APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Braund.

1938

June 3.

U TUN MAUNG *v.* L. AH CHOY.*

Acknowledgment—"Paid to account"—Endorsement of payment on back of promissory note signed by debtor—Inference of liability for the balance—Limitation Act, ss. 19, 20.

Where a debtor signs a statement on the back of a promissory note that he has "paid to account" a sum which is considerably less than the principal amount due, the words must mean that the debt has not been paid in full and the signed endorsement is an acknowledgment of liability within s. 19 of the Limitation Act and from its date a fresh period of limitation must be computed.

When a case falls within s. 19 of the Limitation Act it is unnecessary to consider it under s. 20 for the purposes of Limitation.

Ganesh v. *Joshi*, I.L.R. 47 Bom. 632 ; *M.K. Chetlyar* v. *R.M.S.L. Chettyar*, [1937] Ran. 421 ; *Pamnlapati* v. *Kondammdi*, I.L.R. 40 Mad. 698 ; *P. K. Roy* v. *N. Roy*, I.L.R. 48 Cal. 1046, referred to.

Shearman v. *Fleming*, 5 Ben. L.R. 619, distinguished.

A reference for the decision of a Bench was made in the following terms by

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MACKNEY, J.—One U Ohn Khin and the present appellant, U Tun Maung, executed a promissory note in favour of the respondent, L. Ah Choy, on the 2nd June 1931. The present suit was instituted by L. Ah Choy on the 26th May 1937, for recovery of the amount due thereon. The plaintiff sought to escape the bar of limitation by proving that, on the 27th May 1934, Maung Ohn Khin and Maung Tun Maung had paid to account the sum of Rs. 10 towards the amount due on the promissory note. This amount had been appropriated towards interest. The position taken by the two defendants was somewhat different. Ohn Khin appeared to admit that the amount was due although he denied that he had made any payment of Rs. 10 as alleged. Maung Tun Maung professed to be ignorant about the matter as he had relinquished his claim to the estate in

* Special Civil 2nd Appeal No. 333 of 1937 from the judgment of the District Court of Amherst in Civil Appeal No. 36 of 1937.

respect of which the money had been borrowed. He also denied that he had made any payment of Rs. 10. Both defendants admitted having endorsed their signatures on the back of the promissory note.

The Subdivisional Court was not satisfied that Maung Tun Maung had paid any interest as alleged and granted a decree against Ohn Khin only as he did not contest the suit. Against this order the plaintiff appealed making Tun Maung a respondent.

The learned District Judge was satisfied that the Rs. 10 had been paid by the two defendants and limitation was thus saved. He accordingly allowed the appeal and granted the plaintiff a decree against Tun Maung also. U Tun Maung now appeals against the decree of the District Court.

It is not now seriously contested that the finding of the District Court that the sum of Rs. 10 was paid as alleged must not be accepted. As the learned District Judge has pointed out, it is quite impossible to accept the very unsatisfactory evidence of witnesses who are deposing out of inaccurate memories to events which happened three years ago. The story of the defendants that they blindly wrote their signatures on the back of the promi ssory note shortly before it was to become time-barred simply at the request of the plaintiff's agent is unbelievable. When they endorsed the promissory note they must have been satisfied as to the correctness of the entry " paid to account— Rs. 10." It is further urged that, as this Rs. 10 was not interest paid as such although it has been appropriated towards interest, and it cannot be deemed to have been payment of part of the principal the plaintiff-respondent is not entitled to rely on section 20 of the Limitation Act. This contention is supported by the Full Bench decision of the Allahabad Hight Court in *Udaypal Singh* v. *Lakhmi Chand* (1).

The argument in the case cited proceeded on the basis that payment of interest as such, or payment of part of the principal, were in effect acknowledgments of a still existing liability. Prior to the amendment introduced by Act 1 of 1927, it was not necessary that the payment of interest as such should be evidenced by the handwriting of the person making the payment or by writing signed by that person. It was necessary that the payment should be strictly proved to be a payment as interest otherwise the payment could not be taken as an acknowledgment

(1) (1935) I.L.R. 58 All. 261.

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of a continuing liability. After the amendment was introduced, which required that the payments of interest also should be acknowledged by writing, the same considerations hold. Any payment made could not be held to be necessarily either a payment of interest as such or a payment of part of the principal. Consequently, if it was claimed that the payment was of interest, then it must be proved that the payment was a payment of interest expressed as such.

There were two dissentient judgments in that case which took the view that the words " as such " were redundant and that it was contrary to common-sense to decline to recognize the payment made because it was not said expressly whether the payment was of interest or of part principal. In the case which was before the Full Bench the debtors had endorsed a payment on the back of the bond and allowed the bond to remain in the possession of the creditor thus showing that the liability was not completely wiped off.

