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would have been caused to him at all. I would therefore allow the appeal and dismiss the plaintiff's claim on the ground that he was guilty of contributory negligence of which he was fully cognisant, and that is a good defence in law which must prevail.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Iqbal Ahmad

GAJRAM SINGH AND OTHERS (DEFENDANTS) *v.* KALYAN MAL (PLAINTIFF)*

1935 *October*, 22

Contract Act (IX of 1872), sections 60, 61—Appropriation of payments—Time up to which the creditor can make appropriation—Appropriation where only one debt, part of it being a secured debt and another part not amounting to a secured debt.

Where there has been a payment by a debtor to a creditor and no appropriation has been made either by the debtor or the creditor, it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt and at any time, even during the pendency of the litigation concerning the payment, until the judgment is pronounced by the trial court, but not thereafter. If the creditor has not chosen to make any appropriation before then, the provisions of section 61 of the Contract Act come into operation and it is the duty of the court to direct the appropriation in accordance with that section. After the decision of the first court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way.

Sections 60 and 61 of the Contract Act can not in terms apply to a single debt, but the principle underlying the sections has been applied as between the interest and the principal of a single debt, and may be applied where the debt consists of two definite and specified portions, standing on different footings, and it is possible to treat the two portions of the debt as distinct debts. In the case of a mortgage of joint family property made by the manager, for a debt of which a part only is for legal necessity, if at the time of the mortgage, or at least at

*First Appeal No. 445 of 1931, from a decree of Bishnu Narain Tankha, Subordinate Judge of Shahjahanpur, dated the 30th of June, 1931.

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the time when a payment is made, it is definitely known that the debt consists of two portions, one of which is binding on the family and the property and the other only on the manager personally, the debtor making a payment can specify to which portion the payment is to be credited, and in the absence of any specification by the debtor the creditor can appropriate the payment towards one or the other portion. But where it is not clearly known and ascertained that the debt consists of two such definite and specified portions, and especially where the mortgagee regards and maintains the entire debt as being one debt binding on the whole family, it is impossible for him to appropriate the payment towards an unknown and unspecified portion of the debt. In such cases no question of appropriation in its strict sense arises, and the payment must of necessity go towards the discharge of the whole debt treated as one single debt, and to be distributed rateably between the two portions as found by the court.

Dr. *K. N. Malaviya* and Mr. *G. S. Pathak*, for the appellants.

Dr. *S. N. Sen* and Messrs. *S. B. Johari* and *N. C. Sen*, for the respondent.

SULAIMAN, C.J., BENNET and IQBAL AHMAD, JJ.:—The question referred to this Full Bench for decision consists of two parts:

(*a*) Where there has been a payment by a debtor to a creditor and no appropriation has been proved either by the debtor or the creditor, is it open to the creditor to appropriate the amount or any part of it towards the payment of any debt and at any time even during the pendency of the litigation concerning the payment?

(*b*) Whether it is open to a mortgagee of a joint family property, under a mortgage deed executed by the manager of the joint family, when a portion of the mortgage debt was not raised for legal necessity, to appropriate during the pendency of the suit payments made by the mortgagor, towards the discharge of such portion of the debt as was not raised for legal necessity, when no appropriation was made either by the mortgagor or the mortgagee till the date of the suit?

In this case a mortgage deed had been executed by two brothers, Jagdish Singh and Pitam Singh, in favour of Radha Kishan on the 19th of December, 1916, for Rs.15,000 repayable in three years. On the 18th of April, 1921, a sum of Rs.12,469-12-9 was paid to the mortgagee and an endorsement made on the back of the document under the signature of Jagdish Singh, one of the mortgagors. The details were as follows:

	Rs.	a.	p.
On account of interest and compound interest on the entire amount of principal up to 19th April, 1921	7,469	12	0
On account of principal	5,000	0	0

At the time of the payment there was no specification that the amount or any part of it was being paid or received towards that portion of the mortgage debt which may be for or without legal necessity. The present suit was instituted on the 21st of June, 1930, by the receiver of Radha Kishan's estate. In the plaint also the plaintiff did not suggest that the amount had been appropriated towards that part of the mortgage debt which might have been without legal necessity. Indeed, his case was that the whole of the mortgage debt had been taken for legal necessity and was therefore binding on the entire joint family of the mortgagors. The contesting defendants took up the position that no part of the mortgage debt had been borrowed for any lawful or family necessity. The trial court held that the entire amount had been borrowed for legal necessity. But on appeal the learned Judges held that out of the principal amount, the sum of Rs.8,500 was for legal necessity, but not Rs.6,370. On this opinion having been expressed, the learned counsel for the plaintiff respondent requested that his client should be allowed to appropriate the whole of the amount previously paid towards that part of the debt which had not been proved to have been for legal necessity.

