

## [APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 134 of 1875.*1875.  
Oct. 14.NA'RA'YAN UNDIR PA'TIL (DEFENDANT) v. MOTILA'L RAMDA'S  
(PLAINTIFF).*Bond—Error in account—Waiver—Estoppel—Indorsement—Receipt—  
Evidence of payment.*

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way":

*Held* that, though the defendant at the time of the adjustment disputed the correctness of the account, yet that by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors.

*Held* also that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsements is a circumstance of some importance, which ought not to be overlooked, but is by no means conclusive.

*Bekana Tatiah v. Vasuntum Chinna* (Mad. S. D. A. Rep. for 1855, pp. 49 and 50) impeached; *Sashachellum Chetty v. Govindappa* (5 Mad. H. C. Rep. 451), *Kashinath Balal Oka v. Narria Jan* (Bom. Sp. Ap. 438 of 1872), and *Nugur Mull v. Azeemoollah* (1 N.-W. P. H. C. Rep. 146), approved.

THIS was a special appeal, heard on 14th October 1875 by WESTROPP, C.J., and KEMBALL, J., from the decision of H. J. PARSONS, Assistant Judge at Tanna, amending the decree of the Subordinate Judge at Wasin.

The plaintiff sued the defendant on a bond passed by the latter to the former to recover the amount found to be due from the defendant to the plaintiff upon an adjustment of the accounts of their mutual dealings. The bond contained the following stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the

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same. I shall not lay any claim to any payment made except in this way." The defendant admitted the execution of the bond, and having made certain payments under it, but said the balance secured by the bond was incorrect, owing to errors in the account, and that at the time of the adjustment and ever since he had disputed the accuracy of the balance. He further alleged that he had made various payments in respect of the balance which were not indorsed on the bond, and for which he had no receipts. The Assistant Judge held that the defendant could not be allowed to re-open the question of the correctness of the balance, and that oral evidence to prove the payments alleged by the defendant was not admissible.

*Mahádev Chimnáji Apte* for the special appellant.—The plaintiff's accounts were required both to prove errors in the balance for which the bond was passed, and subsequent payments made in satisfaction of it, as appears clearly from the *Darikhást* (Exhibit No. 16). The defendant contended from the beginning that the balance was incorrect. The Assistant Judge wrongly held the stipulation in the bond that payments were to be evidenced by an indorsement on the back of it or by receipt, to be a bar to receiving oral evidence to prove payments which are not evidenced by indorsement or receipt.

[KEMBALL, J., referred to *Sashachellum Chetty v. Govindappa* (1).]

*Shántarám Náráyan* for the special respondent.

*Pándurang Balibhadra*, as *amicus curiæ*, mentioned.—*Káshináth Balál Oka v. Nárriá Jún and others* (Special Appeal No. 438 of 1872) decided by NA'NA'BHAI HARIDA'S and LARPENT, JJ., on 25th June 1874.

WESTROPP, C.J. :—The Assistant Judge, in speaking of alleged payments by the defendant for which he claims credit, says :—“Where an instalment bond contained a stipulation that payment of the instalments should be indorsed upon it, and that in the event of litigation, any allegation of other modes of settlement should be discredited, the Sadr Adálat rejected a written release, filed by the defendant, because it was not indorsed on the bond (S. A. No. 2 of 1855 ; Colebrooke's Digest Bk. I., pl. 285, 286). So here, too, I shall discredit the oral evidence of those witnesses as to

payments having been made in satisfaction of this bond, and only believe the evidence of the receipt. I think it the only proper course to pursue. The lower Court found the payments proved, not on the evidence of the witnesses, but because the plaintiff did not produce his account books, but the account books were asked for, not on this point, but on the point as to whether, when the bond No. 3 was executed, Rs. 999 were due or not. The non-production of them has no connection with this part of the case."

This Court feels bound to observe that somewhat more of accuracy as to the facts would have been desirable on the part of the Assistant Judge. The plaintiff's accounts were asked for as well for the purpose of showing payments to him subsequently to the date of the bond (1st January 1870, Márgshirsh 30th, Samvat 1926), as for the purpose of impeaching the correctness of the balance of account due at the end of A.D. 1869, for which the bond was given. The books asked for are from Samvat 1921 to Samvat 1928 (see Exhibit No. 16). Those subsequent to Márgshirsh 30, Samvat 1926 (1st January 1870), could only have been asked for with reference to the alleged payments in respect of the bond. And in Exhibit No. 15 it is distinctly apparent that the books were sought for that purpose as well as for the other.

We so far agree with the Assistant Judge that we do not think that the defendant ought to be permitted to re-open the question of the correctness of the balance for which the bond of the 1st January 1870 was given. The defendant says that he objected to it at that time, and he produced a witness who also testified to that effect.

Assuming that to be true, the defendant must be regarded as having waived his objection, for, notwithstanding it, he subsequently executed the bond and made payments upon it.

It would be different if his allegation were that after the execution of the bond he discovered the errors in the account on which the balance was arrived at. In such a case, it might possibly, on specification of some one or more of the alleged errors, be right to allow him to re-open the question of the correctness of the account, but that is not his case.

