reply to its pleader's notice (Ex. 2), dated the 20th September 1954. In its notice (Ex. 2) the plaintiff made a demand from the defendant of a sum of Rs, 15,665-6-3, being the balance price of coal as per its khata dues, in response to this demand, the defendant asked the plaintiff to furnish him with detailed statement of accounts in respect of its claim for his checking, after which necessary payments would be arranged. In the letter (Ex. 4/f), the defendant never suggested that he had no personal liability for any part of the plaintiff's claim. On the other hand, it appears from Exs. 1 and 1(a), dated the 21st December 1954 and the 22nd January 1955, respectively, that the defendant himself made two payments to the plaintiff by cheques for a total sum of Rs. 300. This was after the notice of demand (Ex. 2) and the defendant's reply (Ex. 4/f). I am, therefore, of the opinion that it is not a case of mis-joinder of two different causes of action and that the plaintiff is entitled to maintain its entire claim against the defendant personally. It follows that Munilal Jha was not a necessary party to the suit and his non-joinder was of no consequence.

7. The third contention of the learned counsel for the appellant was that the dues of the plaintiff have not been proved in accordance with the law, inasmuch as the plaintiff has not produced the original bills, but only their counterfoils (Exs. 7Z9 and 7Z10) and their accounts book (Ex. 6). According to the learned counsel, it was incumbent upon the plaintiff to lead evidence with respect to the individual transactions. We have looked into the counterfoil bills and the accounts book referred to above and we are satisfied that they were regularly kept in the course of business. This has not been disputed on behalf of the appellant before us. So far as the counterfoil bills are concerned, it is manifest that they were prepared simultaneously with the originals which were tendered to the defendant along with the railway receipts. These counterfoils therefore, prove the individual transactions, and reading them along with the entries in the khata Bahi (Ex. 6), they appear to me to constitute sufficient proof or the individual transactions, Besides, one of the partners of the plaintiff firm (P.W. 3) has pledged his oath to say that the dues of the plaintiff against the defendant amounted to Rs. 15,365-6-3 and that the claim of the plaintiff is true. It will be noticed that the defendant had not denied that the supplies of coal, as mentioned in the counterfoil bills, were not made by the plaintiff. Therefore, there is no force in the contention of the learned counsel that the claim of the plaintiff has not been proved in accordance with the law.

8. The fourth point raised was that the plaintiff firm was registered under the Partnership Act on

the 26th October 1953 and as such a substantial part of the plaintiff's claim is irrecoverable since the supplies prior to the date of the registration of the firm were not made by the plaintiff firm. In my opinion, this point is not available to the appellant having regard to the state of the pleadings in the case. In Paras. 3 and 4 of the plaint, it was clearly alleged that the defendant opened transactions with the plaintiff firm in July 1950, and that during the period 15th July 1950 to 26th June 1964, the plaintiff firm supplied huge quantity of coal to the defendant who took delivery of the same. The plaintiff also regularly submitted bills for all such despatches to the defendant. With reference to these averments made in the plaint, the defendant alleged in Para. 14 of his written statement that Munilal Jha, the managing partner of the plaintiff firm, had approached him in his coal depot at Sealdah in or about July 1950 and offered to sell coal to him. On that occasion, the said managing partner of the plaintiff had represented to the defendant that the plaintiff would supply good coal and in due time at the Sealdah depot of the defendant. In Para. 15 of the written statement, it was said :

> "It is true that the plaintiff company on contract made in Calcutta through its managing partner supplied coal to the defendant at Sealdah on the basis of each permit and sanction granted and issued by the Supply Department and Deputy Coal Commissioner (D), Calcutta, from 17-1-50 to December 1953. All dues of the plaintiff up to December 1953 were fully paid off by the defendant in Calcutta."

Thus, the fact that the plaintiff firm was in existence ever since July 1950 was not disputed by the defendant, and since the plaintiff firm was registered under the Partnership Act long before the institution of the present suit, I see no reason why the entire claim of the plaintiff is not maintainable. The bar of Section 69 of the Partnership Act cannot be invoked in the circumstances of the present case.

9. The fifth question raised by the learned counsel was one of limitation. In its plaint, the plaintiff had set up a case that the account between the parties was a running account : attracting the operation of Article 85 of the Limitation Act, but that was rightly not accepted by I the trial Court which held that the suit was governed by Article 52 of the Limitation Act, 1908, which provided a period of three years from the date of the delivery of the goods as the 'period of limitation for a suit to recover the price of the goods sold and delivered, where no fixed period of credit, as in the present case, was agreed upon. Relying upon this finding of the trial Court, learned counsel for the appellant contended that all claims of the plaintiff in respect of supplies made prior to the 10th May 1954 were barred since the suit was instituted on the 10th May 1957. The view taken by the learned trial Court was that the bar of limitation was saved by the letter (Ex. 4/f), dated the 8th November 1954 (already referred to above) which constituted an acknowledgement within the meaning of Section 19 of the Limitation Act, 1908. Exhibit 4(f), it will be recalled, was written by the defendant to the plaintiff in reply to its notice of demand (Ex. 2). The demand made by the plaintiff was for Rs. 15,665-6-3 being the balance price of coal as per khata dues and in his reply (Ex. 4/f) which was signed by him personally, the defendant stated as follows :-

