

Uthup Vs. Kurian Kathanar

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Court : Kerala

Decided On : Mar-18-1959

Reported in : AIR1960Ker90

Judge : Varadaraja Iyengar and; Anna Chandy, JJ.

Acts : [Contract Act, 1872](#) - Sections 61

Appeal No. : A.S. No. 490 of 1957

Appellant : Uthup

Respondent : Kurian Kathanar

Advocate for Def. : M. Madhavan Nair, Adv.

Advocate for Pet/Ap. : K.K. Mathew, Adv.

Disposition : Appeal dismissed

Judgement :

V. Iyengar, J.

1. This appeal is by the defendant in a suit on a hypothecation bond which has been decreed by the court below after disallowing in entirety certain cross claims as also payments set up by him by way of partial discharge. We are concerned in this appeal with only five of these items disallowed: (i) Plaintiff's chitty

subscriptions paid off by the defendant at plaintiffs request -- Rs. 920; (ii) rent due to the defendant by way of hire from the plaintiff for use of the defendant's car shed --Rs. 100; (iii) amount paid through D. W. 4 to the plaintiff -- Rs. 342; (iv)' amounts spent by the defendant in connection with the plaintiff's foreign trip -- Rs. 25; (v) amount spent by the defendant in connection with the theft of the plaintiff's car -- Rs. 107; and (vi) amount paid to the plaintiff on various occasions towards the plaint debt -- Rs. 937.

2. Taking up the last of the items, viz., amounts paid on various occasions, for purpose of convenience, no receipt or voucher had been filed by the defendant evidencing the same, Indeed the defendant had no idea as to the amounts paid by him on each occasion. The defendant did not also reply to the suit notice. In the light of these arid other circumstances, the court below found that the discharge pleaded here had not been made out. Nothing has been urged before us to take a different view. We accordingly accept the finding of the court below in the matter.

3. As regards the rest of the items, viz. (i) to (v) above, the court below found uniformly that the defendant had failed to prove the special agreements as to adjustment towards the plaint hypothecation transaction which he had set up as regards each item. The defendant had not also prayed for set-off of these items in his written statement and paid court-fees. The court below therefore thought that whatever be the truth or otherwise of the transactions concerned, they could not enable the defendant to resist the passing of a decree in favour of the plaintiff. In this view the court below, though inclined to find for or against the plaintiff on some or other of the transactions, did not exactly do so. Learned counsel for the appellant was willing to concede that the court below was right when it found against the specific agreements for adjustments of the various items. He conceded also that no set-off was prayed for by his party. But even so, he strenuously contended, the court below should have granted 'appropriations' in the suit itself in favour of the defendant and as against the plaintiff under Section 61 of the Contract Act, of the several items and for this purpose should have entered definite findings. Now Section 61 comes into play when a debtor from whom distinct debts are due makes a payment but neither the debtor nor the creditor has made appropriations. The duty is then cast by Section 61 on the Court to apply the

payment in discharge of the debts in order of time and if the debts are of equal standing in discharge of each proportionately. And as it has been held that the creditor's right to appropriate the amount or any part of it towards the payment of any debt exists even during the pendency of the litigation concerning the payment right up to the pronouncement of the judgment. *Gajram Singh v. Kalyan Mal*, AIR 1937 All 1 (FB), it may be taken that the Court must await till then before it takes up its duty under Section 61. However for the duty to be undertaken there must be a litigation concerning the payment. And the two essential requisites therefor are (i) a payment on account and (ii) litigation concerning the same. The former is absent in this case because the transactions here, assuming they are true, are concerned only with giving rise to a creditor status in the defendant vis-a-vis the plaintiff. The latter is absent because no court-fees have been paid by the defendant. We are assuming of course that there are more than one distinct debt Outstanding between the defendant and the plaintiff at time of the judgment -- a matter in respect of which no foundation has been laid so far. We think the court below was right in the circumstances in ignoring altogether the various items herein.

4. In the result the appeal fails and it is dismissed with costs.

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