

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

GOPI NATH SINGH (DECREE-HOLDER) v. HARDEO SINGH AND OTHERS
(JUDGMENT-DEBTORS).*

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January 28.

Act No. IX of 1908, (*Limitation Act*), section 2)—*Appropriation by creditor of payment towards interest—Interest not paid as such—Money paid found by Court to be paid as interest.*

Under the terms of a mortgage bond executed in 1884 any payments made thereunder was to be applied first in payment of interest and next in payment of principal. The debtor paid several sums from time to time from 1887 to 1890. A suit for sale was instituted in 1902 and decreed. The mortgaged property being insufficient to discharge the mortgage an application was filed by the decree-holder for a decree under section 90 of the Transfer of Property Act. *Held* that having regard to the terms of the bond and the finding of the court that payments were appropriated on account of interest, it might be rightly inferred that payments were made on account of interest as such and that the application for a decree under section 90, Act No. IV of 1882 was not barred by limitation, *Hanmant mal v. Rambabai* (1), *Narrunji v. Mugviram* (2), and *Surju Prasad v. Khwahish Ali* (3) distinguished.

THE facts of this case are that on August 28, 1902, Gopinath Singh, the appellant, instituted against the respondents a suit for sale on foot of a mortgage executed by the father of the defendants on March 21, 1884. The deed provided that any payment made under it was first to be applied to the payment of compound interest, next to payment of simple interest, and lastly to the payment of principal. Payments were made from time to time and except one payment in the year 1887 no payment was marked as being made on account of interest. The mortgagee, however, claimed to have appropriated them towards payment of interest. The mortgagee obtained a decree for sale and sold the mortgaged premises. The sale proceeds being insufficient to satisfy his claim he applied for a decree under section 90 of Act No. IV, 1882. The defendants objected to the application on the ground that the plaintiff's suit not having been instituted within six years from the execution of the deed was time barred. The Subordinate Judge of Meerut disallowed the application holding that the payments were not made towards interest and appropriation of payment by creditor could not give fresh

* First Appeal No. 51 of 1908 from a decree of H. David, Subordinate Judge of Meerut, dated the 1st June 1907.

(1) (1879) I. L. R., 8 Bom., 198. (2) (1880) I. L. R., 6 Bom., 103
(3) (1882) I. L. R., 4 All., 512.

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starting point for limitation under section 20 of the Indian Limitation Act. The decree-holder appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant, contended that a creditor had, in the absence of any direction of the debtor to the contrary, a discretion to appropriate any payment towards interest under section 60 of the Contract Act. Such appropriation was sufficient for the purposes of section 20 of Act IX of 1908, to save limitation. Section 20 of Act IX of 1908 was not inconsistent with section 60 of Act IX of 1872, that both the sections read together established the proposition that an appropriation by a creditor of any payment towards interest could save time. He relied on *Nirpat v. Shadi* (1).

The Hon'ble Pandit *Sundar Lal*, for the respondent, submitted that an indication of the will of the debtor that the payment was made towards interest was essential for the purposes of the Limitation Act to extend time. The Contract Act provided for the exercise of discretion by both the payer and the payee as to appropriation of payments, but the Limitation Act section 20, confined itself strictly to the discretion of the payer. To extend time under section 20 of the Limitation Act it was necessary that the debtor should intimate that he was making the payment toward interest as such. He cited *Damodar Ramchander Bapat v. Bai Jankibai* (2), *Hanmantmal Motichand v. Rambabai* (3), *Narrunji Bhimji and others v. Mugniram Chandaji* (4), *Surju Prasad Singh v. Khwahish Ali* (5), *Subraya Kamati v. Pakaya bin Narayan* (6).

Dr. *Tej Bahadur Sapru*, in reply. For the purposes of section 20 of the Limitation Act intimation of intension on the part of the debtor as to the payment of interest as such was not necessary. He relied on a passage at page 748 of *Mittra's Law of Limitation and Prescription*. He further submitted that the Contract Act was an earlier Act, while the Limitation Act was a later one. If the Legislature had meant anything to contradict the earlier Act there would have been an express provision as to that in the later.

(1) Weekly Notes, 1881, p. 19.

(2) (1903) 5 Bom., L. R., 350.

(3) (1879) I. L. R., 3 Bom., 198

(4) (1880) I. L. R., 6 Bom., 103.

(5) (1882) I. L. R., 4 All., 512.

(6) (1902) 4 Bom., L. R., 281.

KNOX and GRIFFIN, JJ.—This first appeal arises out of an application made by one Chaudhari Gopinath, decree-holder. The application is under section 90 of the Transfer of Property Act asking for a decree under that section and for sale of certain property of Dalip Singh and others, judgment-debtors.

Among other objections raised by the judgment-debtors was an objection to the effect that the claim to this decree was barred inasmuch as the suit was filed when more than six years had expired after the execution of the bond. The bond was dated 21st of March 1884, the suit brought upon it was instituted on the 28th of August 1902. Several payments had been made from time to time, but the judgment-debtors objected that these payments were not payments made towards interest "as such." The Subordinate Judge who tried the suit held that these payments should be considered payments appropriated by the judgment-creditor towards interest due under the bond. The lower Court in considering the application for execution was of opinion that (1) mere appropriation by the creditor of any amount paid towards interest, or (2) any direction of a Court that sums paid be appropriated under the provisions of the Contract Act, sections 59, 60 and 61, towards interest could not be interpreted as payments made by the debtor towards interest "as such" and (3) that the suit brought by Chaudhri Gopinath having been filed when more than six years had expired from the execution of the bond, held that the present application for a decree under section 90 of the Transfer of Property Act could not be granted and dismissed the decree-holder's application. The decree-holder comes here in appeal and contends that under the circumstances of the case the payments made by the judgment-debtor must be held to be payments coming within section 20 of the Limitation Act, namely, payments of interest on debt paid "as such" before the expiration of the prescribed period by the person liable to pay the debt.

