

(1995) 02 KL CK 0052
In the High Court Of Kerala
Case No : A.S. 642 and 660 of 1991

Kodi Valappel Abdul Majeed and Another	APPELLANT
Vs	
Chirayil Kakkunnath Ummer Kunhi	RESPONDENT

Date of Decision : 10-02-1995

Acts Referred:

Contract Act, 1872 — Section 59, 60

Citation : (1995) 1 KLJ 375

Hon'ble Judges : K.T. Thomas, J;K.K. Usha, J

Bench : Division Bench

Advocate : A.P. Chandrasekharan and G. Shrikumar, for the Appellant; K. Divakaran Nair, for the Respondent

Judgement

K.T. Thomas, J.—Two separate money suits, instituted by the same person against a couple, were jointly tried and were decreed in terms of the plaintiffs repelling the plea of discharge set up by the Defendants. These appeals are in challenge of those decrees.

2. The first suit was on a simple mortgage (Ext. A-5) executed by the Appellants for a sum of Rs. 48,000. The second suit was based on a promissory note executed by both Defendants (Ext. A-1) for Rs. 1,52,000. In the said suit Plaintiff credited Rs. 55,000 which Defendants paid before the suit and hence the claim was only for the balance amount with interest.

3. Defendants/Appellants contended, inter alia, that the sum of Rs. 55,000 was paid towards Ext. A-5 mortgage debt and hence the said amount should have been appropriated towards that debt. His further contention is that Defendants had repaid the promissory note debt in full.

4. Plaintiff in a replication filed later admitted that a sum of Rs. 72,000 was also paid by the Defendants over and above the sum of Rs. 55,000. But the Plaintiff put forward a case that the said sum of Rs. 72,000 was appropriated towards another debt due to his wife which was covered by Ext. A-2 cheque drawn by her

in favour of the first Defendant. Learned Sub Judge upheld Plaintiff's contention and found that the amount of Rs. 72,000 was paid towards the debt due to his wife.

5. Learned Counsel for the Appellants argued before us that Ext. A-2 cheque amount was not a separate debt incurred by the Defendants de hors the other two liabilities but it formed part of the consideration for the promissory note. Alternatively he contended that Rs. 72,000 paid by the Defendants was towards the promissory note debt and the Plaintiff is not entitled to use it for any other debt. Regarding the payment of Rs. 55,000 made on 27th September 1990, it was argued that the same was specifically intended to be appropriated towards the mortgage debt.

6. Plaintiff as P.W. 1 has clearly admitted even in his chief examination itself that the payment made on 27th September 1990 was towards the mortgage debt. In the light of such an admission, it is unnecessary to delve into any other evidence on that point. If that be so the mortgage debt stood wiped off by 27th September 1990.

7. We can, therefore, proceed to consider whether Rs. 72,000 which Defendants have paid through cheques could have been used for applying to any debt other than the promissory note debt. Defendants have emphatically repudiated the case that Defendants owed a debt to Plaintiff's wife. Ext. A-2 cheque was drawn by the Plaintiff's wife on 24th November 1987 and it was encashed on the next day, whereas the promissory note was executed on the subsequent day. This was pointed out by the Defendants to support their contention that the cheque amount formed part of the consideration for the promissory note.

8. Be that as it may, we would proceed on the assumption that Ext. A-2 cheque was drawn for creating a different debt. But the real question is whether Rs. 72,000 could have been used for repayment of some other debt. According to the Appellants, the said amount was paid towards the promissory note debt. Could the Plaintiff have utilised the amount for a different debt?