The next point to be disposed of is, whether the Judge was right in holding that the oral evidence of payments alleged to

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have been made by the defendant could not be taken into consideration. The learned Assistant Judge, in the above extract, referred to a decision of the Sadr Adalat in such a manner as to lead this Court to suppose that he meant the Sadr Adalat of this Presidency, and has caused much trouble and loss of time in searching for that decision. It appears, however, to be the Madras Sadr Adalat, which, in *Bekana Tatiah v. Vasuntam Chinna* (1), without giving any reason for their ruling, decided that, where an instalment bond contained a condition that the payments should be indorsed on the bond, and that, in event of litigation, any allegation of other modes of payment should be discredited, a receipt in writing by the obligee of the bond could not be received as evidence of a payment by the obligor. This Court, even if that decision were still intact, would decline to follow it, inasmuch as the giving of a receipt in writing by the obligee not indorsed upon the bond would amount on his part to a waiver of, and dispensation with, the condition. Further, this Court regards such a stipulation as in itself so objectionable that it ought not to be enforced.

It is against good conscience that an obligee should stipulate that, although he may have been paid in part or in full, he should, if the evidence of such payment were not in writing, be at liberty to treat the payment as a nullity. He would, in enforcing such a condition, be availing himself of his own negligence or wrong. Such a condition, we think, could only be imposed by the Legislature, which has, in certain cases, imposed somewhat analogous conditions, as for instance in Section 206 of the Civil Procedure Code, which provides that "no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made, or to whom it has been transferred."

The stipulation in the bond is, "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way." The stipulation is stronger and clearer than that in *Sushachellum v. Govindappa*

(1) Mad. S. D. A. Rep. for 1855, pp. 49 and 50.

(1) in which the High Court of Madras must be regarded as having over-ruled the decision of their predecessors of the Sadr Adalat in *Bekama Tatiah v. Vasuntim Chinna*, but the reason, which we have already given, is, we think, quite sufficient to support the conclusion at which we have arrived, viz., that the stipulation in the bond cannot be permitted to control Courts of Justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law, which would warrant our Courts in excluding direct oral evidence of payment. We agree with Scotland, C.J., and Innes, J., (2) that the absence of indorsements in the case of a bond containing (as bonds here often do) such a stipulation as that here, is a circumstance of some importance and ought not to be overlooked, but it is by no means conclusive and ought not to be so regarded. The passages in Colebrooke's Dig. Bk. I., pl. CCLXXXV., CCLXXXVI., referred to by the Assistant Judge, show the antiquity of the practice amongst Hindus of indorsing payments on bonds and of giving receipts in writing. Those texts, however, as regards the debtor are hortatory rather than mandatory, while the two following texts (CCLXXXVII., CCLXXXVIII.), show that the Hindu law with respect to the creditor, who accepted a payment, but gave no receipt or refused to give it, was stringent even to the extent of treating such an omission or refusal as a forfeiture of the balance of the debt. It is, however, with the Anglo-Indian law of evidence we have to deal. It does not exclude oral evidence of payment, and we should deem it to be both against good conscience and the policy of the law to reject it. Its value must be weighed in each particular case.

This cause must be retried by the Assistant Judge. Our previous observations show that the plaintiff's account books, subsequent to 1st January 1870, should be called for. If he refuses to produce them or does not satisfactorily account for their non-production, the Assistant Judge should take that circumstance into consideration together with such evidence, oral or otherwise, as there may be of the payments alleged by the defendant and not admitted by the plaintiff. We reverse the decree of the

(1) 5 Mad. H. C. Rep. 451.

(2) *Id. Ib.* 453.

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1875. Assistant Judge and remand this cause for retrial on the merits ;

NA'RA'YAN UNDER PA'TIL v. MOTILAL RA'MDA'S. costs of both appeals and of the suit to be disposed of by him as may appear to him to be just.

We understand that Nánábhái Haridás and Larpent, J.J., have, in Special Appeal 438 of 1872 (decided 25th June 1874), *Káshinath Balal Oka v. Narria Jan and others*, come to a decision as to the admissibility of oral evidence notwithstanding such a condition as in the bond in this 'suit. *Nugur Mull v. Azeemoollak* (1), is to the same effect.

### [APPELLATE CRIMINAL JURISDICTION.]

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REG. v. LAKHYA' GOVIND AND ANOTHER.

*The Code of Criminal Procedure, Act X. of 1872, Section 67—Jurisdiction—Dacoity in the Gáyakwád's territory—Trial in British Territory.*

Where dacoity was committed at Velanpor, a village in the territory of H. H. the Gáyakwád, and a part of the stolen property found where it had been concealed by the accused in British territory, it was

*Held* that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor, although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might in the legal sense have coalesced with the first and principal one, so as to give jurisdiction under Section 67 of the Code of Criminal Procedure in each district into which the property was conveyed. But on a conviction of retaining stolen property the sentences awarded could, it was held, be sustained, the retaining having taken place in British Territory.

This was an appeal from the decision of H. F. Aston, Assistant Session Judge of Surat, confirmed by H. Birdwood, Session Judge.

The evidence showed that the appellants formed part of a gang which committed dacoity at Velanpor in the territory of H. H. the Gáyakwád. A portion of the stolen property was found concealed at the village of Sáriá, in the Chikli Taluka of the Surat District. This circumstance, the Assistant Judge supposed, gave his court jurisdiction to try the accused on the charge of dacoity, though it was committed in foreign territory. The trial accordingly went on, and the evidence having been found sufficient, resulted in the conviction on that charge of both the accused who were sentenced

(1) 1 N. W. P. H. C. Rep. 146 (1869, Part VIII.)