

ORIGINAL CIVIL,

*Before Mr. Justice Chandavarkar.*CULLIANJI SANGJIBHOY, PLAINTIFF, v. RAGHOWJI VIJPAL
AND OTHERS, DEFENDANTS.*

1904.

September 20.

LAKSHMIBAI, PLAINTIFF, v. CULLIANJI SANGJIBHOY, DEFENDANT.†

Costs—Solicitor's lien for costs—Summary jurisdiction of Court over Suitors—Compromise by parties without knowledge of Solicitor—Solicitor's right to oppose motion—Negotiable Security—Transfer of negotiable security by debtor to his creditor—Effect.

By a private compromise between Cullianji the plaintiff, in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and Rs. 15,853 in full settlement of her claim and a further sum of Rs. 500 for her solicitor's costs.

On the 21st February 1904, possession of the immoveable property was given and a sum of Rs. 500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853 respectively, but the hundis were dishonoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshmibai, by cheque, in lieu of the 2 hundis for Rs. 5,000.

On the 4th June 1904, Lakshmibai's Solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd of June 1904, the plaintiff paid the sum of Rs. 5,853 to Lakshmibai, in cash, in respect of the hundi for Rs. 5,853, which was dishonoured.

The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's Solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of Rs. 9,000 as security for the same.

Held, that in the absence of fraud or collusion between the parties, the Solicitor was entitled to be paid his taxed costs, by the plaintiff, up to Rs. 5,853, being the amount paid by the plaintiff after notice of the lien.

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a Solicitor's lien for costs: and in enforcing it the Court must be guided by the principles of English law.

Whether the Solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction.

* Suit No. 545 of 1891.

† Suit No. 625 of 1903.

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Devkabei v. Jefferson, Bhaishankar and Dinsha⁽¹⁾ and *Khetter Kristo Mitter v. Kally Prosunno Ghose*⁽²⁾, followed; *Ramdoyal Serowgie v. Ramdeo*⁽³⁾ dissented from.

Held, also, that the giving of a negotiable security by the plaintiff to Lakshmi-bai operated as a conditional payment only and not as a satisfaction of the debt. *In re Romer and Haslam*⁽⁴⁾, followed.

THE facts of this case are as follows:—In 1891, Cullianji, the plaintiff, filed a suit (No. 545 of 1891), against the defendants, including Lakshmibai, his adoptive mother, to establish his rights as the adopted son of Sangjibhai Raisey and to recover the property of the deceased.

The suit was referred to arbitration and ended in an award, dated the 28th July 1895.

On the 15th November 1902, the High Court passed an order restraining Raghowji, the 1st defendant, who was in possession of part of the deceased's estate, from delivering possession of the same to the plaintiff, until further order.

On the 9th January 1903, the Court passed a decree in terms of the award and referred the suit to the Commissioner for taking accounts.

This reference was due to the contention of Lakshmibai, that the plaintiff had failed to carry out the terms of the award in her own and her daughter's favour.

In 1903, Lakshmibai filed a suit (No. 625 of 1903) against the plaintiff.

On the 5th February 1904, a compromise was arranged between the parties. By it, Cullianji agreed to give to Lakshmi-bai certain immoveable properties situated at Cutch and a sum of Rs. 15,853 in settlement of her claim and a further sum of Rs. 500 for her Solicitor's costs in both suits.

On the 21st February 1904, possession of the immoveable properties was given to Lakshmi-bai and a sum of Rs. 500 was paid to her. Three hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853 respectively were also given to Lakshmi-bai, but the same were not honoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshmi-bai, by cheque, in lieu of the 2 hundis for Rs. 5,000.

(1) (1886) 10 Bom. 248.

(3) (1899) 27 Cal. 269.

(2) (1898) 25 Cal. 887.

(4) [1893] 2 Q. B. 286 at p. 296.

On the 4th June 1904, Mr. Hiralal Dayabhai, Lakshmibai's Solicitor, gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd June 1904, the plaintiff paid the sum of Rs. 5,853 in cash to Lakshmibai in respect of the hundi for Rs. 5,853, which was dishonoured.

On the 27th July 1904, the plaintiff moved the Court for an order, discharging the order made on the 15th November 1902 and authorizing Raghowji, the 1st defendant, to hand over to the plaintiff the estate of the deceased.

Mr. Hiralal Dayabhai appeared by counsel to oppose the motion on behalf of Lakshmibai and on his own behalf.

Lowndes, for plaintiff and defendant 1:—We contend that the plaintiff, having satisfied the claims of his adoptive mother in both suits, is entitled to have delivery of the property.

The 1st defendant is an old man and he desires to be released from the case and management of the property, in order that he may retire to his native country.