It appears to me that, if I may say so with the greatest respect, the majority of the learned Judges on the Full Bench have overlooked the fact that, after the payment, the bond remained in the hands of the creditor, from which the natural presumption is that the liability under the bond still continued. That being so the payment made must have been either a payment of interest or a payment of part of the principal. Where circumstances (such as the amount paid being very much less than the amount of interest due) indicated that the payment was a payment of interest, it must be taken to be such.

In *Venkatadri Appa Rao and others* v. *Parthasarathi Appa Rao* (1) their Lordships of the Privy Council laid it down that, where both principal and interest are due, sums paid on account must be applied first to interest. In the absence of any evidence to the contrary the payment of Rs. 10 in the present case would naturally be assumed to have been payment of interest, for no interest had been paid since the execution of the note.

There has been no decision in this Court on the point which arises, since the amendment of section 20 of the Limitation Act.

In *U Ba Gyi* v. *U Than Kyauk* (2), a decision of a single Judge in a case under section 20 of the Limitation Act prior to the amendment, it was held, following cases of the Allahabad High Court and of the Bombay High Court, that the mere appropriation

(1) (1921) I.L.R. 44 Mad. 570. (2) (1929) I.L.R. 7 Ran. 522.

by the creditor of a payment by his debtor as interest would not save limitation. The payment of interest must be made as such by the debtor.

I am of the opinion that this case is of sufficient importance to be heard by a Bench of the Court. It is by no means clear to me that the minority of the learned Judges in the Allahabad case have not come to the correct conclusion. No doubt when any payment has to be proved it must be established whether the payment was a payment of interest as such or a payment of part principal, but it does not appear to me to be necessary that it should be shown that when the payment was made there was an express declaration on the part of the person making the payment that it was a payment of interest, before the Court can regard it as such.

I suspect that under the old Act only part payments of principal had to be acknowledged in writing because such a payment in a sense effected a change in the original contract ; the words " as such " were then used in connection with a payment of interest merely to emphasize the fact that no payment of part of the principal could be proved orally. I do not see that the importation of these two words necessarily means that the payment must be expressly stated to be a payment of interest ; it is sufficient to shew that in fact the payment was a payment of interest. And this applies now, although a payment of interest has to be acknowledged in writing if it is to save limitation.

The argument employed by the learned Chief Justice who wrote the leading judgment in the Allahabad case to justify the contention that a payment of interest must be expressly said to be such at the time of payment, could equally well be used to show that a payment of part principal must also be expressly stated to be such at the time of payment before limitation could be saved.

If the payment of part of the principal is valuable only as an acknowledgment of the continuing liability, then it seems to me it is just as necessary to say that it is such a payment as it is to say that the payment of interest is a payment of interest ; and, if at the time of the payment of the one express words must be used, then equally they must be used at the time of payment of the other. It may be that this interpretation tends to diminish the importance to be attached to the words " as such ", but it is to be remembered that section 20 as amended does not apply to the case of payment of interest made before the first day of January 1928, and this would be a sufficient explanation for the retention of the old wording.

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Under the section as it stood prior to the amendment, if there were no writing it could not be proved that the payment was a payment of part of the principal, so unless it could be shown that the payment was a payment of interest as such it might be possible that the payment had been one made in settlement of the debt. Now after the amendment, provided that there has been a writing, it seems to me that it is open to the plaintiff relying on section 20 to prove either that the payment was, in fact, a payment of interest or, in fact, a payment of part principal, although no words were used at the time of payment to express which it was.

The proceedings will, therefore, be submitted to my Lord the Chief Justice for orders as to whether the appeal should be heard by a Bench.

Darwood for the appellant. The words on the back of the note are "paid to a/c Rs. 10." The plaintiff claims that the sum was paid towards interest. There is no evidence to show that the sum was paid towards interest "as such", and therefore the plaintiff's suit must fail. *Udaypal Singh* v. *Lakhmi Chand* (1).

The endorsement cannot be regarded as an acknowledgment within s. 19 of the Limitation Act. *Shearman* v. *Fleming* (2).

Mootham for the respondent. According to the Bench decision of this Court it is immaterial whether the sum was paid towards interest or principal. So long as the factum of payment is signed by the debtor, the provisions of s. 20 of the Limitation Act are satisfied. *Khan Sahib* v. *Lebbay* (3).

The endorsement in any case is an acknowledgment of liability within s. 19 of the Limitation Act. In *Shearman*'s case there was a letter, but here we have a promissory note on the back of which the words and the signatures of the debtors appear. These words

(1) I.L.R. 58 All. 261. (2) 5 Ben. L.R. 619, 638.
(3) [1938] Rang. 591.

clearly indicate that the debt is still due, and the promissory note was still in the hands of the creditor.

See *Ganesh* v. *Joshi* (1) ; *M.K. Chettyar* v. *R.M.S.L. Chettyar* (2) ; *Pamulapati* v. *Kondamudi* (3) ; *P. K. Roy* v. *N. Roy* (4).

