advise His Majesty that the appeal be dismissed with costs.

J. V. W. *Appeal dismissed.*

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RAM KANAI SINGH DEB DARPASHAHA v. MATHEWSON

Solicitors for the appellants: *Theodore Bell & Co.*
Solicitors for the respondents: *Burton, Yeates & Hart.*

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

KEDAR NATH MITRA

v.

DINABANDHU SAHA.*

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March 25.

Cheque, payment by—Effect of such payment—Part-payment—Limitation—Limitation Act (IX of 1908), s. 20—Continuous account.

If a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives.

Where such a cheque is signed by the debtor and paid in part-payment of the principal of a debt, the cheque being subsequently honoured, the proviso to s. 20 of the Limitation Act has been complied with.

Mackenzie v. *Tiruvengadathan* (1) distinguished.

Where the dealings between two parties give rise to a continuous account the whole forms one cause of action.

Bonsey v. *Wordsworth* (2) followed.

APPEAL by Kedar Nath Mitter, the defendant, against the judgment of Chaudhuri J.

Between the 7th January 1903 and the 28th September 1911, the plaintiffs sold and delivered to the defendant certain quantities of timber at certain rates, the aggregate price amounting to Rs. 9,997-7. Against

*Appeal from Original Civil No. 42 of 1914, in suit No. 1167 of 1912.

(1) (1886) I. L. R. 9 Mad. 271. (2) (1856) 18 C. B. 325, 334.

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these goods the defendant between the 5th April 1903 and 27th March 1912 made various part-payments amounting in the aggregate to Rs. 6,289-13-6.

This suit was instituted on the 21st December 1912 for the balance of Rs. 3,707-9-6 together with the sum of Rs. 704-3 alleged to be due for interest.

It was contended by the plaintiffs that they appropriated the earlier payments to the earlier debits and that inasmuch as the part payments with reference to the later debits were made by means of cheques drawn and signed by the defendant or his agent, the whole of the amount in suit was within the period allowed by the Law of Limitation.

It was contended by the defendant that the plaintiff's claim for the price of goods supplied to him, prior and up to the 16th December 1909, was barred by the Law of Limitation: the defendant admitted liability to the extent of Rs. 2,490-9-3 in respect of the goods supplied to him, on and from the 24th December 1909, and brought that sum into Court.

The main question in issue was whether a cheque given in part-payment of principal came within the purview of the proviso to section 20 of the Limitation Act.

The suit came on for hearing before Chaudhuri J., and on the 16th March 1914 his Lordship disallowed the plaintiffs' claim for interest and passed a decree in their favour for the sum of Rs. 3,707-9-6, observing as follows :—

"This is a suit for the recovery of a certain sum of money claimed to be due for the price of timber sold by the plaintiffs to the defendant, including a sum for interest. The facts of this case are not disputed, except with regard to the agreement for payment of interest. The plaintiffs annex to the plaint a statement of the goods sold and of the payments received. There is no dispute as regards them. The defendant however says that there was no agreement for payment of interest as alleged in the plaint, and also relies on the Statute of Limitations in respect of the price of

goods sold between Asar 1314 B. S. up to the 1st Pous 1316. This portion of the claim is said to be barred. There was undoubtedly an adjustment of accounts, on the 29th Chaitra 1313, corresponding to the 12th April 1907. Payments on account, however, continued to be made by the defendant by cheques, which, I find, was the defendant's ordinary method of payment, up to Chaitra 1318. I am excluding from this payments of small sums of money on the New khata day. On the adjustment mentioned about Rs. 650 was found due by the defendant. This amount was paid in instalments beginning from the 12th April 1907 up to 1st October 1908. There are therefore two questions to determine, namely (1) Was there any such agreement for payment of interest as alleged by the plaintiffs? (2) Is the claim between Asar 1314 and the 1st Pous 1316 barred by the Statute of Limitations; that is to say, do the payments by cheques operate in favour of the plaintiffs under the provisions of section 20 of the Limitation Act and keep alive his claim for the price of the goods supplied during this period? . . . . . "

"The next point is as regards the question of Limitation. Payments were admittedly made by cheques as alleged by the plaintiffs, and the question for my determination is whether a person drawing a cheque in favour of his creditor, by the fact of drawing such a cheque can be said to be making a payment, the fact of which appears in his handwriting. Now so far as the word "payment" is concerned, Lord Campbell in construing 9 Geo. IV. C. 14 Section 1, held that the word "payment" was used by the Legislature in a popular sense and cited Justice Maule's dictum in the case of *Maillard* v. *Duke of Argyle* (1) "Payment is not a technical word. It has been imported into law proceedings from the exchange and not from law treatises." So far as the Contract Act is concerned payments may be made in various ways. See section 50 of the Contract Act and the illustrations. It was held in *Sukhamoni Chowdhurani* v. *Ishan Chandra Roy* (2), that there was no particular mode or form of payment which was specified in the Limitation Act, that there were many modes in which payments might be made. In *Kariyappa* v. *Rachapa* (3) it was held that a settlement of account was a payment. The question is whether a cheque so drawn, paid and honoured, can be considered a payment and if it is a payment, does the fact of the payment appear in the handwriting of the debtor. I would not have entertained much doubt about this point, had it not been for the decision of a very eminent Judge in Madras in *Mackenzie* v. *Tirurengadathan* (4), where it was held that a cheque was only an order for payment, that it did not evidence any payment at all, nor did it shew for what

(1) (1843) 6 Man. & Gr. 40.
(2) (1898) L. R. 25 I. A. 95, 101.
(3) (1900) I. L. R. 24 Bom. 493.
(4) (1886) I. L. R. 9 Mad. 271.

