Privy Council Appeal No. 46 of 1938

Rama Shah - - - - - - - - - - *Appellant*

v.

Lal Chand - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1940

Present at the Hearing:
VISCOUNT MAUGHAM
LORD PORTER
SIR GEORGE RANKIN
[*Delivered by* SIR GEORGE RANKIN]

This appeal raises questions as to the true construction and effect of section 20 of the Indian Limitation Act (IX of 1908) as amended by the Indian Limitation Amendment Act (I of 1927). Conflicting decisions in India have made it desirable that their Lordships should construe the section, and as in the present case the High Court has differed from the trial Court on the facts, the evidence must be examined.

The plaintiff appellant Rama Shah is described as a banker and carries on a business at Jhelum which includes the lending of money. The defendant Lal Chand is a timber merchant of the same town who on various occasions between 17th October, 1929, and 17th July, 1931, took a loan from the plaintiff, giving to him a promissory note for the amount of the loan with interest at twelve per cent. per annum. Two small loans not covered by promissory notes were alleged by the plaintiff to have been made and were disputed by the defendant, but five promissory notes are admitted by the defendant and a number of substantial payments are admitted by the plaintiff to have been received in respect of them. There has, however, been considerable dispute between the parties as to the proper allocation of the payments to promissory notes. In the result, when the plaintiff on 24th January, 1936, brought in the Court of the Subordinate Judge at Jhelum the suit out of which this appeal arises, he brought it as a suit for the balance due upon a promissory note for Rs.18,500 dated 4th February, 1930. He claimed that the amount outstanding for principal and interest was Rs.11,463. The learned Subordinate Judge was satisfied as to the correctness of this figure but the High Court having reduced it to Rs.10,334-9-3 the plaintiff by his counsel has accepted the lower figure as the sum to be decreed if it be held that his suit succeeds.

The promissory note of 4th February, 1930, being expressed to be payable on demand the period of limitation for a suit on the note was three years from its date (Article 73) so that the plaintiff's suit of 24th January, 1936, was *prima facie* barred. There was an endorsement, however, on the note in the writing of the defendant dated 24th January, 1933, signed by him: "*Paid Rs.100 to-day in this pro note (sgd.) Lal Chand, Bahri,* 24.1.1933". This date was within the period of three years from the date of the note but only by a few days, and the probable object of the endorsement is reasonably plain. The defendant admitted that he had made the endorsement on the 24th January, 1933, but denied that any money passed. Both Courts in India have disbelieved him on this point and it is not now disputed that the sum of Rs.100 was paid as the endorsement states.

The proviso at the end of the first sub-section of section 20 of the Limitation Act of 1908 was the subject of amendment made by Act I of 1927 and the amended sub-section stands as follows:

> "20.—(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:
>
> Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

Before 1927 the proviso read:—

> "Provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

There is no room for the contention that the sum of Rs.100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment so that part of it at least must of necessity have been intended to go towards interest or towards principal.

Applying the amended sub-section to the present case, the learned Subordinate Judge found on the evidence that the payment of Rs.100 on 24th January, 1933, was immediately appropriated by the plaintiff towards the principal of the debt, and was a part payment of principal from which a fresh period of limitation began to run. He accordingly gave judgment for the plaintiff (9th June, 1936). On appeal, the High Court at Lahore (Dalip Singh and Skemp JJ.) held that the sum of Rs.100 was never appropriated by the debtor or by the creditor either to interest or to part-payment of principal until the date of suit (24th January, 1936), or at earliest until 18th December, 1935—that is, until long after three years had elapsed from the date of the note. On this view of the facts the High Court, by the decree (14th April, 1937) now under appeal, dismissed the suit

as time-barred, being of opinion that a payment made generally on account of an interest-bearing debt becomes a payment towards the principal only by appropriation thereto and must (in order to have the effect of preventing limitation) be appropriated before the period of limitation has expired. In so holding the learned judges followed a decision of the High Court at Allahabad in *Udaypal Singh* v. *Lakhmi Chand* (1935) I.L.R. 58 All 261—a Full Bench case in which two of the five members of the Full Bench had dissented. It appears that some dissent has since been expressed in the High Court at Patna (*Liquidator Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha* (1936) I.L.R. 16, Patna 27, and *Bankanidhi Tantra* v. *Godipatna Co-operative Society ibid.* p. 294). *Khan Sahib* v. *Uchal Lebbay*, I.L.R. [1938] Rang. 591 is also inconsistent with the Full Bench decision.

