

MANU/BH/0168/1929

Equivalent Citation: AIR1929Pat694, (1930) ILR 9 PAT 385, 122Ind. Cas.817

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Decided On: 15.08.1929

Appellants: **(Tikait) Mahabir Prosad Narayan Deo**
Vs.
Respondent: **Bhupal Ram and Ors.**

Hon'ble Judges/Coram:

Das, James and Rowland, JJ.

JUDGMENT

Das, J.

1. The question referred for our decision is:

whether on the proper construction of Section 8, Chota Nagpur Encumbered Estates Act, the institution of a suit is prohibited; and whether in the event of no such suit being instituted the plaintiffs' Claim would be barred by limitation.

2. The material facts are these. Tikait Kunj Bihari Narain Deo father of the appellant executed two handnotes in favour of the plaintiff's assignor, one dated 3rd February 1904 for a sum of Rs. 1,102 and the other dated 11th August 1904 for a sum of Rs. 897. The estate of the defendants' father was attached under the provisions of the Chota Nagpur Encumbered Estates Act on 30th November 1905. The plaintiff's assignor in due course preferred his claims on the basis of the two handnotes in question and the manager who was administering the estate belonging to the defendant's father under the Encumbered Estates Act admitted a portion of the Claim on 21st September 1906. On 15th May 1924 the estate was released under the circumstances mentioned in Clause 2, Section 12, Encumbered Estates Act; and on 28th November 1924 the suits out of which these appeals arise were instituted for the recovery of the money due on the handnotes in question. The only question which we have to consider is whether the suits are barred by limitation.

Section 3 provides that:

On the publication of an order under Section 2, the following consequences shall ensue;

First, all proceedings which may then be pending in any civil Court in British India, or in any revenue Court in Bengal in respect to such debt or liabilities, shall be barred and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void;

Secondly, so long as such management continues, the holder of the said property and his heir shall not be liable to arrest for or in respect of the debts and liabilities to which the said holder was immediately before the said publication subject, or with which the property so vested as aforesaid or any

part thereof was at the time of the said publication Charged, other than debts due, or liabilities incurred, to Government; nor shall their my table property be liable to attachment or sale under process of any civil Court in British India, or any revenue Court in Bengal for or in respect of such debts and liabilities other than as aforesaid; and

Thirdly, so long as such management continues,

(a) the holder of the said immovable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof, or to grant valid receipt for the rents and profits arising or accruing there from;

(b) such property shall be exempt from attachment or sale under such process as aforesaid, except for or in respect of debts due, or liabilities incurred to Government; and:

(c) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them, in pecuniary liability.

3. If was contended that the vesting order under Section 2 had the effect of an injunction restraining the institution of the suit: and so under Section 15, Lim. Act, the time of the continuation of the injunction ought to be excluded. The contention receives support from the decision of the Calcutta High Court in Kameswar Prosad v. Bhikhan Narain Singh [1893] 20 Cal. 609, but I have given my reasons in Khairullah Khan v. Lachmi Ram MANU/BH/0087/1927 : A.I.R. 1928 Pat. 179, for dissenting from the view of the Calcutta High Court. I do not desire to repeat my reasons again; it is sufficient for me to say that I adhere to the view which I have already expressed. In my opinion the provision that " all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void, does not preclude a litigant from instituting a suit in a Court of law though it may be that once the suit is instituted, he may be unable to proceed to a hearing by virtue of that provision.

4. Mr. A.B. Mukherji relies upon the penultimate paragraph of Section 12 which according to him clearly indicates that there was a revivor of his claim as soon as the estate was released under the circumstances mentioned in Clause 2, Section 12. Section 12 as it originally stood gave power to the commissioner to restore the holder or his heir to the possession and enjoyment of the property under certain circumstances. It adopted as a general rule that after a scheme has been approved by the commissioner under Section 11 there was no power in the commissioner to restore the holder of the estate or his heir to the possession and enjoyment of the property unless all the debts and liabilities have been paid and discharged or unless an arrangement was made for satisfaction of the debts and liabilities accepted by the creditors and approved by the commissioner. It allowed, however, the commissioner to release the estate before a scheme has been approved by him if he thought that the provisions of the Act should not continue to apply to the case of the holder of the said property or his heir.