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purpose the payment was made. This case, I find, was considered by this Court in *Mandardhar Aitch* v. *Secretary of State* (1), where Mr. Justice Banerji said that he was not prepared to go quite so far as the Madras case did. So far as the payment by cheque is concerned, it has been held in a great many cases to be a payment when the cheque is honoured. In *Currie* v. *Misa* (2) it was held that a security of that character was taken as money's worth. In *Irving* v. *Veitch* (3) it was held that the date of payment by a bill drawn is the date of the delivery of the bill by the debtor, not the time of its payment. In various cases it was considered to be a conditional payment in the event of its being dishonoured. I will only refer to the case of *Turney* v. *Dodwell* (4) in this connection. I considered that a cheque drawn by a debtor in favour of his creditor specifying the amount to be paid which is in part of the claim then outstanding against him is a payment—the fact of which appears in the handwriting of the debtor, and therefore, I will allow the plaintiffs' claim to the extent of Rs. 3,707-9-6, the amount of principal with interest at 6 per cent. on decree and costs on scale No. II, 6 per cent. on the amount pending suit. Interest will cease to run on the amount paid into Court from the date of such payment.

From this judgment the defendant, Kedar Nath Mitra, appealed.

Mr. S. R. Das (with him *Mr. Rasul*), for the appellant. The claim of the plaintiffs for the price of goods prior and up to three years previous to the institution of the suit, was barred by the Law of Limitation. A cheque drawn by the debtor in favour of the creditor is not a payment—it is only an order for payment, and does not evidence the *factum* of payment: it would not support a plea of satisfaction: in any event the cheque could not be said to be a payment in the handwriting of the defendant; it was the Bank that made the payment: *Maher* v. *Maher* (5), *Mylan* v. *Annavi Madan* (6), *Mackenzie* v. *Tiruvengadathan* (7), *Mandahar Aitch* v. *Secretary of State*

(1) (1901) 6 C. W. N. 218.
(2) (1875) L. R. 10 Ex. 153, 164.
(3) (1837) 3 M. & W. 90.
(4) (1854) 3 E. & B. 136.
(5) (1867) L. R. 2 Exch. 153.
(6) (1905) I. L. R. 29 Mad. 234.
(7) (1886) I. L. R. 9 Mad. 271.

for India (1), *Ram Chandar* v. *Chandi Prasad* (2). The course of transactions between the parties did not constitute one account: each item constituted a separate contract. A tradesman can bring as many suits as there are items in his account: *Satcourie Singh* v. *Kristo Banyal* (3).

Mr. Zorab (with him *Mr. B. L. Mitter*), for the respondent. A cheque is payment and operates as extinguishment of a debt, unless dishonoured: *Marreco* v. *Richardson* (4), *In re Boswell* (5), and *Felix Hadley & Co.* v. *Hadley* (6). In the present case the cheques were honoured: hence it must be taken that payment was made on the dates the cheques were made over by the defendant and accepted by the plaintiffs. It is obvious the person making the payment was the defendant, and his signature to the cheques complies with the proviso to section 20 of the Limitation Act.

The dictum in *Mackenzie* v. *Tiruvengadathan* (7) is *obiter* and erroneous. There was one running account and the payments by cheques were part payments on account and so saved limitation: *Walker* v. *Butler* (8), *Irving* v. *Veitch* (9).

Mr. Das, in reply, referred to *Garden* v. *Bruce* (10) and s. 61 of the Contract Act.

JENKINS C.J. The only question that arises on this appeal is whether a cheque given in part-payment of principal is sufficient to take the case out of the Indian Statute of Limitation having regard to the terms of section 20 of that Act.

The facts are not in dispute. And if the cheque

(1) (1901) 6 C. W. N 218.
(2) (1897) I. L. R. 19 All. 307.
(3) (1869) 11 W. R. 529.
(4) [1908] 2 K. B. 584.
(5) [1906] 2 Ch. 359, 366.
(6) [1898] 2 Ch. 680.
(7) (1886) I. L. R. 9 Mad. 271.
(8) (1856) 6 E. & B. 506.
(9) (1837) 3 M. & W. 90.
(10) (1868) 37 L. J. C. P. 112.

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is sufficient for the purpose of section 20 then this appeal must fail.

It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives. There is no suggestion in this case that the cheque upon presentation was not paid. In fact, it was, and so there was payment in the fullest sense of the term and thus a part of the principal of the debt has, before expiration of the prescribed period, been paid by the debtor to the creditor.

Then it is said that the proviso to the section has not been complied with. That proviso is that in the case of a part-payment of the principal of a debt the fact of the payment must appear in the handwriting of the person making the same. If I am right in the view that the cheque actually was a payment the very payment was in the handwriting of the person making the same. I cannot for a moment suppose that this proviso was inserted as a sort of a trap to enable debtors to escape from the result of what they have done, and yet that would be the practical result of the argument advanced on behalf of the appellant. It seems to me that the words of the Act are amply satisfied by the circumstances of this case and I say this notwithstanding the decision in the case of *Mackenzie* v. *Tiruvengadathan* (1), which is capable of distinction from the present.

A point was made before us as to the appropriation of payment and the nature of the plaintiff's claim. This has not been made a ground of appeal. But

(1) (1886) I. L. R. 9 Mad. 271.

even if it had been, it seems to me that it is valueless. It rests upon the supposition that where, as here, there is a continuous account there is a separate cause of action in respect of each item. That seems to me to be quite opposed to the true character of such accounts. In *Bonsey* v. *Wordsworth* (1), it was said, on the strength of the previous authorities, that "where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

In my opinion the learned Judge was right in the conclusion at which he arrived. This appeal is dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellant: *H. N. Datta.*

Attorney for the respondent: *W. G. Rose.*

J. C.

(1) (1856) 18 C. B. 325, 334.