

1932  
 COMMISSIONER  
 OF  
 INCOME-TAX,  
 BOMBAY  
 PRESIDENCY  
 P.  
 F. E. DINSHAW  
 Mirza J.

The only other provision under the Indian Income-tax Act under which an alleged loss of the kind like the present could be claimed to be deducted, is section 10. Clause 2 of section 10 enumerates the kind of deductions which are to be allowed. The list does not include a bad debt and the list must be held to be exhaustive. See *In re Tata Industrial Bank, Limited.*<sup>(1)</sup>

*Answer accordingly.*

J. G. R.

<sup>(1)</sup> (1921) 46 Bom. 567.

### ORIGINAL CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Mirza.*

JIVRAJ JOHARMAL (ORIGINAL DEFENDANT), APPELLANT *v.* LALCHAND SHREEKISON & CO. (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

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 March 15.

*Transfer of Property Act (IV of 1882), sections 3, 130—Transfer of goods whose price is more than the amount advanced on them—Whether transaction amounts to transfer of actionable claim—Necessity of writing—Novation.*

One M had borrowed a sum of money from G. & Co. who held 212 bales of cotton as security for the debt due to them. M was also indebted to the defendant and to another firm in which the defendant was a partner. M, the defendant, and G. & Co. entered into an arrangement by which the 212 bales of cotton were transferred to the defendant who took upon himself the liability for the amount due by M to G. & Co. and M agreed that the defendant should hold the said bales as security for the said debt as well as for the debt due to the defendant personally as also for the debt due to the firm in which the defendant was a partner. The bales of cotton were to continue to remain with G. & Co. who agreed to hold them for the defendant instead of for M. After this arrangement was made M wrote a letter to the defendant saying "our bales 212 which are lying with Gill & Co. are got transferred to your name. When these 212 bales are sold do you please credit the amount of sale-proceeds towards this amount." The plaintiffs who claimed a sum of money from M filed a suit against M to recover that amount and in that suit they obtained an order for attachment before judgment in respect of the said bales subject to the claim of G. & Co. In the said attachment proceedings the defendant took steps to raise the attachment, as a result of which the Court directed the plaintiffs to file a suit

\*O. C. J. Appeal No. 37 of 1931 : Suit No. 3256 of 1925.

against the defendant for a declaration that the said bales belonged to M subject to the claim of G. & Co. and that the defendant had no interest in them, superior to the plaintiffs' claim. The plaintiffs contended that the transaction by which the defendant claimed the said bales amounted to a transfer of an actionable claim and that as there was no writing in respect of the same, it was void under section 130 of the Transfer of Property Act. The trial Court upheld the contention.

On appeal :—

*Held*, reversing the decree of the trial Court, (1) that the arrangement arrived at between M, the defendant, and G. & Co., amounted to a novation, as it resulted in substituting the defendant as a debtor to G. & Co., in place of M, and it made the defendant the beneficial owner of the said bales charged with that debt :

*Sethna v. Hemingway*,<sup>(1)</sup> referred to ;

(2) that even if the said transaction amounted to a transfer of an actionable claim, the letter written by M to the defendant operated as a sufficient transfer in writing to satisfy the requirements of section 130 of the Transfer of Property Act, as that section does not require the writing to be in any particular form.

#### SUIT for a declaration.

Messrs. Gill & Co., who were cotton merchants and Muccadums in Bombay, had with them in July 1925 212 bales of cotton belonging to one Ganeshmal Munda. They had advanced to him a sum of Rs. 27,500 on the security of the said bales.

Ganeshmal Munda in July 1925 also owed a sum of Rs. 10,400 to the plaintiffs, Rs. 3,491-8-0 to the defendant Jivraj Joharmal, and a sum of Rs. 10,500 to Lalchand Bastiram & Co. in which firm the defendant was a partner.

On July 22, 1925, an arrangement was arrived at whereby Munda agreed to transfer the 212 bales lying with Gill & Co. to the defendant's name and on such transfer the defendant was to hold the same as security for the sums of Rs. 3,491-8-0 and Rs. 10,500 as also for the Rs. 27,500 due by Munda to Gill & Co.

On July 23, 1925, Gill & Co. wrote to the defendant a letter wherein they said :—

“ . . . Bales 212 of Sheth Ganeshlal Munda are credited to your account as per his and your instructions and Rs. 27,500 (twenty-seven thousand and five hundred)

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have been debited to your account and credited to the account of Sheth Ganeshlal Munda which please note."

