

THE  
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APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

GANPATRAO BALKRISHNA BHIDE (ORIGINAL DEFENDANT), APPELLANT,  
*v.* HIS HIGHNESS THE MAHARAJA MADHAVRAO SINDE SARKAR  
ALIJA BAHADUR, G.C.S.I. (ORIGINAL PLAINTIFF), RESPONDENT.\*

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*Deposit of money—Stakeholder—Valid assignment by depositor to his creditor—  
Neglect of the creditor to recover—Creditor chargeable with the amount.*

Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor, being able to recover the amount so assigned, neglected to do so he was chargeable with the amount.

FIRST appeal from the decision of Rattonji Mancherji, First Class Subordinate Judge of Poona, in original suit No. 359 of 1902.

The plaintiff, His Highness the Maharaja Madhavrao Sinde Sarkar of Gwalior, sued to recover from the defendant Rs. 4,178-7-2 and for account and damages. The suit was filed on the 22nd October 1902. The plaint alleged that the defendant was plaintiff's Vakeel (agent) at Poona and was as such in management of the plaintiff's Inam, Patelki Vatans and proprietary lands in the Poona, Ahmednagar, Sholapur and Nasik Districts, that the defendant was appointed plaintiff's Vakeel on the 28th January 1897, and on the 2nd February next he took over charge from his predecessor, that subsequently the defendant being dismissed he was directed on the 2nd November

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1901 to deliver over charge of the cash balance, papers and dead-stock to his successor, one Parchure, that the defendant accordingly delivered over charge on two dates, namely, the 9th December 1901 and the 12th July 1902, but on both the occasions he failed to deliver over the account to his successor, he did not properly explain how he had disbursed the various sums that had come to his hands, and the plaintiff was therefore obliged to make the account as far as it was possible from *Goshawaras* (abstracts of accounts) the defendant had sent to him from time to time, and that the suit was filed on the basis of the account so made. Out of the amount which the plaintiff sought to recover from the defendant the item of Rs. 3,136-15-11 was strenuously contested.

The defendant answered that (1) when the plaintiff appointed him as Vakeel, he deposited Rs. 3,000 with Shrimant Gopalrao Vithal *alias* Bhaiya Saheb Apte, First Class, Sardar of Gwalior, at the direction of the Maharaja (plaintiff) himself, and when he gave over charge to the plaintiff's present Vakeel, he gave to the said Vakeel with his consent a "cheque" (letter) to recover the balance due from the said deposit of Rs. 3,000 and the plaintiff accepted the "cheque" and passed receipt in his favour, therefore, the present suit would not lie; (2) he was unable to give a detailed reply with respect to the various items claimed unless he was permitted to see the papers which he handed over to the plaintiff; (3) he was not guilty of negligence or default in the discharge of his duties as plaintiff's Vakeel; he did everything after having obtained the previous sanction of the plaintiff and discharged his duties honestly and diligently; (4) and that it was not explained in the plaint by what act or omission, he occasioned the loss or damage, claimed by the plaintiff.

At the hearing the Subordinate Judge framed nine issues, and while the suit was pending the parties put in a joint application on the 18th March 1905, stating that the dispute between the parties had been compromised and asking for the withdrawal of the suit. This was allowed. On the 4th April 1905 the plaintiff's pleader applied for a review of the above order on the ground that he had consented to the withdrawal of the suit upon the strength of telegraphic messages which were

subsequently found out to be bogus and fictitious and not emanating from the plaintiff Maharaja or his responsible officers. On the 15th July 1905 the Subordinate Judge passed an order restoring the suit to the file.

The defendant appealed against the said order but the appeal was rejected. The High Court, however, in disposing of the appeal directed the Subordinate Judge to take evidence and inquire into the question whether the suit had been properly and validly compromised and to decide it along with the other questions involved in the case.

The Subordinate Judge accordingly added a tenth issue to the nine already framed at the original trial. On the first, seventh, eighth and tenth issues, the findings of the Subordinate Judge were as follows :—

- (1) The plaintiff was entitled to recover Rs. 3,901-14-6.
- (7) The deposit of Rs. 3,000 was not made by the defendant with Gopalrao *alias* Bhaiya Saheb Apte at the desire of the Maharaja.
- (8) The defendant was not entitled to set off that amount against such amount as might be found due from him to the plaintiff.
- (10) The suit was not properly and validly compromised.

