

ENFORCING PAYMENT OF A TIME BARRED DEBT: CONTRACT ACT AND LIMITATION ACT

The remedy provided in law to the creditors for recovery of their monies comes with an expiration date. When the time provided under the law of limitations for recovering such a debt lapses, the debt becomes barred due to passage of excess time. Such debts being barred by the statute of limitation, their liability still subsists even though the remedy perishes. This principle is based on ethical principle that a debt does not extinguish and facts of a case may stop operation of the clock of limitation fixed by law or entirely revive a debt barred by the law of limitation, as set out in Section 18 of The Limitation Act, 1963 ("**Limitation Act**") and Section 25(3) of the Indian Contract Act, 1872 ("**Contract Act**"), respectively.

Section 25 (3) of the Contract Act

Consideration is an essential requisite of a contract. However, Section 25 of the Contract Act provides certain exceptions when agreements without any consideration are deemed to be valid and binding. One such exception is Section 25(3) of the Indian Contract Act, 1872 wherein it is considered a valid contract when a person to be charged or his agent, makes a promise to the creditor, in writing, to pay the debt partly or wholly, of which the creditor might have enforced payment, but the debt has become barred due to the law for the limitation of suits.

In order to satisfy the stipulations of Section 25 (3) of the Contract Act, the following essentials must be present:-

- (i) there must be a promise to pay a debt;
- (ii) the creditor might have enforced payment but the debt is barred by limitation;
- (iii) the promise must be made in writing; and
- (iv) it should be signed by the person to be charged therewith or his agent.¹

Promise may be express or implied

A question whether the promise by debtor to pay a time barred debt should be express or maybe implied has come across Indian Courts regularly. The Madras High Court in the case of *N. Ethirajulu Naidu Vs. K.R. Chinnikrishnan Chettiar*² held that an agreement to be valid under Section 25(3) of the Contract Act requires an express promise made in writing and signed by the person to be charged therewith. Nothing short of an express promise will provide a fresh period of limitation and that an implied promise is not sufficient. In the case of *M.S.N. Charities Vs. Pilla Ramarao*³ the Andhra Pradesh High court rejected the argument of implied promise for the purpose of Section 25(3) of Contract Act and held that the promise to pay must be in writing and it should be expressly mentioned by using the words "I promise to pay" or words and phrases which connote similar meaning. The language used must indicate that it is something more than an acknowledgment of a debt.

¹ Order dated 11th February 2015, Civil Suit No. 250 of 2007 (Madras High Court)

² AIR 1975 Mad 333

³ 2009(2)APLJ (HC) 226

On the contrary, the Delhi High Court in case of *Suresh Kumar Joon Vs. Mool Chand Motors and Ors.*⁴ has held that a cheque does not contain an express promise in writing to pay. However, Section 9 of the Contract Act makes it very clear that the promise can be express as well as implied. Hence, when a debtor issues a cheque to his creditor, he makes an implied promise to pay the amount of the cheque being issued by him and constitutes a contract within the meaning of Section 25(3). However, the Bombay High Court in the case of *V. A. Enterprises vs. M/s. Tooltek Special Machines & Ors.*⁵, held that a cheque cannot be a promise as envisaged under section 25(3) of the Contract Act in itself.

The Karnataka High Court while deciding the case of *Adivelu Vs. Narayanachari*⁶, quoted Supreme Court's decision in *Shapoor Freedom Mazda v. Durga Prosad Chamaria*⁷ and held, that if the legislature had intended that promise under Section 25 (3) should be an "express promise" only, it would have indicated so, but the word "express" is not found in Section 25(3) of the Contract Act, so it would not be proper to read so and restrict its scope. It also held that the term "promise" in Section 25(3) has to be read alongwith Section 2(b) and Section 9 of the Contract Act. Similarly, the Bombay High Court once again in case of *R. Sureshchandra and Co. Vs. Vadnere Chemical Works and Ors.*⁸ held that a promise can be inferred by necessary implication and held the balance sheet of the debtor, showing indebtedness, a promise within the meaning of Section 25(3) of the Contract Act.