9. As a legal principle, learned counsel for the Plaintiff contended that since no particular direction was given by the debtor it was open to the creditor to appropriate the sum to any one of the debts due from the debtor. The rule of appropriation is based on the maxim *quicquid solvitur, solvitur secundum modum solventis-quicquid recipitur, recipitur secundum modum recipientis* ("money paid is to be applied according to the intention of the party paying it; and money received, according to that of the recipient."). In *Clayton's case* 1816 (1) Mar. 572 the aforesaid maxim was adopted in England as a rule in equity. It was reaffirmed by *Blackburn, J. City Discount Co. v. Mc Lean* (1874) L.R. 692. The said principle has been incorporated in the Indian Contract Act with necessary safeguards as per Sections 59 and 60. Of course, both sections deal with cases where more than one debt are due to the same person. Nevertheless, the principle embodied in Section 60 is that creditor's discretion in making the

appropriation would arise only in the absence of any circumstance indicating debtor's intention regarding appropriation of the money paid by the debtor. If the debtor intimated the creditor about the mode of appropriation the latter has no alternative but to follow the mode intimated. But even if no intimation was expressly conveyed to the creditor he can choose his own option in making the appropriation only in the absence of any circumstance to indicate that debtor had intended how the money paid by him should be applied.

10. The words "other circumstances indicating to which debt the payment is to be applied" in Section 60 of the Contract Act cannot be squeezed into a straight jacket as no fixed meaning can be given to the words. Nor can we catalogue an exhaustive list of such circumstances vide *Bansidhar v. Akhay Ram* (1890) All. W.N. 61. As Section 59 used the words "under circumstances implying", the section envisages a positive feature that there must be express intimation from the debtor or at least there must be circumstances for drawing the inference that debtor wished to have the amount applied for discharging a particular debt when there are more than one debt due from him. Though Section 60 refers to a negative aspect i.e., absence of circumstances, it also denotes the liability of the creditor that appropriation at his option can be made only if there was omission to make the intimation or only in the absence of circumstances indicating to which among the debts the payment is to be applied. In other words, if some indication is gatherable from any circumstance as to how the payment should be applied, then the creditor has no discretion, but the debtor has the right to have the payment appropriated in the way he wanted. The jurisprudential idea is apparent from the provisions that when a debtor makes repayment he must have the upper hand to direct the mode of appropriation. As the legal position is the above even when a debtor says in court that he intended the payment to have been applied to a particular debt the court would be justified in drawing a factual presumption in favour of the debtor. Of course, the creditor can rebut the presumption by showing that a different intention was indicated or that there was complete absence of any indication regarding appropriation.

11. Learned Counsel for the Plaintiff relied on a sentence in the testimony of D.W. 1 (in cross-examination) which reads thus: "It is correct to say that cheques were drawn on the Indian Bank for payment towards the amount covered by the cheque issued by the Plaintiff's wife". The said argument was found acceptance with the learned Sub Judge as sufficient indication to the effect that the money was to be appropriated towards the debt due from the wife. We do not think that the said sentence can be used to make out an intimation to the Plaintiff. But that apart, there is another clear circumstance to indicate that the payment was intended to be applied towards the promissory note debt. The payment was made through cheques (Ext. B-9 series) and in all those cheques first Defendant was shown as the drawee. That fact is a reasonably certain indication that payment was made to the Plaintiff and not to his wife.

12. We, therefore, hold that Rs. 72,000 should have been applied towards Ext.

A-1 promissory note liability. (Appellants have paid Rs. 10,000 during the pendency of the appeal and a further sum of Rs. 50,000 was deposited in the Lower Court as per a direction issued by this Court in C.M.P. No. 6660/91 in A.S. No. 643/91. There is no dispute regarding those payments and hence those payments also should be credited towards Ext. A-1 promissory note liability).

In the result, we find that no amount is due to the Plaintiff under the mortgage debt as that debt was wiped off completely. The suit on mortgage has, therefore, to be dismissed. We do so. Regarding the suit on Ext. A-1 promissory note a decree will be drawn up for the balance amount, if any, after crediting Rs. 1,32,000 (Rs. 72,000 + Rs. 60,000) which Appellants have admittedly paid. In the circumstances of these cases we are of the view that parties shall bear their respective costs throughout and we order so. Lower Court decree will stand modified in the above terms.