CALCUTTA HIGH COURT

Ismail Bhai Rahim

Vs

Adam Osman

(Panckridge, J.)

23.02.1938

JUDGMENT

Panckridge, J.

1. This case raises points of considerable interest, though the amount at stake, apart from the question of the costs of the litigation, is a trifling one. The plaintiffs are executor and executrix of the will of Ibrahim Alia Rukhea Rahim, deceased. On 11th May 1935, Rahim advanced a sum of Rs. 2500 to the defendants. The advance was covered by a hatchita, and the defendants promised to pay interest at the rate of 7 annas per cent, per month until realization. Rahim died on 4th July 1935. Before probate of his will was obtained, Bahim's widow instituted the present suit and the executor joined with her as co-plaintiff. At the date of the institution of the suit, that is to say on 5th May 1936, the interest on the advance amounted to Rs. 130-2-6. Accordingly the sum claimed was Rs. 2630-2-6 with interest and costs. In the written statement the defendants plead that the plaintiffs wrongfully refused to accept payment of the sum, which was properly due to them on several occasions prior to the institution of the suit, and that, in particular, payment was not accepted on or about 15th August 1935 of the amount properly due on the basis of the loan, namely Rs. 2500 on account of principal and Rs. 35 on account of interest calculated up to the aforesaid date aggregating Rupees 2535 although offered by the defendants. This sum was paid into Court on 4th June 1936. Consequently, what I have to decide is whether the plaintiffs are entitled to Rupees 90 over and above the amount paid into Court. Although a tender is not alleged and although the language of Section 38, Contract Act, is not adopted in the written statement, the defence really is that the defendants on 15th August 1935 made an offer of performance to the plaintiff's which was not accepted and that therefore the defendants are not responsible for the non-performance of the promise to pay. The facts are as follows : On 15th August 1935 the defendants' attorneys wrote two letters one addressed to the widow of Rahim and the other to his heirs. Both the letters contain the following passage:

Our clients are ready and willing and hereby offer to repay the said sum of Rupees 2500 with interest up to date to the proper legal representative of the said Ismail Bhai Kahiru. Will you please let us know whether any representation of his estate has been taken from the Court, and the names and addresses of such representatives to enable our client to repay the said sum with interest. We are also instructed to give you notice that our clients are not liable to pay any interest on the said sum of Rs. 2500 from today.

2. Apparently, no answer was received by the defendants' attorneys from the addressees. The passages which I have read are the offer on which the defendants rely as excusing them from the liability to perform the contract to repay with interest. I will assume for the purposes of the case that either the widow or the heirs did, on 15th August 1935, stand in the shoes of the original promisee, and I will also assume that the defendants were in a position to implement the offer made by their attorneys. It cannot be argued that there was any tender of the amount due in the sense in which that term is used in English law. Mr. Chaudhury for the defendants points out that Section 38 says nothing about tender, and that all that the promisor has to do under this Section is to make an offer of performance. Pie argues that the principle underlying the English law as to tender is that the promisor must perform his promise as far as the circumstances permit him to do so; that is to say a person who has made a promise to pay must tender the actual money in the form in which the promisee is legally entitled to demand it, and the circumstances must be such that the only thing which prevents the discharge of the contract by performance is the refusal of the promise to accept performance.

3. I am inclined to agree with Mr. Chaudhury that in construing Section 38, Contract Act, one should endeavour to keep one's mind clear of pre-possessions arising from familiarity with the English rules as to tender. It is true that the distinguished authors of Pollock and Mulla on the Indian Contract Act at page 272 of Edn. 6 state that a tender of money in payment must be made with an actual production of the money. For that proposition, they rely on *Veerayya v. Sivayya*[1] It is difficult from the extremely-compressed report of that case to ascertain what the facts were, but I am inclined to think that in the contract, which the Court was considering, there was an express obligation to tender. If that were so, the English rules as to tender would apply, not by virtue of the provisions of the Indian Contract Act, but by virtue of the agreement of the parties. It must be observed however that under Section 38 the offer of performance must fulfil certain conditions. The second condition is as follows: It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

4. In my opinion, an offer made by a promisor through his solicitor to pay a debt with interest

due thereon at the date of the offer does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise. It is true that in this case it so happened that the defendants and the addressees of the two letters lived in the same street, but I do not think that this circumstance can bring the case within the condition formulated in the Section. I do not consider that the promisor can reasonably expect the promisee to attend at the promisor's residence or place of business for the purpose of satisfying himself that the promisor is both able and willing to carry into effect the offer he has made. In my opinion the letters of 15th August 1935 do not contain an offer which fulfils the conditions laid down by Section 38. Mr. Chaudhuri however has another line of defence, for he says that, assuming that the offer would have been ineffective if made to, the original promisee, it is nonetheless an effective offer seeing that it was made to the legal representatives or heirs of the deceased promisee after the death of the latter. A passage in Pollock and Mulla, Edn. 6, supporting this proposition is to be found at page 272 and is as follows: But when the creditor is dead and no probate has been obtained by the executors of the deceased, an offer by letter to pay the debt, on a proper release being executed, is a valid tender, provided the debtor was able to pay the debt, and had money available for that purpose. No actual production of money is necessary in such a case, there being no person entitled in law to receive the payment. The rule that nothing but actual tender will stop interest applies only in those cases where there has been someone to whom interest could be tendered either as a creditor himself or one who established his right to be the representative of a deceased person.

