ORIGINAL CIVIL.

Before Panckridge J.

1938

Feb. 22, 23.

ISMAIL BHAI RAHIM

v.

ADAM OSMAN.*

Contract—Offer to perform by promisor—Tender—Cost—Indian Contract Act (IX of 1872), s. 38.

Section 38 of the Indian Contract Act should be construed independently of the English rules as to tender.

Veeraya v. *Sivayya* (1) discussed.

An offer made by a promisor, through his solicitor, to pay a debt with interest due thereon at the date of the offer does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise as is required by s. 38 of the Indian Contract Act.

An offer which would have been ineffective if made to the original promisee is no less ineffective if made to the legal representatives or heirs of the deceased promisee after the death of the latter.

Pandurang Krishnaji v. *Dadabhoy Nowroji* (2) dissented from.

A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and thus bringing the amount for which proceedings have to be taken within the pecuniary jurisdiction of a less costly tribunal.

James v. *Vane* (3) and *Chunder Caunt Mookerjee* v. *Jodoonath Khan* (4) considered.

ORIGINAL SUIT.

The facts of the case are fully set out in the judgment. Relevant arguments of counsel also appear from the judgment.

Sudhir Ray and *N. Sanyal* for the plaintiffs.

S. Chaudhuri for the defendants.

(1) [1915] A. I. R. (Mad.) 546.
(2) (1902) I. L. R. 26 Bom. 643.
(3) (1860) 29 L. J. (Q. B.) 167.
(4) (1878) L. L. R. 3 Cal. 468.

*Original Suit No. 759 of 1936.

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PANCKRIDGE J. This case raises points of considerable interest, though the amount at stake, apart from the question of the costs of the litigation, is a trifling one.

The plaintiffs are executor and executrix of the will of Ibrahim Alla Rukhea Rahim, deceased.

On May 11, 1935, Rahim advanced a sum of Rs. 2,500 to the defendants. The advance was covered by a *hâtchitâ*, and the defendants promised to pay interest at the rate of 7 annas per cent. per month until realisation.

Rahim died on July 4, 1935. Before probate of his will was obtained, Rahim's widow instituted the present suit and the executor joined with her as co-plaintiff. At the date of the institution of the suit, that is to say, on May 5, 1936, the interest on the advance amounted to Rs. 130-2-6. Accordingly the sum claimed was Rs. 2,630-2-6 with interest and costs.

In the written statement the defendants plead that the plaintiffs wrongfully refused to accept payment of the sum, which was properly due to them, on several occasions prior to the institution of the suit, and that, in particular, payment was not accepted on or about August 15, 1935, of the amount properly due on the basis of the loan, namely, Rs. 2,500 on account of principal and Rs. 35 on account of interest calculated up to the aforesaid date, aggregating Rs. 2,535, although offered by the defendants. This sum was paid into Court on June 4, 1936. Consequently, what I have to decide is whether the plaintiffs are entitled to Rs. 90 over and above the amount paid into Court.

Although a tender is not alleged, and although the language of s. 38 of the Indian Contract Act is not adopted in the written statement, the defence really is that the defendants, on August 15, 1935, made an offer of performance to the plaintiffs which

was not accepted, and that, therefore, the defendants are not responsible for the non-performance of the promise to pay.

The facts are as follows:—

On August 15, 1935, the defendants' attorneys wrote two letters, one addressed to the widow of Rahim, and the other to his heirs. Both the letters contain the following passage:—

> Our clients are ready and willing and hereby offer to repay the said sum of Rs. 2,500 with interest up to date to the proper legal representative of the said Ismail Bhai Rahim.
>
> Will you please let us know whether any representation of his estate has been taken from the Court, and the name and address of such representative to enable our client to repay the said sum with interest.
>
> We are also instructed to give you notice that our clients are not liable to pay any interest on the said sum of Rs. 2,500 from to-day.

Apparently, no answer was received by the defendants' attorneys from the addressees.

