(1973) 07 BOM CK 0001

Bombay High Court (Nagpur Bench)

Case No: A.F.A.D. No. 55 of 1964

Tulsabai Nathudas and Others	APPELLANT
Vs	
Narayan Ajabrao Raut	RESPONDENT

Date of Decision: July 26, 1973

Acts Referred:

- Central Provinces Debt Conciliation Act, 1933 - Section 13, 13(1)
- Contract Act, 1872 - Section 2, 25(3)

Citation: AIR 1974 Bom 72 : (1974) MhLj 28 : (1974) MhLj 26

Hon'ble Judges: Chandurkar, J

Bench: Single Bench

Advocate: W.G. Somlawar, for the Appellant; D.B. Najbile, for the Respondent

Judgement

Chandurkar, J.

The plaintiff is the appellant. He had filed a suit against the defendant for recovery of Rs. 919.41 with interest on the basis of a promissory note dated 7-6-1958, admittedly executed by the defendant. The averments made by the plaintiff in the plaint only made out a case of cash consideration having been paid to the defendant at the time of the execution of the promissory note. He claimed Rs. 900/- as principal, Rs. 18\\- by way of interest from 11-4-1961 to 11-6-1961, and Rs. 1.41 P. as notice charges. The defendant admitted the execution of the promissory note, but according to him, no consideration was paid in cash. His story was that one Rambhau son of Bhabhutrao who was a minor, had to pay three installments according to a scheme framed by the Debt Conciliation Board for repayment of the debts of the plaintiff. According to him, the repayment was to be made in installments of Rs. 300\\- each due on 15-3-1956, 15-3-1957 and 15-3-1958, but Rambhau, who was a close relation of the defendant, was unable to pay the same and the plaintiff therefore, insisted that the defendant should execute a promissory note in suit for the amount of Rs. 900\\- due from the said Rambhau. According to the defendant, the installments due on 15-3-1956 and 15-3-1957 had become

irrecoverable, and in order to save limitation the plaintiff insisted on the defendant executing the said pro-note to keep the claim with limitation. The other contentions raised by the defendant were that the plaintiff was a money lender by profession and he was not entitled to sue without a money lender''s licence under the C.P. and Berar Moneylenders Act, 1934 (hereinafter referred to as the Moneylenders Act.)

2. The trial court on evidence found that no cash consideration flowed from the plaintiff to the defendant when the promissory note was executed by him. It also found that out of the three installments payable by Rambhau the installments due on 15-3-1956 and 15-3-1957 had become barred by limitation. It also found that the plaintiff was a moneylender and that he had a licence; but on the finding that there was no consideration for the pro-note. the plaintiff''s suit was dismissed.

3. The plaintiff field an appeal challenging the dismissal of his suit. The lower appellate court held that the first tow installments had become irrecoverable in view of the provisions of Section 13 of the C.P. and Berar Debt Conciliation act, 1933, and that the only legal consideration for the promissory note was Rs. 300\\- which represented the installment which could validly and legally be recovered on the date on which the promissory note was executed. The plaintiff was, therefore, found entitled to recover Rs. 300\\- from the defendant, but the lower appellate court declined to grant interest to him in view of the provisions of section 7 of the Moneylenders Act because he had not complied with the requirement of sending yearly statements of accounts being sent to the debtor. A decree for Rs. 301.41 P. with proportionate costs of the suit was, therefore, passed in favour of the plaintiff after setting aside the trial court''s decree dismissing the suit. The plaintiff has now filed this second appeal.

4. Mr. Somalwar, learned counsel appearing on behalf of the appellant, contends that the provisions of Section 25(3) of the Indian Contract Act which was invoked by the lower appellate court against the plaintiff had no application in the instant case because the promissory note was not one without consideration. According to the learned counsel, the consideration for the promissory note consisted in his giving a discharge from the liability to pay the installments to the original debtor Rambhau and thereby forbearing to use him for the recovery of the installments which he was required to pay. It was contended that forbearance to sue a person and abstaining from enforcing a liability is good consideration, within the meaning of "consideration" as defined in Section 2(d) of the Contract Act. therefore, according to the learned counsel, the promissory note which is executed by the defendant was for consideration and a decree for the entire amount in respect of which the promissory note had been executed should have been passed. While it is nor possible to dispute that forbearance to sue is good consideration for the purposes of an agreement, it is difficult to see how the plaintiff is entitled to contend that the consideration for the promissory note in question was his forbearance to sue Rambhau who was originally liable for the payment of installments. It is not

disputed than on the date on which the promissory note was executed by the defendant, the plaintiff passed a writing in favour of Rambhau, minor represented by his mother, giving him full discharge from the liability to pay the three installments which he was otherwise liable to pay. Exhibit D-1 which is this writing is dated 7-6-1958, and in this writing the plaintiff has stated that he had received Rs. 900\\- which were due under the installments dated 15-3-1956, 15-3-1957 and 15-3-1958. Having given Rambhau full discharge from the liability to pay the installments, the plaintiff had deprived himself of any right to enforce this liability against Rambhau. There can be forbearance to sue a person only if the person suing has a subsisting right which could be enforced against the other person. Having given up all his rights to recover the amount of the installments from Rambhau, the plaintiff did not have any subsisting right to sue Rambhau, for any of the three installments, and if he had no such right, it is difficult to understand the argument that he was in a position to forbear or abstain from suing Rambhau.

