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June, 5.

Before Mr. Justice Stuart and Mr. Justice Sulaiman.

BASDEO, RAM SARUP (DEFENDANT) *v.* DILSUKH RAI, SEWAK RAM (PLAINTIFF).*

Act No. IX of 1872 (Indian Contract Act), section 63—Accord and satisfaction—Cheque for smaller amount than sum due sent as payment in full and cashed by creditor—Creditor not bound to accept it, if at all, as payment in full.

Where the debtors, knowing that the creditors claimed a certain amount, sent them a cheque for a smaller sum, with a condition that it was to be taken as in full satisfaction of the claim, and the creditors cashed it and then wrote intimating that they did not agree to the condition, it was *held* that the acceptance of the cheque by the creditors was not a conclusive proof of acceptance of the condition and did not preclude them from suing for the balance of their claim. *Miller* v. *Davies* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narayan Prasad Ashthana*, for the appellants.

Munshi *Girdhari Lal Agarwala*, for the respondents.

STUART and SULAIMAN, JJ. :—Second Appeal No. 862 and Second Appeal No. 960 of 1921 are connected appeals arising out of the same suit. The plaintiffs' firm brought a suit to recover a sum of Rs. 1,265-13-0 with interest, on the following allegations. Their case, devoid of all unnecessary details, was that the plaintiffs, as agents of the Standard Oil Company, sold 900 tins of kerosine oil to the defendants, the price of which was Rs. 3,982-13-0, that the defendants paid only a sum of Rs. 2,717, and that the balance of Rs.1,265-13-0 was still due. The plaintiffs claim to recover this amount with interest.

On behalf of the defendants it was contended that the sum of Rs. 2,717 had been paid in full payment of the plaintiffs' claim and that, having accepted that amount, the plaintiffs are no longer entitled to claim any balance. It was further pleaded that a sum of Rs. 500 had been paid by the defendants as advance money for the oil contract and should be deducted.

The court of first instance decreed the plaintiffs' claim for the recovery of Rs. 1,265-13-0 and disallowed the defendants' objection as to the payment of Rs. 500. There were two appeals filed before the learned District Judge, who has affirmed the decree of the court of first instance. The defendants have come up here in second appeal, and, on their behalf, it is contended that it is not now open to the plaintiffs to

* Second Appeal No. 862 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 13th of April, 1921, confirming a decree of Kanleshar Nath Rai, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Agra, dated the 31st of May, 1920.

(1) Not reported: referred to in (1889) 22 Q. B. D., 610.

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ignore the conditions under which the amount of Rs. 2,717 was paid under a cheque and to claim the balance.

It appears that the defendants sent a cheque for Rs. 2,717 with a condition that this sum was being paid in full discharge of the total amount due to the plaintiffs. The plaintiffs retained this cheque and ultimately cashed it, and two days after this they sent a letter to the defendants intimating that they had cashed the cheque, but that they did not agree to receive the amount in full discharge of the payment of the sum due to them. The learned advocate for the defendants contends that this is really a case of accord and satisfaction and he relies strongly on section 63 of the Indian Contract Act which embodies that principle. Now, if the plaintiffs had really agreed to accept a smaller sum in full payment of the amount due to them, then there can be no doubt that it would no longer be open to them to go behind that admission and claim the recovery of the balance. On the other hand, if they did not agree to accept that amount in full discharge of the payment of the amount due to them, section 63 of the Indian Contract Act would have no application, for that section would only apply where a promisee agrees to remit wholly or in part the performance of the promise made to him or accepts, instead of it, any satisfaction which he thinks fit. The main question, therefore, was whether the plaintiffs did, in fact, agree to accept the money sent in full satisfaction of their claim. The finding of the learned District Judge on this point is against the appellants and *primâ facie* that finding is a finding of fact which cannot be interfered with in second appeal.