A recent case *Kesar Singh* v. *Wasir Singh* (Civil Revision No. 559 of 1938) before the Lahore High Court in revision under section 25 of the Provincial Small Causes Courts Act (IX of 1887) was referred by Tek Chand J. to a Division Bench by an order dated 9th June, 1939, which has been laid before the Board. In this order the different views taken by High Courts in India as to the correctness of *Udaypal's* case have been usefully set out, and it would appear that in some respects that decision is not consistent with certain previous decisions, and that the decision of the Lahore High Court now under appeal has not since been uniformly followed in that Court.

It will be convenient that their Lordships should state their opinion as to the effect of section 20 in a case where the debtor has made a payment on account of an interest-bearing debt without appropriating the sum paid either towards interest or principal, and where the creditor has made no appropriation until after the expiry of the period of limitation. The view taken by the dissenting judges in *Udaypal's* case is that as the debtor in making the payment must have meant it to go either towards interest or principal a fresh period of limitation must always begin to run if the requirement as to writing is satisfied. This view has in one or other of the cases upon the subject been defended both by regarding the words "as such" retained in the amending section, as nugatory; and also by contending that if the payment was not intended by the debtor as a payment of interest he must have intended it as a payment on account of principal, and that in any case it was a part-payment of principal, even if not of principal as such. On the other hand the view taken by Sulaiman C.J. in *Udaypal's* case was that where no appropriation is made by the debtor the creditor may appropriate: if he appropriates the payment towards interest it becomes a payment of interest though not paid by the debtor as such: if he appropriates it towards principal it becomes a part-payment of principal and saves limitation none the less that it was not paid as such. The learned Chief Justice rejected the doctrine that the debtor's

payment must be either a payment of interest as such or a part payment of principal.

So far, their Lordships are of opinion that the learned Chief Justice was in the right. When the amendment of 1927 extended the requirement of writing to the case in which interest had been paid, this amendment was carried out by altering the language of the proviso at the end of the sub-section leaving the language of its main provision to stand as before. The words "as such" had long been given a settled meaning importing the intention of the debtor that his payment should go towards interest as distinct from principal. Though the amendment raised in a pointed manner the question whether the words "as such" should be retained, it is clear that the legislature decided to retain them; and it is not reasonable as a matter of construction of a statute to suggest that they can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before 1st January, 1928. Though interest and principal are under the section on a different footing as regards the person making the payment, it is not very clear why the legislature should have hesitated to drop the words "as such" and it may well be that the difficulty could best be resolved by their omission. But the section must be construed carefully according to its terms, and effect must be given to the consideration that in order to give a fresh period of limitation interest must be paid as such though there is no similar requirement in the case of a part-payment of principal.

In *Firm Rai Bahadur Het Ram-Bodh Raj* v. *Firm Seth Aya Ram-Tola Ram* 1937, 42 Calcutta Weekly Notes 509, the Board had to consider a case in which a judgment debt was by certain terms of compromise payable by instalments. The first instalment was to have been paid on 27th January, 1929, and was to be Rs.13,000 with a year's interest to that date—that is from 27th January, 1928, to 26th January, 1929. It was stated by Lord Russell of Killowen delivering the judgment of the Board:

> "The last payment made in respect of the first instalment and interest was a sum of Rs.825 paid, as admitted by the parties on the 15th February, 1929. The payment was made, and necessarily made, in respect of principal and interest; it was therefore a payment of interest on a debt as such by the person liable to pay the debt. Further, in a letter addressed to the decree-holders, and signed by Bodh Raj, he says, referring to the Rs.825, 'Deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name. . . . Send me a formal receipt of the amount of the first instalment together with interest by registered post.' These facts are sufficient to show that section 20 has come into play, and that accordingly the period of limitation must be computed from the 15th February, 1929."