Promise on email

The Indian courts have till date neither confirmed nor rejected the validity of a promise to pay made on email with regards to Section 25(3), but an analogy can be drawn on the basis of Section 10A of the Information Technology Act, 2000 which provides for an electronic contract to be both valid and enforceable.

Acknowledgment is different than promise

Acknowledgment of a debt is often confused as a promise or commitment by a debtor to pay the outstanding debt. However, acknowledgment is merely an admission by the writer that there is a debt owed by him either to the receiver of the letter or to some other person on whose behalf it is received. Section 18 of the Limitation Act provides that when a person against whom a right or a property is claimed, before the date of expiration of the period for filing of a suit or application, acknowledges such a liability, the limitation shall be computed from the time when such an acknowledgement was made. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. An acknowledgment need not be accompanied by a promise to pay either expressly or even by implication.

Promise to pay a time barred debt - fresh contract and cause of action

⁴Order dated 22nd August 2012, IAs No. 8561/2011 and 8562/2011 in CS (OS) 389/2009 (Delhi High Court)

⁵ Order dated 14th October 2013, Criminal Application No.159 of 2012 (Bombay High Court)

⁶AIR 2005 Kant 236

⁷[1962] 1 SCR 140

⁸AIR1991Bom44

A simple acknowledgement under section 18 of the Limitation Act would only extend period provided under limitation laws. After the debt becomes barred by law of limitation, only way it can be revived is when a debtor enters into a fresh obligation with the creditor and unconditionally promises to pay the time barred debt and satisfies the conditions laid down in Section 25(3) of the Contract. The Supreme Court in *Hiralal & Ors. Vs. Badkual & Ors.*⁹ held that an acknowledgment implying a promise to pay cannot be made the basis of suit and treated as giving rise to a fresh cause of action.

The Madras High Court in the case of *Sri Kapaleeswarar Temple, Mylapore Vs. T. Tirunavukarasu Kishen Lal*¹⁰ held that a promise satisfying the conditions laid down in Section 25(3) of the Contract Act, will amount to a fresh contract in the eyes of law and is an independent and enforceable contract. However, the liability which it renews is a liability which existed from before, though for the time being it may have ceased to be enforceable. A debt may become irrecoverable under the law in force by reason of the lapse of the period of limitation, but the debt exists all the same, and if a person chooses to pay a time-barred debt in the manner permitted by Section 25 of the Contract Act, the debt which he chooses to pay remains the same debt, though by reason of the contract which he enters into, it assumes a new garb and gains a fresh vitality.¹¹

The Madras High Court in *R.Madesh vs M.Rathinam*¹² held that promise under 25(3) will amount to a fresh contract in the eyes of law and can certainly be made the basis of an action for recovering the amount promised. The Bombay High Court in the case of *R. Sureshchandra (supra)*, also relying on *Hiralal (supra)* further held that nothing short of a clear promise can provide a fresh period of limitation. A promise made in writing to pay a time barred debt amounts to a fresh contract enforceable in law, provides for a fresh period of limitation and would therefore, also provide a fresh cause of action.

Another interesting question which arises is the rate and period of interest which can be claimed under this fresh contract. The Bombay High Court in the case of *South Eastern Roadways, Bombay vs. U.P. State Agro Industrial & Ors.*¹³, where there was a promise to pay under Section 25(3), awarded interest to the plaintiff at the past interest rate and from the date of the transaction, *pendente lite* and future, opining that the transaction being commercial, there was no reason for the plaintiff to be deprived of interest.

Conclusion

It is evident from above that a time barred can be revived under section 25(3) of the Contract Act by way of an unconditional, written promise creating a fresh contractual obligation between the parties and provides a fresh cause of action. An acknowledgment under Section 18 of the Limitation Act only extends the period of limitation and shall be made before the debt is barred by the Limitation Act. As to whether such a promise shall be express or can be implied is a grey area since the different High Courts have had different opinions on the same.

⁹AIR1953SC 225

¹⁰AIR1975Mad164

¹¹(1924) ILR 46 All 775, Jagannath vs Gajadhar

¹²Order dated 11 February, 2015, Civil Suit No.250 of 2007 (Madras High Court)

¹³AIR 1993 Bom 300

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