THE INDIAN LAW REPORTS

PUNJAB SERIES

APPELLATE CIVIL.

Before Falshaw and Kapur JJ.

1952

July 15th

JOINT HINDU FAMILY STYLED AS MANGAT RAM SHIV NATH,—*Plaintiff-Appellant.*

versus

SETH MANGE LAL OM PARKASH,—*Defendant-Respondents.*

Regular First Appeal No. 103 of 1948.

Indian Limitation Act (IX of 1908)—Sections 19 and 20—Acknowledgment and part payment of debt by post-dated cheque—Date of acknowledgment or payment—Whether the date of the cheque or the date of its delivery—Joint Hindu Family—Business—Whether can be presumed to be joint Hindu family business.

The defendant firm ordered certain goods from the plaintiff firm and made part payment by a cheque, dated 16th January 1943, but delivered to the plaintiff firm on 15th January. It was cashed on 18th January. The plaintiff firm describing itself as a joint Hindu family firm brought the present suit for the recovery of the balance. The defendant firm pleaded that the plaintiff firm was not a joint Hindu family Firm but a contractual firm and not being registered under section 69 of the Partnership Act could not sue and that the suit was statute barred.

Held, that it is true that there is a presumption in favour of the plaintiffs being a joint Hindu family but there is no presumption in favour of their being a joint Hindu family business and if a set of persons carry on business as a firm it is for them to show that the firm is a joint Hindu family Firm.

Held, that the acknowledgment or payment by cheque which is the basis of extension of time was made on the

day when the cheque was given and not the day when it was cashed or the date which it bore.

Held, that section 19(2) of the Limitation Act is subject to the provisions of the Evidence Act and there is nothing in the Evidence Act which prohibits a man showing the actual date of acknowledgment to be different from that mentioned in the document. Moreover the acknowledgment of payment by cheque falls under section 20 of the Limitation Act where there is no such provision as in section 19(2) of the Act.

Kedar Nath Mitra v. *Dinabandhu Saha* (1), *Jagtu Mal-Sada Sukh Rai* v. *Charanji Lal-Fakir Chand* (2), *Parfulla Chandra Nag* v. *Jatindra Nath Kar* (3), *Marreco* v. *Richardson* (4), *Gowan* v. *Forster* (5) and *Turney* v. *Dodwell* (6), relied upon.

Regular First Appeal from the decree of Shri Sunder Lal, Commercial Sub-Judge, 1st Class, Amritsar, dated the 9th June 1948, dismissing the plaintiff's suit and leaving the parties to bear their own costs.

C. L. AGGARWAL, for Appellant.

BISHEN NARAIN, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. This is a plaintiff's appeal against a judgment and decree of Mr Sunder Lal, Commercial Sub-Judge, 1st Class, Amritsar, dated the 9th June 1948, dismissing the plaintiff's suit for the recovery of Rs 5,490-11-0 due on a *bahi* account, but leaving the parties to bear their own costs.

The plaintiff firm carries on business at Amritsar and the defendants at Delhi. The latter placed an order for the supply of thirty thousand post-pickets at the rate of annas 7 per set F.O.R. Delhi. The entire quantity was supplied and Rs 8,000 was paid on the 18th January 1943. This is really the date on which the cheque for Rs 8,000 was cashed. The cheque was dated the 16th January 1943 and was delivered to the

(1) I.L.R. 42 Cal. 1043
(2) I.L.R. 14 Lah. 580
(3) I.L.R. (1938) 2 Cal. 538.
(4) (1908) 2 K.B. 584
(5) 3 B. & Ad. 507
(6) 3 E. and B. 136.

plaintiff on the 15th January 1943. The suit is for the balance of the price. The defence, *inter alia*, was that because the plaintiff's firm was not a registered firm it could not institute the suit and that the suit was barred by time. On both these points the trial Court held in favour of the defendants. The plaintiffs have come up in appeal to this Court.

The plaintiff brought the suit in the name and style of Joint Hindu family firm known as Mangat Ram-Sheo Nath through Mangat Ram its manager and Karkun resident of Amritsar. In the plaint limitation was alleged to have begun from the 18th January 1943, the allegation made in paragraph 5 was—

> "This suit is within time as the cheque given is dated the 18th January 1943".

The defendants pleaded that the plaintiff firm was not a joint Hindu family firm but was a contractual partnership and as it had not been registered under section 69 of the Partnership Act it could not sue. Three issues were framed by the learned trial Judge—

1. Has this Court got territorial jurisdiction to try this suit ?

2. Is the plaintiff firm a joint Hindu family firm and entitled to institute the suit without registration ?

3. Is the suit within time ?

The first issue is no longer in dispute. The controversy in appeal was confined to issues 2 and 3 which have been found against the plaintiff.

Mr Chiranjiva Lal Aggarwal submits that it was for the defendants to prove that the plaintiffs were not a joint Hindu family firm but a contractual firm. It is the plaintiffs who have described themselves as a joint Hindu family firm. It is true that there is a presumption in favour of their being a joint family but there is no presumption

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in favour of their being a joint family business and if a set of persons carry on business as a firm it is for them to show that the firm is a joint Hindu family firm. In the present case there is no evidence at all to show that the plaintiffs are an undivided Hindu family firm. Therefore we must take it that the plaintiffs are a contractual firm, and no evidence has been submitted by the plaintiffs to show that they have been registered as a firm and in the absence of such proof the plaintiffs because of section 69 of the Indian Partnership Act were not entitled to institute the present suit. I am, therefore, of the opinion that the learned Judge rightly held in favour of the defendants on this point.