Even assuming that Lakshmibai's Solicitor has the lien, which he alleges, he has no *locus standi* in the present motion, for the property, of which possession is sought, is admittedly the plaintiff's: see *Ramdoyal Serowgie v. Ramdeo*.⁽¹⁾

In the absence of fraud or collusion between the parties, which is denied, the only claim, which the Solicitor could have against the plaintiff, would be in respect of the Rs. 5,853, paid on June 22nd, after notice of the lien. But the payment of Rs. 5,853 was not a payment under the compromise between the parties, but in extinction of an independent liability, arising under the hundi; and the hundi was given to Lakshmibai, before notice of the lien.

The Solicitor has not however the lien, which he alleges, for the only lien, which an attorney can claim in India, is that expressly conferred by sections 217 and 221 of the Indian Contract Act.

Setalvad for defendant 6 and her attorney:—The compromise between the plaintiff and the 6th defendant Lakshmibai was a

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fraudulent and collusive settlement, intended to cheat Mr. Hiralal Dayabhai out of his costs. The High Court has a summary jurisdiction over its suitors and a Solicitor has a right to ask the Court to give effect to his lien for costs, before any order is passed, see *Devkabai v. Jafferson*⁽¹⁾ and *Khetter Kristo Mitter v. Kally Prosunno Ghose*.⁽²⁾

We ask, that the plaintiff may be ordered to deposit the sum of Rs. 9,000, as security for the costs incurred by Lakshmibai in both suits.

Weldon for defendant 8.

CHANDAVARKAR, J.—These are two motions, one arising out of suit No. 545 of 1891, and the other out of suit No. 625 of 1903.

The former suit was brought by Cullianji Sangjibhai as the adopted son of Sangjibhai Raisey, deceased, to establish his right as such adopted son and recover the property of the deceased. The defendants were the executors of the will of the deceased, his two widows Lakshmibai and Raliatbai, and his mother Tejbai.

The suit was referred to arbitration which ended in an award, dated the 28th July 1895.

On the 15th of November 1902, this Court passed an order restraining the 1st defendant, Raghovji, who held possession of the estate of the deceased's firm in Bombay, from delivering and the plaintiff, Cullianji, from receiving possession of the same until further order of the Court.

The suit came on for hearing on the 9th of January 1903 when the Court passed a decree in terms of the award and referred the suit to the Commissioner for taking accounts to ascertain what portions of the award had been carried out and what portions, if any, remained to be carried out. This reference was due to the contention of Lakshmibai, the adoptive mother of the plaintiff, who was defendant No. 6 in the suit, that the plaintiff had not carried out the terms of the award in her and her daughter's favour.

In the meantime Lakshmibai filed suit No. 625 of 1903 against her adopted son Cullianji, plaintiff in the other suit.

(1) (1886) 10 Bom. 248.

(2) (1898) 25 Cal. 887.

Cullianji now, by his motion in suit No. 545 of 1891, asks the Court to discharge the order of the 15th of November 1902, because Raghowji, being too old and ill, wishes to retire. Cullianji further states as one ground for his prayer that he has effected a compromise with his adoptive mother, Lakshmibai, in respect of both the suits and that he has satisfied her claims, so that she can have no opposition to offer to the motion.

Mr. Hiralal Dayabhai, a Solicitor of this Court, who appeared as attorney for Lakshmibai in both the suits, appears by counsel, Mr. Setalvad, to oppose the motion on behalf of the said Lakshmibai and also on his own behalf. He asks the Court to compel Cullianji Sangjibhai to deposit Rs. 9,000 as security for his costs incurred in both the suits as Lakshmibai's attorney. The same prayer is made by him in the other motion which arises out of suit No. 625 of 1903 brought by Lakshmibai against the said Cullianji.

The important question I have now to decide relates to Mr. Hiralal Dayabhai's right of lien for his costs as attorney of Lakshmibai in both the suits.

That right is alleged to arise as against Cullianji Sangjibhai, plaintiff in suit No. 545 of 1891 and defendant in suit No. 625 of 1903, under the following circumstances:—Mr. Hiralal acted as Lakshmibai's solicitor in both the suits and incurred costs. But behind his back Cullianji and Lakshmibai effected a compromise and Cullianji pretends to have made payments to Lakshmibai, who again pretends to have received such payments, but the payments are collusive and fraudulent.