This was a decision under the amended section and it shows that the words "as such" have lost nothing of their previous meaning which involves that the intention of the debtor must be shown to have been that the payment should go towards interest. The case also shows, however, that

the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may clearly appear from the circumstances of the case. This doctrine had been settled law in India under the unamended section—see *Gopinath Singh* v. *Hardeo Singh* (1909) I.L.R. 31 All. 285. *Charu Chandra Bhattacharjee* v. *Karam Bux Sikdar* 27 C.L.J. 141. Even when the requirement as to writing is satisfied it is still insufficient to give rise to a fresh period of limitation that the debtor has made the payment generally on account and that the creditor has appropriated it to interest. Nor in the absence of an intention on the part of the debtor does a payment amount to a payment of interest as such by reason of the rule that it is the right of a creditor to have payments treated in account as liquidating the interest before the principal—the "old rule" recognised by the Board in *Venkatadri Appa Row* v. *Parthasarathi Appa Row* (1921) L.R. 48, I.A. 150, citing Rigby L.J. in *Parr's Banking Co.* v. *Yates* L.R. [1898] 2 Q.B. 460, 466. The rule was stated with precision by Lord Macmillan (*Income-tax Commissioner* v. *Maharajadhiraja of Dharbhanja* 1933, 60 I.A. 146 at 157) in the following terms:

> "Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest."

On the other hand, it remains true that the section when dealing with part payment of principal contains no similar stipulation as to the debtor's intention. The words "as such" are not repeated and the contrast between the two classes of payments is too marked to be mistaken or overlooked. Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or e.g., by the fact that the amount of the payment exceeded the interest then due. But the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. *In re Ambrose Summers* (1896) I.L.R. 23, Cal. 592, 598, was a case where the debtor had sent to his bank a cheque for Rs.600 to be placed to the credit of his loan account, and the bank had thereafter charged interest on the principal sum less Rs.600. Sale J. held that this operated in fact as a part payment of the principal debt. In numerous cases it has been held that a payment made without appropriation by the debtor will if it be appropriated by the creditor towards the principal debt be sufficient to give rise to a fresh period of limitation.

Their Lordships cannot accept the contention of learned counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands or that the character of the payment must necessarily be determined at the time when the payment is made. Stress was laid on the change in the proviso from "the fact of the payment

appears" to "an acknowledgement of the payment appears", but neither expression affords in their Lordships' opinion any ground for holding that the character of the payment, as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment.

In *Udaypal's* case Sulaiman C.J. lent the weight of his authority to the view that the section must be read as proceeding upon an acknowledgement by the debtor of his liability though the learned Chief Justice agreed that the section is not professedly based upon any such principle. Accordingly he put the case of a payment insufficient to discharge the debt in full but made upon the footing that no more was due, and he expressed the opinion that such a payment would not be within the section. Their Lordships cannot agree that the section is to be read as governed by any such principle as is suggested familiar though it be in the law of England. They can discover no sufficient reason for the assumption that the section is an expression of any single principle. In English law effect was first given to acknowledgements and payments by reason of general principles of exception applied by the Courts to the Statute of Limitation (1623) which did not contain express exceptions in these respects, and though the exceptions were in the end made statutory they retained much of their original character. In the Indian Limitation Act, section 19, which deals with acknowledgements, is not to be read as based upon the theory of implied promise; and it is difficult to see why section 20, which deals with payments, should be regarded as based upon a theory of acknowledgement. The Indian legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in section 20 by which the matter must be judged are "where part of the principal of a debt is paid". As it is not prescribed by the section that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section, it is not in their Lordships' view correct to require that the payment should have been made of part as part. On this point the view taken in *Municipal Committee Amritsar* v. *Ralia Ram* (1936) I.L.R. 17, Lah. 737, 756, is to be preferred to the view taken in *N.A.M. Appasami Pillai* v. *Morangam Muthirian* (1934) 68 M.L.J. 73 (1935) A.I.R. Mad. 371, which applied the English decisions.

The main contention of the learned judges who were in the minority in *Udaypal's* case and of others who dissent from that decision is that if a payment be made by a debtor without allocating it to principal or to interest it can correctly be regarded as a part-payment of principal by reason of the mere fact that it was not made on account of interest as

such. In cases decided before 1927 there is some trace of the opinion that where the requirement of writing was satisfied it mattered nothing whether the payment was for interest as such, since if not it was a part-payment of principal. This appears to have been the view of Fletcher J. in *Hem Chandra Biswas* v. *Purna Chandra Mukherji* (1916) I.L.R. 44, Cal. 567. Their Lordships agree with the majority of the Full Bench in *Udaypal's* case in rejecting the attempt to maintain that a payment on general account is either a payment of interest as such or a part-payment of principal. The disjunction is incomplete: as Sulaiman CJ. put it "there are additional possibilities as well" (p. 273). There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when a payment is made generally on account of a debt—an "open payment" as it was called by Lord Macmillan in a passage already cited in this judgment.