5. The decision on which the learned authors rely for this passage is *Pandurang Krishnaji v. Dadabhoy Nawroji*[2] a decision of a Judge sitting singly on the Original Side. In my opinion, there is no principle on which the distinction which Mr. Chaudhuri seeks to draw can be justified. He says, quite correctly, that where a creditor dies, the debtor is in this unfortunate position he must either take the risk of tendering to a person who is not entitled to receive the debt, and of a subsequent suit by the deceased creditor's executors or administrators, or he must wait until someone obtains probate or letters of administration and incur liability to pay additional interest in the meanwhile. That may be so, but I do not see that these considerations affect the sort of offer which the debtor must make if he is to have the benefit of Section 38. The debtor is not bound to take the risk of offering payment to some one whose right to receive the debt may turn out to be non-existent. If he does take the risk, I am unable to understand why the offer which he makes should not be subject to exactly the same conditions as those which it would have had to fiulfil had it been made to the original promisee. Accordingly, I feel justified in disregarding the decision in *Pandurang Krishnaji v. Dadabhoy Nawroji* [3]I hold that the offer made in the letter of 15th August 1935 did not comply with the conditions specified in Section 38 even on the assumption that it was made to a person who had succeeded to the creditor's right to receive

payment of the debt. It follows therefore that the plaintiffs are entitled to a decree for the amount claimed. It is impossible not to feel a certain amount of sympathy for the defendants in the matter, because on 9th May 1936 they made what would admittedly have been a valid tender of payment had it been made on 15th August 1935, that is to say, they tendered through their solicitors currency notes for Rs. 2535 and the concluding portion of the letter containing the offer is in the following terms:If your client still insists on the subsequent interest, which, of course our clients deny, they can accept the said sum of Rs. 2535 without prejudice to their alleged claim for further interest.

6. The defendants point out that it was open to the plaintiffs to accept the sum tendered and, if they saw fit, to sue in the Small Cause Court for the sum of Rs. 95 by which their claim exceeded it. Unquestionably, had that been done, the costs of the proceedings would have been considerably reduced. Learned Counsel for the defendants had drawn my attention to *Chunder Caunt Mookerjee v. Jodoonath Khan*[4]. He does not maintain that the case is directly in point. There the Court held that the question of costs was not affected by the fact that the plaintiffs had refused to accept a tender of a sum less than the sum for which they ultimately obtained a decree. The Court pointed out that the tender was made in full satisfaction of the plaintiff's claim and that the plaintiffs could only accept it on the terms of relinquishing the balance. The final sentence of the judgment is as follows : "if the money had been tendered unconditionally, it might have been otherwise." Here it is true, the tender was subject to no conditions; indeed it was accompanied by a statement that if accepted", it would be without prejudice to the plaintiff's claim to sue for the balance.

7. A reference has also been made to *James v. Vane*[5] That was a decision as to the construction of certain rules of procedure of the Court of Queen's Bench. What had happened was that the plaintiff had claimed for a sum of £28-19-4 and that the defendant, after tendering of £26-10-6 had paid that Bum into Court and contested the plaintiff's claim as to the balance. The plaintiff eventually obtained judgment for the balance of £2-8-10. The Court held that the case was one in which the plaintiff had failed to recover more than £20 within the meaning of the rules. That decision is not to my mind of much assistance when I have to consider how I should exercise my discretion as to costs under Section 35, Civil P.C. As far as I know, a creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of partpayment and thus bringing the amount for which proceedings have to be taken within the pecuniary jurisdiction of a less costly tribunal.

8. There is nothing in the rules and orders of the Original Side nor in the Presidency Small Cause Courts Act, which applies to the present circumstances. I do not think I should be justified in using my discretion as to costs as a means of punishing the plaintiffs for not having accepted a

suggestion which I think they might very reasonably have accepted. Moreover, I cannot shut my eyes to the fact that the defendants are, to some extent, the authors of their own misfortune. An application was made at an early stage of the suit for summary judgment under Ch. 13(A), but the defendants persisted in having the merits of their defence investigated, and for the costs which have been incurred since they were given leave to defend, they have only themselves to thank. In the circumstances, I do not feel that I can depart from the ordinary rule, and. costs must follow the event. The plaintiffs are accordingly entitled to their costs and interest on judgment at 6 per cent, including reserved costs.

Cases Referred.

1(1915) 2 A.I.R. Mad. 546
2(1902) 26 Bom. 643
3(1902) 26 Bom. 643
4(1877) 3 Cal. 468
5(1860) 29 L.J.Q.B. 169