1939 *Present :* **Soertsz A.C.J. and de Kretser J.**

SOCKALINGAM CHETTIAR *v.* MUNASINGHE *et al.*

285—D. C. Chilaw, 11,192.

Prescription—Mortgage bond—Payment of interest in advance—Date of payment—Interruption of prescription—Ordinance No. 22 of 1871, s. 6.

Plaintiff lent the defendants money on a mortgage bond dated November 14, 1927, which required them to pay interest once in four months in advance. The first four months' interest was accordingly deducted when the bond was executed. No other interest was paid. Plaintiff brought the present action to recover the money due on the bond on March 11, 1938. The defendant pleaded prescription.

***Held*, that the action was prescribed under section 6 of the Prescription Ordinance, No. 22 of 1871.**

The payment of interest in advance cannot be regarded as a payment made on the date the interest became due for the purpose of interrupting prescription.

APPEAL from a judgment of the District Judge of Chilaw.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for plaintiff, appellant.

N. E. Weerasooria K.C. (with him *A. E. R. Corea*) for defendants, respondents.

Cur. adv. vult.

March 31, 1939. SOERTSZ A.C.J.—

The plaintiff in this case sues on a mortgage bond dated November 14, 1927. He instituted this action on March 11, 1938, that is more than ten years after the date of the bond, but he relies on what occurred on the day on which the bond was executed to save it from the statute of limitations.

Admittedly, on that date the mortgagee retained a sum of Rs. 105 out of the amount he was lending "by way of interest for the first four months".

The plaintiff contends that by virtue of that arrangement, a sum of money sufficient to make good the interest due for four months was deposited with the mortgagee, so that he might apply it as interest fell due, and that, in that way, March 13, 1938, must be regarded as the last date of interest on which there was a payment due on the bond.

The plaintiff bases this contention on the proposition that interest is an amount paid by the borrower to the lender as consideration for his being allowed to have the use of the latter's money and that, therefore, no obligation arises for the borrower to pay interest till he has had use of the money, and that it cannot be said that there was a "payment" of the interest due for March, 1938, in November 1937. In short his contention, as I understand it, is that the word "pay" in its proper legal connotation in a case like this, means the giving of money to discharge an existing obligation, and, in this case he says that there was no obligation in November, 1937, to "pay" interest for March. In this view of the matter all that happened on the execution of the bond was that the borrower left a sum of money with the lender which became a "payment" as it came to be appropriated from day to day, or perhaps, from moment to moment as the interest fell due. In that way the last "payment" took place with the last appropriation at the end of March 13, 1938.

The case for the defendant is that on the execution of this bond four months' interest fell due, and was paid, and that that was the date of the last payment of interest on the bond.

The question that arises for decision is which of these interpretations is the correct interpretation of section 6 of Ordinance No. 22 of 1871 which governs the matter.

The relevent words of that section are "No action shall be maintainable for the recovery of any money due upon any hypothecation or mortgage . . . . . unless the same be commenced . . . . within ten years from the date of such instrument . . . . or *of last payment of interest thereon*".

In ordinary speech, we speak of interest being paid in advance, and do not feel that we are misapplying the word "pay" or that we are extending it beyond its strictly proper limits. But it is said that in a legal

context such as this, the word "pay" can only be used to describe the giving of money in order to discharge an existing obligation, a debt already accrued. As a general rule that seems sound. I find in *Nathan's Common Law of South Africa, Vol. II at p. 655* the following statement: "so far as the time of payment is concerned, it is clear that there can be no payment of anything before it is due, since so long as no debt is in existence, there can be no payment. Thus if the debt has become annulled because there has been no compliance with the condition upon which it was undertaken, payment thereof cannot take place. Not only can the debtor not be compelled to pay, nor the creditor to receive payment before the condition is fulfilled, but if the debtor was unaware of the condition and paid the debt in error he may recover the same by the *condictio indebiti*". But he goes on to add "a payment which is invalid through non-fulfilment of the condition precedent may become validated by subsequent fulfilment of the condition, such fulfilment *having a retrospective effect extending to the time* the agreement was made. But where a period of time and not the fulfilment of a condition precedent has been agreed upon for payment, *and the debtor pays before such period has elapsed, the payment will be valid*".

The case we are dealing with is a clearer case of a valid payment having taken place on the date of the bond, for that is the very date the parties agreed upon as the date on which the first payment of interest should be made.

Mr. Perera's argument seems to me to beg the question when he bases it on the premise that there was no interest due at the time the bond was executed or in other words, no existing obligation to pay it.

In my view, by virtue of the special argeement between the parties four months' interest fell due at the moment the bond was executed and the mortgagee paid over the money to the mortgagor.

