

Sept. 22, 1910

Present : Hutchinson C.J.

MOORTHIPILLAI v. SIVAKAMINATHAPILLAI.

235 C. R., Colombo, 14,137.

Prescription—Part payment of debt after the period of prescription had run.

When the time has expired within which an action to recover a debt is maintainable; and the debtor afterwards promises in writing to pay the debt, or makes a payment on account of it, the effect of the promise in writing or of the payment (from which a promise to pay the balance is inferred) is to take the case out of the operation of the enactments which prescribe the time within which an action must be brought.

When a debt is prescribed it is not extinguished; an express promise to pay it (which is now required by the Ordinance No. 22 of 1871 to be in writing), or a part payment, is a renunciation of the benefit of the prescription.

IN this case the plaintiff alleged in the plaint that the defendant borrowed from him, between the year 1903 and February 13, 1906, at different times, sums of money amounting to Rs. 250—with interest at 12 per cent.; and that the defendant paid on account of the said principal two sums of money, Rs. 30 and 25, respectively, on March 22 and April 2, 1909; and that on April 19, 1909, upon an account stated between the parties, a balance sum of Rs. 291.40 was found to be due and owing from the defendant to the plaintiff.

The parties went to trial on the following issues :—

- (1) Did defendant on April 19, 1909; promise to pay plaintiff Rs. 291.40 ?
- (2) If so, can the plaintiff maintain an action thereon ?
- (3) Is the claim prescribed ?

The learned Commissioner of Requests (M. S. Pinto, Esq.) dismissed plaintiff's action for the following reasons stated in his judgment :—

“The promise relied on has been satisfactorily proved..... The promise was to pay a debt already prescribed. The learned counsel for the plaintiff argued that the promise was a new cause of action, and that there was a new contract apart from the debt, which was dead, and that the new contract gave the plaintiff a valid right to sue..... Section 13 of Ordinance No. 22 of 1871 provides that no acknowledgment or promise by words only shall be deemed evidence of a new or continuing contract whereby to take a case out of the operation of the enactments regarding prescription (*viz.*, section 6 to section 12).

“Section 8 distinctly enacts that no action is maintainable for any money lent without written security, unless such action is brought within three years from the time after the cause of action

has arisen. This section in unmistakable language bars actions brought after the period of three years. If, therefore, the present action is allowed, it will mean that this case has been taken out of the operation of section 8 by a promise by words only. The argument of Mr. Tambyah was anticipated by the framers of section 13, for they provided that the promise was invalid even as evidence of a new contract.

Sept. 22, 1910

*Moorthi-
pillai v.
Sivakami-
nathapillai*

“ These are the words of Moncreiff J. in *Kaffoor Saibo v. Mudalihamy Baas*¹ : ‘ He is suing upon a new contract (an account stated), upon a new cause of action, which is independent of his liability to pay for goods sold and delivered. Now this new contract is not to be proved by an acknowledgment or promise by words only.’ Although the ‘ new contract ’ was in that case founded on an account stated and this case is founded on a promise, the dictum of the learned Judge is applicable here.

“ I find that the promise in question was made, but hold that this action cannot be maintained, as the cause of action—the promise—is not provable by reason of section 13 of Ordinance No. 22 of 1871, and I find that the claim in respect of the money lent is prescribed.”

The plaintiff appealed.

Sampayo, K.C. (with him *Tambyah*), for the appellant.

No appearance for the respondent.

[The following authorities were cited at the argument: *In re Boswel* (1906) 75 *L. J. ch.* 234 and 658 ; *In re Friend*, 66 *L. J. ch.* 737.]

Cur. adv. vult.

September 22, 1910. HUTCHINSON C.J.—

The plaintiff sues to recover Rs. 291.40 and interest. He states in his plaint (1) that he lent the defendant at various times sums amounting to Rs. 250, which the defendant promised to pay on demand with interest ; (2) part payments in March and April, 1909, which are set out in the particulars filed with the plaint ; (3) an account stated in April, 1909, when the balance sum of Rs. 291.40 was found to be due from the defendant to him. The defendant in his answer simply denied all these statements ; he did not plead that the claim was prescribed. Issues were settled :—

- (1) Whether the defendant borrowed from the plaintiff the sums alleged by the plaintiff ?
- (2) Whether he made the payments in March and April, 1909 ?
- (3) Was there an account stated ?
- (4) Is anything due from the defendant to the plaintiff ?
- (5) If it is due, is the claim prescribed ?

The Commissioner heard counsel on the 5th issue first, and after hearing evidence by the plaintiff he expressed his opinion that the alleged payments did not save the claim from being prescribed ; and that the account stated was not proved ; he gave the plaintiff

¹ (1903) 6 *N. L. R.* 216.

Sept. 22, 1910

HUTCHINSON
C.J.

*Moorthia-
pillai v.
Sivakami-
nuthapillai*

time to withdraw this action and bring a fresh action on the alleged promise to pay ; and in default of the plaintiff doing so, he ordered the action to be dismissed.

On appeal this order was set aside and the case sent back for trial. The Commissioner then framed fresh issues :—

- (1) Did the defendant on April 19 (afterwards amended to March 22) promise to pay the plaintiff Rs. 291.40 ?
- (2) If so, can the plaintiff maintain this action ?
- (3) Is the claim prescribed ?

The plaintiff's counsel objected to the 3rd issue. His reason is not recorded ; perhaps it was because the defendant had not pleaded prescription.

The Commissioner after hearing the evidence found that the promise to pay was proved, but that as it was not in writing, and the claim was prescribed before the promise was made, the promise did not save the claim from being prescribed. That was clearly right. He made no reference to the part payments, but held that the claim for the money lent was prescribed, and dismissed the action.

The payments by the defendant in March and April, 1909, on account of his debt were sworn to by the plaintiff ; the defendant in his evidence did not expressly deny them, but contented himself with denying that he ever borrowed any money from the plaintiff. I will not send the case back for the Commissioner to record his finding as to whether the payments were made, because it seems clear from both his judgments that he believed that they were made ; and I must decide this appeal on the footing that they were made. And if they were made, the claim is not prescribed.

When the time has expired within which an action to recover a debt is maintainable, and the debtor afterwards promises in writing to pay the debt or makes a payment on account of it, the effect of the promise in writing, or of the payment (from which a promise to pay the balance is inferred), is not to revive a dead claim, but to take the case out of the operation of the enactments which prescribe the time within which an action must be brought. That is sufficiently shown by the passage from Pothier quoted by the Commissioner in his first judgment. When the debt is prescribed it is not extinguished ; the bar must be opposed by the debtor ; it is not supplied by the Judge ; and it may be waived by a renunciation of it by the debtor ; and an express promise to pay it (which is now required by the Ordinance to be in writing), or a part payment, is a renunciation of the benefit of the prescription. (*Pothier on Obligations, p. 3, ch. 8, art. 1.*)

I set aside the decree dismissing the action, and direct judgment to be entered for the plaintiff for Rs. 291.40, with interest at 9 per cent. per annum from April 20, 1909, till payment in full, with costs in both Courts.

Appeal allowed.