APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

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Feb. 11.

T. D. FOSTER AND FOUR
v.
R.M.A.L. CHETTY FIRM.*

Appropriation of payment by a debtor on behalf of himself and other debtors —Effect of creditor holding the payment in a suspense account without appropriation to the debt specified—Indian Contract Act (IX of 1872), section 59—Subsequent reappropriation of the same payment by the debtor, not joined by other debtors.

Held, that where one of several debtors makes on behalf of himself and other debtors, payment to the creditor to be appropriated to a specified debt, and the creditor accepts the payment, the creditor must at once apply the payment accordingly and not hold it in a suspense account on behalf of the debtor who made the payment.

Held further, that a subsequent arrangement with the debtor, for applying the payment so held in a suspense account to another debt, is invalid, and that the debt, which if the creditor had complied with his legal duties would have been satisfied, cannot be revived without the consent of all the obligors.

Devenport v. *The Queen*, (1877) 3 A.C., 115 ; *Croft* v. *Lumley*, (1 58 6 H.L.C., 672—*followed.*

This was an appeal heard by a Divisional Bench of the High Court (Lentaigne and Carr, JJ.) against the judgment and decree of the District Court of Amherst for Rs. 5,776 and costs, in respect of the balance alleged to be due under a promissory-note for Rs. 6,000 executed by the five appellants in favour of the Respondent Chetty, awarded against three appellants. The following is a summary of the facts and points arising as found in the judgment of Lentaigne, J.:—

The appellants had pleaded payment, *firstly*, by a bearer cheque for Rs. 6,000 dated the 8th May 1922, drawn by the appellant Datta in favour of the

* Civil First Appeal No. 61 of 1923 from the District Court of Amherst in Civil Regular No. 136 of 1922.

appellant Foster and endorsed by Foster, which was handed to the appellant Dayalal and paid by him to the Chetty on the 9th May 1922, with a direction to credit the amount to the promissory note in suit, and *secondly*, by a cheque for Rs. 120, the amount of the interest due on promissory note, which was admittedly paid to the Chetty on the 24th July 1922 and to the account of this promissory-note.

The respondent admits that the said cheque for Rs. 6,000 was handed to him by Dayalal, but he stated that it was handed to him on the 8th May and not on the 9th May ; he denied that he was given a direction to credit the cheque to the promissory-note now in suit, but alleged that directions were given to credit it to some old account or other promissory-notes. It has been held that he has given varying accounts as to the actual direction received. The cheque bore a note to the effect that it would not be payable until the 15th May, and the Chetty admits that on the 18th May he collected and received the amount from the Chetty banker on whom the cheque was drawn ; he states that he then credited the Rs. 6,000 to Dayalal's credit as an entry in a suspense account and that when Dayalal came to him on the 22nd May, he credited it to various old promissory-notes on which he says that Dayalal and others were liable, and that he only credited Rs. 750 thereof to the principal sum and a further Rs. 120 thereof to interest on the promissory-note in suit.

The District Judge has accepted appellants' allegations that the handing of the cheque took place on the 9th May, and that the direction was then given to the Chetty to credit the amount to the promissory-note in suit ; but he has accepted the Chetty's story as to what occurred on the 22nd May, and had held that on the 22nd May Dayalal altered

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his previous direction and gave the Chetty the direction to credit the amount to other promissory-notes, etc. He had held that Dayalal was then committing a fraud on the appellant, Foster, but that the Chetty was entitled to persuade Dayalal to alter the previous appropriation and to act on the substituted agreement as to appropriation. On this last finding he had granted the decree now under appeal.

* * * * *

Villa (with *Hay* and *Jeejeebhoy*)—for the Appellants.

Chari—for the Respondent.

LENTAIGNE, J.—I would hold that on the 9th May, 1922, when Dayalal handed the cheque for Rs. 6,000 to the plaintiff Chetty, he gave the Chetty a specific direction that the proceeds of that cheque should be paid to the promissory-note in suit.

