(1977) 07 CAL CK 0052

Calcutta High Court

Case No: F.M.A. No. 51 of 1976

Municipal Commissioners of Garulia		APPELLANT
	Vs	
Kamala Kanta Das		RESPONDENT

Date of Decision: July 20, 1977

Acts Referred:

- Bengal Municipal Act, 1932 - Section 535, 535(1), 535(2), 66
- Constitution of India, 1950 - Article 226
- Contract Act, 1872 - Section 25(3)
- Court Fees Act, 1870 - Section 18
- Limitation Act, 1963 - Section 19

Citation: (1977) 2 ILR (Cal) 310

Hon'ble Judges: B.C. Ray, J; Anil K. Sen, J

Bench: Division Bench

Advocate: Arun Kumar Dutt II and Sekhar Mustaphi, for the Appellant;Subhas Bhattacharjee, for the Respondent

Judgement

Anil K. Sen, J.

This appeal from the appellate order is at the instance of the Defendants in a money suit who happen to be the Commissioners of the Municipality of Garulia and the appeal is directed against an order of remand dated August 28, 1975, passed by the learned Additional District Judge, Ninth Court, 24-Parganas.

2. The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) instituted the money suit No. 44/69 in the Eighth Court of the Subordinate Judge at Alipore for recovery of a sum of Rs. 11,716-02 towards his arrears of salary and allowances and a sum of Rs. 203-98 towards interest from the Defendants Appellants (hereinafter referred to as the Defendants) on the following allegations:

According to the Plaintiff, he was a permanent employee under the Defendants and he was wrongfully suspended from service on December 18, 1956 and was thereafter wrongfully dismissed from service on May 7, 1957, by the Defendants. The Plaintiff challenged the validity of the aforesaid order of dismissal in an application under Article 226 of the Constitution in this Court which was registered as C.R. No. 2398/57. This application succeeded and a learned single Judge of this Court allowed the said application and set aside the order of dismissal on March 20, 1958. The Defendants preferred an appeal against the said order being F.M.A. 413/58. But the said appeal also failed and was dismissed on May 21, 1963. According to the Plaintiff, it is only after the disposal of the above appeal that he was reinstated on July 30, 1963. But when he claimed his salary and allowances for the period, he was kept out of service, namely, from December 18, 1956, till July 29, 1963, the Defendants delayed settling the said claim until October 30, 1966, when the Defendants adopted a resolution to the following effect:

Resolved that arrear payment from 18.12.56 to 29.7.63 be made vide Government order No. 5010/175 A-5/64 dt. 6.8.65 after deducting the period of his trade from 1.4.58 to 31.3.64.

Even after the aforesaid resolution was adopted, the arrear salary and allowances were not paid and on the other hand, on November 8, 1966, the Municipality offered to pay a sum of Rs. 472-27 after deducting a sum of Rs. 11,238-73 from the total arrears of salary and allowances amounting to Rs. 11,716-02. According to the Plaintiff, the Defendants proposed to deduct the aforesaid sum of Rs. 11,238-73 wrongfully as if the said amount had been earned by the Plaintiff from his own trade during the period he was kept out of service. Hence, the Plaintiff instituted the suit for recovery of the amounts referred to hereinbefore and the suit was so instituted on October 10, 1969.

3. The Defendants contested the suit by filing a written statement. In this written statement the Defendants denied the material allegations made in the plaint and disputed the claim put forward by the Plaintiff. A further defence was taken that the Plaintiff in law was entitled to recover such amount out of the arrears as would be found payable after deducting the amount earned by him during the said period on his personal endeavour in any trade. Other objections as to limitation were raised.

4. On the pleadings as above, the learned Judge in the trial Court framed the following five issues:

(1) Is the suit barred by limitation?

(2) Is the Plaintiff entitled to get arrears of salaries from 18.12.56 to 29.7.63 as claimed in the plaint?

(3) Can the Plaintiff legally claim the salary during the time he was engaged in his personal trade business?

(4) Is the suit bad for non-joinder of parties?