The bond in suit was, as already stated, executed on the 21st March 1884, and there has been a series of payments made under it nearly every year from the year 1887 up to the year 1899. With the exception of the very first payment, namely, that on the 26th March 1887, not one of these payments is

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marked as being made on account of interest. The payment of 1887 is set out as a payment of Rs. 600 on account of interest.

We find on looking into the bond that there is an express provision in it that any payment made under it was first to be applied to the payment of compound interest, next to the payment of simple interest, and lastly to the payment of principal.

In view of this we hold that at the time the parties entered into the bond they did so under circumstances which implied that payment was to be applied to the discharge, first of the particular debt of interest and afterwards to the discharge of the debt of principal.

Next there is the circumstance that the first payment made under the bond was distinctly ear-marked as a payment towards interest, so far coinciding with what we have just held to be the intention of the parties when they entered into the bond.

Then it is not entirely without significance that all the subsequent payments made and endorsed upon the bond without any difference from the first payment with the solitary exception that the "words on account of interest" are wanting. From these circumstances we may safely assume, we think, that the parties intended and understood that the payments were to be and had been made by the debtor as payments on account of interest and that they should have been appropriated by the creditor as payments on account of interest. We also find that in the original suit the Court considered that the payments were on account of interest.

The learned advocate for the judgment-debtors contended that as there was no direction by the judgment-debtors as to how the money was to be appropriated, and as no appropriation was made then and there in the case of any of the payments with the exception of that made on the 26th March 1887, none of these payments could rightly be held to be payments of interest on debt paid as such and none would save limitation from running. In support of his contention he referred us to the case of *Hanmantmal Moti Chand v. Rambabai* (1), *Narrunji Bhimji v. Mugnirum Chandaji* (2), *Surju Prasad Singh v. Khwahish Ali* (3)

(1) [1879] I. L. R., 3 Bom., 198. (2) [1880] I. L. R., 6 Bom., 103.

(3) [1882] I. L. R., 4 All., 512.

In the first of these cases the judgment of the learned Judges of the Bombay High Court starts with the words "It is clear, on the plaintiffs own statement, that there has been no payment of interest as such."

The second case was one of an undefended suit brought upon a running account between plaintiffs who were merchants of Bombay and the defendant who was a trader. There was nothing in the case to show that there had been any payments on the parts of the defendant as interest. In the third case the learned Judges who decided that case say that there was nothing to show that payments were made towards interest as such. In this respect they are all distinct from the present case.

In the course of the argument we were referred to the case of *Damodar Ramchander Bapat v. Bai Jankibai* (1). Mr. Justice TYABJI who decided the case held that the question whether sums paid by the judgment-debtor were or were not paid as interest on a debt was a question of fact. He accordingly examined the evidence and found that whether he looked into the nature of the payment itself or the nature of the endorsement, he felt great difficulty in coming to the conclusion that the payments made were payments of interest as such. We agree with the learned Judge that the question is a question of fact in each case and in the present case as we have already pointed out we come to the conclusion from (a) the very particular words set out in the bond between the parties, (b) the terms in which the first payment was recorded on the bond, (c) the record of subsequent payments on the bond, that there is evidence from which it can be rightly inferred that in the present case the payments made by the judgment-debtors were intended to be and were payments of interest as such.

We think that the learned Subordinate Judge was wrong in holding that the application before him was barred by limitation inasmuch as the payments made bring the case down to the year 1899, and well within the period of limitation. We allow the appeal, set aside the decree of the Court below and in accordance with Order 41, Rule 23, direct the case to go back to the lower court with directions to re-admit it in its original number in the

(1) [1903] 5.Bom., L. R., 350.

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register of applications and to proceed to determine it according to law. Costs of this appeal to be costs in the case and to follow the event. Fees in this Court will include fees on the higher scale.

Appeal decreed.

1909
 January 30.

APPELLATE CRIMINAL.

Before Mr. Justice Griffen.

EMPEROR v. JAMNA.

Penal Code (Act XLV of 1860), section 304A—Administering poison believing it to be a charm—Rash and negligent act—Liability.

Where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious and mixed it with his food believing that by doing so she would become rich. *Held* that her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise, and as by her rash and thoughtless act she caused death she was guilty of an offence under section 304A., Indian Penal Code. *Emperor v. Nagawa* (1) distinguished. *Q.-F. v. Bhakhan* (2), followed.

The facts of this case are as follows :—

The accused was a poor relative of one Lal Singh and lived near his house. On the 25th March 1908, Lal Singh's household became ill after taking food, and four of them died on the next day. The accused was suspected of having administered poison and made a confession that she had received a powder from an enemy of Lal Singh who had told her that if she administered it to Lal Singh she would become rich and Lal Singh would become poor. She mixed that powder with Lal Singh's food. She retracted this confession, but the court below believed it and convicted her under section 304A, Indian Penal Code, and sentenced her to two years' rigorous imprisonment. The prisoner appealed to the High Court.

Babu Satya Chandra Mukerji, for the appellant, contended that on the findings of fact arrived at by the learned Sessions Judge there was no case against the accused either under section 304 or 304A. The accused did not know the nature of the substance which she mixed up with the flour. That being so there

* Criminal Appeal No. 1082 of 1908 from an order of H. J. Bell, Sessions Judge of Aligarh, dated the 17th September 1908.

(1) (1902) 4 Bom., L. R., 425.

(2) (1887) P. R., 60.