IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.

Second Appeal No. 348 of 2019

M/s Prashant Construction
Through Proprietor Prashant
Prabhakar Deshmukh, aged 44 years,
R/o-Shankar nagar, Khamla Road,
Nagpur. **…. Appellant**

.. Versus ..

The Corporation of City of Nagpur,
Through its Municipal Commissioner,
Civil Lines, Nagpur. **…. Respondent**

Mr. S. S. Khadse, Advocate for the appellant
Mr. T. T. Mirza, Advocate instructed by Mr. A. M. Quazi, Advocate for the respondent

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CORAM : ANIL L. PANSARE J.
DATED : 07-05-2024

COURT'S ORDER :

Heard the learned counsel for the respective parties, at length.

2. The appellant is the original plaintiff and the respondent is the original defendant. The parties will be hereinafter referred to by their original nomenclature for the sake of convenience.

3. The plaintiff had instituted a suit for recovery of Rs. 6,70,842/- being Special Civil Suit No. 258/2007 before the learned 6th Joint Civil Judge, Senior Division, Nagpur. The suit was partly decreed

vide judgment and decree dated 21st April, 2011 whereby the trial Court had directed the defendant-Corporation to pay an amount of Rs. 6,70,842/- along with interest at the rate of 6% per annum till the realization of the amount. The defendant -Corporation has assailed the said judgment and decree before the learned Extra Joint District Judge, Nagpur in Regular Civil Appeal No. 774/2012. The learned first Appellate Court has allowed the appeal and, thus, dismissed the suit, by setting aside the judgment passed by the trial Court.

4. The plaintiff being aggrieved by the judgment of the first Appellate Court, has preferred the present Appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'.)

5. This Court vide order dated 1st October 2019, while issuing notice to the defendant-Corporation, has formulated the following substantial question of law :-

> *Whether the appellate Court was justified in reversing the decree passed by the trial Court in favour of the appellant by holding that the suit filed by the appellant was barred by limitation ?*

6. The relevant facts to answer the question, are as follows :

The plaintiff is a registered contractor with defendant - Corporation. In the year 1999-2000, some construction work was allotted to the plaintiff. The plaintiff claimed that the work was duly completed some time in the year 2000. The plaintiff's bills were, however, withheld. The plaintiff therefore preferred a petition being Writ Petition No.3122/2005 before this Court, wherein the defendant's counsel made a statement that the issue of bills of the contractor will be taken up in the next meeting of the Corporation. The Petition was accordingly disposed of as withdrawn on 19th July 2005. Thereafter on 29th January 2006, the defendant-Corporation passed a resolution in the general body meeting, to release the payment of the contractor.

7. This resolution is taken aid of by the plaintiff to contend that the cause of action to file the suit arose on and after 29th January, 2006. The trial Court was of the view that the resolution would amount to acknowledgment of liability and that therefore, the plaintiff's suit is well within the limitation.

8. The first Appellate Court, however, took note of the fact that the work order was issued in the year 1999-2000. The work was executed and bills were tendered. PW1 admitted in his cross-examination that the measurement was taken in the same year. The plaintiff - proprietor has admitted that the measurement of the work was done in the same year and the bills were also tendered in that year. Further, the plaintiff has claimed interest on the outstanding amount from 1st April 2000. Thus, it is held by the first Appellate Court, and rightly so that it is the plaintiff's case that according to plaintiff, the amount was due prior to 1st April, 2000.

9. The first Appellate Court has then found that the plaintiff has failed to show that there occurred some correspondence between the parties to the litigation or that the defendant acknowledged the liability within three years or till filing of the writ petition or passing of the resolution.

10. The contentions of the plaintiff before the first Appellate Court were that defendant-Corporation never refused the claim of the plaintiff but has kept the bills pending and, therefore, the plaintiff was under the *bona fide* impression that the payment will be made. It is, thus, suggested that the defendant has never refused to pay the amount and as such, the cause of action continued. It is further contended that by passing the resolution dated 29th January 2006, the defendant has acknowledged the payment and that therefore, the suit filed in the year 2007 was well within the limitation.

11. The first Appellate Court has then referred to various judgments of this Court and held that the period of limitation will be governed by Article 18 of the Limitation Act and that the suit ought to have been filed within three years, but has been filed in the year 2007 and thus, is barred by limitation.

12. So far as the finding of the trial Court is concerned, the first Appellate Court has reversed the findings on the ground that it is settled position of law that an acknowledgment must be in writing, signed by the parties clearly acknowledging the liability of the outstanding amount and it must be relating to subsisting liability which must be within the period of three years, as held in the judgment of *Bank of Baroda, Indore vs. Krishna Kakani* : *2001(4) Civil LJ 343*. Accordingly, the first Appellate Court has held that the trial Court committed a grave error in holding that the resolution dated 29th January 2006, amounts to acknowledgment of liability of the due amount.