The bond provides that the principal shall be payable on demand "and until such repayment to pay interest on the said sum . . . . at and after the rate of 18 per cent. . . . . to be computed from the date hereof and payable once in four months in advance . . . . and the first of such payment of interest to be made on this day of execution of these presents, provided however that if the payment of interest be regularly made in the manner aforesaid the said mortgagee . . . . . shall be bound to accept interest . . . . at the rate of 14 per cent. . . . . ." Here there are two separate covenants: one to pay the principal on demand; the other to pay interest in advance. By paying in advance the mortgagor obtains a four per cent. reduction of interest.

It is clear that the mortgagor agreed to pay interest in advance. If he failed to do so on the 1st day of every four-month period a cause of action would at once have accrued to the mortgagee to sue, on the covenant, for the recovery of the interest. There was, therefore, a present debt, an existing obligation. If, however, after interest had been paid for four months the mortgagee recovered the principal as he was entitled to do on the strength of the "on demand" clause before the four-month period had elapsed, the mortgagor gets back the overpaid interest, not on the principle of the *condictio indebiti* but on that of the *condictio causa data, causa non secuta*.

For these reasons, I reach the conclusion that the last date on which there was payment of interest on this bond was November 14, 1927.

I do not think I shall be justified in paraphrasing the date of the last payment of interest, into "the last date in respect of which interest has been paid".

The appeal fails. I dismiss it with costs.

DE KRETSER J.—

The only question raised on this appeal is one of law and it arises from the following facts:—Plaintiff lent the defendants on November 14, 1927, Rs. 2,250 on a mortgage bond which required him to pay interest once in four months, in advance. The first four months' interest was accordingly deducted when the bond was executed. No other interest was paid. Plaintiff brought this action on March 11, 1938, and the defendants pleaded section 6 of Ordinance No. 22 of 1871 in bar of his action. The plea was upheld in the trial Court. The question is whether this decision was right.

To begin with it is necessary to say at once that payment of interest is regarded as implying not merely an acknowledgment of an existing debt, but a promise to pay it, and therefore prescription runs from the date of the implied new promise. In other words, payment of interest is on much the same footing as a part payment of the principal and is in fact, on a higher footing since a part payment need not necessarily involve a promise to pay any balance, whereas a payment of interest clearly acknowledges the existence of the debt out of which the obligation to pay interest arises.

That this is the principle is clear from the English cases and text books dealing with the subject, the text books dealing with the Indian law on the same subject and our own decisions, of which *Kathirvelu Chetty v. Ramaswamy Chetty*[1] resembles the present case most closely.

Next, it is important to note that payment is put on the same footing as a written acknowlegdment, because there is not merely a verbal promise, but an act which establishes the new promise. It is something done after the first promise and dates the period of prescription from the date of that something which is done. It must also be remembered that because every man is supposed to know the law the Legislature uses language in ordinary matters which the average man can understand. Maxwell (On the interpretation of Statutes) at page 81 says, "In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense; *uti loquitur vulgus*". In this connection see also *Beedle v. Bowley*[2].

Section 6 of the Prescription Ordinance is enacted in connection with a number of daily occurrences, viz., the loan of money and the payment of interest.

Would any ordinary person be so subtle-minded as Counsel for the appellant and think that the money handed over in November was not paid that day, but was paid as each month's interest became due, or the four months' interest became due, and would he think that there was an implied condition that the plaintiff should pay himself on the defendant's

[1] *4 C. A. C. 26.* [2] *12 S. C. 401.*

behalf, that such a payment would be by the defendant himself and, what is more, that the date of payment should be the last day of each period fixed, and that there would be an implied promise made on that date to pay the loan? Would he think that something done to-day is in reality something done tomorrow?

I very seriously doubt that he would ; and when one realizes that interest accrues from day to day, the position would be that a payment would be made every day and a promise implied every day, and so plaintiff would have about one hundred and twenty promises to rely on, and would choose the latest as suiting his purpose best. The whole position is too artificial to be accepted unless one must do so.

Let us examine the argument that the word "payment" in section 6 has only one meaning, viz., "the discharge of an obligation" and therefore there can be no payment in advance, but what really happens is that a sum of money is deposited with the creditor who is authorized to apply it as the interest falls due. Suppose this is correct, does there follow a further reference that he did so apply the money, that is, that he kept his promise and that he kept it on some particular date, also a matter of inference ?

Now "interest" is really the compensation which the lender receives for his not being able to use his money, his *id quod interest* in fact. Therefore there can be no interest at the time the money is lent. Therefore a payment on that day is not only not a payment, but not a payment of interest. And this view seems to have been adopted in a case reported in Sanjiva Row's book on the similar provision in the Indian Act. Unfortunately a report of that case is not available locally. That case took the further logical step of saying that therefore there was no payment of interest as contemplated by the Statute.

