(1959) 02 AHC CK 0015

Allahabad High Court (Lucknow Bench)

Case No: Special Appeal No. 5 of 1957

Sada Shiva and Others		APPELLANT
	Vs	
Mahabir Prasad and Others		RESPONDENT

Date of Decision: Feb. 26, 1959

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Limitation Act, 1908 - Section 20, 20(1)

Citation: AIR 1959 All 631

Hon'ble Judges: Nasirullah Beg, J; J.K. Tandon, J

Bench: Division Bench

Advocate: Sarvasri Ali Hasan and N. Banerji, for the Appellant; R.N. Shukla, for the Respondent

Final Decision: Allowed

Judgement

N.U. Beg, J.
This is a special appeal filed against the judgment of a learned single Judge of this Court dated the 19th December, 1956.

2. The suit out of which this appeal arises was filed by one Gajodhar. This suit was for recovery of an amount of Rs. 600/- on the basis of a simple mortgage deed dated the 13th April, 1931. This mortgage deed was admittedly in favour of three persons, who were the mortgagees under this mortgage. One was Jagannath, who had advanced a sum of Rs. 600/-. The second mortgagee was one Suraj Bali, who had advanced a sum of Rs. 900/-, and the third mortgagee was the plaintiff Gajodhar, who had advanced a sum of Rs. 600/-. The total amount of the principal advanced under the -said mortgage deed thus came to Rs. 2,100/-.

The mortgagor in the said mortgage deed was Mahabir, who was defendant No, 1 in the suit. Defendants Nos. 2 and 3 were the heirs of Suraj Bali. Defendants Nos. 4 and 5 were the heirs of Jagannath, the third mortgagee. The plaintiff''s case was that

Jagannath''s mortgage money was paid off by the mortgagor in the year 1937 and Suraj Bali''s mortgage money was paid off in the year !l944. The plaintiff''s dues were not paid, hence he brought the present suit on the 25th July, 1949, for recovery of the said amount of Rs. 600/- on the basis of the aforesaid mortgage deed.

3. The suit was resisted by the defendants on a number of grounds which are not relevant at this stage. The sole plea which is relevant at this stage is the plea of limitation. This plea has been hotly contested between the parties throughout. The plea of limitation, as it has arisen before us, relates to Section 20, of the Limitation Act. According to the terms contained in the mortgage deed itself, the suit of the plaintiff would obviously be time-barred. The date of the mortgage was 13-4-1931. The period fixed in the mortgage deed was a year and a half.

Adding the period fixed in the mortgage to the period of 12 years, which is the period of limitation for bringing a suit on the basis of a simple mortgage, the limitation for the filing of the suit would expire in the year 1944. The present suit was brought in the year 1949. The present suit would, therefore be barred by time unless limitation was saved by the provisions of Section 20 of the Limitation Act on which the plaintiff relied for extending the said period of limitation.

The case of the plaintiff put before us is that certain payments were made by the mortgagor towards the interest of the mortgage money prior to the expiry of the period of limitation, i. e,, prior to 1944. It may be mentioned at this stage that initially in the plaint the plaintiff had relied on certain endorsements regarding payments on the mortgage deed. This case was, however, altered at the appellate stage. At that stage the plaintiff amended this part of his case and relied on certain payments made by the defendant towards interest which payments, according to the plaintiff, were recorded by the defendant in his account-books. The first appellate Court allowed this plea. to be raised by the plaintiff.

It remanded the suit to the trial Court on this ground. The trial Court allowed the parties to adduce fresh evidence on this particular point. It cannot, therefore, be said that the parties were taken by surprise by the introduction of this fresh case. After taking the evidence of the parties and considering it, the trial Court came to the conclusion that certain payments were made by the defendant to the plaintiff towards the interest due under the said mortgage, and that these payments were recorded in his account-books. It further found that these payments were made before the expiry of the period of limitation. In view of these findings, it was of opinion that Section 20 of the Limitation Act was complied with. It accordingly decreed the plaintiff''s suit with costs.

4. In appeal by the defendant No. 1, the first appellate Court affirmed the findings of the trial Court and upheld the decree passed by it. Dissatisfied with this judgment, defendant No. 1; filed a second appeal in this Court.

5. That appeal came up for hearing before a learned single judge of this Court, The learned Judge allowed the appeal, reversed the concurrent findings of both the Courts below and dismissed the plaintiff''s suit with costs. The view taken by the learned single Judge was that in giving the findings the lower Courts had relied on presumption. It appears that the plaintiff bad summoned certain account-books from the defendant.

According to the plaintiff, these account-books contained the relevant entries regarding the payment of interest made by the defendant. The defendant did not produce these account-books. The learned single Judge was of the view that because of the failure of the defendant to produce those account-books, the lower appellate Court had raised a presumption adverse to the defendant. He was further of opinion that a presumption of this nature would not constitute sufficient compliance with the provisions of Section 20 of the Indian Limitation Act. He, accordingly, allowed the appeal. Dissatisfied with that judgment, the plaintiff had filed this Special Appeal.

