

The Firm of A.M.K.M.K. - - - - - Appellants

v.

M.R.M. Periyanan Chettiar - - - - - Respondent

FROM

THE COURT OF APPEAL OF THE FEDERATION
OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 11TH JANUARY, 1955

Present at the Hearing :

LORD OAKSEY
LORD MORTON OF HENRYTON
LORD KEITH OF AVONHOLM

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment and decree of the Court of Appeal of the Federation of Malaya dated the 21st March, 1952, which upheld a judgment and decree of the High Court of the Federation of Malaya at Penang dated the 31st August, 1951, dismissing the action brought by the appellants against the respondent.

The issues in the action are clearly and simply set out in the pleadings, to which their Lordships will at once refer. It is alleged in the statement of claim, and admitted by the defence, that the appellants are a firm of moneylenders carrying on business at 35, New Lane, Penang; that the respondent is also a moneylender carrying on business also at 35, New Lane, Penang; and that in or about the month of February, 1939, the appellants and the respondent commenced to have dealings between each other on current account, on terms that interest on the appropriate balances should be calculated and debited at the end of every six monthly period in such account, in accordance with the usual Penang current account rate as fixed by Chettiar custom from time to time.

Paragraphs 4-6 of the statement of claim are in the following terms:—

“4. This current account was continued and carried on between the plaintiffs and the defendant up to the beginning of the occupation period and there was as on the 15th day of February, 1942, a sum of \$49,900/- due and payable by the defendant to the plaintiffs.

5. This current account was continued to be operated during the occupation period and was closed on or about the 6th day of August, 1945, there being no balance due and payable by the defendant to the plaintiffs as on that date.

6. The plaintiffs are entitled to be repaid by the defendant the said sum of \$49,900/- being the pre-occupation debit balance against the defendant on the said account having regard to the provisions of

section 8 of the Debtor and Creditor (Occupation Period) Ordinance 42 of 1948.”

Then follows a claim for the sum of \$49,900/- with certain interest.

The vital portion of the defence is paragraph 2 which is as follows:—

“2. As to paragraphs 4 and 5 of the statement of claim the defendant says that the current account referred to was carried on and continued to be operated by the parties from February, 1939, until August, 1945, and that the credit balance of \$49,900/- in favour of the plaintiffs, as on the 15th day of February, 1942, was paid off by reason of the plaintiffs’ drawings by the 4th day of January, 1943, on which date the amount standing to the credit of the plaintiffs was nil.”

As the appellants rely upon the terms of the Debtor and Creditor (Occupation Period) Ordinance 1948 (No. 42 of 1948) it is convenient at this point to set out certain portions of that Ordinance.

The Ordinance is headed “An Ordinance to regulate the relationship between Debtors and Creditors in respect of debts incurred prior to and during the period of the enemy occupation of the territories comprising the Federation of Malaya”. It came into force on the 1st October, 1949.

Section 2 (1) contains the following definitions:—

“In this Ordinance, unless the context otherwise requires the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

‘debt’ means a sum certain in money payable by virtue of a legal obligation and recoverable when due by process of law ;

‘Malayan currency’ means the dollar currency in circulation and constituting legal tender in the territories now comprising Malaya before or after the occupation period ;

‘occupation currency’ means any currency issued by the Occupying Power and in circulation during the occupation period, but does not include Malayan currency ;

‘occupation debt’ means a debt payable by virtue of an obligation incurred during the occupation period and accruing due at any time ;

‘occupation period’ means the period commencing on the fifteenth day of February, 1942, and ending on the fifth day of September, 1945, both dates inclusive, and includes any part of such period ;

‘pre-occupation debt’ means a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time ;

‘time essence contract’ means a contract the parties to which intended that it should be of the essence of the contract that payments under it should be made on a date or dates certain.”

Section 3 provides that, subject to the provisions of section 7, any pre-occupation debt which still remains wholly unpaid at the commencement of the Ordinance shall be payable in full with interest calculated in a manner there specified.