The learned advocate for the defendants (appellants), however, contends that the plaintiffs took time in retaining the cheque which was sent under an express condition that the money was being paid in full discharge of the amount due to the plaintiffs, and that this was a conclusive proof of their having agreed to accept that offer; and it is strongly contended that the sending of the money by the defendants must be deemed to be a conditional offer made by them and the retaining of the cheque by the plaintiffs was an acceptance of that offer, and it is, therefore, urged that the plaintiffs having accepted the defendants' offer to pay the sum of Rs. 2,717 in full discharge of the amount due, are not entitled to go behind it. This contention, if well founded, would convert the question into one of law. We are, however, of opinion that the

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mere fact that the plaintiffs retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of their debt does not raise any conclusive presumption that they had accepted it as a conditional offer made by the defendants. Every case is to be judged on its special circumstances, and in this particular case the lower appellate court has come to a finding that the plaintiffs did not really agree to accept the amount in full discharge of their debt. This is really a question of fact.

On behalf of the defendants reliance is placed on the analogy of section 83 of the Transfer of Property Act, and it is contended that inasmuch as the sum was paid in full discharge of the amount due, the principle underlying that section applies. Reference was also made to the case of *Ram Chandra Marwari* v. *Keshobati Kumari* (1). But the perusal of that judgment would make it clear that that case proceeded entirely on the provisions of section 83 of the Transfer of Property Act which distinctly provides that the money so deposited would have to be accepted in full discharge of the amount due. Their Lordships of the Privy Council, in the case referred to above, lay stress on the fact that the mortgagee was bound to comply with the requirements of the statute under which the money was paid into court and that there was no jurisdiction in the court to permit the money deposited to be drawn out of court on any terms other than those imposed by the statute. That case is clearly distinguishable from the present case. The rule of English law undoubtedly seems to be in favour of the respondents' contention and lays down that if the sum of money sent by a debtor to a creditor is less than the amount actually due, the creditor is not bound to refuse it and may accept the debtor's offer without prejudice to his claim such as it may be. The case of *Miller* v. *Davies* which is an unreported case but is referred to in the judgment in the case of *Day* v. *McLea* (2), is a case which is very much similar to the case before us. In that case a solicitor was entitled to a sum of £50 as costs. The defendant, however, sent a cheque for £25 with a letter stating that in order to put an end to the matter he sent the cheque for £25 on the terms that the plaintiff would receive it in full settlement. The plaintiff kept the cheque and cashed it, but wrote to the defen-

(1) (1909) I. L. R., 36 Calc., 840.
(2) (1889) 22 Q. B. D., 610.

dant that he declined to accept it in full satisfaction of the payment of the amount due and that he required a cheque for the balance. The plaintiff then brought a suit to recover the balance and the defendant pleaded that there was an accord and satisfaction of the claim, but it was held that it was a question of fact on what terms the cheque was kept. The verdict of the jury was that there was no accord and satisfaction, and that was held to be final in the matter. The same principle was accepted in the reported case of *Day* v. *McLea* (1), which also was a similar one. In that the plaintiffs were claiming damages, and the defendants sent a cheque to them for a sum less than the amount claimed, which cheque the plaintiffs retained. Nevertheless it was held that this did not amount to full accord and satisfaction of the claim. It was further remarked that—

"If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and to cause him to act upon that view. In either case it is a question of fact."

Both on authority and principle, therefore, it is clear to our minds that the mere fact that the plaintiffs retained the cheque and cashed it cannot be a conclusive proof in law that they had agreed to accept the amount on the condition offered by the defendants. The question was primarily one of fact and the view taken by the District Judge is binding on us. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

PUTTU LAL AND OTHERS (DEFENDANTS) *v.* DAYA NAND (PLAINTIFF).* 1922 *June*, 5.

Civil Procedure Code (1908), *section* 92—*Suit between rival claimants to the office of trustee—Trustee nominated in trust-deed—Subsequent deed nominating different person.*

Section 92 of the Code of Civil Procedure does not apply to a suit between persons who individually claim a right to succeed to the office of trustee.

Where the founder of a trust had, by the trust-deed, appointed himself a trustee for life and nominated the plaintiff as his successor in that office, but by a subsequent document he appointed the defendants as trustees after him, it was *held* that as he had reserved no power to himself by the

* Second Appeal No. 334 of 1921, from a decree of E. Bennet, District Judge of Farrukhabad, dated the 3rd of February, 1921, confirming a decree of Saiyid Iftikhar Husain, Officiating Subordinate Judge of Farrukhabad, dated the 21st of August, 1920.

(1) (1889) 22 Q. B. D., 610.