It is admitted that the Chetty realised the proceeds of this cheque on the 18th May, and I would hold that payment by cheque, which was only conditional on the 9th, became an absolute payment on the 18th May when the proceeds were obtained. The Chetty states that he then credited the Rs. 6,000 to Dayalal's account in order to keep it in suspense until he could see Dayalal. I will discuss below the legal question whether he was legally entitled to take that course.

The Chetty has then stated, and the District Judge has found as a fact, that on the 22nd May an arrangement was come to between the Chetty and Dayalal that the Rs. 6,000 should be appropriated to certain earlier promissory-notes and that only Rs. 750 and Rs. 120 should be credited to the promissory-note n suit. The District Judge has also found as a fact

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that the Chetty had entered the amout in the suspense account with the object of persuading Dayalal to alter the previous appropriation to that recorded in the accounts on the 22nd May and that he succeeded in persuading Dayalal to do so. Having regard to the fact that Dayalal admits that he signed Exhibit B, showing that he had received the other promissory-notes from the Chetty on the 22nd May, I would agree with these findings of fact as to what occurred on the 22nd May, but in my opinion these facts will not affect the legal position as existing on the 18th May.

I think that a question arises whether Dayalal was really acting in part as the agent of Foster when he made the payment on the 9th May, but for the purposes of argument I will first assume that Dayalal was not acting as agent for anybody and that he was merely paying a debt due by himself and others. On this assumption he was a debtor paying a debt by a cheque which was a conditional payment and when making such payment he gave a direction as to the appropriation of that payment, which became an absolute payment on the 18th May at a time when the said direction still remained uncancelled. It appears to me that there is no question that the Chetty, on the 9th May, accepted this conditional payment by cheque, and it is clear that he did not repudiate such acceptance at any time up to the date of his receiving the actual cash amount. In my opinion it was the duty of the Chetty creditor to obey the direction as to appropriation when he received the cash or proceeds on the 18th May, and that the provision at the end of section 59 of the Indian Contract Act, 1872, would have applied and was mandatory to the effect that the payment "must be applied accordingly." If then the Chetty had

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done what he was bound by law to do, he would on the 18th May have made an entry of satisfaction to the extent of Rs. 6,000 in respect of the promissory-note in suit. In that case there would be no question that both Foster and Datta, as well as the other appellants, would have ceased to be liable to the Chetty for more than the small balance of Rs. 120 by reason of the increase of the total debt to the extent of the one month's interest of Rs. 120 then due. I think that the appellants were entitled to that benefit from this payment, whether the Chetty did his duty or not, and I do not think that the Chetty can alter that position by committing a breach of duty. If it is held, as I think it must be, that Foster and Datta were released from liability to the extent of Rs. 6,000 on the 18th May 1922, I do not see how any agreement come to between Dayalal and the Chetty on the 22nd May could alter that position and revive a liability which had been *pro tanto* extinguished. I think that it would be necessary to get Foster and Datta, as well as the other appellants, to join in the agreement reviving that liability for the portion of the debt which had been extinguished.

Though I am satisfied that the above propositions are correct statements of the law applicable to the facts of this case, I have been unable to find any authorities on cases exactly parallel to this case ; and it was admitted at the Bar that the advocates concerned had been unable to obtain any authority in point. On behalf of the respondent it was contended that so long as the Chetty did not act on the direction, if any, received on the 9th May, it was open to him to keep the money in a suspense account and subsequently to get the debtor to cancel the appropriation. My answer to this argument is that in my