(5) To what relief, if any, is the Plaintiff entitled?

The learned Judge, however, by a judgment and decree dated October 5, 1974, dismissed the suit deciding the issue No. (1) as to limitation adversely against the Plaintiff. The learned Judge in the trial Court considered the question of limitation from two aspects, namely, whether the claim can be said to have been barred by limitation under the general law of limitation or under the special law of limitation as provided in Section 535(2) of the Bengal Municipal Act. The learned Judge held that the Plaintiff''s claim was not barred under the general law of limitation since it was not really based on any cause of action arising from non-payment of the arrears alone but it was based on a promise as incorporated in the resolution dated October 30, 1966, in view of the provisions of Section 25(3) of the Contract Act. Even then, the learned Judge dismissed the suit when he took the view that the suit was not instituted within six months from the date of such promise, the claim being barred under the provisions of Section 535(2) of the Bengal Municipal Act.

5. The Plaintiff preferred an appeal before the lower appellate Court and the learned Additional District Judge, who heard the appeal, took the view that the present suit is not one to which Section 535 of the Bengal Municipal Act can have any application whatsoever and in that view, he held that the special law of limitation prescribed by Section 535(2) of the Bengal Municipal Act can have no application. Necessarily, the learned Additional District Judge set aside the finding of the learned Subordinate Judge in this respect and he further affirmed the view taken by the learned Subordinate Judge that the Plaintiff''s claim is not barred under the provisions of the general law of limitation since the suit in its substance is based on a promise incorporated in the resolution dated October 30, 1966 and was instituted well within three years from that date. In this view, the learned Additional District Judge allowed the appeal and remanded the suit for re-hearing in accordance with law on its merits.

6. Feeling aggrieved by the order of remand as aforesaid, the Defendants have preferred the present miscellaneous appeal to this Court. Mr. Dutt appearing in support of this appeal has raised two points. In the first place, Mr. Dutt has contended that it was the learned Subordinate Judge who was right in his conclusion that the present suit is one which comes squarely within the provisions of Section 535 of the Bengal Municipal Act and as such, would be covered by the special law of limitation prescribed for such suits by Sub-section (2) of the said section. Mr. Dutt has assailed the view taken by the learned Additional District Judge in the contrary. Secondly, Mr. Dutt has contended that, in any event, when the two Courts below have concurrently come to the conclusion that the suit is based on a cause of action arising from a promise incorporated in the resolution dated October 30, 1966, the learned Additional District Judge went wrong in not appreciating that the claim can be limited only to the extent of the promise made and on the facts of the present

case, the promise must be held to be limited to the period claimed deducting therefrom the claim for the period April 1, 1958, to March 31, 1964.

7. Mr. Bhattacharjee appearing on behalf of the Plaintiff-Respondent has contested both the points raised by Mr. Dutt and he has strongly supported the order of remand as passed by the learned Additional District Judge.

8. On the concurrent findings of the two Courts below there can be no dispute about the nature of the suit. In the suit the Plaintiff alleges that he, being a servant under the Defendants, was entitled to his salaries and allowances for the period December 18, 1956, to July 29, 1963, when he was wrongfully kept out of service and he was not paid his due salaries and allowances for the said period and when the said claim was made the Defendants did consider the claim and adopted a resolution on October 30, 1966, promising to pay the said arrears. The two Courts below, in our opinion, had rightly held that the suit was really based on the promise incorporated in the resolution dated October 30, 1966 whereby the Defendants promised to pay their debt to the Plaintiff towards arrears of salary and allowances whatever the extent of that promise may be. The two Courts below have differed in their view as to whether such a suit would come within the purview of Section 535 of the Bengal Municipal Act.

9. Section 535 of the Bengal Municipal Act provides as follows:

535. Notice of suits against Commissioners.--(1) No suit or other legal proceeding shall be brought against the Commissioners of any municipality or any of their agents, officers or servants, or any person acting under their direction, for any act purporting to be done under this Act or any rule or by-law made thereunder until the expiration of one month next after notice in writing has been delivered or left at the office of such Commissioners and also (if the suit or proceeding is intended to be brought against any officer or servant of the said Commissioners or any person acting under their direction) at the place of abode of the person against whom such suit or proceeding is intended to be brought, stating the cause of action and the name and place of abode of the person who intends to bring the suit or proceeding;

and unless such notice be proved, the Court shall find for the Defendant.

