

**(1910) 07 BOM CK 0023**  
**In the Bombay High Court**  
**Case No : First Appeal No. 90 of 1907**

|                                   |    |            |
|-----------------------------------|----|------------|
| Ganpatrao Balkrishna Bhide        |    | APPELLANT  |
|                                   | Vs |            |
| H.H. The Maharaja Madhavrao Sinde |    | RESPONDENT |

**Date of Decision :** 06-07-1910

**Acts Referred:**

**Citation :** (1910) 12 BOMLR 780

**Hon'ble Judges :** Batchelor, J; Basil Scott, J

**Bench :** Division Bench

**Final Decision :** Allowed

## **Judgement**

Basil Scott, Kt., C.J.—This is a suit to recover from the defendant Rs. 4178-7-2 in respect of moneys alleged to be due by him to the plaintiff on relinquishing his agency of the plaintiffs Deccan estates.

2. The plaintiff is the Maharajah Scindia of Gwalior who has Inam and Patilki Vatan and other lands in the Bombay Presidency and entrusts supervision of them to an agent at Poona.

3. On the 28th of January 1897 the defendant was appointed the plaintiff's agent and took over charge on the 2nd of February in that year. He was dismissed towards the end of 1901 and on the 9th of December in that year gave overcharge of his office to Parchure, the plaintiff's agent at the date of the filing of the suit. The most important item of claim relates to a cash balance of Rs -136-15-4 which according to the accounts furnished by the defendant to the new agent was in his hands on the 9th of December.

4. The defendant pleads that when the plaintiff appointed him as agent he, the defendant, deposited Rs. 3,000 as security with Shrimant Gopalrao Vithal Saheb Apte a First Class Sardar of Gwalior at the direction of the plaintiff himself and when he came over charge to the new agent he gave to him a letter to show the balance due out of the said deposit, and the plaintiff accepted the letter and passed a receipt in his favour

5. The material issues raised in the lower Court with reference to this claim are, the 1st, 7th and 8th issues.

(1) Does the plaintiff prove that all or any of the sums aggregating Rs. 4,178-7-2 due to him from the defendant?

(7) Has the defendant deposited Rs. 3,000 with Sardar Gopalrao Vithal at the desire of his master when he was first appointed "

(8) if so, is the defendant entitled to set off that amount against such "amount as may be found due from him to the plaintiff?"

6. The hearing of the case was very much delayed by an order of dismissal upon allegations of a compromise which subsequently proved to be incorrect and the suit was then restored and tried by the direction of this Court. It has now been disposed of by the Subordinate Judge who has passed a decree for the plaintiff for the principal sum claimed together with the other smaller sums.

7. The case has, however, been tried on very unsatisfactory materials, for, the plaintiff relying upon his sovereign rights has declined to answer some very pertinent interrogatories administered to him by the defendant as to interviews alleged to have taken place between them. On the other hand the defendant apparently hoping to the last for a settlement with the plaintiff gave very meagre evidence. The alleged depository, Gopalrao Vithal Saheb Apte, was not examined in the earlier stages of the suit; and at the time when the completion of the trial had been directed by the High Court, was dead. The question at issue has, therefore, to be decided chiefly upon documentary evidence. It appears that on the 9th of December 1901 when the defendant handed over charge to the new agent a memorandum was prepared of the property handed over which stated that the balance in the defendant's hands found due to the end of Samvat 1957 was Rs. 2982-15-11, and had been handed over. This memorandum was endorsed by Parchure. It is not pretended by the defendant that the balance was handed over in cash. It is, however, admitted that a letter dated the 9th of December 1901, addressed to Kunte, the head of the Mafi Office of the plaintiff at Gwalior, and signed by the defendant (Exhibit 127) was handed to Parchure stating that the defendant had handed over charge and got a receipt and that steps should be taken to recover the Rs. 2,982-15-11, being the amount of the balance with the defendant, from his money kept in reserve by Scindia Sirkar with Gopalrao Vithal Apte for the due discharge of the functions of his office and that a letter had also been sent to Apte. This was forwarded to the Mafi Office on the 10th of December 1901 along with the memo above referred to bearing Parchure's endorsement.

