

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ramgopal Mookerjee v. Masseyk and Kenny, from the Sudder Dewanny Adawlut of Calcutta ; delivered July 18, 1860.*

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Present :

LORD KINGSDOWN.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR EDWARD RYAN.

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SIR LAWRENCE PEEL.

SIR JAMES W. COLVILE.

THIS is a suit brought by the Appellant to recover 12,829 rupees alleged to be due to him from the Respondents under an ikrar-namah or agreement.

It appears that the Appellant was the lessee of certain lands in the Zillah of Jessore, and that the Respondent Kenny, who was the proprietor of several indigo factories in that district, was under-lessee of a portion of the property.

The Appellant alleged that a large sum was due to him from Kenny for rent, and he brought several actions in the Zillah Court of Jessore to recover the amount, and issued attachments against Kenny's factories and other property.

In 1850 while this litigation was pending, the other Respondent Masseyk intervened and alleged that he had become the purchaser of the interest of Kenny, and he objected to any sale being made under the attachments.

He obtained an order to stay the sale under four of the attachments, from which order the present Appellant appealed to the Sudder Dewanny Adawlut, and that appeal was pending at the time

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when the engagement on which the question before us was raised, was entered into by Masseyk; besides which three other execution of decree cases were pending for trial in the Zillah, and other actions were brought by Masseyk against the Appellant.

In this state of things the instrument in question was executed by Masseyk on the 25th September, 1850.

It is in the Bengali form and language, and is addressed by Masseyk to the Appellant. It recites the circumstances already stated, and that Masseyk was desirous of coming to an amicable settlement for the money due to the Appellant, that the amount due to the Appellant from Kenny had been proved to be 33,589 rupees 15 annas 3 pice, and of which under an amicable settlement Masseyk had agreed to pay to the Appellant 25,000 rupees, and that the Appellant had agreed to receive the said sum and make a remission.

The agreement then states that certain sums had already been received by the Appellant in part of the 25,000 rupees; that at the time of the execution of the instrument 10,000 rupees more had been paid to the Appellant through his Mooktiar, leaving 12,713 rupees; and that Masseyk agreed to pay this sum, with interest, from the 1st Bhadoon (16th August, 1850) by two instalments, one of 6,000 rupees, for principal, on the 10th Magh (22nd January, 1851), and the other of 6,719 rupees, for principal, on the 10th Choit (23rd March, 1851). In what way the interest was to be paid we will consider presently. The payments were to be endorsed on the back of the ikrar; then follow these words:—"And whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal."

The factories are then pledged for the payment of this money, as well as the personal liability of Masseyk. Then follow these words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated

factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said factories from the said purchaser.”

Provision is then made for putting an end to the several suits subsisting between the different parties.

It is to be observed that, although the debt from Kenney to the Appellant might be 33,589 rupees 15 annas 3 pice, it by no means followed that the property which Masseyk had purchased was liable to the payment of the whole of that sum; and, whatever might be the liability of the property, Masseyk was, previously to this agreement, under no personal liability. By the agreement he made himself personally liable to the extent of 25,000 rupees, for the debt of another; of which sum nearly half was actually paid at the time; and these payments made and to be made were part of an arrangement for a general settlement of the various disputes then pending between the parties, and for the dismissal of the suits.

There is nothing in the agreement which makes the payment of the instalments on the days fixed of the essence of the contract, unless that stipulation is to be inferred from the words, “If I fail to pay agreeably to the condition written.”

Instead of there being in any other part of the agreement anything to favour this construction, the nature of the engagements on each side, and the clause to which we have referred as to any payments on account being applied first to payment of interest, appear to us to furnish an implication to the contrary.

It being a part of the agreement that the suits in the Zillah Court and the Sudder Dewanny should be abandoned, the vakeels of both parties, on the day of the date of the agreement, brought it under the notice of the Sudder Dewanny by Petition. It was also, on the same day, brought to the notice of the Zillah Court.

The first instalment of 6,000 rupees became due on the 22nd January, 1851: it was not actually paid till the 21st of March, 1851.

The second instalment became due on the 23rd March, 1851, and was not received by the Appellant until the 5th July, 1851. Under these circum-

stances the Appellant has brought his action against Masseyk and Kenny, insisting that the agreement has not been performed according to its tenour, and that he is therefore entitled to receive the payment of the whole amount of 8,000 and odd rupees, which, he says, were only to be remitted on the condition of the less sums being paid punctually on the specific days mentioned in the agreement.

On the part of the Respondent it is contended that payment on the day was no essential part of the contract; that this is not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of payment is the only consideration which the creditor receives for his indulgence; that this case does not therefore fall within the principle of Ford and Lord Chesterfield relied on by the Appellant, but is a case in which a third person being under no liability consents to incur that liability, and binds himself in a penalty for the due performance of his engagement.