The passages which I have read are the offer on which the defendants rely as excusing them from the liability to perform the contract to repay with interest.

I will assume for the purposes of the case that either the widow or the heirs did, on August 15, 1935, stand in the shoes of the original promisee, and I will also assume that the defendants were in a position to implement the offer made by their attorneys.

It cannot be argued that there was any tender of the amount due in the sense in which that term is used in English law.

Mr. Chaudhuri for the defendants points out that s. 38 says nothing about tender, and that all that the promisor has to do under this section is to make an offer of performance. He argues that the principle underlying the English law as to tender is that the promisor must perform his promise as far as the circumstances permit him to do so; that is to say, a person who has made a promise to pay must tender

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the actual money in the form in which the promisee is legally entitled to demand it, and the circumstances must be such that the only thing which prevents the discharge of the contract by performance is the refusal of the promisee to accept performance.

I am inclined to agree with Mr. Chaudhuri that, in construing s. 38 of the Indian Contract Act, one should endeavour to keep one's mind clear of prepossessions arising from familiarity with the English rules as to tender.

It is true that the distinguished authors of Pollock and Mulla on the Indian Contract Act, at p. 272 of the 6th Ed., state that a tender of money in payment must be made with an actual production of the money. For that proposition they rely on *Veerayya* v. *Sivayya* (1). It is difficult from the extremely compressed report of that case to ascertain what the facts were, but I am inclined to think that in the contract which the Court was considering there was an express obligation to tender. If that were so, the English rules as to tender would apply, not by virtue of the provisions of the Indian Contract Act, but by virtue of the agreement of the parties.

It must be observed, however, that under s. 38 the offer of performance must fulfil certain conditions. The second condition is as follows :—

> It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

In my opinion, an offer made by a promisor through his solicitor to pay a debt with interest due thereon at the date of the offer does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise.

It is true that in this case it so happened that the defendants and the addresseees of the two letters

(1) [1915] A. I. R. (Mad.) 546.

lived in the same street, but I do not think that this circumstance can bring the case within the condition formulated in the section.

I do not consider that the promisor can reasonably expect the promisee to attend at the promisor's residence or place of business for the purpose of satisfying himself that the promisor is both able and willing to carry into effect the offer he has made.

In my opinion, the letters of August 15, 1935, do not contain an offer which fulfils the conditions laid down by s. 38.

Mr. Chaudhuri, however, has another line of defence, for he says that, assuming that the offer would have been ineffective if made to the original promisee, it is none the less an effective offer seeing that it was made to the legal representatives or heirs of the deceased promisee after the death of the latter.

A passage in Polock and Mulla, 6th Ed., supporting this proposition is to be found at p. 272 and is as follows :—

> .....But when the creditor is dead and no probate has been obtained by the executors of the deceased, an offer by letter to pay the debt, on a proper release being executed, is a valid tender, provided the debtor was able to pay the debt, and had money available for that purpose. No actual production of money is necessary in such a case, there being no person entitled in law to receive the payment. The rule that nothing but actual tender will stop interest applies only in those cases where there has been someone to whom interest could be tendered either as a creditor himself or one who established his right to be the representative of a deceased person.

The decision on which the learned authors rely for this passage is *Pandurang Krishnaji* v. *Dadabhoy Nowroji* (1), a decision of a Judge sitting singly on the Original Side. In my opinion, there is no principle on which the distinction which Mr. Chaudhuri seeks to draw can be justified. He says, quite correctly, that where a creditor dies, the debtor is in this unfortunate position,—he must either take the risk of tendering to a person who is not entitled to receive the debt, and of a subsequent suit by the

(1) (1902) I. L. R. 26 Bom. 643.