Section 4 so far as material is as follows:—

“(1) Subject to the provisions of sub-section (2) of this section, where any payment was made during the occupation period in Malayan currency or occupation currency by a debtor or by his agent . . . to a creditor or to his agent . . . and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

(2) In any case—

(a) where the acceptance of such payment in occupation currency was caused by duress or coercion ; or

(b) where such payment was made after the thirty-first day of December, 1943, in occupation currency in respect of a pre-occupation capital debt, exceeding two hundred and fifty dollars in amount, which—

(i) was not due at the time of such payment ; or

(ii) if due, was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract ; or

(iii) if due and demanded as aforesaid was not paid within three months of demand or within such extended period as was mutually agreed between the creditor or his agent and the debtor or his agent ; or

(c) where such payment was made in occupation currency to a Custodian or liquidation officer in respect of a pre-occupation capital debt exceeding two hundred and fifty dollars in amount except where payment as aforesaid was caused by duress or coercion ;

such payment shall be revalued in accordance with the scale set out in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation.”

Section 5 provides that any payment made during the occupation period by a debtor or his agent to a creditor or his agent in respect of an occupation debt shall be a valid discharge of such debt to the extent of the face value of such payment.

Section 6 deals with occupation debts which still remain unpaid at the commencement of the Ordinance and need not be set out here.

Section 7 makes certain special provisions in regard to bank accounts.

Section 8 must be quoted in full :—

“ For the purposes of this Ordinance—

(a) any payment made by, or on behalf of any person into any bank or other account during the occupation period shall be deemed to have been applied first to any debit balance, or part thereof, which arose during the occupation period and was still outstanding against such person in such account at the time when such payment was made ; and

(b) any withdrawal made by, or on behalf of, any person from any bank or other account during the occupation period shall be deemed to have been applied first against any credit balance, or part thereof, which arose during the occupation period and was still outstanding in favour of such person at the time when such withdrawal was made.”

The Schedule sets out a sliding scale of the value of occupation currency from February, 1942 to 13th June, 1945. It is only necessary to state that during the year 1942 occupation currency is treated as being of the same value as Malayan currency, that in January, 1943, 105 occupation dollars are treated as being equivalent to 100 Malayan dollars and thereafter the value of occupation currency diminishes, at first slowly but latterly very rapidly, until on the 6th August, 1945, the figure is 35,500, on the 12th August the figure is 95,000 and on the 13th August occupation currency becomes valueless.

No oral evidence was called at the trial but certain documents were put in, including Exhibit No. 1 which shows the current account of the respondent, as kept in the books of the appellants, from October, 1941, onwards. The books kept by the respondent agree in every particular with Exhibit No. 1.

Up to the 6th August, 1945, the account shows frequent entries to the credit and debit of the respondent, and the balance is struck and interest debited every six months, in April and October each year.

The account shows that on the 17th October, 1941, the respondent's account was in debit to the amount of \$41,900 and at the beginning of the occupation period (15th February, 1942) the debit balance had risen to \$49,900, the amount now claimed. Throughout the occupation period and thereafter the account continued to be kept in the same way as before.

The debit balance against the respondent tended to decrease after the 15th February, 1942, and on the 4th January, 1943, he made a payment of \$1,550 which exactly cleared off the amount of his then debit balance. Many further debit and credit entries are recorded until on the 6th August, 1945, the respondent paid a sum of \$31,400 which cleared off his debit balance as at that date. This is the last entry before the occupation period ended on the 5th September, 1945. From that date onwards only a few small dealings took place between the parties.

The respondent accepts as correct the allegation in paragraph 4 of the statement of claim that a sum of \$49,900 was due and payable to the appellants when the occupation period began, but, as appears from his defence, he contends that he discharged that debt by a series of payments the last of which was the payment of \$1,550 on the 4th January, 1943.