The next question raised is whether the suit is within limitation. It is admitted in the trial Court that the cheque for Rs 8,000 was delivered to the plaintiffs on the 15th of January 1943 and that is the common case of the parties before us also. Mr Chiranjiva Lal Aggarwal submits that the limitation would begin either from the date of the cheque which was the 16th of January 1943, or from the date of encashment of the cheque which is the 18th January 1943. In either case the suit would be within time. I am unable to agree with this contention. In *Kedar Nath Mitra* v. *Dinabandhu Saha* (1), it was settled by a judgment of Sir Lawrence Jenkins, C. J., that payment by cheque is payment towards the debt due and where a cheque is delivered to a payee by way of payment and was received by him as such the cheque operates as payment subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives. The learned Chief Justice said at p. 1048—

> "If I am right in the view that the cheque actually was a payment the very payment was in the handwriting of the person making the same."

This was no doubt a case under the old Act before the amendment of 1927. In place of the words

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"the fact of payment" appearing in the handwriting of the person making the payment the words now are "an acknowledgment of the payment" appearing in the same handwriting that has got to be proved. In *Jagtu Mal-Sada Sukh Rai* v. *Charanjit Lal-Fakir Chand* (1), it was held that the result of the amendment of the proviso to section 20 of the Indian Limitation Act is that the creditor is now able to rely on the writing of the debtor, not only as to the fact of the payment but also as the acknowledgment of that fact. In the present case the cheque, dated the 16th January 1943, and therefore post-dated was delivered on the 15th January 1943 and the question is whether this is an acknowledgment and if so the limitation would run from the 15th or the 16th or the 18th January. It was held in *Parfulla Chandra Nag* v. *Jatindra Nath Kar* (2), that when part payment of a debt is made and accepted by a cheque written in the handwriting of the person liable to pay the debt it is evidence both of the fact of payment and of acknowledgment within the meaning of section 20 of the Indian Limitation Act and a fresh period of limitation should be computed from the time when the cheque is handed over to the creditor. Reliance was there placed on a judgment of the Court of Appeal *Marreco* v. *Richardson* (3). There a writ was issued on June the 18th, 1906, to recover from the defendant the amount of certain bills of solicitors' costs which related to the years 1891 to 1896. On the 10th May 1900 there was an interview between the client and the solicitor. At that interview the defendant handed over to the solicitor a cheque for £20, post-dated May the 20th and at the same time requested the solicitor not to present it for payment till June the 20th and it was paid on June the 20th. A writ was issued two days before the expiration of six years from the day when the cheque was in fact paid on presentation. A plea was raised that the debt was statute-barred. Bray, J., held it to be so and an appeal was taken to the Court of Appeal. At

(1) I.L.R. 14 Lah. 580
(2) I.L.R. (1938) 2 Cal. 538
(3) (1906) 2 K.B. 584.

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page 589 the President, Sir Gorell Barnes, said—

> "But the cheque was given more than six years before the commencement of this action, and "it is now contended on behalf of the plaintiffs that, because by arrangment between the defendant and his deceased solicitor the cheque was to be paid, and was paid, within six years of the comencement of the action, a fresh acknowledgment and promise to pay are to be inferred as having been made at the date of payment of the cheque. That is equivalent to saying that the bankers, in paying the cheque, made a fresh promise on behalf of the defendant to pay the whole debt. Such a contention is inconsistent with what I conceive to be the Law on the subject, and in my opinion the only time when any promise to pay the whole debt was made or could be implied was when the parties met and the cheque was given".

The Learned President relied on two cases. The first is *Gowan* v. *Forster* (1), where Parke, J., took the same view at page 511. He said during the argument—

> "The reason why a part payment takes a case out of the statute is, that it is evidence of a fresh promise. Here the promise must be considered as having been made when the bill was given, and not when it was paid".

Littledale, J., said at p. 513—

> "The promise is to be implied at the time when the bill was given".

The second case that he relied upon is *Turney* v. *Dodwell* (2). The following passage from the judgment of Lord Cambell, C. J., is very apposite—

> "We think that, where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the

(1) 3 B. & Ad. 507
(2) 3 E. & B. 136

balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill".

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This is a case which is on all fours with the one before us. The cheque was a post-dated one and had been given a day previous. The acknowledgment or payment by cheque which is the basis of extension of time was therefore made on the day when the cheque was given. Mr Chiranjiva Lal Aggarwal, submitted that where a post-dated cheque is given only that date can be taken to be the date of acknowledgment which the cheque itself bears because according to him no evidence can be given of the date of acknowledgment under section 19 (2) of the Limitation Act. But this is subject to the provisions of the Evidence Act and there is nothing in the Evidence Act which prohibits a man showing the actual date of acknowledgment to be different from that mentioned in the document. Moreover the acknowledgment of payment by cheque falls under section 20 of the Limitation Act where there is no such provision as in section 19 (2) of the Act. I am, therefore, of the opinion that the learned Judge has rightly held that the suit is barred by time.

In the result this appeal fails and is dismissed with costs.

FALSHAW, J.—I agree.

Falshaw, J.