5. It follows therefore that the estate could be released under Section 12 either when all the debts and liabilities have been paid and charged or if the commissioner at any time before a scheme has been approved by him under Section 11 thought that the provisions of the Act should not continue to apply to the case of the holder of the said property or his heir or if at any time an arrangement was made for satisfaction

of the debts and liabilities accepted by the creditors and approved by the commissioner. The penultimate paragraph of Section 12 upon which reliance is placed then proceeds to say as follows:

Where the holder of the property or his heir is so restored under the circumstances mentioned in Clause 2 of this section, such restoration shall be notified in the Calcutta Gazette, and thereupon the proceedings, processes, executions and attachments mentioned in Section 3 (so far as they relate to debts and liabilities which the manager has not paid off or compromised), and the debts and liabilities barred by Section 7, shall be revived.

6. It is obvious that what revives under the penultimate paragraph of Section 12 are the debts and liabilities barred' by Section 7. In order to understand what the penultimate paragraph means, it is necessary to consider Section 7 which in effect lays down that every debt or liability not duly notified to the manager under the provisions of the Encumbered Estates Act, shall be barred. Now in this case the debt or liability was undoubtedly notified to the manager. It follows, therefore, that the penultimate clause of Section 12 cannot be relied upon as supporting the case of the reviver.

7. It was contended that on this construction a curious result is reached; that a person not notifying his debt and liability is in a better position than a person who does notify the debt or liability to the manager. The answer is that according to the Act as originally enacted, once a scheme was approved by the commissioner under Section 11 he was powerless to release the estate until all the debts and liabilities were discharged or unless there was an arrangement made for the satisfaction of the debts and liabilities which was accepted by the creditors and approved by the commissioner. It follows, therefore, that once a scheme was approved the persons who had notified their debts to the manager had to be paid off before the estate was released, so that there was no necessity to protect this class of persons at all.

8. There was, however, a necessity to protect those who did not notify their debt to the manager, and the penultimate clause of Section 12 protects them by enacting that their claims shall revive where the holder of the property or his heir is restored if the commissioner at any time before a scheme has been approved by him under Section 11 thought that the provisions of the Act should not continue to apply. The Act has now been amended and the commissioner now has power to release the estate if before a scheme has been approved by him or after a scheme has been so approved he thinks that the provisions of the Act should not continue to apply to the case of the holder of the said property or his heir. The effect of this change of law on the penultimate clause is obvious; but the legislature by a curious omission has forgotten to take note of it. In my opinion reading the penultimate clause together with Section 7, it is clear that only those debts and liabilities revived which were not notified to the manager under Section 7. Now the debts which are the subject matter of the present suits were undoubtedly notified to the manager. It follows, therefore, that the penultimate clause does not help the argument of Mr. A.B. Mukherji.

9. Mr. A.B. Mukherji then relied upon the last clause of Section VA and contended that the legislature clearly contemplated that suits might be instituted in regard to such revived proceedings, and prescribed a period of limitation, for the same. But the revived debts and liabilities mentioned in the last clause must refer to such debts - and liabilities as were not notified to the manager under Section 7. In my view there is no warrant in the statute itself for the view which has been advanced before us.

10. It was lastly contended that the plaintiff ought to be entitled to the exclusion of the time during which he was prosecuting with due diligence his claim before the manager; and he relies upon the decision of the Judicial Committee in *Ranee Surno Moyee v. Shooshee Mokhee Burmonia* [1867] 12 M.I.A. 244, but if I am right in the view that there was at no time anything in the Chota Nagpur Encumbered Estates Act, to prevent the plaintiff from instituting a suit in the civil Court, then it is obvious that the decision of the Judicial Committee can have no application to the facts of the case. Apart from that there is the other difficulty that Section 14 applies only when the Court in which the claim was being prosecuted:

from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

11. I am doubtful if the manager under the Encumbered Estates Act is a Court; but even if it be considered that he is a Court it is not established that he was unable to entertain it from defect of jurisdiction or other cause of a like nature.