5. There can, however be no dispute that Exhibit D-1 dated 7-6-1958 and the promissory note in question (Ex. P-1) which is also of the same date, are parts of the same transaction by which Rambhau was given a discharge and the liability to pay the debt of Rambhau was taken over by the defendant. It is in this context that the question of consideration becomes important. Can it be said that the promissory note represents the consideration of Rs. 900/- which was stated to be payable by Rambhau to the plaintiff or was the liability, which could legally be enforced against Rambhau on the date of the promissory note, in respect of any lesser amount? The learned counsel for the appellant, however, contends that in this suit which is based on the promissory note executed admittedly by the defendant the question whether any of the three installments could have been legally recoverable from Rambhau or not is foreign to the scope of this suit, and that it must be assumed that the liability to pay Rs. 900/-. Now, it has not been disputed before me on behalf of the appellant that actually no cash consideration flowed fro the plaintiff to the defendant. But as a matter of fact it was argued that the consideration consisted in discharging Rambhau from the liability to pay the installments. In other words, the consideration for the promissory note is the amount which Rambhau was liable to pay to the plaintiff. It is difficult to see how when such a question arises it cannot be inquired in this suit as to what exactly was the legal liability of Rambhau because it is only that liability which could be the consideration for the promissory note. If it is found that the plaintiff could legally enforce his claim for the whole amount of the three installments, then the discharge to Rambhau must be said to be in respect of the entire liability of Rs. 900\\- and that would then become the consideration for the promissory note in question. If however, the defendant was able to show that Rambhau was not liable to pay all the three installments, then to the extent that some parts of the installments were not recoverable under law, the promissory note would become without consideration. It would, therefore, be perfectly permissible to go into the question as to the nature and quantum of the consideration,

especially when the defendant has successfully rebutted the presumption u/s 118 of the Negotiable Instruments Act because no cash consideration has flowed from the plaintiff to the defendant. It is here that the provisions of Section 13 of the Debt Conciliation Act and \\section 25 of the contract Act become relevant.

the provisions of the Debt conciliation Act show that after the installments were settled by the Debt conciliation Board, provision was made in Section 13 with regard to the recovery of these installments. Section 13 (1) provided that ;if a debtor defaults in paying any amount due in accordance with the terms of an agreement registered under sub-section (2) of section 12, such amount shall be recoverable as an arrear of land revenue on the application of the creditor made with in ninety days from the date of default. It is not disputed that in the matter of recovery of installments which Rambhau was liable to pay, the relevant provisions were those contained in Sections 13 and 13-C of the Debt conciliation Act. u/s 13 (1), therefore, there was limitation prescribed within which the creditor had to make an application for the recovery of the amount due in accordance with the agreement between the creditor and the debtor. Under the further provisions of Section 13, the revenue Officer had power to direct the sale of the whole or such portion of immovable property as was liable to be sold for the recovery of any amount as would satisfy the liability. u/s 13-C(1) it is provided that when the Revenue Officer fails, under sub-section (1) of Section 13, to recover as an arrear of land revenue any part of the amount referred to therein, he shall certify that it is irrecoverable and thereupon the agreement shall cease to subsist for all the creditors. Sub-sections (2), (3) and (4) which have some relevance to the contention of the learned counsel for the appellant are as follows:
"2. If after the sale of immovable property referred to in Section 13-A or 13-B, any creditor has grounds to believe that the property remaining with the debtor is not sufficient to give effect to under sub-section (2) of Section 12, he may apply to the Deputy commissioner or such Revenue Officer as he may authorise in this behalf for the grant of a certificate that the remaining amount payable under the agreement is irrecoverable. Such application shall be in writing and shall specify the above stated grounds.

3. If the Deputy commissioner or Officer authorised under sub-section (2) is satisfied, after hearing the debtor and other creditors and after making such enquiry as he thinks fit, that the whole or any part of the remaining amount payable under the agreement is irrecoverable he may grant a certificate accordingly and thereupon the agreement shall cease to subsist for all the creditors.

4. Where an agreement ceases to subsist any amount which was payable under such agreement but has not been paid shall be recoverable as if a decree of a civil Court had then been passed for its payment".