8. In proof of the deposit with Apte the defendant produces a document signed by Apte from which it appears that from October 1895 to October 1897 money of the defendant had been lying at interest with Apte and that on the 13th October 1898, the date of the document, there was due for principal, interest and kosha Rs. 3,017-14-0, and that it was agreed that that sum should remain as the

defendant's deposit as long as the office of Vakil was continued in relation thereto without interest accruing thereon.

9. The documents in which the defendant refers to this deposit are all consistent with each other. In Exhibit 127, the letter of assignment, he speaks of the money as his rupees kept in reserve by Scinde Sirkar with Apte for the due discharge of the functions of his office. In Exhibit 131 he says that the amount due from him should be recovered by the Sirkar from Apte as the cash balance in connection with the office of Vakil deposited as The v. In Exhibit 150, dated the 19th of July 1902, the defendant writing to Apte speaks of the rupees as having been secured with Apte by way of security on an oral order from the Sirkar.

10. Apte's only letter upon the subject, Exhibit 129 of the nth of June 1902, states that when the defendant obtained the appointment as the plaintiff's Vakil it was agreed that the money should be kept by Apte by way of security and that the Maharajah had sent him an order to call on the defendant to pay the balance due to the Maharajah which having been done the defendant had forwarded Parchure's receipt which Apte had sent on to the Maharajah asking for directions as to the return of the defendant's money detained with Apte by way of security.

11. There is no oral evidence whatever touching the circumstances under which the deposit was made. The defendant merely says he paid Parchure by cheque on Apte and not in cash. The Maharajah has declined to answer the interrogatories administered to him on the subject. Apte died in 1905 without having been examined and his son who was examined on interrogatories denies that any deposit was made with his father. Parchure alleges that when the defendant gave him the letter of the 9th of December 1901 he said he had Rs. 3,000 in deposit with Apte as security for his having stood surety for him.

12. The learned Judge held that it was proved by the acknowledgment, Exhibit 184, that Apte held Rs. 3017-14-0 in deposit for the plaintiff and was to retain the same in his custody as long as the defendant occupied the position of the plaintiff's Vakil and that as stated in Apte's letter of the nth of June it was agreed when the defendant obtained employment with the plaintiff to hold the sum which was already in deposit with Apte, as security.

13. He takes the view, however, that the money was held by Apte for his own security as the guarantor of the fidelity of defendant and that the deposit was not made at the plaintiff's desire or with his cognizance or knowledge. 1 He says that Parchure was simple enough to accept Exhibit 127 in payment of the cash balance though neither he nor the Maffi officer could have any legal right upon the letter to enforce the demand against Apte if he declined to comply with it.

14. Now the money held by Apte was either (i) a deposit creating an actionable claim of the defendant transferable by him for any purpose, or (2) money held by Apte on account of the defendant and the plaintiff as security for the defendant's fidelity in his agency and applicable to answer any failure by him to account, or (3) money held by Apte for his own personal security against any claim which

might be made by the plaintiff against him as guarantor for the defendant's fidelity. In case (3) the defendant would not be entitled to claim the money from Apte till the latter had been freed from his liability under his guarantee nor would the amount of the deposit be material to the plaintiff as Apte's liability would be personal and unlimited.

15. In case (2) the deposit would be held with the plaintiff's cognizance as security and Apte would be a mere stakeholder bound to pay it in any manner agreed upon by the defendant and the plaintiff.

16. The two documents signed by Apte which relate to this deposit are inconsistent with the theory which found favour with the learned Judge. There is no suggestion in Exhibit 184 of any personal liability on the part of Apte for the behaviour of the defendant, while Apte's letter of the nth June 1902 (Exhibit 129) points strongly to the conclusion that he held the deposit at the orders and with the approval of the plaintiff and was willing to pay it back to the defendant if the plaintiff permitted him to do so. This view is supported by the reference by the defendant in Exhibit 127 to Scindia Sirkar in Exhibit 150 to the " oral order " from the Sirkar.