6. Having heard the learned Counsel for the parties, we are of opinion that this appeal should be allowed. In allowing the second appeal, the learned single Judge made the following observations:

"Since the registers were not produced, the courts below drew an inference that in these registers the appellant had made an endorsement in his own hand about the payments made in 1937 and 1944. The question is how far the courts below were justified in drawing that presumption and whether the plaintiff-respondent could rely upon an entry made in those registers, assuming that such an entry existed."

Later on in his judgment the learned single Judge observed as follows:

"It was in these circumstances that the trial Court held that the non-production of the account-books raised a presumption that there were entries in those registers in the handwriting of the appellant and as such Section 20 was made applicable."

7. The learned Counsel For the appellant before us has argued that there was no question of presumption at all in the present case. He has invited our attention to the deposition of the defendant No. 1 himself. In his evidence the defendant No. I clearly admitted that he had made payments. The learned Counsel for the appellant also read out the portion o the statement of the defendant which clearly indicated that he had not only made payments towards interest but that he had recorded those payments in his account-books.

The learned Counsel for the appellant further read out the portion of the admission made by the defendant which showed that those payments were made before the expiry of the period of limitation prescribed for filing the suit on the basis of the said mortgage. We have ourselves perused the said evidence and we have no doubt in our mind that the admissions made, by the defendant in those statements are clear

and bear out the aforesaid contentions of the learned Counsel. On behalf of the. respondent, the learned Counsel invited our attention to certain other portions of the deposition of the defendant, which were contrary to the aforementioned admissions.

No doubt, the defendant No. 1 did make statements contrary to that mentioned above in a subsequent portion of his evidence with a view to resile from the admission made by him previously. Both the trial Court as well as the first appellate Court, however, believed that the part of the defendant''s evidence which related to the admission of the fact that he had made payments towards the interest of the said mortgage deed before the expiry of the period of limitation, and that those payments were recorded by him in his account-books.

Both the Courts below, having believed that part of the defendant''s statement, we are of opinion that the finding of the first appellate Court, based as it was on admissible evidence, had become final. The appellate Court at the stage of the second appeal had, therefore, no jurisdiction to interfere in the said finding. In fact the observations of the learned single Judge indicate that he was under the impression that the Courts below had proceeded on presumptions.

It appears to us that, far from proceedings on presumptions, the Courts below had relied on positive I evidence in the case. That evidence consisted of the admissions made by the defendant No. 1 himself in the witness box. Under these circumstances we are of opinion that the finding of the first appellate Court had become final and should not have been upset.

8. Faced with this situation, the learned Counsel for the respondent has advanced some fresh arguments before us relating to the interpretation of Section 20 of the Limitation Act. He has stated that even if we believe the said statement of the defendant, it would not constitute a sufficient compliance with the provisions of Section 20 of the Limitation Act. Section 20 of the Act runs as follows :

"20. Effect of payment on account of debt or of interest on legacy. (1) Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment."

In the above section the learned Counsel for the respondent has emphasised the use of the word ''appears.'' The learned Counsel for the respondent: has argued that this word indicates that the writing of the person making the payment referred to in the proviso should actually appear before the Court, In the present case what has

been made out is merely the fact that the defendant had made payment towards interest, and that he had made entries to that effect in his account-books. Neither the account-books nor the entries were actually produced before the Court.

Under the circumstances the learned Counsel argues that the mere admission by the defendant that he had made entries to that effect in his account-books which were not presented before the Court would not be a sufficient compliance with the provisions of this section. Having given our anxious consideration to this part of the learned Counsel''s argument, we find ourselves unable to give effect to it.

In our opinion the word ''appears'' only means that payment was incorporated in a writing brought into existence by the person making the payment or at his instance in a writing signed by him that this fact should appear to the Court to be established by the evidence in the case. It does not mean; that the writing should be actually in existence before the Court at the moment when the Court is adjudicating on the point in issue.

In our opinion the construction suggested by the learned Counsel would be unreasonable and. might sometimes result in injustice. Thus, for example, it is possible that the debtor might have made payments within the period of limitation and might have incorporated acknowledgment of the same in a writing, and though such a writing; might have been lost, yet both the creditor as well as the debtor might admit in Court that such payments were made and acknowledgments of the same were also made in the handwriting of the debtor. Can it be said that in such a case in spite of this admitted position the creditor would be disentitled from making his claim and falling back on Section 20 of the Limitation Act, just because the written document happened to be unfortunately lost?