(2) Every such suit or proceeding shall be commenced within six months next after the accrual of the cause of action and not afterwards.

(3) When the suit or proceeding is for damages, tender of amends, if any, made before the suit or proceeding is brought may, in lieu of or in addition to any other plea, be pleaded. If the suit or proceeding was commenced after the tender or is proceeded with after payment into Court of any money in satisfaction of the Plaintiff''s claim and the Plaintiff does not recover more than the sum tendered or paid, the Defendant shall be entitled to full costs of the suit or proceeding after the tender or payment.

10. There can be no dispute that in order to attract Sub-section (2) of Section 535 the suit must come within the purview of Sub-section (1). Sub-section (1), however, clearly in its turn applies to suits and proceedings when brought against the Commissioners or their agents, officers or servants or any person acting under their direction for any act purporting to be done under the Act or any rule or by-law thereunder. Therefore, the act of the Defendants, which leads to the cause of action, must be an act either done under any of the statutory provisions or at least in colour of powers under some such statutory provision. Section 535 does not bring within its told each and every suit against the Municipality. In our view, the learned Judge in the lower appellate Court was perfectly justified in his conclusion that the present suit which, in substance, is based on a breach of the promise incorporated in the resolution dated October 30, 1966, cannot be said to be a suit coming within the purview of Section 535 since the breach was not an act done under any of the statutory provisions incorporated in the Act or the rules or by-laws made thereunder. This position is now well-settled in view of a number of decisions of this Court and the later decisions of the Supreme Court. In the case of The Commissioners of Hooghly-Chinsura Municipality v. Ekkari Ghose and Anr. (1954) 58 C.W.N. 755, this Court held that a suit for specific performance of a contract of sale of land by the Municipality does not come within this section since there is no provision in the Act or any rule or by law made thereunder under which a refusal to perform a contract can be justified or can be purported to have been made. In holding as such, this Court relied on earlier decisions of this Court in the case of Corporation of Calcutta v. Ashoke Kumar De (1928) 32 C.W.N. 575 and the same view was also taken in the case of Bando and Co. Ltd. Vs. Corporation of Calcutta, . The judgment of this Court in the case of Jatindra Nath Pal v. Corporation of Calcutta ILR (1944) Cal. 463, relied on by the learned Additional District Judge, also well-supports this view. As stated hereinbefore, the point is now settled even by the Supreme Court considering parallel provisions in the case of The Municipal Corporation, Indore v. Niyamatullah (dead) by his legal representatives AIR 1971 S.C. 97. Mr. Dutt in his contention wanted to suggest that when the Plaintiff claims the arrears and such claim is based on an assertion that his dismissal was wrongful and when such dismissal was effected in exercise of powers u/s 66 of the Act, it must be deemed to be a suit brought for an act purported to have been done under the provisions of Section 66. We are unable to accept this contention. The suit is not one for setting aside the dismissal nor has the Plaintiff sought for any declaration in respect of the dismissal which stands set aside by the decision of this Court in its writ jurisdiction. Truly speaking, as found concurrently by the two Courts below, the suit is not even for recovery of arrears of salary and allowance but a suit to enforce the promise incorporated in the resolution dated October 30, 1966, referred to hereinbefore. Breach of such a promise not being justified by any of the provisions of the Bengal Municipal Act or rules or by-laws made thereunder and such breach not having been made in purported, exercise of any power under the said Act or rules or by-laws made thereunder, the suit can in no manner be brought within the fold of

Section 535(1) of the Bengal Municipal Act. The learned Judge in the trial Court failed to consider and appreciate this aspect altogether when he accepted as if as granted that the suit would come within the provisions of Section 535. The learned Judge in the Court of appeal below was, therefore, perfectly justified in setting aside the finding of the learned Judge of the trial Court that the suit is barred by the special law of limitation prescribed by Section 535(2) of the Bengal Municipal Act and we affirm the said view of the learned Judge of the lower appellate Court.

