
Mannalal Vs S.P. Sitambernath

S.A. No. 45 of 1959

Court: Madhya Pradesh High Court

Date of Decision: Oct. 26, 1960

Acts Referred:

Contract Act, 1872 " Section 25(3)

Citation: (1961) J LJ 851

Hon'ble Judges: P.K. Tare, J

Bench: Single Bench

Advocate: R.K. Pandey, for the Appellant; P. Lobo, for the Respondent

Final Decision: Dismissed

Judgement

P.K. Tare, J.

This is defendant's appeal against the decree, dated 29-10-1958, passed by Shri D. P. Tiwari, First Additional District

Judge, Raipur, in Civil Appeal No. 34-B of 1956, reversing the decree, passed by Shri B. P. Shriwas, Civil Judge, Dhamtari, in Civil Suit No. 13-

B of 1955, dated 21-9-1956.

2. The respondent filed a suit for recovery of Rs. 3,500 inclusive of interest, alleging that an account was made of the previous dealings between

the parties, when a sum of Rs. 3,000 was found due on 19-3-1952, in lieu of which the defendant executed a receipt of the same date, admitting

the amount due on the loan. The defendant also promised to pay the said sum of Rs. 3,000 with interest at the rate of Re 1 per cent per month by

7-6-1952. The plaintiff had served registered notices, the last of which was dated 17-2-1955, which was refused by the defendant. Therefore, the

plaintiff claimed a decree for the principal amount with interest.

3. The appellant's defence was that no accounts had been made on 19-3-1952. He denied the receipt, dated 19-3-1952 and alleged that he had

never promised to pay the amount with interest. He further alleged that there had been a civil suit between him and others on the one hand, and

Mst. Rambati and Mst. Kalavati on the other hand in the year 1944, which was ultimately taken up to the High Court. The plaintiff had advanced

some amount to the defendant for fighting out the said litigation. He admitted that some amount was due towards those advances. But, the plaintiff

fraudulently got the document, dated 19-3-1952, executed by the defendant. It was further alleged that the deed, dated 19-3-1952 was a

promissory-note, and as it was unstamped, it was inadmissible in evidence.

4. The learned Judge of the trial Court, by order, dated 7-11-1955 had given a finding that the deed, dated 19-3-1952, was a promissory-note.

As such it was not required to be impounded, as it was not an agreement, as was alleged by the plaintiff. The promissory-note could not at all to

be validated by payment of the requisite stamp duty and penalty. Therefore, the deed could not be admissible in evidence at all for any purpose,

whatsoever.

5. The learned Judge of the trial Court, by Judgment, dated 21-9-1956, dismissed the plaintiff's suit on the sole ground that the deed, dated, 19-

3-1952. was a promissory note, which was inadmissible in evidence for any purpose, whatsoever. On all other points, the learned Judge negatived

the defence and upheld the plaintiff's contentions regarding settlement of accounts and the sum of Rs. 3,000 being due on 19-3-1952. The learned

Judge further held that the defendant had made repayment of Rs. 700 and that the deed, dated 19-3-1952 was not got executed by ""practising any

fraud. Further the learned trial Judge held that as the deed, dated 19-3-1952, was a promissory note, the same being inadmissible in evidence, the

plaintiff could rely on the oral loan. But, his suit was dismissed, as it was held that he had failed to establish an oral loan.

6. Upon an appeal by the plaintiff, the learned appellate Judge came to the conclusion that the deed, dated 19-3-1952 was not a promissory note,

but, it was an acknowledgment, accompanied by a promise to pay u/s 25, sub-section 3 of the Contract Act. Therefore, the learned Judge

validated the deed by impounding it as an agreement. The learned appellate Judge relied on a Division Bench of this Court consisting of Grille, C.J;

and Hidayatullah, J. (as he then was) in Tulstram vs. Zaboo ILR 1948 Nag 639. In that view of the case, the decree of the trial Court was

reversed and the plaintiff's suit was decreed.

7. The question that arises for consideration in the present appeal is whether the deed, dated 19-3-1952, is a promissory-note or is an

acknowledgment accompanied by a promise to pay u/s 25, sub-section 3 of the Contract Act and whether the first appellate Court and also this

Court can go behind the finding of the trial Judge, dated 7-11-1955, for the purpose of determining the real nature of the deed to ascertain whether

it is a promissory-note or whether it is a promise to pay u/s 25, sub-section (3) of the Contract Act.