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deceased creditor's executors or administrators, or he must wait until someone obtains probate or letters of administration, and incur liability to pay additional interest in the meanwhile. That may be so, but I do not see that these considerations affect the sort of offer which the debtor must make if he is to have the benefit of s. 38. The debtor is not bound to take the risk of offering payment to some one whose right to receive the debt may turn out to be non-existent. If he does take the risk, I am unable to understand why the offer which he makes should not be subject to exactly the same conditions as those which it would have had to fulfil had it been made to the original promisee. Accordingly I feel justified in disregarding the decision in *Pandurang Krishnaji* v. *Dadabhoi Nowroji* (*supra*).

I hold that the offer made in the letter of August 15, 1935, did not comply with the conditions specified in s. 38, even on the assumption that it was made to a person who had succeeded to the creditor's right to receive payment of the debt. It follows, therefore, that the plaintiffs are entitled to a decree for the amount claimed.

It is impossible not to feel a certain amount of sympathy for the defendants in the matter, because, on May 9, 1936, they made what would admittedly have been a valid tender of payment had it been made on August 15, 1935, that is to say, they tendered through their solicitors currency notes for Rs. 2,535, and the concluding portion of the letter containing the offer is in the following terms :—

> If your client still insists on the subsequent interest, which, of course our clients deny, they can accept the said sum of Rs. 2,535 without prejudice to their alleged claim for further interest.

The defendants point out that it was open to the plaintiffs to accept the sum tendered and, if they saw fit, to sue in the Small Causes Court for the sum of Rs. 95 by which their claim exceeded it. Unquestionably, had that been done, the costs of the proceedings would have been considerably reduced.

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Learned counsel for the defendants had drawn my attention to *Chunder Caunt Mookerjee* v. *Jodoonath Khan* (1). He does not maintain that the case is directly in point. There, the Court held that the question of costs was not affected by the fact that the plaintiffs had refused to accept a tender of a sum less than the sum for which they ultimately obtained a decree. The Court pointed out that the tender was made in full satisfaction of the plaintiff's claim and that the plaintiffs could only accept it on the terms of relinquishing the balance. The final sentence of the judgment is as follows: "If the money had been tendered unconditionally, it might have been otherwise." Here it is true, the tender was subject to no conditions; indeed it was accompanied by a statement that, if accepted, it would be without prejudice to the plaintiffs' claim to sue for the balance.

A reference has also been made to *James* v. *Vane* (2). That was a decision as to the construction of certain rules of procedure of the Court of Queen's Bench. What had happened was that the plaintiff had claimed for a sum of £28-19-4 and that the defendant, after tendering of £26-10-6, had paid that sum into Court and contested the plaintiff's claim as to the balance. The plaintiff eventually obtained judgment for the balance of £2-8-10. The Court held that the case was one in which the plaintiff had failed to recover more than £20 within the meaning of the rules.

That decision is not to my mind of much assistance when I have to consider how I should exercise my discretion as to costs under s. 35 of the Civil Procedure Code. As far as I know, a creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and, thus bringing the amount for which proceedings have to be taken, within the pecuniary jurisdiction of a less costly tribunal.

(1) (1878) I. L. R. 3 Cal. 468. (2) (1860) 29 L. J. (Q. B.) 169.

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There is nothing in the rules and orders of the Original Side nor in the Presidency Small Causes Courts Act, which applies to the present circumstances. I do not think I should be justified in using my discretion as to costs as a means of punishing the plaintiffs for not having accepted a suggestion which I think they might very reasonably have accepted.

Moreover, I cannot shut my eyes to the fact that the defendants are, to some extent, the authors of their own misfortune. An application was made at an early stage of the suit for summary judgment under Chap. XIII(A), but the defendants persisted in having the merits of their defence investigated, and for the costs which have been incurred since they were given leave to defend, they have only themselves to thank.

In the circumstances, I do not feel that I can depart from the ordinary rule, and costs must follow the event.

The plaintiffs are, accordingly, entitled to their costs and interest on judgment at 6 per cent., including reserved costs.

Suit decreed.

Attorneys for plaintiffs: *N. C. Bural & Pyne.*

Attorneys for defendants: *A. P. Roy & Co.*

S. M.