10. So far as the application of the general law of limitation is concerned, Mr. Dutt in his fairness has not disputed the concurrent view taken by the two Courts below. There can be no dispute that but for the resolution dated October 30, 1966, the claim put forward by the Plaintiff would have been barred under the provisions of the general law of limitation. Though the Plaintiff in the plaint claimed upon a mistaken idea as to the legal position that such a claim was not barred by limitation in view of the acknowledgment made in the resolution dated October 30, 1966, it cannot be disputed that the said resolution could not have saved the limitation if the suit was based really on non-payment of the salary and allowances inasmuch as the claim having been barred already, the resolution dated October 30, 1966, could not constitute an acknowledgment within the meaning of Section 19 of the Limitation Act. Really, however, the suit was one based on the promise incorporated in the resolution dated October 30, 1966 and the two Courts below have rightly held that a barred debt can furnish appropriate consideration for such a promise within the meaning of Section 25(3) of the Contract Act. The suit thus really being based on the promise as aforesaid and having been brought within three years thereof, cannot but be held to be not barred by limitation under the general law of limitation.

11. This takes us to consider the second point raised by Mr. Dutt. When on the concurrent findings of the two Courts below the suit rests on the promise incorporated in the resolution, there can be no dispute that the claim would succeed only to the extent of the promise and no further. The Defendants raised a specific issue before the lower appellate Court in this regard. It was claimed that if the Defendants are to suffer any decree, that decree cannot exceed a sum of Rs. 472-27 as that was the amount which was promised to be paid under the resolution and not anything more. The learned Judge of the lower appellate Court, however, overruled this plea when he, on a construction of the resolution, Ex. 7, came to the conclusion that what was promised was to pay the entire arrears subject to a deduction of the Plaintiff''s earning by trade during the period April 1, 1958, to March 31, 1964. According to the learned Judge of the lower appellate Court, what would be the earning for the aforesaid period would be a matter of assessment on evidence to be adduced at the trial after remand. The learned Judge of the lower appellate Court, however, refused to accept the contention of the Defendants that the promise was limited to a sum of Rs. 472-27. Mr. Dutt appearing on behalf of the Defendants strongly assails this finding of the learned Judge of the Court of appeal below. We have carefully considered the contention raised by Mr. Dutt in this respect and we

have come to the conclusion that, though the Defendants were not entirely justified in taking a plea that the promise was limited to payment of a sum of Rs. 472-27, yet the learned Judge of the Court of appeal below was also not right in his conclusion that what was promised to be paid was the arrears due between the period December 18, 1956 and July 29, 1963, excluding therefrom the earnings of the Plaintiff by trade earned between the period April 1, 1958 and March 31, 1964. In our view, the learned Judge of the Court of appeal below failed to appreciate that on his construction of the promise, Section 25(3) of the Contract Act itself will have no application, because on his view, what was promise was an unascertained sum which could be ascertained only after taking accounts as to the earnings made by the Plaintiff during the period as aforesaid. The promise, which constitutes the foundation of a claim based on Section 25(3), must always be a promise in respect of an ascertained sum and not any unascertained amount. Be that as it may, in our view, what was promised was not any unascertained amount and it is really unfortunate that the learned Judge of the Court of appeal below failed to take note of the promise incorporated in the resolution itself. We have set out the resolution hereinbefore whereby the Commissioners specifically resolved to pay the arrears claimed between the period December 18, 1956 and July 29, 1963, deducting, however, the period from April 1, 1958, to March 31, 1964. This latter period was described as the period of trade. In this resolution there is nothing to indicate that what was sought to be deducted was merely the earnings from trade during the period April 1, 1958, to March 31, 1964, as held by the, learned Judge in the Court of appeal below. In our view, therefore, the Commissioners really promised to pay the arrears as claimed excluding the arrears for the aforesaid period April 1, 1958, to March 31, 1964.