12. In my judgment the specific question which has been put to us must be answered in the affirmative and I would allow these appeals, but in the circumstances without costs.

James, J.

13. I have had the advantage of reading the judgment of my brother Rowland, and I need say no more than that I agree with his conclusions and with the reasoning by which he has arrived at them. I would affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Rowland, J.

14. In these two appeals the substantial question is of limitation. The appellant executed two hand-notes in 1904. His estate was vested in a Manager under Chota Nagpur Encumbered Estates Act (Act 6 of 1876) on 30th November 1905 and the creditor preferred his claim which was allowed by the Manager on 21st September 1906 subject to a deduction of Rs. 75 on each bond. The claim was assigned to the plaintiffs on 9th January 1908 and the Manager allowed mutation of his name on 1st October 1910. The estate was released on 15th May 1924 without any payment having been made on account of this debt. Two suits one on each handnote were instituted on 28th November 1924. The defendant pleaded limitation but the first Court as well as the lower appellate Court rejected this plea following the decision of the Calcutta High Court in *Kameshwar Prasad v. Bhikhan Narain Singh* [1893] 20 Cal. 609, and holding that the plaintiff's right of suit was barred while the estate of the defendant was under management but the right to sue revived on release of the estate. The decision in *Kameshwar Prasad v. Bhikhan Narain Singh* [1893] 20 Cal. 609, was followed in the Patna case of *Mathura Prasad Singh v. Jugeshwar Prasad Singh*, MANU/BH/0166/1926 : A.I.R. 1926 Pat. 260, and a similar view was taken in *Jyoti Prasad Singh Deo v. Ranjit Singh* MANU/BH/0101/1921 : A.I.R. 1922 Pat. 287, In conformity with the principle of the above decisions it has also been held in *Jagdish Chandra Deo v. Satrugan Deo* [1906] 33 Cal. 1065, that an appeal is barred and cannot be entertained while the estate of the debtor is under management, while in *Thakur Prasad Aurora v. Manager of Barabhum Encumbered Estates* [1919] 4 Pat. L.J. 321, it was held that a suit would not lie against the manager for a declaration in respect of debts of which he had determined the amount under Section 8 of the Act.

16. A different view has, however, been taken in *Khairulla Khan v. Pandey Lachmi Ram* A.I.R 1928 Pat. 179, and accordingly the two Judges before whom these present appeals came have referred the matter to a Full Bench for a determination whether on the proper construction of Section 3, Chota Nagpur Encumbered Estates Act, the institution of a suit is prohibited and whether in the event of no such suit being instituted the plaintiff's claim would be barred by limitation.

17. The drafting of the Chota Nagpur Encumbered Estates Act (6 of 1876) has been criticised on almost every occasion on which its provisions have come up for interpretation and the Act has been repeatedly amended. Section 2 provides for the appointment of a manager and the vesting in him in certain circumstances of the immovable property of what has been called in common speech an encumbered proprietor. The order is to be published in the Gazette and the consequences ensuing on such publication are recited in Section 3 of the first portion of which enacts that:

all proceedings which may then be pending in any civil Court; in British India or in any revenue court in Bengal in respect to such debts or liabilities shall be barred, and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void.

18. The first point for our consideration is whether the statute operates to bar a suit. In *Kameshwar Prasad v. Bhikhan Narain Singh* [1993] 20 Cal. 609, the provisions of the Act are examined in detail and the view is expressed that Section 3 on its literal construction bars the institution of a suit because:

process includes writs of summons and without a writ of summons, or in our phraseology here a summons, a suit cannot be validly instituted at all. Therefore when the legislature declares that in respect of particular matters all processes shall be null and void, it absolutely bars all suits respecting them.

19. This reasoning was examined in *Khairulla Khan v. Pandey Laohmi Ram* MANU/BH/0087/1927 : A.I.R. 1928 Pat. 179 where it is pointed out that in India a suit is instituted by the presentation of a plaint and a distinction is drawn between institution of the suit and the issuing of a summons to the defendant to appear and answer the claim and the conclusion is drawn that even if the summons cannot be served a suit may be instituted thereby keeping the claim alive as against the defendant. Consequently the omission to institute a suit will lead to the claim becoming barred by lapse of time in the ordinary course.