13. Mr. S. S. Khadse, the learned counsel for the appellant, however, has invited my attention to sub-section (3) of Section 25 of the Indian Contract Act, 1872 (“Contract Act” in short), which reads thus:

> ***“25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law*** *- 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.*
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> *Explanation 1 - Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.*
>
> *Explanation 2 - An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.”*

14. Mr. Khadse, submits that the resolution dated 29th January, 2006 could be said to be a promise made by the Respondent-Corporation to pay the amount due to the appellant. In support, he has relied upon the judgment delivered by the Division Bench of this Court, in the case of *Canara Bank and others vs. Vijay Shamrao Ghatole and Others* reported in

1996 (5) Bom CR 338. The Division Bench has held that the promise to pay the time-barred debt must be expressed so as to constitute the contract u/s 25(3) of the Contract Act.

15. Mr. T. T. Mirza, learned counsel instructed by Mr. A. M. Quazi, learned counsel for the Respondent - Corporation has countered the submissions on the count that the resolution passed by the Respondent-corporation is conditional and, therefore, cannot be said to be a promise made by the Corporation to pay
time-barred debt.

16. I have minutely gone through the resolution of General Body dated 29th January, 2006. The House took a decision to release the payment of bills due to the contractors which were withheld in terms of the recommendations made by Nandlal Committee. The resolution states that Nandlal Committee has submitted a report noting various objections in respect of the transactions of the Corporation for the period from 1997-98 to 1999-2000 and, therefore, the payments of contractors were withheld. The prime objections noted were that the works were allotted without calling tenders, the certificate of satisfactory completion of work had not been issued by the concerned Engineer, the measurement books of some of the works were not available etc. The House took a decision to exempt the irregularities in respect of works which have been certified by the concerned Executive Engineer to have satisfactorily completed.

17. The Courts below, more particularly the first Appellate Court has taken note of the fact that the work order was issued in the year 1999-2000, the work was executed and bills were tendered. The respondent-Corporation admitted that the measurements of the works

were taken on 16th March 2001. The Corporation also admitted that the work was completed within one month of issuance of work order and further that the bills came to be finalised. Thus, it is not the case of the Corporation that the appellant has not completed the work satisfactorily or that the Executive Engineer has not issued the certificate to that effect or that the measurement book in respect of the said work is not available.

18. In that sense, to my mind, the work done by the appellant would be governed by the resolution passed by the Corporation for releasing the payment. This resolution is in writing and pertains to the amount withheld in terms of the recommendations of the Nandlal Committee. The Corporation decided to release the amount. The appellant is not at fault in the entire sorry episode, except that he kept waiting with the hope of getting the payment. As such, the appellant has filed the writ petition as mentioned earlier and the Corporation made a statement of taking a decision on the issue of pending bills of contractor and, therefore, the petition came to be withdrawn. In that sense, one cannot say that the appellant has slept over his rights.

19. The learned counsel for the respondent then submits that the said resolution cannot be treated as an agreement as it lacks the basic ingredients to constitute agreement. According to him, for a valid agreement, there has to be an offer by one party and acceptance by another. This contention, to my mind, is contrary to the purport of Section 25(3) of the Contract Act. This Court in *Canara Bank*'s case (supra) has held that Section 25(3) of the Contract Act provides that when a promise is made in writing as envisaged in the said provision to pay the time-

barred debt, the promise itself is treated as a contract and, therefore, such a promise would furnish a fresh cause of action to the creditor.

20. The learned counsel for the respondent has then raised another ground by contending that the resolution passed by the Corporation on the point of payment is not in respect of a particular Contractor/s. He submits that the name of the appellant having been not included in the resolution, it may not be possible to infer that the promise has been made to pay the debt to the appellant. I have already culled out the ingredients of the resolution in the earlier paragraph. It is in respect of payments of all the Contractor/s. The House took a decision to release the payment of bills due to Contractor/s but subject to certain conditions. Admittedly, the appellant/Contractor is not hit by any of these conditions. Thus, by way of resolution, a decision has been taken to release the payments of bills due to the Contractor/s which ought to include the appellant/Contractor unless otherwise expressly stated.

21. In the circumstances, the appellant having completed the work satisfactorily and he being not at fault, the resolution can be taken aid of to wriggle out of the technical glitch in releasing payment in favour of the appellant which otherwise is due to him. In the aforesaid backdrop, if the resolution is read, it would fall within the ambit of Section 25 (3) of the Contract Act, the resolution being in writing and expressly decides to release the payment of the contractors, which includes the appellant and, therefore, could be said to be a promise and not acknowledgment of time-barred debt.

22. As such, this point was not argued before the Courts below. However, the same being a law point can be raised at any stage of the

litigation, including the Second Appeal. Consequently, the same is being entertained.

23. For the reasons aforesaid, in my view, the reversal of finding of the trial Court by the first Appellate Court would require correction. The substantial question of law is answered in the negative. Thus, the appellant has made out a case. Hence the following order :-

ORDER

i) The Second Appeal is allowed.

ii) The judgment and decree dated 5th July 2018 passed by learned Extra Joint District Judge, Nagpur in Regular Civil Appeal No. 774/2012 is set aside.

iii) The judgment and decree dated 21st April,2011 passed by the learned 6th Joint Civil Judge, Sr.Dn., Nagpur in Special Civil Suit No. 258/2007 is restored.

iv) No costs.

(Anil L. Pansare, J.)

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