

LETTERS PATENT APPEAL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
LeRossignol.*

RELU MAL AND OTHERS (PLAINTIFFS) Appellants

1925

versus

Nov. 18.

AHMAD AND OTHERS (DEFENDANTS) Respondents.

Letters Patent Appeal No. 238 of 1924.

*Indian Contract Act, IX of 1872, sections 59, 60, 61—
Appropriation—of payments by a debtor who owes several
debts to the same person—when to be made and to which
debt.*

Held, that, when a debtor owes several debts to one person and makes a payment to him, it is the direction, either express or implied, of the debtor with regard to the application of the payment which governs that payment's destination, and the wording of section 59 of the Indian Contract Act shews that that direction must be synchronous with the payment.

Where, however, the debtor has not taken advantage of the privilege conferred upon him by section 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt actually due and payable to him from the debtor and section 60 grants to the creditor plenary discretion to make appropriation at any time even up to the time of trial.

Cory Brothers and Company, Limited v. The owners of the Turkish Steamship "Mecca" (1), and Seymour v. Pickett (2), followed.

Kundan Lal v. Jagan Nath (3), dissented from.

Clayton's case (4), distinguished.

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Abdul Raof, dated the 12th November 1924.

SHAMAIR CHAND, for Appellants.

MEHR CHAND, MAHAJAN, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL J.—This appeal arises out of a suit brought on a deed of hypothecation for the

(1) (1897) Ap. Cases 236.

(3) (1915) I.L.R. 37 All. 649.

(2) (1905) I.K.B.D. 715.

(4) (1816) 15 R.R. 161.

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recovery of principal and interest. The original creditor was one Ulfat Ram and the plaintiffs are his representatives. The main defence raised was a complete repayment of the claim and the further contention that other payments in respect of other debts had been made to the widow of Ulfat Ram. On the production of Ulfat Ram's account book it was found to contain in the defendant's account seven entries on the debit side and five on the credit side. The first item on the debit side was strangely enough the item secured by the deed of hypothecation ; the other items were unsecured. Of the items on the credit side two were specifically appropriated, the other three had not been specifically appropriated, to the unsecured debit items ; but it is significant that the total credits tallied with the total unsecured debts. On these facts the Courts below have concurred in holding that, though the main defence is false, the unappropriated credit items must be applied in reduction of the present claim on the hypothecation-deed as being the earliest debit, and for this course they have sought and found justification in section 61 of the Contract Act.

For the plaintiffs it has been urged before us that inasmuch as the debtor did not take advantage of the privilege conferred upon him by section 59 of the Contract Act, section 60 of that Act gives the creditor plenary discretion to apply any payment at any time even up to the time of trial to any debt he chooses and after having heard counsel for both sides we hold that the appeal must succeed.

Now, it is indubitable that when a debtor owes several distinct debts to one person and makes a payment to him, it is the direction either express or implied of the debtor with regard to the application of

the payment which governs that payment's destination. A careful consideration of section 59 of the Indian Contract Act leaves no doubt, however, that that intimation must be synchronous with the payment. Where, however, the debtor has not taken advantage of the power conferred upon him by section 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt actually due and payable to him from the debtor. The learned Judge of the Single Bench, following *Kundan Lal v. Jagan Nath* (1), holds that sections 59, 60 and 61 of the Contract Act were enacted to embody the rule laid down in *Clayton's* case (2). It was held in that case that the creditor can take advantage of the discretion allowed to him by section 60 only at the time of the payment and is not at liberty to make any *ex post facto* appropriation. Now, *Clayton's* case was based on peculiar facts. The question which the Court was called upon to decide was whether a customer of a bank was justified in claiming that payments made to him by the bank were payments made against particular credit items in his account and not against the account as a whole, and it was held that the payments were made against the whole account, and that the creditor was not at liberty to urge *ex post facto* that particular payments to him should be debited against particular credit items. In that case, however, the learned Master of the Rolls stated that he was not called upon to determine the general question of the creditor's right to make the application of indefinite payments; so that the decision clearly has no general application. The view that the creditor may apply payments up to the very last moment, even up to the time of the trial, was adopted

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(1) (1915) I.L.R. 37 All. 649.

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in *Cory Brothers and Company, Limited, v. The owners of the Turkish Steamship "Mecca"*, *The "Mecca"* (1), and in *Seymour v. Pickett* (2), and has been followed by the High Courts of Bombay, Madras and Patna. On the other side is only the ruling relied upon by the Court below, and the main reason of the view of that Court appears to be that were the law as laid down in *Cory Brothers and Co.* (1), accepted, there would remain no scope for the application of section 61 of the Contract Act which provides that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time. This objection, however, does not impress us, for it is not difficult to imagine cases in which neither party, either by oversight or by mistake, has made any appropriation. Moreover, a Code attempts to provide for all possibilities.

In our opinion the Courts below might well have held on the peculiar circumstances of this case that the original creditor Ulfat Ram did appropriate the payments to the unsecured debts, but we are bound by the finding of fact that he did not do so. Holding, however, that section 60 of the Contract Act grants to the creditors plenary discretion to make the appropriation at all times up to the time of trial (and it is obvious that this rule contravenes no principle of justice or equity), we consider that the plaintiffs at the institution of the suit had appropriated payments to the unsecured debts and were not restricted in the exercise of this discretion to the point of time when the payments were actually made.

We accordingly accept the appeal, set aside the decrees of the Courts below and decree in full for the plaintiffs with costs throughout.

C. H. O.

Appeal accepted.

(1) (1897) Ap. Cases, 286.

(2) (1905) I.K.B.D. 715.