On July 24, 1925, Munda wrote to the defendant a letter wherein he stated :—

" . . . Your account is made up and moneys up to this date are due to you as mentioned below :—

Rs.	a.	p.	
3,491	8	0	up to 21st July 1925.
27,500	0	0	Hawala (transfer entry) of Gill & Co. at Bombay.
10,500	0	0	Hawala (transfer entry) of Bhai Lalchandji Basteramji.

Rs. 41,494-8-0 (in words Rupees forty-one thousand four hundred ninety-four and a half) . . . are to be paid to you. As against the said amount our bales 212 (in words two hundred and twelve) which are lying with Gill & Co. are got transferred to your name. When these 212 bales are sold to you please credit the amount of sale-proceeds towards this amount."

On August 21, 1925, the plaintiffs filed a suit against Munda to recover the amount due to them. On that day they obtained an order for attachment before judgment on the said 212 bales subject to the claim of Gill & Co. on those bales.

On September 10, 1925, the defendant having come to know of the attachment took out a summons for raising that attachment on the ground that Munda's interest, if any, in the said bales was subject to defendant's rights under the arrangement made on July 22, 1925.

On September 25, 1925, the plaintiffs were ordered as a result of the said Chamber summons, to file a suit against the defendant for a declaration that the 212 bales of cotton standing in his name in the books of Gill & Co. were in fact the property of Ganeshlal Munda, and for determining who were the parties entitled to the balance of the sale-proceeds on sale of the said bales after payment to Gill & Co. of the amount due to them. In pursuance of the said order the plaintiffs filed this suit on November 5, 1925.

On the suit coming on for trial, Davar J. held that the transfer of the bales from Ganeshlal Munda to the defendant

on July 22, 1925, was a transfer of an actionable claim, and as such it required a writing according to section 130 of the Transfer of Property Act, and as there was no writing, the transaction was void. He therefore decreed the plaintiffs' claim.

The defendant appealed.

*N. P. Engineer*, with *A. C. Amin*, for the appellant.

*Sir Jamshed Kanga*, Advocate General, for the respondents.

BEAUMONT C. J. This is an appeal from a decision of Mr. Justice Davar, which raises a short point of law. The material facts are that a man named Ganeshlal Munda owed a sum of Rs. 27,500 to Messrs. Gill & Co., who held as security for the debt 212 bales of cotton belonging to Munda. The appellant, who is the defendant in the suit, was also entitled to a debt due from Munda, and there was another firm, in which the appellant was interested, to which was also owed money by Munda. In those circumstances an arrangement was made in July 1925, the effect of which was that the appellant took over the liability of Munda to pay Gill & Co.'s debt, and also the liability for the debt to the other firm in which the appellant was interested though nothing, I think, turns on that debt; and Gill & Co. agreed that they would hold the 212 bales to the account of the appellant, instead of to the account of Munda. The transaction, the nature of which is not in dispute, is proved by a clerk of Gill & Co. who produced Gill & Co.'s books Exhibit 7, which is a letter written by Gill & Co. to the appellant, explains exactly what had happened. In that letter Gill & Co. say :—

“ 212 bales of Ganeshlal Munda are credited to your account as per his and your instructions and Rs. 27,500 have been debited to your account and credited to the account of Ganeshlal Munda.”

The transaction is shown more in detail in Gill & Co.'s books. That letter was written on July 23, 1925, and on the next day Munda wrote to the appellant a letter (Exhibit 9) stating

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that Rs. 41,000 odd, made up of Rs. 27,500 due to Gill & Co., Rs. 10,500 due to the other firm I have mentioned, and the amount due to the appellant "are to be paid to you", that is, the appellant. Then the letter proceeds :—

"As against the said amount our bales 212 which are lying with Gill & Co. are got transferred to your name. When these 212 bales are sold do you please credit the amount of sale-proceeds towards this amount."

So that the effect of that was that the appellant became entitled to the 212 bales, which were deposited with Gill & Co., as security for the total debt of Rs. 47,000 odd, and the appellant took over Munda's debt to Gill & Co.