The first question raised by Mr. Lowndes, Counsel for Cullianji, is as to the right of Lakshmibai's solicitor to oppose the motion in suit No. 545 of 1891 on the ground of his alleged lien. Assuming, asks Mr. Lowndes, that the solicitor has the lien he claims, what *locus standi* has he to come in and oppose on the basis of that claim the plaintiff's prayer for possession of the property which is admittedly the plaintiff's. I am of opinion, however, that if the Court has a summary jurisdiction of an equitable character over its suitors in respect of the lien of a solicitor for his costs, a solicitor, engaged by a party to a suit, has a right to come in and say that before any order is passed on the

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basis of a compromise arrived at privately between the parties, effect should be given to his lien. Whether the solicitor moves the Court by an application of his own or 'appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. Cullianji, plaintiff in suit No. 545 of 1891 and defendant in suit No. 625 of 1903, says that he has settled and satisfied the claims of Lakshmibai in both suits, and on the strength of that he asks the Court to discharge the order of the 15th of November 1902. Lakshmibai's solicitor replies that the settlement and the satisfaction are collusive transactions intended to cheat him out of costs incurred by him for his client. I think that the solicitor has a right to be heard on the motion in suit No. 545 of 1891 as upon his own motion in suit No. 625 of 1903. The objection raised by Mr. Lowndes is at the best one of mere form and procedure. Under the English Law, quite independently of any statute, I understand that a solicitor had always a lien on property recovered, and that lien, as pointed out by Jessel, M. R., in *Hamer v. Giles*⁽¹⁾, could always have been enforced by an order in the suit. And in substance it is such an order that I am now asked by the solicitor before me to make.

But it is further urged by Mr. Lowndes that such a lien as the solicitor now claims in respect of his costs does not exist by the law. The learned Counsel's argument is that the only lien which a solicitor in this country can claim is that expressly given to him by sections 217 and 221 of the Contract Act, and that the English Law as to a solicitor's special lien for costs upon a fund realized in a cause has no application here. This argument, however, is disposed of by the decision of Sargent, C. J., and Scott, J., in *Devkabai v. Jafferson, Bhaishankar and Dinska*⁽²⁾, where Sargent, C. J., said :—

"It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic., Cap. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit—see *Morgan on Costs*."

⁽¹⁾ (1879) 11 Ch. D. 942 at p. 947.

⁽²⁾ (1886) 10 Bom. 248 at p. 253.

This is not a mere dictum ; it forms an essential link in the chain of reasoning upon which the actual decision in the case rests. Further, practically the same view was taken by the present Chief Justice of this Court when he was a Puisne Judge of the Calcutta High Court in his judgment in *Khetter Kristo Mitter v. Kally Prosunno Ghose*⁽¹⁾, where the question was whether an attorney for one of the parties to a suit could invoke the summary jurisdiction of the Court in assertion of his lien on the fund recovered in the suit under a compromise. His Lordship held:—

“It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court. But while the right is clear, it must be conceded that the litigants themselves are really masters of the suit, and that it is within their power to compromise it without the acquiescence or even the knowledge of their attorneys. The exercise of this right, however, is subject to important qualifications. In the first place the compromise must have been made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs ; and, secondly, no payment can be made under the compromise to the prejudice of the attorney’s claim after notice of it has been given to the person by whom the payment is made.

“These principles appear to me to be the clear result of the authorities in England ; and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country.”

These two decisions, then, are authorities for the proposition that this Court has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor’s lien for costs, and that in enforcing it the Court must be guided by the principles of English Law. Mr. Lowndes has invited me not to follow these decisions, because neither of them takes note of the law embodied expressly in the Indian Contract Act.

In *Ramdoyal Serowgie v. Ramdeo*⁽²⁾, Sale, J., has expressed his dissent from the decision in *Khetter Kristo Mitter v. Kally*

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(1) (1898) 25 Cal. 837 at p. 890.

(2) (1899) 27 Cal. 269.

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Prosunno Ghose⁽¹⁾. But I prefer to follow the latter because it is supported by the decision of a Division Bench of this Court in *Devkabai v. Jefferson, Bhaishankar and Dinsha*⁽²⁾, which is binding upon me, sitting as a single Judge.

Passing, then, to the merits of the question, it was but very faintly argued before me that the compromise between Cullianji and Lakshmibai was either collusive or fraudulent. There must be clear evidence of collusion and conspiracy to deprive a solicitor of his costs (see the dictum of Fry, L. J., in *The Hope*)⁽³⁾. There is none here. On the other hand, the affidavits and the correspondence relied on at the Bar in the course of the argument leave no doubt on my mind that the compromise was honestly arrived at, and I find no trace whatever of any intention to defraud the solicitor. Nor can I hold upon the materials before me that the payments alleged to have been made to Lakshmibai in accordance with the compromise and admitted by Lakshmibai in her letters and telegrams to her solicitor are collusive transactions. The single fact relied upon by the solicitor's Counsel in impeachment of those payments is that Lakshmibai has not furnished to the solicitor any particulars, though she was frequently asked. But she has herself admitted in her letters and telegrams that she has received everything payable to her under the compromise.