Counsel for the appellants contended that none of the payments made during the occupation period could be applied in or towards discharge of a pre-occupation debt and they relied upon section 8 of the Ordinance. They first suggested that as section 8 applies only to payments and withdrawals made during the occupation period, a line should be ruled across the account immediately below an entry of \$200 to the credit of the respondent on the 11th February, 1942. So far their Lordships agree, as this was the last pre-occupation entry. It reduced the total sum standing to the debit of the respondent to \$49,900, and that sum, in their Lordships' view, falls exactly within the definition (already quoted) of a pre-occupation debt which appears in section 2 (1) of the Ordinance.

Counsel went on to suggest that a second line should be ruled immediately below the credit of \$31,400, already mentioned, which appears at the date 6th August, 1945. Between these two lines are recorded all the debits and credits during the occupation period, and counsel contended that, by virtue of section 8 (a) of the Ordinance, every payment made by the respondent during that period must be set off against sums drawn by him from the appellants during the same period, and no such payment could be applied to reducing the pre-occupation debt of \$49,900.

It is common ground between the parties that the common law of England must be applied in the present case, except in so far as it is expressly varied by the terms of the Ordinance. See section 2 (1) of the Civil Law Enactment 1937 (No. 3 of 1937). The common law rule applicable to the circumstances of this case is stated by Lord Selborne in *in re Sherry* 25 Ch.D. 692 at p. 702 "The principle of *Clayton's Case* (1 Mer. 572 at page 605) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *primâ facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account."

In the present case, both debtor and creditor carried all payments made by either of them to the other to a current account, and if there had been no statutory provision to the contrary the pre-occupation debt would have been discharged by the payments made by the respondent between the 15th February, 1942, and the 4th January, 1943. All these payments, however, were payments made during the occupation period,

and s. 8 of the Ordinance applies to them. Their Lordships agree with Pretheroe J. that the effect of s. 8 can conveniently be illustrated by considering the first entry made in the accounts after the beginning of the occupation period. That entry recorded a payment of \$700 by the respondent to the appellants. On that date there was no "debit balance which arose during the occupation period", and counsel for the appellants contended that it could not be applied in reduction of the pre-occupation debt of \$49,900 but must be deemed to have been held in suspense until there appeared in the account a debit balance arising during the occupation period. Their Lordships cannot accept this contention. By section 8 of the Ordinance such a payment is to be deemed to have been applied *first* to any debit balance which arose during the occupation period. In order to give effect to the appellants' contention it would be necessary to read the word "first" as meaning "exclusively". In their Lordships' view this is an impossible construction. The word "first" implies that there is some other purpose to which a payment made during the occupation period may be applied. As there was no debit balance arising during the occupation period at the time when the payment of \$700 was made, section 8 does not cover the case and there is nothing to prevent the \$700 being applied, in accordance with the rule in *Clayton's Case*, in reduction of the pre-occupation debt. Similarly, each subsequent payment by the respondent during the occupation period must be treated as having been applied first to any debit balance arising during the occupation period and existing at the time of the payment, and, subject thereto, must be treated as having been applied in reduction of the pre-occupation debt of \$49,900. Each payment applied in the latter manner is, in their Lordships' view, a "payment made during the occupation period . . . by a debtor . . . to a creditor . . . in respect of a pre-occupation debt", within section 4 of the Ordinance, and is, therefore, "a valid discharge of such pre-occupation debt to the extent of the face value of such payment" by virtue of the same section. By these means the pre-occupation debt of \$49,900 was fully discharged on the 4th January, 1943, and the appellants' claim fails.

Subsection (2) of section 4 can have no application to the present case, since there is no suggestion of duress or coercion and all the payments which discharged the pre-occupation debt were made before the 31st December, 1943.

For these reasons their Lordships will humbly advise Her Majesty that this Appeal should be dismissed. The appellants must pay the respondent's costs.

In the Privy Council

THE FIRM OF A.M.K.M.K.

v.

M.R.M. PERIYANAN CHETTIAR

DELIVERED BY
LORD MORTON OF HENRYTON

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