On August 21, 1925, the plaintiff-respondents, who had a claim against Munda, applied for attachment before judgment in respect of these 212 bales, and in September a summons was taken out by the present appellant to raise the attachment, and as a result of that summons an order was made on September 25, 1925, that the plaintiffs be at liberty to file a suit in respect of the matters in dispute. On November 5, 1925, the plaintiffs filed this suit, and they alleged in the first instance that the transaction between Munda and the appellant was a collusive and fraudulent transaction, and that the appellant was merely the nominee of Munda, and that the bales all the time in substance belonged to Munda. At the trial those charges of fraud and collusion were withdrawn, and an amendment was allowed on certain terms as to costs by which the plaintiffs claimed that the transaction by which the appellant (the defendant in the suit) claimed the 212 bales was void under the Transfer of Property Act, and the question of law which we have to determine is whether that claim is correct or not. The learned Judge held that the transfer of the bales from Munda to the plaintiff was a transfer of an actionable claim which under the Transfer of Property Act must be in writing, and he further held that there was nothing in writing to satisfy the requirements of the statute.

Mr. Engineer on behalf of the appellant takes two points. He says, first, that the transaction was not a transfer of an actionable claim, and, secondly, that, if it was a transfer of an actionable claim, then in fact Exhibit 9 is a sufficient transfer in writing to satisfy the statute. Before dealing further with his contentions, I should refer to the material words of the Act. Under section 130 of the Transfer of Property Act, it is provided that a transfer of an actionable claim shall be in writing signed by the transferor. That is all in the section material for the present purpose. Then section 3 defines what is an actionable claim. It says an actionable claim means a claim to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property. Pausing there, this debt was clearly secured by hypothecation or pledge of moveable property, and, therefore, the debt itself does not fall within the definition of actionable claim. But then the definition goes on to say that actionable claim includes a beneficial interest in property not in the possession either actual or constructive of the claimant which the civil Courts recognise as affording grounds for relief.

Now, it is said here on behalf of the plaintiff-respondents that Munda was entitled to a beneficial interest in these bales, and that cannot be questioned; and it is further said that as a result of the transaction of July 1925 that beneficial interest in the bales passed to the appellant. In substance, no doubt, that is so. Before the transaction of July 1925 Munda was entitled to redeem these bales on paying the amount due to Gill & Co. and Munda was entitled to any surplus proceeds of sale which might result if Gill & Co. sold the bales; and after the transaction of July 1925 both of those beneficial interests or claims belonged to the appellant as chargees. Therefore, say the respondents, the beneficial interests of Munda in the bales, being an actionable claim, are transferable under section 130 only by a transfer in writing, and there being no such transfer, the bales did not pass to

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the appellant. Mr. Engineer's answer to that is that if this transaction be looked at properly the Transfer of Property Act has no application at all; the transaction did not involve a transfer but was an instance of what is known as "novation". The ordinary case of "novation" is where you have a debt due by A to B, and another debt due by C to A, and the three parties meet and agree that, instead of A paying B, and C paying A, C shall pay B. The result of such an arrangement is that you destroy the old debts which A owed to B, and which C owed to A, and you substitute for those debts a new debt by C to B. That is in law something different from a mere transfer of the debt. In so far as the debt in this case is concerned, I feel no doubt that the case was one of "novation," the three parties, Gill & Co., Munda, and the appellant, all being parties to the transaction. Mr. Engineer contends that the same principle must apply to the interest in the bales, and that the real transaction amounted to this, that Gill & Co. handed the bales back to Munda in return for payment of Rs. 27,500, that Munda then handed the bales over to the appellant as security for moneys due to the appellant, and that the appellant then handed the bales back again to Gill & Co., who lent to him the same amount as had previously been lent to Munda. The transaction of course was not carried out by actual transfers and payments, but by *havala* entries in the books. I think on the whole that that argument of Mr. Engineer is sound, and that the true view is that the transaction was not a transfer of property, but was a substitution of the appellant for Munda as the debtor to Gill & Co. and as the beneficial owner of the bales charged with the debt. I think authority for that conclusion is to be found in the case, on which Mr. Engineer relies, of *Sethna v. Hemingway*.<sup>(1)</sup> In that case a sum of Rs. 10,500 was deposited in a bank by a person referred to in the head-note as W, and W transferred the receipt for that amount to his nephew H. The receipt

<sup>(1)</sup> (1914) 38 Bom. 618.

was not of course a negotiable instrument, but H took the receipt to the bank with a letter from W, and the bank acted on the receipt and paid the money to H; but the Court expressed the opinion that if the bank had acted on the receipt only by accepting H as the person entitled to the money on deposit, nevertheless that would not have been a transfer of property within section 130 of the Transfer of Property Act but would have been a mere instance of novation.