8. Taking up the second question first, the learned counsel for the appellant invited attention to Section 36 of the Indian Stamp Act and urged that

the finding of the trial Judge, dated 7-11-1955, was final under the said section and, as such, the first appellate Court could not go behind that

finding. The said section is as follows:-

Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage

of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Section 61 of the Stamp Act provides as follows :-

(1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding, under Chapter XII or Chapter

XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a

stamp, or upon payment of duty and a penalty u/s 35, the Court to which appeals lie from or references are made by, such first-mentioned Court

may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of

duty and penalty u/s 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and

determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument

then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and

where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence or in any certificate

granted u/s 42, or in Section 43, prosecute any person for any offence against the Stamp-law which the Collector considers him to have

committed in respect of such instrument:

Provided that-

(a) No such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such Court, was

payable in respect of the instrument u/s 35, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading

payment of the proper duty;

(b) except for the purposes of such prosecution, no declaration made under this section shall affect the validity of any order admitting any

instrument in evidence, or of any certificate granted u/s 42.

It is significant to note that the words used in Section 36 are ""where an instrument has been admitted in evidence."" The bar provided by the section

would evidently not be applicable, where an instrument has been rejected as inadmissible in evidence on account of a wrong order of the trial

Court. There is no warrant for the assumption that the section would be attracted to a case of rejection of a document on the ground of

inadmissibility. The finality attached to the order of the trial Court is for the purpose of admissibility of the document in evidence, as also for the

purpose of charging the requisite stamp duty and penalty on the deed. I am unable to accept the suggestion of the learned counsel for the appellant

that the effect of Section 36 of the Indian Stamp Act would be such as to override the provisions of Section 105 of the Civil Procedure Code,

which empowers the appellate Court to entertain an objection regarding any error, defect or irregularity in an order, affecting the decision of the

case on merits. Firstly, in my opinion, Section 36 would not at all, be attracted to a case of rejection of an instrument on account of inadmissibility;

and, secondly, Section 36 of the Stamp Act cannot be construed in such a manner as to override of the provisions of Section 105 of the Civil

Procedure Code. Therefore, I am of opinion that the first appellate Court had the power to examine the real nature of the deed; dated 19-3-1952,

and, if the Court found that the deed was not a promissory-note; but, was an acknowledgment accompanied by a promise to pay, the Court had

further power to admit the document in evidence upon payment of the proper stamp duty along with penalty. Similarly, this Court also would have

the power to examine the real nature of the document and to admit it in evidence, if it is found that the view of the trial Judge as expressed in the

order, dated 7-11-1955, is not sustainable in law. In that event, this Court could admit the document in evidence by validating the same, if the said

irregularity or error on the part of trial Judge affects the decision of the case on merits. There is no reported case directly on the point. But, upon an

analysis of the provisions of the section itself, I have no doubt that the section would not apply, where a document has been rejected in evidence

by the Court of trial. In that event, the appellate Court can examine two questions-(i) admissibility of the document in evidence, (ii) proper stamp

duty payable on the deed. In all such cases it would be open to the appellate Court to examine the real nature of the deed, where the deed has

been held inadmissible by the trial Court.

9. The next question is whether the deed, dated 19-3-1952, is a promissory note or an acknowledgment, accompanied by a promise to pay u/s 25

sub-section 3 of the Contract Act. A promissory note has been defined by section 2 sub-section 22 of the Stamp Act as follows:-

Promissory note:-"promissory note" means a promissory note as defined by the Negotiable Instruments Act, 1881:

It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any

condition or contingency which may or may not be performed or happen.

10. Section 4 of the Negotiable Instrument Act defines a promissory note as follows:-

A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the

maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

The real nature of the deed, dated, 19-3-1952, has, therefore, to be ascertained in the light of the the definitions provided by the said Acts.

11. The deed, dated, 19-3-1952, is as follows:-

From the recitals of the document, it is clear that the appellant acknowledged his liability for the loan of Rs. 3,000 and further he made a promise

to pay the amount with interest. As such, there can be no doubt that the document is not a promissory note, as per the tests laid down by Their

Lordships of the Privy Council in the cases that I shall presently advert to. But, the deed is clearly an acknowledgment of liability accompanied by

a promise to pay u/s 25 sub-section 3 of the Contract Act, as laid down by a Division Bench of this Court in Tulsiram vs. Zaboo (supra). The

deed in that Division Bench case was very similar to the present deed. as is disclosed from the recitals which were as follows:-

To Tulsiram Shankarlal Marwadi, from Bhimashankar Isappa Wani, resident of Sangaon. Compliments. Further. The reason for writing the letter

is that I have this day taken from you Rs. 3,458-2-0 and affixed :a stamp. I will pay interest on this at the rate of Rs. 1 p.c.p.m. Mitti Jeshta, Sudi 8

Samvat 1989, dated the 12th June 1932.

By the hand of self.

Signature,

Signature of Bhimashankar

Isappa in the hand of self.

The learned Judges constituting the Division Bench considered the relevant case law exhaustively; and ultimately came to the conclusion that the

deed was an acknowledgment of liability, accompaigned by a promise to pay section 25 sub-section 3 of the Contract Act. Sitting singly, I am

bound by the ruling of the Division Bench. Moreover, I find that the deed in the present ease cannot at all be construed to be a promissory note.