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It is quite clear that where there are more distinct debts than one, the debtor may, either with express intimation or under circumstances implying that payment is of a particular debt, make the payment, which must, under section 59 of the Contract Act, be applied accordingly. In the absence of any such intimation or such circumstances the creditor has the discretion under section 60 to apply the payment to any debt, even though barred by limitation. The creditor's right to make the appropriation would certainly last until he had done something which puts an end to his option. In the case of *Cory Brothers and Co.* v. *Owners of the "Mecca"* (1) LORD MACNAGHTEN laid down that the creditor may exercise his right "until the very last moment". It has been held in some cases that the option may be exercised even during the pendency of the suit: See *Seymour* v. *Pickett* (2) and *Kunjamohan Shaha* v. *Karunakanta Sen* (3). But no case has been cited where the option has been allowed as of right after the judgment has been pronounced by the first court. It seems to us that if the creditor has not chosen to make any appropriation until the court pronounces its opinion, the provisions of section 61 come into operation, and it is the duty of the court to direct the appropriation in accordance with that section. After the decree of the first court has been passed it would be too late for the creditor to make up his mind to appropriate the payment in a particular way. The appellate court should as a rule pass the decree which the trial court would have passed on the date when it decided the case. The question as to how appropriation has been made is a question of fact, and the appellate court cannot take this fresh matter into consideration without admitting additional evidence in appeal. If the case has to be decided on the record as it stands, the appellate court must assume that no appropriation had been made by the

(1) [1897] A.C., 286(293). (2) [1905] 1 K.B., 715.
(3) (1933) I.L.R., 60 Cal., 1265.

creditor at all. The fact that the creditor's counsel offers to make the appropriation in the appeal should not carry any weight. We would, therefore, answer the general question referred to us by saying that the creditor can appropriate the payment to any debt until the judgment is pronounced by the trial court, but not thereafter.

The second question is not so simple. In terms sections 59 to 61 of the Contract Act cannot apply to a single loan taken by the manager of a joint Hindu family, part of which may be for legal necessity and part not for such necessity. To start with, the debt is one debt and, strictly speaking, not distinct debts. But the principle underlying these sections has been applied to the case of interest accruing on principal, although the two really form part of one single debt and not distinct debts: See *Luchmeswar Singh Bahadur* v. *Syad Lutf Ali Khan* (1) and also *Maharaja of Benares* v. *Har Narain Singh* (2). Their Lordships of the Privy Council have also in a recent case as in *Luchmeswar's* case applied the principle of appropriation to interest as distinct from the principal: See *Commissioner of Income-tax* v. *Maharajadhiraj of Darbhanga* (3).

Where at the time of the mortgage, or at least at the time of the payment, it is definitely known that one portion of it was for legal necessity or in payment of an antecedent debt of the father and therefore binding on the whole joint family, and another portion not such a debt and therefore due from the father personally, it may be possible to treat the two portions of the debt as distinct debts. There is no reason why at the time of the payment the debtor cannot specify that the amount should go towards the discharge of one or the other portion. If such a specification is made, the creditor would be bound to appropriate it accordingly. If the principle underlying these sections were not applicable

(1) (1871) 8 Beng. L.R., 110(112). (2) (1905) I.L.R., 28 All., 25.
(3) (1933) I.L.R., 12 Pat., 318.

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to such a debt, the result would be that even if the sons make the payment in order to discharge that part of the debt which was for legal necessity, the creditor would have the right to appropriate it towards the other part. This, in our opinion, cannot be the legal position.

Similarly, when it is definitely known that the debt consists of two such portions, the creditor in the absence of any specification by the debtor can appropriate the payment towards one or the other portion. In particular, if the payment is made by the executant himself, the creditor may well appropriate it towards that portion of the debt which was due from the payer himself.

But where it is not clearly known that the debt consists of two definite and specified portions, one for legal necessity and the other not so, the debt must be regarded as a single debt and not as two distinct debts. This would be particularly so where the creditor is maintaining that the whole amount was for family necessity. In such a case it is difficult to see how the creditor can make an appropriation towards an unknown portion of the debt. In cases where both the creditor and the debtor treat the debt as one debt, the former regarding the whole as a joint family debt due from the whole family and the latter as a debt due personally from the manager, it would be difficult for either party to make appropriation without specifically splitting up the debt. In such cases if the amount is paid and received towards the whole debt, it must of a necessity go towards the discharge of the whole debt treating it as one single debt. In such an event no question of appropriation in its strict sense arises. It would be just and equitable to distribute the payment rateably between the two portions as found by the court. This would be all the more so, if the creditor maintains till the time of the passing of the decree that the whole debt was one debt binding on the entire family, and leaves it to the court to decide the matter.

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The question in this form did not arise in the case of *Ram Nath* v. *Chiranji Lal* (1), nor was it decided. In that case the creditor was willing to allow a rateable distribution, and it was the debtor who was saying that the whole of the amount should be appropriated towards that part of the debt which was for legal necessity. As the debtor's option must be exercised at the time of the payment, the debtor had in that case already lost his option and could not compel the creditor to appropriate the amount in a particular way. In the absence of any express specification by the creditor, the court upheld the rateable distribution of the amount. The word "appropriation" as used in that judgment did not mean the exclusive appropriation to one part of the debt, but its rateable distribution between the two portions of the debt.

Our answer to the other part of the question is that when the two portions of the debt have not been definitely ascertained, and the mortgagee regards the whole debt as one debt, it is not open to the creditor to appropriate the payment towards an unknown and unspecified portion of the debt; but he may make the appropriation if the two portions are definitely ascertained, in such a way as to make them constitute two distinct debts, although parts of the same loan.

This is our answer to the question referred to us.

REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

SARJULAL BEHARILAL (DECREE-HOLDER) *v.* SUKHDEO PRASAD AND OTHERS (OBJECTORS)*

1935 *December*, 17

Civil Procedure Code, order XXI, rule 58—*Claimant's objection to attachment of property—Proceeding in execution—Reference to arbitration* ultra vires—*Jurisdiction—Civil Procedure Code, section* 141 ; *schedule II, paragraph* 1.

*Civil Revision No. 477 of 1934.

(1) (1934) I.L.R. 57 All. 605.