There might also be cases in which such a writing might have been removed, stolen or forcibly snatched away from the creditor by the debtor himself. Would it be fair and equitable in such a. case to allow the debtor to take advantage of his. own misdeed, and to hold that the creditor would be deprived of his right to bring a suit by the mere fact that such a writing was forcibly snatched away from him, even though it is proved beyond doubt that such payments were made to him and a writing incorporating the acknowledgments had been brought into existence by the hand of the debtor himself or at his instance? In our opinion there would be a substantial compliance with the provisions of the section, if payment was actually made before the expiry of the period of limitation and such payment is proved to have been incorporated in a writing signed by the debtor or in a writing made by him.

9. In this connection, the learned counsel for the respondent invited our attention to Section 20 of the Limitation Act of 1871 (Act IX of 1871) in which the term used was "exists". We, however, fail to see how this argument is of any help to him. It is significant to note that in the present section the term used is not "exists" but

"appears." It the term "exists" had been used, it might perhaps have been argued with some show of plausibility that it connoted the actual existence of the document. The legislature has however, avoided the use of. that term in the present section, and has used a different term. The very change in phraseology, therefore, militates against the respondent''s contention in the present case.

10. The learned counsel for the respondent then invited our attention to Section 19 of the Limitation Act of 1877 (No. XV of 1877). According to that section where the writing referred to therein was lost, oral evidence of its contents would not be received. We are of opinion that this argument also would not take the case of the respondent very far. It is significant in this connection to note that there is no corresponding provision in the present Section 20 of the Limitation Act barring the importation of oral evidence to prove the contents.

If the Act of 1877 is to be considered in the present case as providing an analogy, then one would have expected that if the legislature wanted to bar the importation of oral evidence it should have explicitly stated so, as it had done in the Limitation Act of 1877. In the absence of any provision in the present Section 20 of the Limitation Act barring the importation of the oral evidence in this regard, we sec no reason why the Courts should not consider all relevant evidence admissible under the Evidence Act.

In this connection it was argued before us on behalf of the appellant that the provisions of the Indian Evidence Act which is a general Act should be applicable to such cases, unless there is an express exclusion of the same by the provisions of the Limitation Act. We are inclined to agree with this argument. Under the Evidence Act where primary evidence of a document is lost or destroyed, it is open to a party to give secondary evidence of the same. If, therefore, the primary evidence of the writing is not forthcoming before the Court, we see no reason why the secondary evidence of the said writing should be ruled out by the Courts, if the same is permissible under the provisions of the Evidence Act.

11. The last argument of the learned Counsel for the respondent was that the use of the word ''acknowledgment'' in the proviso indicates that something more than a mere entry in the account books is required for the purpose of complying with the provisions of the proviso in Section 20 of the Limitation Act. What this something more should be was not clearly stated by him. At one stage he seemed to argue that the particulars of the deed and of the debt should be incorporated in the writing.

We see no warrant for this argument in the phraseology of the enactment. The proviso does not specify that anything more than mere payment should be incorporated in the writing or in the writing which would bear the signature of the debtor. It is no doubt true that the word ''acknowledgment'' is used therein. In our opinion the use of the word ''acknowledgment'' was a deliberate one and was for the purpose of emphasising the fact that the writing in question was the conscious

act of She person making the payment.

In this connection it may be mentioned that under the proviso the statement on record might be in the handwriting of the debtor or it might be signed by him. The signature would include the thumb-mark of the debtor also. As the proviso included a writing signed as well as thumb-marked by the debtor, the legislature might have considered necessary to use the word ''acknowledgment'' with a view to indicate that a writing, the contents of which were not brought home to the knowledge of the person appending the signature, would be of no avail.

In other words, the purpose of the use of the word ''acknowledgment'' was to indicate that the mind of the person making the payment was consciously working when his hand affixed the signature or made the writing. It, therefore, means nothing more than that the writing was the conscious act of a person who realised that he was liable in other words it was his intelligent act and not an unintelligent act. Such acknowledgment should indicate that the person making the payment was conscious of the fact that payment was being made and that payment was being made as interest. In the present case the defendant No. 1 has clearly made an admission in this regard also. He has stated as follows:

"I used to write in the register that the money was being paid towards interest."

It is, therefore, clear that while making the said entries the defendant was conscious of his liability and was further conscious of the fact that the payment made by him was towards the discharge of his liability of interest under the said mortgage deed. It is also evident that the fact that it Was paid as interest was also written by him and admitted by him to be so in the writing made by him.

12. Under the above circumstances we arc of opinion that it must be held that the admission made by the defendant in the present case constituted a full and complete compliance with the requirements of Section 20 of the Limitation Act. In this view of the matter we are of opinion that the suit of the plaintiff in the present ease cannot be dismissed on the ground that it is barred by limitation.

13. For the above reasons, we are of opinion that this special appeal should be allowed and the, judgment of the learned single Judge set aside. We accordingly allow this appeal, set aside the judgment of the learned single Judge and decree the plaintiff''s suit with costs throughout.