> "With reference to your Pleader's letter, dated 20th September 1954, demanding from me a sum of Rs. 15,665-6-3. I beg to request you to please furnish me with the detailed statement of accounts in re: the above claim at your earliest convenience for my checking, after which necessary payments will be arranged. In this connection I may mention that I also requested you to send a statement of account in February last which I did not receive. So please furnish me with the same without delay for settlement as I do not like any unpleasantness between myself and yourselves."

The question for determination is whether this constituted an acknowledgement of liability within the meaning of Section 19 of the Limitation Act. Learned counsel for the appellant contended that it did not, because in his letter (Ex. 4/f), the defendant had asked for a detailed statement of accounts for his checking, and after that he would arrange the necessary payments. According to the learned counsel, Ex. 4(f) constituted a conditional promise to pay the debt which did not amount to an acknowledgement of the debt without proof of the fact that the condition had been performed, that is to say, without proof of acceptance of the plaintiff's statement of accounts relating to its claim. In this connection we were referred to *Maniram v. Rupchand*[1] where their Lordships of the Privy Council adopted the dictum of Mellish, L.J. in *In re River Steamer Co., Mitchell's Claim*[2], that an acknowledgement to take the case out of the Statute of limitation must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. The contention of the learned counsel is that Ex. 4(f) attracted the third proposition of Lord Justice Mellish, namely, a conditional promise to pay the debt and the condition performed, and the condition had not been performed in this case. In my opinion, it was not a case of performance of any condition upon which the promise to pay depended. In his letter (Ex. 4/f), the defendant did not put forward any condition which the plaintiff had to perform and upon which the defendant had promised to pay the dues of the plaintiff. The case of the defendant fell within the first proposition of Lord Justice Mellish, namely, an absolute promise to pay, because the defendant had admitted his liability to the plaintiff and agreed to arrange for the necessary payments after being furnished with the detailed statement of accounts. In Maniram's case, (1906) 33 Ind App 165 (PC), their Lordships pointed out that an unconditional acknowledgement has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary and that is what every honest man would mean to do. In this view, the letter (Ex. 4/f) is a clear acknowledgement of liability within the meaning of Section 19 of the Limitation Act, 1908. After the receipt of the plaintiff's notice of demand (Ex. 2), the defendant had made two payments by cheques, one Ex. 1 on the 21st December 1954 and the other Ex. 1(a) on the 22nd January 1955. Evidently, these payments were made in pursuance of the acknowledgement of liability which the defendant had made in his letter Ex. 4(f). I am, therefore, clearly of the opinion that the defendant had acknowledged the liability in respect of the entire claim of the plaintiff amounting to Rs. 15,665-6-3, and as such no part of the plaintiff's claim was barred by limitation.

10. Finally, the learned counsel challenged the correctness of the decision of the trial Court awarding interest to the plaintiff from the date of the demand (Ex. 2). The trial Court did not accept the plaintiff's case that there was stipulation for payment of interest in case the price remained unpaid, but awarded interest to the plaintiff by way of damages from the date of the receipt of the notice of demand (Ex. 2) by the
defendant. It was contended by the learned counsel that the view taken by the trial
Court is not correct, because in Ex. 2, no claim for interest was put forward by the plaintiff. That is, no doubt, true, but the demand clearly was for the outstanding balance price of coal which the plaintiff had supplied to the defendant. The supplies had been effected upto the 26th June 1954, and in the normal course, the price ought to have been paid by the defendant within a reasonable time of the deliveries, but the payment had been delayed for nearly three years and plaintiff was obliged to institute the present suit for recovery of the price. In such circumstances, it was within the discretion of the Court to award interest to the plaintiff at a reasonable rate on the amount of the price under Section 61(2) of the Sale of Goods Act. The price was undoubtedly payable when the notice of demand (Ex. 2) was served by the plaintiff upon the defendant, and there can be no doubt that the rate of 6 per cent per annum which the Court awarded was a reasonable rate. Thus, no interference is called for against this part of the decree.

11. No other point was raised on behalf of the appellant. The decree of the trial Court must, therefore, be upheld.

12. In the result, the appeal is dismissed with costs.

Mahapatra, J.

13. I agree.

Appeal dismissed.

Cases Referred.

[1](1906) 33 Ind App 165 (PC)
[2](1871) 6 Ch A 822 (828)