Present : De Sampayo A.J. and Pereira J.

1912.

RAMANATHEN CHETTY *v.* SARKUMAN.

153 and 154—D. C. Kegalla, 3,225.

Payment—Appropriation of payment—Intention may be inferred from nature of transaction—Appropriation may be made by creditor without notice to debtor.

Where a debtor makes payment to his creditor, his intention that it should be appropriated to any particular debt or account may not only be manifested by him in express terms, but it may be inferred from the nature of the transaction.

PEREIRA J.—Although an appropriation by a creditor is ordinarily an appropriation made at the moment of payment and with notice to the debtor, yet a *de facto* appropriation by a creditor without notice to the debtor would be binding on the former if the latter insists on his being so bound.

THE facts are set out in the judgment of De Sampayo A.J.

Bawa. K.C., for appellant.

A. St. V. Jayewardene, for respondent.

Cur. adv. vult.

July 30, 1912. DE SAMPAYO A.J.—

The plaintiff, as administrator of the estate of one Muttusamy Chetty, brought this action on March 21, 1911, on a mortgage bond for Rs. 7,000 dated March 5, 1900, and granted by the defendant to the said Muttusamy Chetty. The defendant pleaded prescription. The bond is payable on demand with interest at 15 per cent., but the plaintiff depends on an alleged payment of Rs. 6.18 on July 20, 1902, on account of interset due on the bond. The questions at issue were whether the defendant paid this sum, and if so, whether it was rightly appropriated to the bond account. There was no positive evidence of payment. The only witness called for the plaintiff was Una Sinne Lebbe, who described himself as manager of Muttusamy Chetty's boutique. He produced a ledger written by a kanakkapulle containing a general running account between Muttusamy Chetty and the defendant in respect of goods supplied and money advanced in connection with the boutique. This book showed an entry under date July 20, 1902, of a payment of Rs. 6.18. Entries in books of account regularly kept in the course of business are no doubt relevant, but section 34 of the Evidence Ordinance

1912.

DE SAMPAYO A.J.

Ramanathen Chetty v. Sarkuman

declares that such statements shall not alone be sufficient evidence to charge any person with liability. Mr. Bawa, for the plaintiff, referred to a statement of the defendant in cross-examination that in January, 1901, he paid Rs. 100, adding "the other payments are correct". Here it was obvious that the defendant, who had previously denied having paid anything on the bond, was speaking of payments on the general boutique account. There being no other evidence of the payment of Rs. 6.18 on July 20, 1902, I think the plaintiff has failed to prove any payment so as to take the case out of prescription and to charge the defendant with liability on the bond. Moreover, the District Judge looked upon this entry in the ledger with suspicion, as having been recently made, especially as the daybook which was said to be in existence was not produced, and he found on the evidence that the payment relied on was not made. In view of this finding, it is hardly necessary to go into the other question, viz., whether the payment, if made, can rightly be appropriated to the bond. The defendant appears to have been an old customer of Muttusamy Chetty, and purchased goods and borrowed small sums of money from time to time. The ledger account produced commences as far back as 1896, and is carried down to July, 1902, and shows sundry payments on account. The last entry in the account, which is the sum in question, is as follows: "July 20, by cash Rs. 5 and Re. 1.18 to the new boutique, Rs. 6.18. It is difficult to resist the conclusion that this payment, if made, was for sundries purchased three days previously to the value of Rs. 6.18. Apart from that, the account, as I have said, is a general boutique account, and to my mind the payment was made under circumstances indicating that the defendant appropriated it to the boutique account, and not the bond account. It is true that under date March 21, 1900, there is a debit entry, "Amount paid on mortgage bond No. 14,158 dated 5th Rs. 7,000," but it is immediately followed by the credit entry. "By amount of the above deed Rs. 7,000." This means that the loan on the bond was taken out of the account altogether. Anyway, there is no further reference to the bond in the account. No interest accruing on the bond is calculated or entered. It is hardly conceivable that such a small and odd sum as Rs. 6.18 would in any circumstances have been paid by the debtor, or accepted by the creditor, to the account of a bond on which a very much larger sum was due as interest at the time. It is obvious that the payments from time to time made by the defendant were on the general boutique account, and when the payment of Rs. 6.18 was made on July 20, 1902, I find it impossible to come to any other conclusion than that it was made on the same account. The law does not require that the intention of the debtor to appropriate a payment to a particular account should be declared in express terms; it is sufficient if it can be inferred from his conduct at the