The Subordinate Judge passed his decree in the following terms :—

Decree for the plaintiff for Rs. 3,901-14-6, which he do recover from the defendant. The defendant is also hereby ordered to hand over to the plaintiff the kirds and khatawanis for the years he was in office as plaintiff's Vakeel, or in default to pay him Rs. 5 by way of damages. It is but just and proper that the defendant should pay his own costs and those of the plaintiff to the extent of the claim decreed.

The defendant having appealed the High Court on the 3rd September 1908 recorded the following interlocutory judgment :—

SCOTT, C. J. :—The principal point in this appeal is, whether the appellant was entitled to claim that the debt, due by him to the respondent, at the time when he relinquished the agency at the end of 1901, has been satisfied.

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The way in which the point was taken in the written statement was, that there had been a payment by cheque, reliance being placed upon a letter, dated the 9th of December 1901 (exhibit 127). The expression "cheque" is obviously a misdescription, but the real question which arises with reference to that document is, whether the letter does not amount to an equitable assignment of the money held in deposit on account of the plaintiff by Gopalrao Apte, whether, in other words, it is not a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act. If it be held to be a transfer of an actionable claim, the next question which arises is, whether it was accepted by the plaintiff's agents as an absolute or a conditional satisfaction of the claim of the Maharaja for the cash balance shown to be in the hands of the defendant at the time of his relinquishing his agency, and secondly, whether those agents had any authority, express or implied, to accept such transfer in satisfaction, conditional or otherwise, of that claim. In deciding the question of implied authority one consideration which will arise is the object for which the deposit was held by Apte; if it was held for the purpose of meeting such a claim as was preferred by the Maharaja against his agent, the presumption of implied authority will be strong.

The further question, which still arises if the acceptance and the authority are established is, whether, notwithstanding that the deposit money has not in fact been recovered by the Maharaja's agents from Apte, the Maharaja or his agents have not so conducted themselves by neglect or omission as to be estopped from contending that the claim against the defendant in respect of the balance in his hands has not been satisfied by the assignment of his claim against Apte.

None of these questions have been argued in the lower Court, but they are, in our opinion, questions the determination of which is essential to the right decision of the suit upon the merits, and we therefore frame the following issues:—

(1) Was there a transfer of an actionable claim against Apte by the letter of the 9th December 1901, exhibit 127?

(2) If so, did the plaintiff or his agents accept the same in conditional or absolute satisfaction *pro tanto* of the claim for cash balance against the defendant?

(3) If the transfer was so accepted by the agents, had they authority express or implied from the plaintiff so to do?

(4) If so, whether the plaintiff or his agents have so conducted themselves by omission or neglect as to estop the plaintiff from contending that the claim for cash balance has not been satisfied by the transfer?

In considering the last issue the Subordinate Judge should refer to the case of *Peacock v. Purssell*<sup>(1)</sup>.

The Court should take such additional evidence as may be tendered upon these issues and return its findings thereon together with the evidence within four months.

On the first issue the Subordinate Judge recorded a negative finding and gave no findings on the remaining issues.

The appeal then came on for argument before Scott, C. J., and Batchelor, J.

*P. D. Bhide* for the appellant (defendant):—

The lower Court erred in holding that the deposit was not made at the desire of the Maharaja plaintiff. Exhibit 184 is clear on the point. Gopalrao Apte acknowledges therein that the amount was kept with him as security for the proper discharge of our duties. Further, in exhibit 129 he says that the money was deposited with him at the instance of the Maharaja. This was at least the understanding between ourselves and Apte. In exhibits 130 and 150 we say that the money was deposited at the direction of the Maharaja. Moreover, the acceptance by Parchure shows that it was a deposit at the instance of the Maharaja, otherwise he would not have received our letter to Apte, exhibit 129, and would not have taken from us the charge of the office. Further, Parchure inquired by wire of Apte and having received a reply from him accepted the letter of assignment, exhibit 127. We assigned over the money which Apte held for us to the plaintiff who never made a demand on

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Apte. It is not necessary that any particular form of expression should be used to create an assignment: *Buck v. Robson*<sup>(1)</sup>, *In re Whitting*<sup>(2)</sup>. If transfer can be implied, it is quite sufficient according to law: section 130 of Transfer of Property Act. We therefore contend that there was a transfer by us of an actionable claim.