20. On this point I am clear that the reasoning of the Calcutta decision cannot be literally followed. Not only is the distinction between institution of a suit and the issue of summons to the defendant drawn in Section 26 and Order 4, Rule 1, Civil P.C., but a similar distinction occurs in the previous Codes as far back as 1859. Nevertheless I think that for the purpose of ascertaining the intention of the statute it is not necessary to draw so fine a distinction as is drawn in *Khairulla Khan v. Pandey Lachmi Ram* MANU/BH/0087/1927 : A.I.R. 1928 Pat. 179, regard should rather be had to the general scope of the statute. It was said in *Raja Jyoti Prasad Singh Deo v. Banjit Singh* MANU/BH/0101/1921 : A.I.R. 1922 Pat. 287:

Now it appears to me that Section 3 gives a statutory protection to a person whose property is brought within the operation of the Encumbered Estates Act and Section 12 removes that protection when the proprietor is restored to possession and provides in effect that all remedies which but for Section 3

the creditor could enforce against the proprietor shall be enforceable against the proprietor as soon as he is restored to possession.

21. I think that although the reasoning in *Kameshwar Prasad Singh v. Bhikhan Narain Singh* [1893] 20 Cal. 609, may not be literally acceptable, the conclusion stated in the following terms is correct:

The only remedy enjoyed by creditors is by claim before the manager and by payment if he does pay under the powers given to him.

And I must say that I feel as difficulty in accepting the position that to keep his claim alive it was incumbent on the plaintiff to institute a suit which he could not prosecute.

22. In *Basu Kuer v. Dhun Singh* [1889] 11 All. 47 their Lordships of the Privy Council have said:

It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not and it would be a lamentable state of law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.

23. The conclusion that their Lordships came to was that when an arrangement had been made for the satisfaction of a debt in a particular manner a fresh cause of action accrued when that arrangement broke down. There is another decision in the case of *Soorno Moyee Dasi v. Shooshee Mokhee Brumonia* [1867] 12 M.I.R 244 in which their Lordships of the Privy Council declined to accept the argument that a party was bound to institute a suit which must necessarily have been infructuous. The suit was for arrears of rent; the party had been sold up and the sale set aside. Thereafter the landlord sued for back rents. Their Lordships dissented from:

the statement of the learned Judges of the High Court to the effect that the appellant might have sued for these arrears pending the proceedings to set aside the sale of the patni,

remarking:

It is clear that until the sale had been finally set aside she was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.

Their Lordships held that the plaintiff could compute a new period of limitation from the date when the sale was finally set aside.

24. In *Bajjnath Sahay v. Bamgut Singh* [1896] 23 Cal. 775, the suit had been brought on 26th July 1887 to set aside a sale made on 24th September 1812 and purporting to have been confirmed by the commissioner on 25th January 1884. The plaintiffs were pursuing another remedy before the revenue authorities until 21st August 1886. It was held that limitation against them did not begin to run until the final order was passed in 1886.

25. In *Muthu Korakkai Chetty v. Madar Ammal* [1920] 43 Mad. 185, it was decided by

a Full Bench that where after a sale of property there had been proceedings for setting it aside limitation did not begin to run until these proceedings were disposed of whether it be limitation for an application for delivery of possession or whether it be limitation for a suit to set aside the sale In all these cases the decision was based not on the suspension of the running of limitation but on the accruing of a fresh cause of action. In his judgment in the last mentioned case Old field, J. referred to the class of cases in which a plaintiff having obtained all he wanted in previous proceedings had, when those proceedings were set aside, to take fresh ones in connexion with which limitation was pleaded:

The decisions in his favour are easily intelligible with reference to the date of his deprivation of the relief he had secured.