6. Under sub-section (2) of section 13-C, it is open to the creditor to apply to the Deputy Commissioner for a certificate that the remaining amount payable under the agreement is irrecoverable if the creditor has grounds to believe that the property remaining with the debtor was not sufficient to give effect to the terms of the agreement registered under sub-section (2) of section 12; and under sub-section (3), if the Deputy Commissioner is satisfied that after hearing the debtor and other creditors and after making such enquiry as he thinks fit that the whole or any part of the remaining amount payable under the agreement is irrecoverable, he can grant a certificate accordingly, and thereupon the agreement ceases to subsist for all the creditors. Thus, under sub-sections (1) and (3) of section 13-C, the Revenue officer or the collector, as the case may be, has been empowered to issue a certificate that the agreement ceases to subsist and it is then that under the agreement can be recovered as if a decree of a civil Court had then been passed for the payment of that amount. On a reading of sections 13 (1) and 13-C (1), (3) and (4) it appears to me that the jurisdiction of the Civil Court can be invoked only where a certificate has been issued by the Revenue Officer or the Deputy commissioner on finding that the amount cannot be recovered as an arrears of land revenue. I am supported in this view by a Division Bench decision of the Nagpur High Court in AIR 1939 227 (Nagpur) in which it was held that where the amounts due from the debtor are made payable in cash, then the provisions of Section 13 are attracted, and in that case the jurisdiction of the Civil Courts does not arise until the provisions of Section 13 (3) have been complied with. section 13 (1) provides a limitation for the recovery of the installment amount. If the creditor fails to make an application to the Revenue Officer within the limitation prescribed u/s 13 (1), then he has not taken recourse to the summary remedy provided by Section 13 (1) and in respect of the installments for the recovery of which no such application has been made there is no occasion for the revenue Officer to issue a certificate that the amount has become irrecoverable. Unless such a certificate is issued, the agreement cannot be enforced as a decree in respect of the installments for the recovery of which no application has been made and there will be no occasion for certifying them to be irrecoverable and consequently the creditor will not get any right to execute the agreement as if it is a decree in respect of such installment amounts. The recovery of those installment amounts in respect of which no application has been made as required by Section 13 (1) by the creditor does not, therefore, become possible for the creditor through the process of the Civil Court, and the recovery of those installments becomes barred in view of the provisions of Sections 13 and 13-C of the Debt conciliation Act.

7. If the recovery of those installments is barred, then the question will be whether the agreement to pay the amount of those installments will not be hit on the ground that the agreement is without consideration. The debtor is not liable to pay the debt which is barred by limitation, and no process under the law is available to the creditor to recover those installments. However, in certain circumstances a promise

to pay a barred debt has been made enforceable as an exception u/s 25 of the Contract Act. Section 25 provides :

"25. An agreement made without consideration is void, unless -

(1) * * * *

(2) * * * *

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

* * * * *"

8. The lower appellate Court has, in view of this provision, held that the only debt which was recoverable from the debtor Rambhau was the amount of the last installment of Rs. 300/- on the day on which he executed the promissory note and, therefore, Rs. 300/- alone could be treated as valid consideration for the promissory note executed by the defendant. The view taken by him was clearly justified on the authority of the decision in Pestonji v. Bai Meherbai AIR 1928 Bom 539 in which it was held that Section 25, Exception (3), implies that the person making the promise is the person against whom the liability might have been enforced and a promise, therefore, made by a person who is under to no obligation to pay time-barred debts of another, is not within this exception to the general rule. This decision has held the field for now almost 45 years, and though it does appear that while construing the words "the person to be charged therewith" in Section 25(3) the Madras High Court has taken the view that these words were wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning, see Puliyath Govinda Nair Vs. Parekalathil Achutan Nair, , I see no reason to depart from the view relied on a much earlier decision in Tillakchand Hindumal v. Jitamal Sudaram (1873) 10 Bom HCR 206. That was a Division Bench decision in an appeal decided by Westropp, C.J., and West J., in which it was observed :
"The general rule of law, no doubt, is that a consideration merely moral is not a valuable consideration, such as would support a promise .....but there are some instances of promises, which it was formerly usual to refer to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy, and a promise (in writing) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection. It was laid down "that where the consideration was originally beneficial to the party promising, yet, if he be protected

from liability by some provisions of the Statute or common law meant for his advantage, he may renounce the benefit of the law; and if he promise to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it''. The authorities are collected in Leake on Contracts 317, 318"

9. In this decision, the learned Chief Justice has made a note as follows :

"As to cases occurring since the 1st of September, 1872, see the Indian Contract Act, IX if 1872, Section 25, Clause 2 and Clause 3, which seem to leave the law unaltered in such instances as the two above given".

10. In view of the Division Bench decision which is binding on me and was followed by Crump J. in Pestonji Manekji Mody Vs. Bai Meherbai, I am unable to follow the view taken by the Madras High Court and it must be held that the promissory note executed by the defendant to the extent of promising to pay the debt which was already barred and of which recovery was not possible was without consideration and cannot be enforced. The lower appellate Court was, therefore, right in taking the view that the plaintiff was entitled to a decree for Rs. 300/- and the notice charges. The appeal, therefore, fails and is dismissed with cost.

11. Appeal dismissed.