

*Before Mr. Justice Burkill and Mr. Justice Chamier.*

KISHAN PRASAD AND OTHERS (DECREE-HOLDERS) v. BENI RAM  
AND OTHERS (JUDGMENT-DEBTORS).\*

1901  
July 29.

*Execution of decree—Decree payable by instalments—Tender—Payment by money-order where creditor had to send to the Post Office for the money—Implied authority to pay in a certain manner.*

A judgment-debtor under an instalment decree remitted the amount payable on account of one instalment to one of the decree-holders by money-order. The decree-holder payee was at the time living in a village where he would have had to go himself or send some one to take the money from the Post Office; but, on the other hand, two previous instalments had been paid in a similar manner without objection on the part of the decree-holder. On this occasion the decree-holder payee temporized, so that the money was not at once returned by the Post Office to the sender, and subsequently applied for execution of the whole decree on the ground that there had been no valid payment of this instalment.

*Held* that the decree-holder by not refusing the money-order at once had prevented the judgment-debtor from having an opportunity to pay the instalment within time: he had not acted in good faith, and ought not to be allowed to take advantage of his action, even if the previous acceptance of payments made in the same manner did not amount to an implied authority to the judgment-debtor to pay by money-order. *Polglass v. Oliver* (1), referred to.

The appellants in this appeal were the assignees of a decree for money, which under a compromise between them and the judgment-debtors had come to be a decree payable by instalments. The compromise provided that Rs. 75 were to be paid on the purnamashi (30th) of each Sawan, and in case of default the decree-holders were at liberty to execute their decree for the whole balance remaining due. The decree-holders on the 2nd of September, 1898, applied for execution of the whole decretal amount then remaining due, alleging that the judgment-debtors having paid three instalments under the compromise had failed to pay the next instalment which had fallen due on the last day of Sawan, 1305 Fasli (the 2nd August, 1898). The judgment-debtors had in fact despatched a money-order to the address of Jamna Prasad, one of the decree-holders, who resided at a place in which, under the rules in force, the Post Office does not pay the amount of a money-order to the payee at his house, but sends notice of the arrival of the money-order to the payee,

\* Second Appeal No. 412 of 1900 from an order of Rai Anant Ram, Additional Subordinate Judge of Ghazipur, dated the 7th February, 1900, reversing an order of Babu Binsgopal, Munsif of Ballia, dated the 30th September, 1899.

1901

---

 KISHAN  
 PRASAD  
 v.  
 BENI RAM.

requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount. On July 26th a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Postmaster that he would "take the money after inquiry." He never did take the money, and it was ultimately returned to the respondents, but meanwhile the time within which the instalment had to be paid had lapsed.

The Court of first instance (Munsif of Ballia) held that this tender was insufficient and disallowing the judgment-debtors' objections ordered execution to proceed.

The judgment-debtors appealed; and the lower appellate Court (Additional Subordinate Judge of Ghazipur) found that the amount of the instalment in question was sent in time and that the decree-holders improperly refused to take it. He accordingly set aside the Munsif's order.

The decree-holders appealed to the High Court.

Mr. *W. Wallach* (who appeared, holding the brief of the Hon'ble Mr. *Conlan*, with Mr. *Abdul Majid*, for the appellants), while admitting that a valid tender made to one of the three joint decree-holders would be a sufficient compliance with the terms of the decree, contended that on the facts found the respondents had made no valid tender to Jamna Prasad. He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258 of the Code of Civil Procedure to disregard it, because it had not been certified to the Court as required by that section.

Mr. *S. Amir-ud-din* for the respondents. The finding of the appellate Court on the question raised by the appellants is that "the amount of the instalment in question was sent in time to the decree-holders, but they improperly refused to take it." That is a finding conclusive between the parties to the appeal, the soundness of which cannot be questioned in second appeal. There was, moreover, no default on the part of the respondent in paying the instalment for 1305 Fasli. That instalment was remitted to the decree-holders ten days before it was payable. The amount of the money-order was tendered to Jamna Prasad, one of the decree-holders, by the Postmaster, but he refused to accept the tender.

Jamna Prasad's refusal is fatal to the claim now made by the decree-holders. The decree-holders were not entitled to raise any question as to the validity of the tender made to Jamna Prasad. Two previous instalments that had been remitted in the same manner were accepted by the decree-holders, and they are now estopped from arguing that they were not legally bound to accept the present payment tendered in a similar manner through the medium of Jamna Prasad. Section 258 of the Code of Civil Procedure does not apply to the present case, and even if it does, the information subsequently given to the Court by the judgment-debtors is a sufficient compliance with the requirements of that section.

The following judgment was delivered :—

BURKITT and CHAMIER, JJ.—The appellant obtained against the respondents a decree for the payment of money by instalments, one of the terms of which was that the respondents were to pay Rs. 75 on or before the last day of Sawan in each year, and in case of default, execution might be taken out for the whole amount of the decree. The respondents paid the instalments by due date in 1303 and 1304F., and there is no dispute as to them. The question which we have to decide in this appeal concerns the instalment which was payable on or before the last day of Sawan 1305F. (August 2nd, 1898). On July 23rd, 1898, the respondents despatched a money-order for Rs. 75 to the address of Jamna Prasad, one of the appellants, who resided in a locality in which, under the rules in force, the Post Office does not pay the amount of a money-order to the payee at his house, but sends notice of the arrival of the money-order, requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount. On July 26th, a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Post-master that he would "take the money after inquiry." He never did take the money, and it was ultimately returned to the respondents but meanwhile the time within which the instalments had to be paid elapsed.