The facts of *Udaypal's* case were that the payment was made by the debtor without any appropriation as between principal and interest; it was appropriated by the creditor to interest; and the suit was brought to recover the whole of the principal debt with certain further interest. In these circumstances it appears to their Lordships that it was rightly held by the Full Bench that the payment was neither a payment of interest as such nor a part-payment of the principal debt. It is no answer to say that the part-payment of principal need not be made as such: on these facts there was no payment of principal at all.

The subject of "appropriation of payments" is dealt with in the Indian Contract Act by sections 59 to 61 inclusive. Section 60 provides that when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. This is the same rule as that laid down as English law by the House of Lords in *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* L.R. [1897] A.C. 286, and under it the creditor has a right to appropriate a payment by the debtor to the principal or to the interest of the same debt. There is no obligation upon the creditor to make the appropriation at once (*Income Tax Commissioner* v. *Maharajadhiraja of Dharbhanga* (*supra*) 146, 162, *Kunjamohan Shaha Poddar* v. *Karunakanta Sen Chaudhuri* (1933) I.L.R. 60, Cal. 1265, 1270-1), though when once he has made an appropriation and communicated it to the debtor he would have no right to appropriate it otherwise (cf. per Lord Herschell in *Cory's* case *supra* at 292). Lord Macnaghten's language in that case is equally applicable under sections 60 and 61 of the Indian Contract Act—"Where the election is with the

creditor it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money " (p. 294).

What then in the case of an " open " payment is required in order that it may be said in the words of section 20 that before the expiration of the prescribed period part of the principal of the debt has been paid by the debtor? Learned counsel for the appellant pointed to the decisions whereby it has been held that the writing in which appears an acknowledgement of the payment (before 1928, the fact of the payment) need not have come into existence within the prescribed period though the payment itself has to be made within the period and the fresh period of limitation begins to run from the date of the payment. He contended that a similar principle should be applied to the creditor's act of appropriation and that so long as the payment was made within time the appropriation towards the principal debt might be made at any subsequent time and would give rise to a fresh period computed from the date of payment. Learned counsel conceded that in no case had this yet been held and it was forcefully maintained for the respondent that it is impossible, after the prescribed period has run out, to regard anything done by the creditor without even the debtor's consent as effective to extend the time. Their Lordships, while not throwing doubt on the principle that the writing evidencing the payment may come into existence at any time, are of opinion that the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot, they think, have been intended by the legislature that at the end of the prescribed period the right to sue should be barred and yet that the creditor might thereafter remove the bar at his own choice by making an appropriation. While not of opinion that it need be shown that the creditor's appropriation has within the time limited been communicated to the debtor, they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true that until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended section 20 part-payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the debtor's act, whereas the essential matter is really the debtor's act, but unless either a part-payment of principal is required to be made as such in order to stop the running of the statute or a

payment on account of an interest-bearing debt, though made generally on account, is made sufficient for that purpose there is no escape from this conclusion.

