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APPELLATE
CIVIL.
31 C. 183.

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[183] APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and
Mr. Justice Geidt.*

ESHAHUQ MOLLA v. ABDUL BARI HALDAR.*

[19th August, 1903.]

Debtor and Creditor—Tender, validity of—Bond, suit on—Deposit in Court before due date.

A deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt.

SECOND APPEAL by the plaintiff, Eshahuq Molla.

This appeal arose out of an action brought by the plaintiff upon a simple bond for Rs. 160, dated the 8th Aswin 1301 B. S. (23rd September 1894). The due date of the bond was the end of Chait, 1301 (April 1895). It was stipulated that the defendant would be liable to pay compound interest at 3 pice per rupee, per month, if the sum due on the bond were not paid on the due date. The plaintiff brought the above action on the 12th January 1900, claiming Rs. 772 with compound interest as stipulated.

The defence was, that on the 28th Falgoon 1301 (11th March 1895) the defendant had tendered the amount due on the bond to the plaintiff and on his refusal to accept it, in March 1895 he (the defendant) deposited in Court the entire amount of principal and interest due on the bond, and the Court thereupon had served the plaintiff with a notice intimating him of the deposit; and that the plaintiff was not entitled to any interest after the due date.

The Court of first instance gave the plaintiff a partial decree, holding that there was no tender, that the deposit was not according to law, and that the stipulation to pay compound interest was in the nature of penalty and therefore not recoverable. [184] Against this decision the plaintiff filed an appeal, and the defendant a cross-appeal, before the Additional District Judge of 24-Perganas. The learned Judge having allowed the cross-appeal varied the decree of the Court of first instance. The material portion of his judgment was as follows:—

“It is perfectly clear that in the month of Chait the defendant deposited all that was due, with the possible exception of an insignificant amount, in Court and served the plaintiff with notice. This strongly corroborates the defendant's evidence that he had tendered the amount to the plaintiff before. But I lay no stress on this tender because it appears to have been accompanied with conditions. But it is not shown that any conditions were attached to the deposit in Court. The Munsif remarks that the deposit was not made under any law. I do not see that that circumstance affected the plaintiff at all. Whether the defendant was entitled to deposit the money or not, is a question that lay between the defendant and the Munsif who received the money. The only question that affected the plaintiff was whether the money was at his disposal, and that there seems no reason to doubt. It is possible that the plaintiff may have been entitled to another rupee or two, but he could certainly have obtained them by reasonable conduct. I do not like to refer, as a rule, to equity and good conscience, but I certainly think that it would be wholly contrary to both, to give the plaintiff a decree for hundreds of rupees for a trifling error in calculation. There is no doubt that practically all the money was at the plaintiff's disposal in 1301 B. S. If there was another rupee or two required,

* Appeal from Appellate Decree No. 429 of 1901, against the decree of H. R. H. Coxe, Additional District Judge of 24-Perganas, dated Dec. 4, 1900, modifying the decree of Latu Behari Bose, Munsif of Diamond Harbour, dated May 26, 1900.

he could doubtless have obtained them. But he puts forward the childish pretence that he knew nothing about the matter, and six years later sues for four times as much as due to him.

"The Munsif's decree will be varied. A calculation will be made of the amount due on the bond of the 8th Aswin 1301 with interest at the stipulated rate up to the end of that year. If this amount exceeds the deposit of Rs. 201, the plaintiff will be entitled to the difference. As the whole litigation is entirely unnecessary, he will bear the defendant's costs in both Courts. He will be authorised to draw what is ultimately found due to him from the deposit and the defendant will be entitled to the balance."

Babu *Shib Chandra Palit* for the appellant. There is no law under which the deposit was made, and therefore it was not a valid tender. The plaintiff was not bound to take any notice of it. The money deposited in Court cannot be said to have been at the plaintiff's disposal. The Munsif was wrong in accepting the deposit and issuing the notice.

Babu *Girija Prosanna Roy* for the respondent. The finding is that the defendant at first tendered the amount to the plaintiff and then deposited in Court practically all that was due, and served the plaintiff with notice. The deposit was accepted by [185] the Court, and it issued a notice to the plaintiff. The money was therefore at the plaintiff's disposal and he could have easily taken that out. These amount to a valid tender. The plaintiff's claim is inequitable, and it would be very hard upon the defendant if it were allowed. The first Court was right in regarding the claim for interest after due date as a penalty.

MACLEAN, C. J. I am afraid the defendant was ill advised in depositing the money in Court. There is no power enabling him to do so and no obligation on the plaintiff to take it out. There has been no valid tender to the plaintiff of the debt which the defendant owed to him, nor can I see under what authority the money was deposited in the Court of the Munsif of Diamond Harbour, or what power the Munsif had to issue through his officer a notice to the plaintiff of the payment in. The plaintiff in point of law was entitled to disregard such notice. I should have been glad to help the defendant if we could legally have done so, for it is a hard case, but I cannot find any principle upon which we can say that the plaintiff is not entitled to the money he claims.

The appeal must be allowed, and the plaintiff must have a decree for his principal and interest at the stipulated rate up to the date of the suit. We allow no interest after the date of the suit.

Under the circumstances each party will bear his own costs in all the courts.

GEIDT, J. I concur.

Appeal allowed.

31 C. 186.

[186] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and Mr. Justice Geidt.

NUZHATUDDOWLA ABBAS HOSSEIN v. MIRZA KURRATULAIN.*

[6th August, 1903.]

Will—Probate—Caveat—Undue Influence—Validity of Will—Objection to a particular Clause of Will.

In a suit for probate, the caveators assailed the whole of the will on the

* Appeal from Original Decree No. 77 of 1901, against the decree of Jogendra Nath Roy, Subordinate Judge of 24-Perganas, dated March 4, 1901.