26. There is one decision which was based on somewhat different reasoning but which I venture to say must have had the same result from the application of the principles laid down in the cases cited above. I refer to *Lakhan Chunder Sen v. Madhusudan Sen* [1908] 35 Cal. 209, a decision confirmed by their Lordships of the Privy Council in *Nrityamoni Dassi v. Lakhan, Ghupder Sen* A.I.R. 1916 P.C 96, This was a partition suit in which limitation was pleaded. The parties were descendants of three brothers Chooni, Moni and Beni. The-descendants of Chooni brought a suit for possession and partition impleading the heirs of both Beni and Moni. The suit was within time; it was decreed giving, specified shares to the heirs of Beni, Moni and Chooni, respectively. On appeal the decree was set aside so far as-it related to the representatives of Moni. These then brought a partition suit which was resisted on the ground of limitation. The decision was that the suit was not barred and on the principle of the cases I have cited that would seem to be the only possible decision. The judgment was, however, actually based oil a suspension of the right to sue between the 20th April 1903 and 22nd February 1904 and not on the accrual of a new cause of action from the reversal of the decree for partition which had given the-sons of Moni all the relief that they required. It was pointed out in the judgment of the learned Chief Justice that, till the former decree was reversed:

It was not open to them (the plaintiffs; to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit.

27. Applying the principle of these decisions to the cases before us I am of opinion that it was not open to the plaintiff to sue on his debt during the period of management under the Act. The effect of the statute is to prevent the plaintiff having any remedy by suit. His remedy was by presentation of his claim to the-manager under Section 6 and by proceedings before the manager under Section 8; he had no other remedy: *Thakur Prasad Aurora v. Manager Barabhum Encumbered Estate* [1919] 4 Pat. L.J. 321, and *Jogesh Chandra Deo Dhabal v. Satrugan Deo Dhabal* [1889] 11 All. 47, and he obtained in fact from the manager a favourable decision on his claim. All he could do then was to wait for payment in pursuance of the arrangement made under the scheme, Sections 4, 11 and 11-A of the Act, for the settlement of debts. I should therefore be inclined to regard this case as falling in the class referred to in the passage I have cited from the judgment of Old field, J. in *Muthu Korakkai Chetty v. Madar Animal* [1920] 43 Mad. 185, and governed by the principle of the observations I have quoted it am *Soorno Moyee Dasi v. Shoshee Mokhee Burmonia* [1867] 12 M.I.R. 244, and *Basu Kuer v. Dhum Singh* [1889] 11 All. 47.

28. We were addressed at length in argument on the question whether Section 12 of

the Chota Nagpur Encumbered Estates Act (6 of 1876) could operate to revive the debt of the plaintiff. There are no doubt difficulties in holding that the debt could be revived by this section: but I do not propose to go into this question as the respondents must succeed on the grounds I have given above and It is not necessary to rely on Section 12.

29. I do not think that it is necessary of chat it would be good law to invoke a theory of suspension of limitation in any lease in which suspension is not expressly provided for either in the Limitation Act or in some special Act. I would be reluctant to whittle away the definite provisions of Section 9 of the Limitation Act. Suspension of limitation was not made the ground of decision in *Basu Kuer v. Dhum Singh* [1889] 11 All. 47, in *Soorno Moyee Dasi v. Shoshee Mokee Burmonia* [1867] 12 M.I.R. 244, or in *Muthu Korakkai Chetty v. Madar Ammal* [1920] 43 Mad. 185, though in the last mentioned lease one of the learned Judges thought; that limitation was suspended. I have referred to *Lakhan Chunder Sen v. Madhusudan Sen* [1908] 35 Cal. 209, and am of opinion that for the purpose of deciding that case the principle of suspension of limitation need not have been invoked. Nor indeed is it necessary to invoke it in the present appeals because limitation must in any case have been given a fresh start under Section 19 of the Limitation Act from the acknowledgment of the debt on 21st September 1906 during the period of management and thereafter limitation In my opinion did not begin to run till She estate was released, so I consider that no such question of suspension at all arises.

30. The conclusion that limitation does not bar the suit is, in my opinion, in conformity with the current of authority in this Court as well as in the Calcutta High Court. A contrary result would be unfortunate, but I prefer to rely on grounds other than that of convenience, and have tried not to be influenced by this consideration. I would dispose of the reference by answering the first question propounded in the affirmative and the second in the negative to the extent to which the claim was allowed by the manager. The objection that the assignment of the debt to the plaintiffs was invalid has not been pressed before us. I would therefore dismiss the appeals with costs.

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