It remains to consider what happened in the present case when the defendant on the 24th January, 1933, paid Rs.100 to the plaintiff in respect of the promissory note of 4th February, 1930. The main contest at the trial was upon the question whether any money was paid. The defendant's denial in the witness-box has been held by both Courts in India to be untrue. He did not produce his ledger at all. The plaintiff at the first hearing (Order XIII r. 1 C.P.C.) produced an account sent by him to the defendant on 18th December, 1935, shortly before suit. He also produced his books of account from 1929 to 1936 containing the account of the defendant in the ledger as well as a rough cash book and cash book (*kachi* and *pukki rokar*). That the defendant had full opportunity to inspect and examine these appears from the cross examination on behalf of the defendant. That the trial Judge closely examined them appears from his judgment. In one passage he says " The plaintiff's kachi rokar is silent as to this payment but pukki rokar and ledger have got the entry " and at the end he says " I am not satisfied with plaintiff's method of keeping his kachi rokar in which admittedly there are blank spaces here and there. . . . But in as much as the plaintiff's case is proved otherwise as also by production of pukki rokar and the ledger where (whose) entries are further strengthened by defendant's withholding of his books I would allow plaintiff a decree. But as a matter of punishment to plaintiff for keeping a perfunctory kachi rokar I would allow him only half costs." At the trial each party followed the practice (still common in certain parts of India notwithstanding repeated condemnation by the Courts and by this Board) of calling as his own witness the clerk of his opponent. The defendant's clerk was called by the plaintiff to prove receipt of a certain sum of Rs.200, but in cross-examination on behalf of his master he produced his cash book which contained no entry of the payment of Rs.100 on 24th January, 1933, and stated (falsely as it must now be taken) that the promissory note was endorsed in his presence without any payment having been made. The plaintiff's *munib* Godar Mall, called by the defendant said that the account dated 18th December, 1935, was copied by him correctly from the plaintiff's ledger; that " our *kachi* and *pukki rokars* are regular." The plaintiff also deposed that " our *bahis* are regularly kept " and spoke to the payment of Rs.100 and to a number of other matters of account. He explained that in his books there was only one ledger account of the defendant. The account dated 18th December, 1935 (Exh D1 is the Hindi original) is made out on what is called the *katauti* principle—that is to say, interest is calculated on both sides of the account at the same rate so that to any sum paid by the defendant is added interest thereon before deduction is made from the total sum shown to be due

for principal and interest upon each loan. In the plaint it was incidentally alleged that "deduction of interest at *katauti* rate" entered into the account in respect of this promissory note. At the trial specific questions addressed to the appropriation of the sum of Rs.100 do not appear to have been asked of any witness, the contest being upon the fact of payment; but when the evidence was closed much argument was expended upon the question whether the writing was an acknowledgement of part-payment of principal. The learned Subordinate Judge rightly directed himself that the plaintiff had to prove that he appropriated the sum towards the principal debt before the expiry of the period of limitation for a suit on the promissory note. He held that the account of 18th December, 1935, sent to the defendant showed that the plaintiff had given credit for the sum as against the principal sum and that had the defendant not intended this to happen he would have protested at once. "In the present case the defendant pays Rs.100 in his own handwriting and the plaintiff appropriates it towards principal straightaway. This payment in my opinion must be held to be part-payment of principal." The learned Judges of the High Court have reversed this finding of fact mainly on the ground that they were not prepared to hold that the account dated 18th December, 1935, and the evidence of the plaintiff's *munib* proved that in the plaintiff's ledger the sum of Rs.100 had been treated as a part-payment of principal. They appear to agree that the account was drawn up from items entered in the ledger but not that it was a copy of the defendant's account, holding that it was merely prepared for the purposes of the suit. They considered that this view was fortified by the last entry in the account which was out of its proper order according to date. The plaintiff's books, notwithstanding that he produced them, deposed to their regularity, and was cross-examined on their details, were in the High Court treated as though they could only be guessed at on the basis of the account of 18th December, 1935, and the plaint of January, 1934. The High Court might have been saved from taking this course had the trial Judge been careful to mark the plaintiff's books and all the entries referred to at the trial either as exhibits or for identification. But with all respect to the learned Judges, their Lordships think that the course adopted in the High Court was unduly hard upon the plaintiff, more particularly as the trial Judge had gone very fully into the plaintiff's books and the question was not merely a question as to one item but as to the character of the account of the defendant in the books of the plaintiff—whether it was kept on the *katauti* method. Upon this, the refusal of the defendant to produce any relevant book of account kept by himself, save and except an untrue cash book, and the High Court's finding that the Rs.100 were paid, made the burden on the plaintiff light and their Lordships are unable to hold that there was sufficient reason for reversing the finding of the Subordinate Judge.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of the High Court at Lahore dated 14th April, 1937, set aside; that the decree of the Subordinate Judge at Jhelum dated 9th June, 1936, be restored with the variation that instead of the sum of Rs.11,463-8-0 therein mentioned the sum of Rs.10,334-9-3 be substituted. The respondent must likewise pay the plaintiff's costs in the High Court and of this appeal.

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In the Privy Council

RAMA SHAH

v.

LAL CHAND

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