On August 29th, the appellants applied for execution of the decree in respect of the whole sum decreed, alleging that the respondents had failed to pay the instalment for 1305F.

1901

---

KISHAN  
PRASAD  
v.  
BENI RAM.

1901

---

 KISHAN  
 PRASAD  
 v.  
 BENI RAM.

The Munsif ordered execution to issue as prayed, but on appeal the Subordinate Judge held that the instalment for 1305F. had been sent to the appellants in time, and that they had improperly refused to accept it.

The decree-holders have appealed to this Court. Their learned counsel, Mr. *Wallach*, admitted that a valid tender made to one of the three joint decree-holders would be sufficient compliance with the terms of the decree; but he contended that, on the facts found by the lower appellate Court, the respondents had made no valid tender to Jamna Prasad. He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258, Civil Procedure Code, to disregard the tender, because it had not been certified to the Court as required by that section.

Ordinarily, no doubt, a tender of money in payment must be made with an actual production of the amount in cash (or in notes, where notes are legal tender), and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the creditor is not bound to accept it in payment. Tender of the amount due at the house of the creditor by a Post Office peon holding a money-order sent by a debtor would undoubtedly be a good tender by the debtor. In the present case, the creditor would have had to go to the Post Office for the money, and on this account it is said that there was no valid tender. Now it is admitted on the pleadings that the instalments for 1303 and 1304 F. were remitted by money-order, and were accepted without objection by the decree-holders. If, when the arrival of the money-order was notified to Jamna Prasad, he had said that he would not accept the money-order, it would, under the rules in force, have been returned at once by the Post Office to the sender, who might then have had time to pay the money into Court, or to the appellants in cash at their door; but by saying that he would take the money after inquiry, he induced the Post Office to refrain from returning the money to the sender, or notifying to him that the money had been refused.

We are inclined to think that the receipt by the appellants of the instalments for 1303 and 1304F. by money-order without

1901

---

KISHAN  
PRASAD  
v.  
BENI RAM.

objection was sufficient authority to the respondents to send subsequent instalments in the same manner; but apart from that it is clear that Jamna Prasad, by his action in delaying the return of the money to the respondents, deliberately deceived them. In the case of *Polglass v. Oliver* (1), a tender was made in country bank notes, which the creditor was not bound to accept. He made no objection on that account, but claimed a larger sum. It was held that he could not subsequently object to the character of the tender, because if he had objected at once on that ground, it would have given the debtor an opportunity of getting other money and making a valid tender, but by not doing so and claiming a larger sum he had deluded the debtor. There are other decisions to the same effect. The principle on which those cases were decided applies to the present case. Here the appellant, Jamna Prasad, obviously acted in bad faith. If he wished to object to the character of the tender, he should have done so definitely and at once. He was admittedly acting for all the appellants. Jamna Prasad's action must be held to amount to waiver of the objection which he might have made to the character of the tender, and the appellants are estopped from now setting up any objection to the tender on that ground.

We cannot accede to the contention that the Court was bound to disregard the tender because it had not been certified to the Court. Neither the second nor the third clause of section 258 of the Code of Civil Procedure in terms applies to such a case as this, for no actual payment of money was made which could be certified to the Court; but as tender is, for some purposes, equivalent to payment, it may have been the duty of the respondents to inform the Court of the tender. Assuming that section 258 applies to such a case as this, we consider that the requirements of the section were sufficiently complied with by the respondents. They had 90 days within which to inform the Court of the tender having been made. They filed a petition well within that time in answer to the appellant's application for execution. In it they stated what had taken place, and asked that the application for execution might be rejected. It is true that they did not ask for the issue of a notice to the appellants,

(1) (1831) 37 R. R., 623.

1901

KISHAN  
PRASAD  
v.  
BENI RAM.

as required by the section, but, in fact, notice was served upon the appellants' pleader. If, along with their petition of objections, the respondents had filed a separate application, expressly referring to section 258, it would obviously have been the duty of the Court to decide, first, whether a valid tender had been made. A finding in the affirmative would have been equivalent for the purposes of this case to recording a payment as certified. The Court would then have taken up the application for execution, and would have been bound to reject it in pursuance of its finding that a valid tender, equivalent to payment, had been made. In the present case there was only one proceeding, but this can make no difference. In our opinion there is nothing in section 258 which prevented the Court from trying the question whether a valid tender was made, or from giving effect to its finding that a valid tender was made. We dismiss this appeal with costs.

*Appeal dismissed.*

1901  
August 3.

*Before Mr. Justice Burkitt and Mr. Justice Chamier.*

HAJI KHAN (DEFENDANT) v. BALDEO DAS (PLAINTIFF).\*

*Practice—Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged.*

The plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some eleven years before suit, and that for the last three years the defendant had ceased to pay rent, and had recently denied the plaintiff's title.

The defendant denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded also that he had been in adverse possession for more than twelve years.

The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit.

*Held that, under the circumstances stated above, it being, on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree.*

*Naiku Khan v. Gayani Kuar (1), Ali Husain v. Ali Baksh (2) and Balmakund v. Dalu (3) referred to.*

\* Second Appeal No. 581 of 1900 from a decree of Maulvi Maula Baksh, Additional Subordinate Judge of Aligarh, dated the 21st May, 1900, confirming a decree of Babu Parmatha Nath Banerji, Munsif of Koel, dated the 19th March 1900.

(1) (1893) I. L. R., 15 All., 186.

(2) Weekly Notes, 1889, p. 176.

(3) Weekly Notes, 1901, p. 157.