The only ground, then, on which the solicitor, Mr. Hiralal Dayabhai, can rest his claim against Cullianji is that he made one payment, *i.e.*, of Rs. 5,853, to Lakshmibai on the 22nd of June 1904, after he had notice given to him of the lien by the letter of the 4th June 1904. As the other payments had been made before the notice, the lien cannot extend to them, and if Cullianji is liable, his liability can only be in respect of Rs. 5,853. But as to this amount it is contended for Cullianji by his Counsel, Mr. Lowndes, that it was paid on the 22nd of June 1904, because at that date it had become due on a *hundi* drawn by Cullianji in favour of Lakshmibai on a date prior to the date of the notice, *i.e.*, the 4th of June 1904. In other words, it is urged that when the *hundi* was drawn there was a payment

(1) (1898) 25 Cal. 887.

(2) (1886) 10 Bom. 248.

(3) (1883) 8 P. D. 144 at p. 146.

made under the compromise, and the subsequent payment of the amount in cash was a payment not under the compromise but in extinction of an independent liability arising under the *hundi*. Now, the facts bearing on this point, as disclosed in Cullianji's affidavit of the 27th of July 1904, are shortly these:—The compromise between him and Lakshuibai took place on the 5th of February 1904 and by that it was agreed that Cullianji should give her certain immoveable properties at Cutch and a sum of Rs. 15,583 in cash in full settlement of her claim and that of her daughter, and a further sum of Rs. 500 for her attorney's costs in both the suits. She was given possession of the immoveable properties in Cutch on the 21st February 1904, and on the same day Rs. 500 were paid to her as for her attorney's costs. As regards Rs. 15,853, Cullianji gave her three *hundis*, one for Rs. 5,000, the other for Rs. 5,000 and the third for Rs. 5,853, on his Bombay firm. The *hundis*, however, were not honoured on the due dates. Cullianji, therefore, paid the two amounts of Rs. 5,000 each by cheques in March and April last, and he paid Rs. 5,853 in cash on the 22nd of June.

Now the law applicable to this state of facts is thus succinctly stated in Leake on Contract:—"A negotiable security, as a bill or note, indorsed or delivered to and taken by the creditor on account of a simple contract debt, presumptively operates as a conditional payment, that is, payment with the condition that it is paid when due and that the debt revives if it is dishonoured. And the conditional payment operates as consideration for the security by implying forbearance of the debt during its currency. So where payment is to be made by bill by the terms of the contract, the bill given operates in conditional payment, and if dishonoured, it is the same in effect as if no bill had been given." (Leake on Contracts, 3rd Edition, p. 768.) In *In Re Romer & Haslam*⁽¹⁾ the Master of the Rolls said that it was perfectly well-known law that the giving of a negotiable security by a debtor to his creditor operated as a conditional payment only, and not as a satisfaction of the debt unless the parties agreed so to treat it. In *Jambuchetty v. Pallianappa Chettiar*⁽²⁾ the Madras High Court held that whether it was a note or a

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(1) [1893] 2 Q. B. 286 at p. 290.

(2) 13 Mad. L. J., p. 254.

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bill, it was a question of fact in either case whether the parties intended the same as absolute or conditional payment, and the presumption was that the effect of giving or taking a bill or note was that the debt was conditionally paid. There is nothing in the present case to rebut that presumption, and I hold that the payment of Rs. 5,853 to Lakshmibai was virtually one made under the compromise, and that Cullianji Sangjibhai is liable to satisfy Mr. Hiralal's lien of costs upon that amount.

I cannot, however, accede to Mr. Hiralal's prayer that Cullianji should be directed to deposit Rs. 9,000 or any lesser amount as security for such costs. The costs have yet to be taxed, and there is no reason to fear that Cullianji will remove out of the jurisdiction of the Court the property of which he asks to be put in possession.

The order I pass on both these motions is: Discharge the order of the 15th of November 1902.

Direct that the costs incurred by Mr. Hiralal Dayabhai as attorney of Lakshmibai, defendant No. 6 in suit No. 545 of 1891 and plaintiff in suit No. 625 of 1903, be taxed and that Cullianji, plaintiff in the former suit and defendant in the latter, do pay those costs up to the amount of Rs. 5,853. Mr. Hiralal to have his costs of both the motions from Cullianji, who is to have the liberty to appear before the Taxing Master when the bills are taxed.

Attorneys for plaintiff—*Messrs. Bhaishanker, Kanga and Gir-dharlal.*

Attorneys for defendant 1—*Messrs. Little & Co.*

Attorney for defendant 6—*Mr. Hiralal Dayabhai.*

Attorneys for defendant 8—*Messrs. Craigie, Lynch and Owen.*

A. H. S. A.