APPELLATE CIVIL

Before Mr. Justice Baguley.

1929

Apl. 24.

U BA GYI
v.
U THAN KYAUK.*

Limitation Act (IX of 1908), s. 20—"Interest paid as such"—Creditor's right of appropriation in the absence of debtor's directions—Creditor's own appropriation towards interest without debtor's volition does not save limitation.

A creditor has a right to credit a payment by his debtor in such a way as would be most profitable to him, if the debtor has made no stipulation at the time of payment. The creditor could appropriate such payment towards any interest due to him.

Meka Venkatadri v. *Parthasarathi*, 44 Mad. 570 (P.C.); *Nemi Chand* v. *Radha Kishen*, 48 Cal. 839—*referred to.*

But a creditor cannot by his own action and without any act of volition on the part of the debtor start a fresh period of limitation. Under s. 20 of the Limitation Act the payment of interest will save limitation when the payment is made as such by the debtor.

Kariyappa v. *Rachapa*, 24 Bom. 493; *Muhammad Abdulla* v *Bank Instalment Company Limted*, 31 All. 495; *Nga Twe* v. *Nga Ba*, (1914-16), Vol. 2, U.B.R. 80—*referred to.*

Sanyal for the applicant.

Ko Ko Gyi for the respondent.

BAGULEY, J.—This revision arises from a Small Cause Court suit. In that suit U Ba Gyi sued Ko Than Kyauk and Ko Ba Sein on a pro-note. The pro-note on the face of it was barred by limitation, having been executed on September 29th, 1924, while the suit was not filed until September 21st, 1928. The plaintiff however alleged payment of Rs. 50 towards interest on March 3rd, 1927, which, if proved, would of course save limitation.

The trial Court found that the payment has not been made by either defendant "as interest" and therefore limitation has not been saved.

* Civil Revision No. 26 of 1929 (at Mandalay) from the judgment of the Small Cause Court of Mandalay in Suit No. 768 of 1928.

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It is admitted now that so far as Ba Sein is concerned the case is hopeless. But it is still contended that limitation has been saved as against Than Kyauk. In my opinion this contention is not good.

As regards the facts I am prepared to take them as found by the trial Court. The pro-note was executed by Than Kyauk and Ba Sein. On March 3rd, 1927, Amale was sent by Than Kyauk to pay Rs. 50 to the plaintiff and she did so, endorsing the payment on the back of the pro-note. The endorsement simply states that Amale pays Rs. 50 to Daw Su (Daw Su being the daughter of the plaintiff Ba Gyi).

It is argued for the applicant that the plaintiff had a right to appropriate an unspecified payment made in this way towards interest. That he had this right is undoubted, *vide Nemi Chand* v. *Radha Kishen* (1) and *Meka Venkatadri Appa Row and others* v. *Parthasarathi Appa Row* (2).

There can be no question but that for account purposes the plaintiff would have had a perfect right to appropriate this payment towards interest. The question remains however, whether this payment made in this general manner was a "payment towards interest as such." I have been referred to *Nga Twe and one* v. *Nga Ba* (3), in which it is held that to save limitation "there must be an intention on the debtor's part that the money should be paid on account of interest and something to indicate that intention." The authority given in that ruling is *Muhammad Abdula Khan* v. *Bank Instalment, Company, Limited* (4). The headnote of this runs :

(1) (1921) 48 Cal. 839.
(2) (1921) 44 Mad. 570.
(3) (1915) II U.B.R. 80.
(4) (1919) 31 All. 495.

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"Under section 20 of the Limitation Act, the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditor of these payments to interest is not such an indication." Again in *Kariyappa and another* v. *Rachapa and others* (1), I find at page 499, "While the forms of payment may differ, the section provides that it must be a payment made as interest by the debtor to the creditor. Mere crediting by the debtor in his own account books of interest is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred."

It has been argued before me that the two later Privy Council rulings to which I have referred must be held to override the earlier Bombay and Allahabad rulings just quoted. In my opinion there is nothing in these Privy Council rulings to overrule the earlier ones. The point before the Privy Council was mainly one of accounting. The creditor was entitled, if the debtor made no stipulation at the time he made the payment, to credit the payment in such a way as would be most profitable to himself. If the debtor wished the payments to be credited in a way more in his own favour it was for him to stipulate that this should be done, and if the creditor refused he was at liberty to refuse to make the payment. This however is quite a different matter from holding that when a debtor makes a payment, the creditor may by his own action and

(1) (1900) 24 Bom. 493.

without any act of volition on the part of the debtor, start a fresh period for limitation. The Limitation Act says that the debtor must make the payment of interest as such and it is the act of the debtor which gives limitation a fresh starting point. It is impossible for a creditor to make a fresh starting point for limitation. Time runs against him unless the debtor does something, and one thing which a debtor may do is to make a payment of interest definitely as interest. In the present case there is nothing to show that the payment was made definitely as interest. Plaintiff himself was not present when Amale came and paid the money. Ma Su in cross-examination definitely says that nothing was said as to whether the Rs. 50 was the principal or interest. Ma E Kin says that Amale and Ma Saing came and paid Rs. 50 towards the loan. They did not say anything definite as to how the payment should be appropriated. Amale denies making the payment. The rest of the evidence is with regard to the execution of the pro-note.

I am opinion, therefore, that there having been no definite payment of interest as such, the suit was barred by limitation as against both defendants, and the lower Court was quite correct in dismissing it. I therefore dismiss this application for revision. The applicant to pay the respondent's costs in this Court.