rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate forever. If we were to accede to the contention of the defendant appellant, we would be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding, does so, at his peril, and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity. From whatever standpoint we examine the case, it thus transpires that this appeal also is groundless and must be dismissed with costs.

S. K. B. *Appeals dismissed.*

APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

HEM CHANDRA BISWAS

v.

PURNA CHANDRA MUKHERJI.*

1916

June 26.

Limitation—Payments towards debt—Court, if it can find out whether it is for principal or interest—Limitation Act (IX of 1908), s. 20.

Where payments are made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made.

SECOND APPEAL by Hem Chandra Biswas, the defendant No. 1.

* Appeal from Appellate Decree, No. 1018 of 1915, against the decree of G. N. Roy, District Judge of Burdwan, dated Jan. 30, 1915, reversing the decree of Banamali Sen, Munsif of Burdwan, dated Feb. 10, 1914.

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This appeal arose out of a suit on a mortgage bond dated the 3rd July, 1895. The bond was in favour of Shibamohinee, the *pro formâ* defendant in the suit. The plaintiff's case was that he was the real creditor and the bond was in the *benami* of Shibamohinee. The defendant pleaded that he borrowed the money from Shibamohinee herself and that he had paid off the debt. The principal sum lent was Rs. 111. The total amount claimed including interest was Rs. 490, after deducting the three payments of Rs. 10, Rs. 80 and Rs. 10 made on the 28th August, 1900, 24th October, 1900, and 3rd February, 1903, respectively, that had been entered on the back of the bond. The defendant further contended that the bond was barred by limitation, as it did not appear on the face of it whether the last payment of Rs. 10, made on the 3rd February, 1903, was towards principal or interest, and that therefore the plaintiff could not get the benefit of section 20 of the Limitation Act. The suit was instituted on the 20th June, 1913.

The Munsif held that the plaintiff was the real creditor, but dismissed the suit on the ground of limitation, as his conclusion was that the last payment in 1903 was neither for principal, nor for interest *as such*, but was on general account.

On appeal by the plaintiff, the District Judge held on the evidence on record that the last payment in 1903 had been made towards principal and that the bar of limitation was thus removed. The suit was decreed.

The defendant then preferred this appeal to the High Court.

Babu Manmâtha Nath Ray, for the appellant. The only question is whether the alleged payment of the 20th Magh, 1309, corresponding to the 3rd February,

1903, saves limitation under Article 20 of the Limitation Act. I submit it does not. The plaintiff says that he credited the amount towards interest, and the present suit has been instituted on that basis as is apparent from the account given in the plaint. The Court of Appeal below finds that there was no express declaration on the part of the debtor that the payment was for interest, and there is no other circumstance showing that the payment was expressly for interest. Under these circumstances, the creditor cannot claim the benefit of s. 20 of the Limitation Act: it must be shown that the payment was made on account of interest *as such*: *Muhammad Abdulla Khan* v. *Bank Instalment Company* (1), *Bitari Ram* v. *Kanji Singh* (2). The mere appropriation by the creditors of the payment as interest is not such an indication. The finding of the Court of Appeal below that the payment is to be regarded as part-payment of principal is wrong, because (*i*) it is contrary to the plaintiff's own case, *vide* plaintiff's case in the plaint and his deposition; (*ii*) it is based on no evidence; it is rather in contravention of the plaintiff's own evidence; and (*iii*) there was neither a declaration nor an appropriation—the fact that the payment was a part-payment of principal must appear in writing: *Mackenzie* v. *Tiruvengadathan* (3), *Hanmantmal Motichand* v. *Ramba Bai* (4). The word "payment" in the last paragraph of sub-section (1) of section 20 means "part-payment of principal." Principal must be paid as principal: *Ranchordas Tribhowandas* v. *Pestonji Jehangir* (5).

Babu Suratkumar Mitra, for the respondent. Defendant did not say anything whether they were paid for principal or for interest. That appears from the

(1) (1909) I. L. R. 31 All. 495.
(2) (1913) 19 C. W. N. 237.
(3) (1886) I. L. R. 9 Mad. 271.
(4) (1879) I. L. R. 3 Bom. 198.
(5) (1907) 9 Bom. L. R. 1329.

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plaintiff's deposition. The Court is entitled to go into evidence to find out the nature of payment. The cases cited by my learned friend have no application to cases of the present description. The only case of which I am aware that is to the point, is *Subraya Kamati* v. *Pakaya* (1). It is a question of fact. The case of *Damodar Ramchander Bapat* v. *Bai Jankibai* (2) explains *Subraya's Case* (1), and as it appears to me is really inconsistent with it. But all the same the later case also holds that it is a question of fact. If it is so, the appellant can hardly say anything. The finding of fact is in my favour.

Babu Manmatha Nath Ray, in reply.

FLETCHER J. This is an appeal by the first defendant from the judgment of the learned District Judge of Burdwan dated the 30th January, 1915. The suit was brought to enforce a mortgage security and the only question that has been raised in this appeal is one of limitation. The mortgage was dated the 3rd July, 1895, and the present suit was instituted on the 20th June, 1913. Both the lower Courts have found that three payments were made, namely, Rs. 10 on the 18th August, 1900, Rs. 80 on the 25th October, 1900 and Rs. 10 on the 3rd February, 1903. It is common ground that the plaintiff must succeed, if at all, on proving the payment of the 3rd February, 1903 which would save the suit from being barred by limitation. The view that has been taken by the learned District Judge is this :—First of all, he says " Was this payment of the 3rd February, 1903, a payment on account of interest as such within the meaning of section 20 of the Indian Limitation Act?" The learned Judge apparently came to the conclusion that the payment

(1) (1902) 4 Bom. L. R. 231. (2) (1903) 5 Bom. L. R. 350.

not having been expressly made as such, the evidence did not establish that it was made on account of interest as such. He then said that the case did not end there because admittedly there was a payment and there was also a document (from which the fact of the payment appeared) in the handwriting of the person making the same. The learned Judge said "If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal." That view, I think, is right. In none of the cases where a different view has been taken, was there a document in writing to satisfy the second part of section 20 of the Limitation Act. In this case there is a distinct finding by both the Courts below as regards the payment. If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment *plus* the document in writing proving the fact of payment. On that evidence, the learned Judge was entitled to come to the conclusion that the payment was a part payment on account of principal. As a matter of fact, although not expressed in happy language, the learned Judge has found that this payment was on account of principal because he uses these words:—"The payment of Rs. 10 made on the 20th Magh, 1309 B. S., being in the handwriting of the debtor will be considered as payment towards the principal." When the final Court of Appeal on facts says that the payment will be considered that way, it must be considered that way and considered so for all purposes. It seems to me that the learned Judge, on the materials before

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him, was entitled to come to the conclusion as he did that this payment was a payment towards the principal coming within the meaning of section 20 of the Indian Limitation Act The present appeal, therefore, fails and must be dismissed with costs.

TEUNON J. I agree.

S. M. *Appeal dismissed.*