opinion the Chetty was not entitled to keep the money in a suspense account for a single hour, because he had received and accepted the cheque and the money with a specific direction which by law he was bound to carry out. Section 59 of the Indian Contract Act is specific and mandatory to the effect that the payment must be applied accordingly, and a failure to carry out that statutory provision for a single day or a single hour was illegal and a breach of duty. The section does authorise a creditor to refuse to recevie a payment, if he does not agree to the specific direction as to the appropriation thereof; but in my opinion it is clear that such election must be made at once, and if he does not at once reject the payment, it is too late for him to contend that he has not received a payment legally appropriated to the particular debt. Once he receives the payment, the question arises with what intention did the debtor make the payment? For example, it has has been held by their Lordships of the Privy Council in *Devenport* v. *The Queen* (1), that in a case where a tenant, who had incurred a forfeiture, tendered a sum for rent which the landlord nominally refused to accept as rent but did in fact keep under protest, stating that he was receiving it conditionally and without prejudice to the right to deal with the land as forefeited, the landlord was taking a course he was not entitled to take and had thereby waived the forfeiture. The same point had previously been decided by the House of Lords in the case of *Croft* v. *Lumley* (2), where the landlord told the tenant at the time of payment that he refused to accept the money as rent but that he took it solely as compensation for the use of the land. Consquently, it would seem that even if the Chetty had told

(1) (1877) 3 Appeal Cases, 115. (2) (1858) 6 H.L.C.,672 ; 10 E.R., 1459.

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Dayalal on the 9th May that he refused to comply with his direction to apply the cheque to the note in suit and that he intended to apply it to other notes, it would not have justified him in keeping the cheque in contravention of Dayalal's direction, and his only proper course would have been to return the cheque then and there to Dayalal. *A fortiori* the Chetty after apparently accepting the cheque without protest on the 9th May, was not entitled to disregard the direction on the 18th May when he received the cash. These two authorities and other decisions to which I have referred bear out the construction which I have placed on section 59 of the Indian Contract Act, 1872. That being so it seems clear that the note would have been satisfied and discharged *pro tanto* on the receipt of such payment; and such was in fact the intention of Dayalal on the 9th and there is no evidence that he had any change of intention before the 22nd May, and moreover it is not suggested that he had any communication with the Chetty between 9th and 17th May. Once it is clear that the note was satisfied and discharged *pro tanto* on the 18th May, it seems an obvious proposition that the satisfied portion could not be revived without the consent of the five obligors, assuming even that a revival with their consent would not have been a breach of the stamp law.

For the above reasons I would hold that the promissory-note in suit was satisfied by the two payments discussed above except as regards a small balance of Rs. 4-12-0 due for interest which has not been referred to in the argument and is too small to justify a decree when it can more conveniently be deducted from the cost to be awarded.

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I therefore set aside the decree of the District Court and direct that the suit as against all defendants be dismissed, but that the plaintiff Chetty shall pay the costs in both Courts to the appellants, Foster and Datta, less Rs. 4-12-0 to be deducted therefrom as the balance of interest.

CARR, J.—I concur.

CIVIL REFERENCE.

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Heald, and Mr. Justice Beasley.

STEEL BROTHERS & COMPANY, LIMITED

v.

GOVERNMENT.*

1924

Mar. 10.

Super-tax—Indian Income-tax Act (XI of 1922), section 2, sub-section (15), sections 16, 12, 55—Distribution of profits accumulated by a Company in the form of bonus shares—Shareholders with no option to take profits in any other form— "Income, profits or gains" to the shareholder do not include such issue of shares.

Where a limited liability Company capitalized the sum standing in its books as undivided profits and directed that the sum be distributed to the holders of the ordinary shares in the form of fully paid bonus shares, the shareholders being given no option to take the profits in any other form, *held*, that such a transaction does not result in any income, profits or gains to the shareholders, within the meaning of section 2, sub-section (*15*) and sections 16 and 12 of the Indian Income-tax Act, 1922.

Bouch v. *Sproule*, L.R., (1887), A.C., 385 ; *Commissioners of Inland Revenue* v. *Blott*, L.R., 1K.B.D., (1920), 114—*followed.*

Swan Brewery, Limited v. *The King*, (1914) L.R., A.C., 231—*distinguished.*

This was a reference to the High Court made on the 7th December 1923 by the Commissioner of Income-tax, Burma (J. C. Mackenzie, Esq. M.A., I.C.S.), the question referred being,

"Did the transactions evidenced by the resolutions passed by the Indo-Burma Petroleum Company, Limited,

* Civil Reference No. 12 of 1923.