The Judges of the Zillah Court, and all the Judges of the Sudder Court, have decided against the claim of the Plaintiff, the present Appellant; and their Lordships have to consider whether any sufficient reasons have been urged for disturbing those decisions.

Their Lordships are of opinion that they ought not to apply to this case the nice technicalities of English law, that they must look at the agreement with a view to see what the real intention of the parties was, and must inquire whether it appears upon the evidence that there has been any failure by the Respondents in the substantial performance of the contract, and if there has been any default to whom such default is attributable.

It appears to their Lordships to be sufficiently proved that on the 10th Magh the Respondent Masseyk, through his Mooktiar, offered to pay to Deb Coomar Rae, the Mooktiar of the Appellant, in the Zillah of Jessore, the sum of 6,000 rupees as the first instalment due under the agreement, and that Deb Coomar Rae declined to receive it, alleging that he had not in his possession the ikrarnamah on which the receipt of the money was to be indorsed. This instrument is said to have been in

the possession of the Appellant himself, who resided at some distance from Jessore.

It is objected, on the part of the Appellant, to this offer:—

1. That the offer did not include the interest which ought at that time to have been paid ;

2. That Deb Coomar Rae had no authority to receive the money on behalf of the Appellant ;

3. That the Respondent was bound to seek out the Appellant on the day of payment, and to tender to him the exact amount of principal and interest then due.

Their Lordships, on consideration, are of opinion (contrary to the impression which they at first entertained) that by the agreement the interest on the 12,719 rupees up to the day of payment was to be paid at the same time with the 6,000 rupees, and that, therefore, if it were necessary to prove a strict legal tender, such tender was not made ; but they are satisfied that the omission to include the interest arose merely from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused, and they think that a strict legal tender was not necessary.

2. They are by no means satisfied that Deb Coomar Rae had not authority to receive the money. He has not been examined by the Appellant, and he was summoned as a witness by the Respondent and he failed to appear. He was the person through whom, if the attachments against the property had been prosecuted, the money would have been recovered and to whom it would have been paid in the Zillah Court ; and he was, therefore, the person to whom the Respondent might well imagine that the ikrarnamah, on which the payment of the money was to be indorsed, would be transmitted by the Appellant. There seems no improbability in the statement of the Respondent's witnesses that Deb Coomar Rae said that he would send for the ikrarnamah that the indorsement might be made upon it.

3. There seems to have been uncertainty on both sides as to the place at which the ikrarnamah was to be produced and the money was to be paid. The instrument was executed at Calcutta, where the Appellant had a Mooktiar ; it related to property

at Jessore, where the Appellant had another Mooktiar. The Deed had been sent from Calcutta to be produced in the Zillah Court of Jessore. The Appellant resided at Beernuggur, and had a place of business at Kishnuggur. It is stated by the Respondent that it was verbally settled, after the execution of the ikrar, that the money should be paid to the Appellant's Mooktiar in the Zillah of Jessore, and that the Appellant would send the ikrar to him. There is, however, no proof of this. On the other hand, the Appellant does not allege that there was any place fixed, either by agreement or by custom, or by rule of law, where the payment should be made. He suggests, indeed, at different times in the course of the proceedings, that the payment or tender might have been made to his Mooktiar at Calcutta, or to himself at his house at Beernuggur, or at the house of the Malzamendar of the Ejarah. To these the place of business of the Appellant at Kishnuggur was added in the discussion at our Bar as a proper place for making the tender.

Upon the whole their Lordships are satisfied that there was a *bonâ fide* endeavour on the part of the Respondent fairly to perform his engagement, and that there is much reason to believe, with some of the Judges in the Court below, that there was a desire on the part of the Appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance.

The principle of these observations applies to the second instalment as well as the first, and their Lordships have arrived without hesitation at the conclusion that the main ground of the appeal entirely fails, and that if the Appellant has received the full amount of the principal sum of 12,719 rupees, with interest upon that sum till the time of payment, he has received everything which he can justly claim.

They are not, however, satisfied that he has received the full amount of interest which he might reasonably demand; because it appears that with respect to the last instalment there was an interval of several months, during which time no interest was calculated, the delay of payment during that period having arisen, as it is suggested, from the

accidental absence of the European Judge from Jessore. It appears, however, that this point is not stated in the reasons of appeal laid before the Sudder Court, nor does it appear to have been suggested below. The sum would, probably, have been allowed if it had been asked, and if it had been refused the amount would have been far below that for which an appeal to this country can be brought.

Under these circumstances their Lordships think they would not be justified in modifying on this ground the order which they must humbly advise Her Majesty to make, viz., an order that this appeal be dismissed with costs.

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