Upon the second point I feel no difficulty at all. The learned Judge held that the document Exhibit 9, to which I have referred, and which contains a statement by Munda that the "bales are lying with Gill & Co. and are got transferred to your name," did not amount to an instrument in writing within section 130 because it merely recorded in writing a transaction which had already taken place. That letter is dated July 24, and the entries in Gill & Co.'s books are dated July 23. But, in my opinion, the use of the past tense has no significance. Section 130 provides that a transfer not in writing is in effect a nullity. Therefore, if in fact there is, or purports to be, a verbal transfer of an actionable claim made on July 23, and then there is an instrument in writing on July 24 which refers to the transfer having been made, it seems to me that the instrument in writing on the 24th must be read as being in law the transfer. In point of fact the intended transfer on July 23, not being in writing, could only operate as an agreement for transfer and the document on the 24th, referring to the transfer as having been made, must, I think, be construed as referring to the intention of transfer having been arrived at. I think it would be much too narrow a construction to put on this document to say that, merely because it is expressed in the past tense, it cannot operate as a present transfer within section 130, which does not require the transfer to be in any particular form. Even, therefore, if I had been of opinion that the transaction in question amounted to a transfer of an

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actionable claim, I should have held that in this case there was a sufficient transfer in writing to satisfy the requirements of section 130 of the Transfer of Property Act. That is a conclusion which the learned Judge himself says that he was anxious to arrive at, but did not see his way to do so. I think we ought to arrive at that conclusion and the appeal must, therefore, be allowed with costs.

Appeal allowed with costs. Cross-objections dismissed with costs. Suit dismissed with costs. Appellant entitled to the money in the hands of the two attorneys.

MIRZA J. I agree that this appeal should be allowed. On July 23, 1925, the position between the parties seems to have been this: A sum of Rs. 27,500 was due by Munda to Messrs. Gill & Co. As against that amount Messrs. Gill & Co. held 212 bales of cotton belonging to Munda. Under section 172 of the Indian Contract Act the property in those bales was in Munda subject to this that under the common law Messrs. Gill & Co. as pledgees of the goods and being in possession of them had a right to sell them and appropriate the sale-proceeds towards the amount they had advanced to Munda. Under those circumstances it is clear that although the legal ownership in the goods was still in Munda, in reality he had only a beneficial interest to the extent of any surplus there might be after these goods were sold and the sale-proceeds were first applied towards the claim of Messrs. Gill & Co. against Munda. At this time Munda was also a debtor of the appellant in certain sums of money and a tripartite agreement seems to have been arrived at by which the liability of Munda to Messrs. Gill & Co. was extinguished. So was also the security given by Munda to Messrs. Gill & Co. In place of that liability and the security going with it a new contract seems to have been arrived at, by which the appellant became liable to Messrs. Gill & Co. in the sum of Rs. 27,500 and Messrs. Gill & Co. continued to be in possession of the 212 bales but not as pledgees from

Munda but as pledgees from the appellant. The result of the tripartite agreement between the parties amounted, in my opinion, to a novation and not to an assignment of the beneficial interest which Munda originally had in these 212 bales. The entries in the books of Messrs. Gill & Co. which were exhibited in the case as well as the letter Exhibit No. 7 written by Messrs. Gill & Co. to the appellant make it quite clear that as from July 23, 1925, the appellant was to be regarded as the debtor of Messrs. Gill & Co. and the security was to be held by Messrs. Gill & Co. as from the appellant. The appellant, in my opinion, is entitled to succeed on the first point which has been raised on his behalf by Mr. Engineer.

With regard to the second point, viz., the construction which is to be put upon Exhibit 9 it is clear that although the letter Exhibit 9 from Munda to the appellant speaks of the transfer as having been already effected and seems at first sight merely to record what had already taken place, the document must be taken as a whole and in view of the fact that the original is in the vernacular regard must also be had to the mode of thought among the people of this country. It is clear that the document is intended to transfer to the appellant any beneficial interest that may have remained in Munda in respect of these goods. In my opinion Exhibit No. 9 would in any event satisfy the requirements of section 130 of the Transfer of Property Act if this transaction is to be regarded as an assignment of an actionable claim.

Attorneys for appellant: Messrs. *Shamrao, Minochehr & Hirralal*.

Attorneys for respondents: Messrs. *Thakoredas & Co.*

*Appeal allowed.*

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