ROBERTS, C.J.—This case arises out of a suit brought by the respondent in the Subdivisional Court of Moulmein for recovery of the sum of Rs. 4,443 alleged to be due on a promissory note executed on the 2nd of June, 1931, in his favour by two defendants, one of whom is the appellant. By his plaint the plaintiff claimed "exemption from the law of limitation by reason of the fact that both the defendants made a payment of Rs. 10 towards the interest due on the promissory note in suit on the 27th May 1934 which payment was duly endorsed and signed by the defendants on the reverse of the promissory note." In his written statement the appellant denied that he ever paid interest but pleaded that he signed on the reverse of the document in blank "as the plaintiff's agent Mr. Henry brought the promissory note and asked me to sign on the back of it." He further pleaded that the endorsement as to the payment of the alleged interest of Rs. 10 was made subsequently by the plaintiff without his knowledge or consent.

It has been suggested that there are some slight discrepancies in the evidence given on behalf of the plaintiff, but it was given over three years after the acknowledgment of liability was said to have been made by the appellant. His signature appears on the back of the note below the words "Paid to a/c Rs. 10" ; and below his signature is a date, "27/5/34."

(1) I.L.R. 47 Bom. 632.
(2) [1937] Ran. 421.
(3) I.L.R. 40 Mad. 698.
(4) I.L.R. 48 Cal. 1046.

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[On the evidence his Lordship accepted the plaintiff's version and continued :]

Once it is established that the appellant signed his name on the back of the note on the 27th of May, 1934, and under the words "Paid to a/c Rs. 10", what is the position? In my view, upon the authorities this was a clear acknowlegment of liability under section 19 of the Limitation Act, and from the date of it a fresh period of limitation must be computed. The words "Paid to a/c Rs. 10" must mean that the debtor has not paid in full, and are markedly distinguishable from the words "remittance of £ 40 to old account" which were relied on as an acknowledgment of liability, but held not to be such, in *Shearman* v. *Fleming* (1). In that case the words were to be found in a postscript to a letter written by the obligee, and might well have related to a final instalment which extinguished the liability; but in the present case the words "Paid to a/c Rs. 10" were on the back of the promissory note and on the front there was a promise to pay Rs. 2,141 with interest.

There is ample authority for showing that such an endorsement is an acknowledgment of liability. Thus in *Pamulapati Venkatakrishnah* v. *Kondamudi Subbarayudu* (2) the endorsement on the back of a mortgage bond of the words "Rs. 378 paid towards this document" followed by the debtor's signature when nearly Rs. 1,500 was due at the date of payment was held to be an acknowledgment of liability under section 19. The attempt in that case to treat sections 19 and 20 as mutually exclusive, so that where there is part payment an acknowledgment has no effect unless the case falls under section 20, was, in my opinion, rightly rejected by the Court.

(1) 5 Ben. L.R. 619. (2) (1916) I.L.R. 40 Mad. 698.

Then there is the case of *Ganesh Narhar Joshi* v. *Dattatraya Pandurang Joshi* (1), where the endorsement was a signature appended to a note of three payments on different dates. Macleod C.J. said :

" It may be admitted that the second defendant had not written in so many words that he admitted his liability for the balance due. But we must read the whole endorsement made by him, taken in conjunction with the words on the face of the note. It is difficult to say that that endorsement can mean anything else than this, ' I have paid so much on account of my liability on the note, and in consequence I am only liable for the balance remaining due.' "

Next, in *Prasanna Kumar Roy* v. *Niranjan Roy* (2) the principal sum advanced on a mortgage bond was Rs. 5,700 and on payment of Rs. 1,751 an endorsement was made on the back of it in the following terms, " paid on account of the principal as per separate accounts Rs. 1,751 only " and the same conclusion was arrived at. There is a similar authority in this High Court, *M.K. Kasiviswanathan Chettyar* v. *R.M.S.L. Lakshmanan Chettyar* (3).

In my opinion, the effect of section 20 of the Act need not be considered, since the debt was saved from limitation by the operation of section 19. Not only does this matter arise from the pleadings, but the Subdivisional Judge framed as an express issue " is the suit barred by limitation ? " and quoted (from an unauthorized report) a case in which it was apparently held that a bare signature by a debtor on the back of a promissory note executed by him was not an acknowledgment of liability in the absence of evidence as to intention. His words show that the question of section 19 was present to his mind, but here the words " Paid to a/c Rs. 10 "

(1) (1922) I.L.R. 47 Bom. 632. (2) (1921) I.L.R. 48 Cal. 1046.
(3) [1937] Ran. 421.

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clearly show an intention to make an acknowledgment of liability as appears from the authorities I have cited.

Accordingly, for the reasons given, this appeal must be dismissed with costs, advocate's fee ten gold mohurs.

BRAUND, J.—I agree and have nothing to add.