time of payment, or from the nature of the transaction. The same rule, I take it, would apply to appropriation of payments by the creditor himself. From the nature of the transaction, the course of business between the parties, and the state of the running account, I find no difficulty in holding that in this case both the debtor and the creditor at the time of payment and to the knowledge of each other appropriated the Rs. 6.18 to the boutique account, if not in particular to the value of sundries purchased three days previously. On the footing that neither party made any particular appropriation, Mr. Bawa relied on the well-known rule of the Roman-Dutch law that in such a case the law appropriates a payment to the most onerous debt, and argued that the payment of July 20, 1902, should therefore be appropriated to the mortgage account, and that consequently the bond was not prescribed. I should say, if it were necessary to express any opinion on the point, that this rule as to appropriation of payments was intended to benefit the debtor, and not to make his position worse, and that it would not be applied so as to deprive him of the benefit of prescription which the law otherwise gives him. However that may be, I think, for the reasons I have previously given, that the plaintiff's action is barred by prescription, and his appeal should therefore be dismissed.

The defendant now appeals from that part of the District Judge's judgment which deprives him of the costs of the action. I think the District Judge has given good reasons for his order as to costs, and the defendant's appeal should also be dismissed.

I would make no order as to the costs of the appeal.

PEREIRA J.—

On the evidence I am not prepared to hold that it has been proved that the defendant actually paid Muttusamy Chetty the sum of Rs. 6.18 on July 20, 1902; but assuming that that sum of money was, in fact, paid by the defendant, it seems to me that the course of business between the parties clearly indicates that there was at least a tacit understanding between them that the sum should be placed to the credit of the general boutique account between them. From the debit and credit entries of Rs. 7,000 each of March 21, 1900, it is clear that the amount of the bond sued upon no longer formed part of that account, and, indeed, the balance of Rs. 7,840 struck at the end of that account does not include the amount due on the bond. That being so, it cannot be said that there was a part payment of that sum. The view I take here is that the defendant was in reality a party to the appropriation. The English law as to appropriation of payments is in some respects different from the Roman-Dutch, but there is no reason why the rule laid down in *Young v. English*,[1] namely, that the intention of the person

[1] *7 Beav. 10. (See English Reports, vol. XLIX., p. 965.)*

1912.

PEREIRA J.

Ramanathen Chetty v. Sarkuman

making the payment may not only be manifested by him in express terms, but it may be inferred from the nature of the transaction, should not hold good under either law. Assuming, however, for the sake of argument, that the defendant was no party to the appropriation, I am prepared to hold that, still, the appropriation was binding on the plaintiff. Mr. Bawa argued that an appropriation by a creditor must be an appropriation *in limine* and with notice to the debtor. That, no doubt, is how appropriations by creditors are described by the authorities, but in that description they clearly refer to appropriations that are at once binding on the debtor as well as on the creditor. The question remains, however, whether a *de facto* appropriation by the creditor without notice to the debtor is not binding on the former, if the latter insists on his being so bound. I think it is. It is quite clear from what appears in *Voet* (see *46, 3, 16*), *Pothier* (see *3, 1, 7*), and all the other authorities, that the Roman-Dutch law on the subject of the appropriation of payments is based on considerations of advantage to the debtor. In a case cited by Nathan on *The Common Law of South Africa*, it is stated (see *vol. II., p. 596*): "The whole doctrine of the Roman-Dutch law as to appropriation of payments turns upon the intention of the debtor, either express, implied, or presumed." The authorities are agreed that in the case of an appropriation of payments by a creditor the application should not only be "at the instant," but equitable. Both these are conditions in the interests of the debtor, and, therefore, I think it is open to him to waive either or both, and to hold the creditor to an appropriation which, it is proved, he has actually made, although it be that it had been made without notice to the debtor.

I may add that, as observed by Morice in his book on *English and Roman-Dutch Law* (*p. 97, 2nd ed.*), as a result of the requirement that an appropriation by a creditor should be equitable, he would not be allowed to appropriate a payment to a debt which owing to lapse of time would not, but for the payment, be recoverable.

I agree to the order proposed by my brother De Sampayo.

Appeal dismissed.