17. Either in this view of the case or in the first alternative of an actionable claim the defendant by directing the plaintiff's servants to apply virtually the whole of the deposit in satisfaction of the balance due on the agency account and by giving notice of this direction to Apte had put it out of his power to deal with the deposit in any way and had passed the property therein to the plaintiff,

18. After receiving Apte's evasive letter of the nth June 1902 the defendant wrote to him again on 19th July 1902 (Exhibit 150) requesting him to pay over the deposit at once on demand from the plaintiff's Mafi Office and stating that the money had been lodged by way of security on a verbal order of the plaintiff.

19. This letter was given by the defendant to the plaintiff's agent Parchure with an endorsement in the following terms: " The above-mentioned letter should be shown to Apte Saheb and he should be informed to pay the rupees. And I should be favoured communicating to me his reply in writing as to what he has to say. You should show this letter to him through the Maffi Office. Then he will certainly pay the rupees".

20. It appears from Exhibit 128 that the Mafi Office thereafter wrote to Parchure saying that Apte said the deposit was held, on account of a private matter between him and the defendant, but the defendant does not appear ever to have been informed of this reply.

21. In October 1902 this suit was filed ignoring the efforts made by the defendant to have the deposit money applied in payment of the balance due.

22. When at the hearing of the appeal the case was discussed from the point of view of the letter of the 9th December 1901, being an assignment of an actionable claim, the plaintiff's pleader suggested that the case should be

remanded as the plaintiff might be able to adduce further evidence on the point. In view of the scanty evidence on the record, we acceded to this suggestion framing issues to draw the attention of the lower Court and the parties to the points arising for consideration. The plaintiff however notwithstanding an ample allowance of time has adduced no further evidence and the defendant has examined three witnesses who carry the case no further. The learned Judge appears from his judgment on remand to have failed to appreciate the points remitted to him for consideration and the bearing of the documentary evidence upon them. If we draw presumptions against the plaintiff it is not without having given him an opportunity of clearing up all matters appearing in evidence against him.

23. It is clear that, if Apte had the money, it could and should have been recovered from him. His letter of the 11th June 1902 shows he had the money and had been in communication with the plaintiff about it and had offered to pay it to the defendant if permitted to do so by the plaintiff. He would, therefore, have had no answer to a claim by the plaintiff fortified by the defendant's letter of assignment. Apte was a Gwalior Sirdar resident within the jurisdiction of the plaintiff's Courts and the plaintiff cannot be permitted to shield him from liability at the expense of the defendant who has in consideration of money due by him assigned to the plaintiff his property in the deposit. One of the interrogatories administered by the defendant to Apte's son was as follows :-"Were you ever called upon till now to pay the aforesaid sum by the Sirkar?" The answer given on the 24th October 1906 was: 1 Never was the demand made. "

24. It is a well recognised principle that where a creditor has the control of a security he is chargeable with what he might have received from it but for his wilful default : see *Williams v. Price* (1824) 1 S. & S. 581, *Mayer v. Murray* (1878) 8 Ch. D. 424 *Peacock v. Purssell* (1863) 32 L.J.C.P. 266 *Yglesias v. Mercantile Bank of the River Plate* (1878) 3 C.P.D. 330.

25. On the ground that the money mentioned in Exhibit 184 was held by Apte as a stakeholder and was validly assigned by the defendant to the plaintiff in satisfaction of the balance due on the agency account being the purpose for which it was agreed to be held by Apte and that the plaintiff being able to recover the amount so assigned neglected to do so we are of opinion that he is chargeable with the amount. We, therefore, find on the 7th and 8th issues in favour of the defendant.

26. With regard to the remaining items decided in the lower Court against defendant, we do not think there is any ground for disturbing that decision. Costs throughout payable in proportion to the success of the parties.