12. Mr. Bhattacharjee appearing on behalf of the Plaintiff-Respondent has contended that the Plaintiff was reinstated to service on July 30, 1963 and there was no claim for arrears for any period after the said date. Therefore, any deduction of any period from July 30, 1963, to March 31, 1964, as incorporated in the resolution, is wholly misconceived. We agree with Mr. Bhattacharjee that deduction to the extent as above was really misconceived, but that will not entitle us to vary the resolution. When promise constitutes the foundation of the suit, it is the promise of the promisor which counts and in our opinion, the Court is not entitled to alter any part thereof even if a part of it is based on a misconception of the nature pointed out by Mr. Bhattacharjee. A promise of the present nature, for which the consideration is a prior debt, does not alter the pre-existing cause of action though it gives rise to a new one. The old debt is not revived, but it is considered to be a good consideration for the promise to pay and the new promise is the measure of the creditor''s right. Such being the position, we find ample substance in the contention of Mr. Dutt that when promise itself is the true measure of the Plaintiff''s right and when by the promise incorporated in the resolution what was promised to be paid was the arrears for the period December 18, 1956, to July 29, 1963,

deducting therefrom the period April 1, 1958 to March 31, 1964, excluding the irrelevant period, the promise stands as one to pay all arrears from December 18, 1956, to April 1, 1958. This aspect the learned Judge in the lower appellate Court had failed to appreciate and when he directed the remand, he should have restricted the claim to the extent as above.

13. Such being the position, we have to consider the question whether he should still uphold the order of remand limiting the Plaintiff''s claim to the period as aforesaid or, in the interest of justice, we should dispose of this litigation in this Court. We are indeed indebted to the learned Advocates for the parties that they have agreed to have the claim decided and disposed of before us. It has not been disputed by the parties that the Plaintiff''s claim of arrears for the period December 18, 1956, to April 1, 1958, would be a sum of Rs. 1,900-78. On our findings made hereinbefore the claim to the extent as above is admissible to the Plaintiff on the promise and is also not barred by limitation. Such being the position, the issues No. (2) and (3), as raised by the learned Judge in the trial Court, may be decided in favour of the Plaintiff to the extent as above. It is conceded that the suit suffers no defect as to nonjoinder of parties so that the issue No. (4) is decided in favour of the Plaintiff and against the Defendants. So far as the issue No. (5) is concerned, on the findings already made the relief which would be admissible in favour of the Plaintiff, would be a decree for a sum of Rs. 1,900-78 with interest at 6 per cent thereon from the date of the suit till the date of realisation.

14. The appeal is, therefore, disposed of on the following terms, namely, the judgment and order of the Court of appeal below is modified to the extent indicated hereinbefore and in lieu of remanding the suit for re-trial, the suit is disposed of by giving a decree in favour of the Plaintiff for a sum of Rs. 1,900-78 with interest as indicated hereinbefore.

15. Before we conclude, we must dispose of a prayer made on behalf of the Plaintiff-Respondent for refund of the court-fee paid by the Plaintiff-Respondent in the Court of appeal below, where he was the Appellant, under the provisions of Section 18 of the Court Fees Act as applicable to West Bengal. There can be no dispute that the suit having been dismissed on a preliminary point of law, the Court of appeal below set aside the finding on the preliminary point and directed re-hearing of the suit. Though we have upheld the order of remand in part, for the better interest of the parties and with their consent, we have disposed of the suit, but since the suit was dismissed by the learned Judge in the trial Court on a preliminary issue not going into the merits and since if the trial Court had gone into the merits, the trial Court would have, in our view, decreed the suit to the extent as above, the Plaintiff-Respondent, it appears, is entitled to get refund of the court-fee which he paid in the Court of appeal below to the extent of his success, namely, on a sum of Rs. 1,900-78 and we direct that a certificate for such refund of the court-fee be issued accordingly.

16. The parties are directed to bear their own costs throughout in this appeal.

B.C. Ray, J.

17. I agree.