But this does not help the appellant and therefore Mr. Perera invited us to hold that the creditor did as a matter of fact apply the money in his hand as the interest fell due.

Now, we have not here even evidence that he did as a matter of fact so apply the money from time to time. In the Indian Courts it seems to have been held that an entry in his books was not enough to take the action out of the Statute.

The provision comes to us from the English law and Halsbury says, (*vol. 19, p. 67, Article 110—old edition*) "the payment must, however, be such that from it a promise to pay can be inferred in fact and not merely implied in law". Mr. Perera's argument therefore of an implied payment and an implied promise cannot be upheld. And this interpretation is not only a practical one applied to a practical matter, but is full of common-sense of which all law is deemed to be the embodiment.

But is the word "payment" wrongly used when it is applied to is payment of interest in advance ? To the average person it is not. It is so used by the creditor himself in the bond. The word does have a meaning other than the discharge of an obligation, and in fact the money was deducted in this instance on the result of a contract the terms of which were approved of by the creditor if they were not actually insisted on by him. In fact it was not a payment by the debtor implying a promise but a deduction made by the creditor for his own benefit, in which

deduction the debtor acquiesced and perhaps had no option but to acquiesce. The debtor's act was on that date and there is nothing in fact to justify the artificial position that he was making a promise from time to time. It was much the same as if the creditor had in his hands some money belonging to the debtor which he applied when and how he chose. *Nathan*, in his work (*Vol. II., p. 655*) says, " So far as the time of payment is concerned, it is clear that there can be no payment of anything before it is due ; since, so long as no debt is in existence, there can be no payment. Thus, if the debt has become annulled, because there has been no compliance with the condition upon which it was undertaken, payment thereof cannot take place . . . . But a payment which is invalid through non-fulfilment of the condition precedent may become validated by subsequent fulfilment of the condition, such fulfilment having a restrospective effect extending to the time when the agreement was made. But where a period of time, and not the fulfilment of a condition precedent, has been agreed upon for payment, and the debtor pays before such period has elapsed, the payment will be valid . . . . Where a particular date for payment is expressly stipulated, and is in the contemplation of the parties . . . ., payment must take place on the due date. Thus, where it was stipulated in a lease that the rent should be paid in advance on January 1st of each year, and if not paid on the due day the lease should be cancelled, it was held that a tender of rent on January 3rd . . . . was not a compliance with the terms of the lease ".

This quotation shows that the word " payment " can be and is used for something paid in advance in terms of an agreement and that it receives legal sanction, and that the time of payment is the date agreed upon. It also shows that what is not a legal payment may become one later, but the date is still the earlier date.

The error in Mr. Perera's argument is that he assumes that payment can have only one significance and that he confuses appropriation with payment, such a payment as is an act of the debtor and makes him responsible for an implied promise to pay. The appropriation, if made, may be in order, but it is still the act of the creditor, whether made on the authority of the law or on an agreement with the debtor.

The true position is that the defendant was under a legal obligation to pay and he paid as agreed. He was then under no obligation to pay till the four months had elapsed, and meanwhile it was the plaintiff who was under a legal obligation to apply the payment and when he did, he discharged his obligation and not any obligation of the defendant.

Using the rules of construction already referred to the payment of interest was made on November 14, 1937, and the action is prescribed. Alternatively, there was no payment of interest and then too the action is prescribed. There is nothing in Mr. Perera's hypothetical case which prevents such a conclusion being deduced. He asked whether if a man paid twelve years interest in advance, the action would be prescribed in ten years. In the first place such a thing is scarcely likely to happen and it is impossible to legislate for freakish situations, nor to reason from the unusual. Taking things as they exist in Ceylon, a payment of twelve years interest would at least be a return of the loan on the very day it was

taken, and the creditor would have no greater grounds or cause of complaint than if the loan had never been taken. He would have the full use of his money and would not be entitled to interest and the money paid as interest would in reality be a return of the loan. Assuming that the rate of interest were very low, then a great part of the loan would be returned and such an unusual proceeding on the part of the borrower would, and ought to put the lender on his guard against some possible trick in the transaction. If he were so negligent as to go on with it, then he has only himself to blame if he is outwitted by an all too intelligent and unscrupulous borrower. But his position would be on the same footing as a man who neglects to enforce his bond in time and the hardship of his case cannot alter the law and make the payment at once a series of payments, and the debtor's single act a series of acts. There is nothing to prevent him from suing on the bond at any time and if he waits for over ten years, he has merely thrown away his many opportunities and been outwitted.

The appeal is dismissed with costs.

Appeal dismissed.