

1954

Present : Gratiaen J. and Gunasekara J.

G. P. BASTIAN SILVA, Appellant, and W. G. M. WILLIAM SILVA,
Respondent

S. C. 315—D. C. Chilaw, 12,526M

Prescription Ordinance (Cap. 55)—Goods sold and delivered—Appropriation of payments—Part-payment—Section 8 and proviso to section 12.

Where there has been a series of transactions, between two persons, of goods sold and delivered, each item of purchase constitutes a separate debt, and the mere occurrence of an item of purchase within the period of limitation does not keep the claim alive as to the older sales effected outside that period. Further, when payments are made by the debtor without any indication that they are to be appropriated on account of all the debts collectively, the creditor is entitled at his option to appropriate the payments in reduction of the earlier debts which are statute-barred, but such appropriation cannot operate by itself as a part-payment so as to take the balance due on those earlier debts out of the statute; the balance due on the earlier debts continues to be statute-barred.

APPPEAL from a judgment of the District Court, Chilaw.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

Kingsley Herat, for the plaintiff respondent.

Cur. adv. vult.

February 12, 1954. GRATIAEN J.

This is an appeal against a judgment in favour of the plaintiff for a sum of Rs. 1,482/95, representing the balance found to be due to him upon a series of transactions whereby he sold and delivered various quantities of fish to the defendant.

The only issue which calls for decision is whether a part of the plaintiff's claim is barred by prescription. The action was instituted on 16th November, 1946, and the account particulars filed with the plaint show that the total value of the consignments of fish which were delivered within one year of that date was only Rs. 295/50. *Prima facie*, therefore, the claim in respect of the earlier consignments could not be maintained in view of the provisions of section 8 of the Prescription Ordinance. „ In a claim for goods sold and delivered, the mere occurrence of an item of purchase within the period of limitation does not . . . keep the claim alive as to the older sales effected outside that period ”—*Silva v. Adakkan Kangany*¹, *Usuf Saile v. Punchi Menike*² and *Abdul Cader v. Velaiden*³. The plaintiff has not pleaded or proved that there was an “ account stated ” between the parties in respect of the series of transactions to which the action relates. His claim, when analysed, is based on a number of separate causes of action, each of which is referable to a particular contract of sale.

In meeting the plea of prescription the plaintiff relied on three payments, amounting to a total sum of Rs. 261, which he had received from the defendant on November 23rd, 24th and 27th, 1945, in liquidation of the liability (so it has been argued) “ on the running account ” which includes the earlier items which were *prima facie* statute-barred. The learned judge accepted this argument and allowed the plaintiff's claim in its entirety.

The legal consequences of a payment in reduction of a debt are clear enough, and the application of the principle involved is expressly provided for in a proviso to section 12 of the Prescription Ordinance. The effect of a part-payment, in circumstances from which a promise to pay the balance may legitimately be inferred, is to take the case out of the operation of the statute—*Moorthipillai v. Sivakaminathan*⁴. As was explained in *Arunasalem v. Ramasamy*⁵, the law, in the absence of anything to the contrary, implies a promise to pay the balance, even if the debt was already prescribed.

If a claim relates to a single debt which is *prima facie* statute-barred, the burden is on the creditor relying on the subsequent payment “ to show that it was made on account of the debt, and as a part-payment ”—per Clarence C.J. in *Sathappa Chetty v. Muttu Raman Chetty*⁶. If, however, there are more debts than one, the creditor must prove that the part-payment was made “ on general account ” in order to defeat a plea of prescription in respect of all the items—*Re Rainforth : Gwynn v. Gwynn*⁷.

Let us apply these principles to the facts of the present case. Neither party has explained the circumstances in which the defendant made the payments of November, 1945, relied on by the plaintiff. There is accordingly no evidence which justifies an inference that, the defendant intended any of those payments to be appropriated *on account of all the debts collectively*. It follows that, as the defendant himself made no appropriation at the time of payment, the plaintiff was entitled at his

¹ (1904) 1 Bal. 36.

² (1904) 3 A. C. R. 121.

³ 3 C. W. R. 57.

⁴ (1912) 14 N. L. R. 30.

⁵ (1914) 17 N. L. R. 156.

⁶ (1882) 5 S. C. C. 62.

⁷ (1879) 49 L. J. Ch. 5.

option to appropriate the payments to any debts which he selected, *but such appropriation could not operate by itself as a part-payment so as to take the balance of the selected debt out of the statute.*—*vide the authorities quoted in Eailsham Vol. 20 p. 639 footnotes (r) and (t).* The reason is perfectly clear; an inference of an acknowledgment (which is treated as a promise to pay the balance) cannot be drawn except from the conduct of the debtor himself.

In my opinion the judgment under appeal was not justified by the evidence. The plaintiff was entitled to (and I shall assume in his favour that he did in fact) appropriate the payments made in November, 1945, in reduction of the earlier debts which would otherwise be statute-barred, but the balance due on those debts continued to be statute-barred. On the other hand, his claim amounting to Rs. 295/50 on the later transactions which took place within a year of the institution of the action is not prescribed. I would accordingly vary the decree by ordering the defendant to pay to the plaintiff a sum of Rs. 295/50 with legal interest thereon from the date of the action until payment in full, together with costs taxed in the class in which the action ought to have been instituted. The plaintiff must, however, pay to the defendant the costs of this appeal.

GUNASEKARA J.—I agree.

Decree varied.