12. In Md. Akbarkhan vs. Attarsingh L.R. 63 IndAp 279. Their Lordships of the Privy Council had to consider the nature of the deed, which was

in the following terms:-

This (one) receipt is hereby executed by H and A, residents of Hoti, for Rs. 43,900. half of which amount comes to Rs. 21,950, received from

the firm of L, for and on behalf of M of Hoti. This amount to be payable after two years. Interest at the rate of Rs. 5-4-0 per cent per year to be

charged. Dated 1st April 1917. Stamp has been duly affixed.

(Sd.) H.

(Sd.) A.

Their Lordships laid down that if the said document was otherwise within the definition of the promissory note, it would seem that it must be

negotiable, for there appeared to be no words prohibiting transfer or indicating an intention that it should not be transferable. With regard to the

question of negotiability, Their Lordships made the following observations:-

It must be admitted that it would be a somewhat "unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a

document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be

inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice; for the third

illustration indicates that an IOU is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration

however seems to show that the express words "I promise" or "I undertake, are necessary. The form of words is taken from an early English

Case, reported in Selwyn's NP. 11th Edn. p. 401, from Scacc. M I Geo II MSS (1), where according to the learned author the Court stated that

the words "to be paid" in the document there sued on amounted to a promise to pay, observing that the same words in a lease would amount to a

covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within

a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of

recording an agreement to pay money and nothing more, though of course they may state the consideration Receipts and agreements generally are

not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document

plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who

were experienced money lenders, did not draw it on paper with an impressed stamp as they would have had to if the document were a promissory

note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to

pay it is not a promissory note".

13. In AIR 1938 464 (Nagpur) Bose, J, (as he then was) held that where a document does not specify the person to whom the money is to be

paid nor does it say that it is payable to the bearer; it cannot be construed to be a promissory note. In the opinion of the learned Judge, the

document in that case was nothing more than an ordinary receipt or an acknowledgment containing also a promise to pay. Therefore, according to

the learned Judge, the document being an acknowledgment as also an agreement, it was u/s 6 (4) of the Stamp Act liable to be charged with the

higher duty, under Article 5 (c) of Schedule I of the Stamp Act and the same could be validated u/s 35 of the Stamp Act.

14. The test of negotiability of a deed, as laid down by Their Lordships of the Privy Council, as also indicated by Bose, J., is altogether lacking in

the present case.

15. The Division Bench consisting of Bose, J., (as he then was) and the late J. Sen, J., in *Balmukand vs. Ambadas* 1945 NLJ 456, further

indicated the tests, which would determine the question whether the deed is a promissory note or otherwise. The learned Judges of the Division

Bench relied on the dictum laid down by Their Lordships of the Privy Council in *Mh. Akbar khan vs. Attar Singh* (supra). In the light of the tests

laid down by their Lordships of the Privy Council, the learned Judges of the Division Bench held that the document in that case was not a receipt

for money and that it had been duly stamped as a promissory-note and it contained an unconditional promise to pay. The executant indicated it as

a promissory-note and had described it as such. Therefore, it fulfilled the tests laid down by their Lordships of the Privy Council. In that view of

case, the document was held to be a promissory note.

16. So far as the present case is concerned the document does not fulfil the tests of a promissory-note as laid down by their Lordships of the Privy

Council. Therefore, I am of the opinion that the learned appellate Judge acted rightly in holding that the document was an acknowledgment of a

liability, accompanied by a promise to pay u/s 25 sub-section (3) of the Contract Act. Further, I am of opinion that the learned appellate Judge

was within his power in validating the document upon payment of a proper stamp duty and penalty and in admitting the same in evidence u/s 35 of

the Stamp Act. The previous order of the trial Judge, dated 7-11-1955, could not operate as a bar to the course adopted by the learned appellate

Judge.

17. The learned counsel for the appellant further suggested that if this Court finds that the document was not a promissory-note, but was an

acknowledgment of a liability accompanied by a promise to pay, the case ought be remanded to the trial Court for the purpose of enabling the

parties to lead evidence about the existence of the prior loans. It was pointed out that the said evidence was lacking. I am unable to accept this

contention of the learned counsel, inasmuch as, there is cogent evidence on behalf of the plaintiff to prove liability on the basis of the

acknowledgment, which the learned appellate Judge had taken into consideration in coming to the conclusion that the plaintiff was entitled to a

decree, particularly in view of the fact that the trial Judge too had negated the defence pleas on all other points and had upheld the plaintiff's

contentions, except on the question of the nature of the deed.

18. I, therefore, see no reason to take a view different from that of the first appellate Court. Consequently, this appeal fails and is dismissed with

costs. Counsel's fee according to schedule or certificate, whichever be less. The costs of the Courts below shall be borne as directed by the first

appellate Court.