*D. A. Khare* with *G. H. Kulkarni* for the respondent (plaintiff).

SCOTT, C. J.:—This is a suit to recover from the defendant Rs. 4,178-7-2 in respect of moneys alleged to be due by him to the plaintiff on relinquishing his agency of the plaintiff's Deccan Estates.

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

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 9th of December in that year gave over charge 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. 3,136-15-4 which, according to the accounts furnished by the defendant to the new agent, was in his hands on the 9th of December.

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

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 are due to him from the defendant?"

(1) (1878) 3 Q. B. D. 686.

(2) (1878) 10 Ch. D. 615.

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

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

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.

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 depositary 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. 2,982-15-11, 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 Sarkar with Gopalrao Vithal Apte.

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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.

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 Vakeel was continued in relation thereto without interest accruing thereon.

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 Sarkar 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 Sarkar from Apte as the cash balance in connection with the office of Vakeel deposited as *Thev*. In exhibit 150 dated 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 Sarkar.

Apte's only letter upon the subject, exhibit 129 of the 11th of June 1902, states that when the defendant obtained the appointment as the plaintiff's Vakeel, it was agreed that the money should be kept by Apte by way of security, and that the Maharaja had sent him an order to call on the defendant to pay the balance due to the Maharaja which, having been done, the defendant had forwarded Parchure's receipt which Apte had sent on to the Maharaja, asking for directions as to the return of the defendant's money detained with Apte by way of security.

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 Maharaja 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 on 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.

The learned Judge held that it was proved by the acknowledgment, exhibit 184, that Apte held Rs. 3,017-14-0 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 Vakeel, and that, as stated in Apte's letter of the 11th 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.

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.

He says that Parchure was simple enough to accept exhibit 127 in payment of the cash balance, though neither he nor the Mafi officer could have any legal right upon the letter to enforce the demand against Apte, if he declined to comply with it.

Now the money held by Apte was, either (1) a deposit creating an actionable claim of the defendant transferable by him for any purpose, or (2) money held by Apte on account of 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.

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 defendant and plaintiff.

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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 11th 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 defendant in exhibit 127 to Scindia Sarkar in exhibit 150 to the 'oral order' from the Sarkar.

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.

After receiving Apte's evasive letter of the 11th 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 plaintiff's Mafi Office, and stating, that the money had been lodged by way of security on a verbal order of the plaintiff.

This letter was given by defendant to 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 by communicating to me his reply in writing as to what he has to say. You should show this letter to him through the Mafi Office. Then he will certainly pay the rupees."

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.

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.

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 3 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."

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 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 Sardar 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 Sarkar?" The answer given on the 24th October 1806 was 'Never was the demand made'.

It is a well recognised principle that, where a creditor has the control of a security, he is chargeable with what he might

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have received from it but for his wilful default. See *Williams v. Price*<sup>(1)</sup>; *Mayer v. Murray*<sup>(2)</sup>; *Peacock v. Pursell*<sup>(3)</sup>; *Yglesias v. The Mercantile Bank of the River Plate*<sup>(4)</sup>.

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.

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.

Decree varied.

G. B. R.

(1) (1824) 1 S. and S. 581.

(3) (1863) 32 L. J. C. P. 266.

(2) (1878) 8 Ch. D. 424.

(4) (1878) 3 C. P. D. 330.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

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July 8.

CHUNILAL, SON AND HEIR OF ISHWARLAL\* BHOGIDAS (ORIGINAL PLAINTIFF), APPELLANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.\*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, v. CHUNILAL, SON AND HEIR OF ISHWARLAL BHOGILAL (ORIGINAL DEFENDANT), RESPONDENT.\*

*Maxim*—Actio personalis moritur cum persona—*Maxim applies to actions in tort*—No application to actions where contractual obligation implied by law—Government—Employment of shroff to accept Babashai coins—Shroff accepting Shikkai coins instead—The coins accepted by Mint officers—Loss to Government—Measure of damages—Acquiescence or ratification by Government.

On the occasion of calling in the Babashai coins from the British villages in the Kaira District, the plaintiff was employed by Government as a shroff to

\* Joint Appeals Nos. 38 and 42 of 1908.