1931

Present: **Akbar and Maartensz A.J.**

MACK *v.* PERERA.

280—D. C. Colombo, 30,211.

Joint tort feasors—Payment of damages by one—Pro tanto *satisfaction of liability—Accord and satisfaction.*

A payment by one of several tort feasors to the person who has suffered damages operates as an accord and satisfaction to the extent the payment.

Where it is asserted that the payment was in full discharge of the liability, the burden of proof lies on the the party who asserts it.

APPEAL from a judgment of the District Judge of Colombo.

F. A. Hayley, K.C. (with him *Navaratnam*), for defendant, appellant.

R. L. Pereira, K.C. (with him *H. E. Garvin*), for plaintiff, respondent.

September 4, 1931. AKBAR J.—

In this action the plaintiff claimed against the defendant Rs. 5,000 as damages sustained by him in a motor car collision. In his plaint the plaintiff claimed this sum as the full damages sustained by him in the collision and there is not a word in it showing that he had restricted the actual damages to Rs. 5,000 for the purposes of this case. The District Judge gave judgment in favour of the plaintiff for the full sum claimed. Mr. Hayley, who appeared for the appellant, has not contested the findings of facts of the District Judge, in which he held that the collision was due to the negligence of the plaintiff, nor has Mr. Hayley urged that the actual damages suffered by the plaintiff was less than the sum claimed, but he has urged the point of law referred to in issues 5 and 6, namely, that the plaintiff had released and discharged either one Seneviratne or Ratnaike or both from all liability, and that this release enured to the benefit of the defendant. Mr. Pereira who appeared for the plaintiff did not dispute the various points of law which Mr. Hayley developed

for the purposes of his argument, and to which I will refer now. There can be no doubt at all that the defendant was at the time of the accident driving a car, which belonged to Mr. Seneviratne. This being so on the evidence as accepted by the Judge, both Mr. Seneviratne and the defendant were liable as joint tort feasors for the payment of the damages. Further, an accord and satisfaction of an unliquidated claim for damages offered by one of the tort feasors and accepted will release the other tort feasors. Soon after the accident the plaintiff sent letters of demand to each of three persons, namely, Seneviratne, Ratnaike, and the defendant, claiming Rs. 30,000 as damages from each. The defendant in his answer alleged that either Ratnaike (who was also in the car) or Seneviratne or both had paid and settled the claim of the plaintiff and that this settlement discharged the defendant from all liability. The plaintiff, therefore, had full notice of the point, which the defendant proposed to raise and which was afterwards embodied in issues 5 and 6. The plaintiff's list of witnesses included the name of his brother, who was also in plaintiff's car at the time of the accident. The defendant's list of witnesses included the names of Mr. Ratnaike, the plaintiff, and one Mr. Solomon Rodrigo. Only the plaintiff and the defendant gave evidence in this case and in his evidence the plaintiff stated that he had suffered damages amounting to Rs. 20,000 or Rs. 25,000, but that he restricted his claim to Rs. 5,000. In cross-examination he admitted that Mr. Seneviratne, who is now dead, came and saw his brother and that he made good the damages and that Mr. Seneviratne paid Rs. 2,500 to his brother. He also admitted that his brother consulted him before accepting the Rs. 2,500 and that his brother accepted the money on his instruction, but there were no terms or conditions when the money was paid. He, however, added that he did not discharge Ratnaike or Seneviratne and that the money was paid on account. Upon this evidence Mr. Hayley argued that he had discharged the burden which was on him on issue No. 5 and that the plaintiff's admission was equivalent to the plaintiff releasing and discharging Seneviratne from all liability. In the case of *Croft v. Lumley and others* [1], Lord Campbell C.J. stated as follows in the course of his judgment:—

> " But there is an established maxim of law that when money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. We see no reason why this maxim should not be applied to the transaction in question. Mr. Martelli might have refused to receive the money offered, as arrear of rent, and then the plaintiff might have proceeded for the forfeiture. But Mr. Barnes, who offered the money repeatedly told him that if the money was received, it was to be received and applied in payment of the arrear of rent due by the lease; and, under the circumstances, whatever words he might utter, when, acting by the authority of the plaintiff, he took up the money and carried it away, in point of law he received it as rent, thereby waiving the forfeiture and confirming the lease."

[1] *(1856) L. J., Pt. 2, p. 73.*

If we apply this test here in spite of Mr. Mack's so-called admission we have no evidence to prove what the expressed will of the party making the payment, namely, Mr. Seneviratne was, because the money was paid to the plaintiff's brother and he has not been called. Mr. Hayley stated that under section 106 of the Evidence Ordinance, No. 14 of 1895, this fact was within the special knowledge of the plaintiff and, therefore, the burden of proving that fact was shifted to the plaintiff. But Mr. Mack stated in his evidence that he was not present when the money was paid to his brother. I fail, therefore, to see how the burden can be shifted on the plaintiff in the circumstances of this case. Mr. Hayley then argued that under illustration (*a*) of section 106 the intention of Seneviratne as suggested by the character and circumstances of the payment was that when he paid the money it was to operate as a complete discharge from all liability. I do not think that I can accede to this proposition. Mr. Seneviratne may have made the payment on the understanding that this sum of Rs. 2,500 was to be accepted on account, and that he would be willing to pay a further reasonable sum if the plaintiff was obliged to incur further expenditure over and above this sum as a result of the injuries sustained by him. The burden of proof as I have already stated on issue 5 was on the defendant and it was open to him when the plaintiff closed his case to have called the plaintiff's brother to prove what was the intention of Seneviratne when he paid the sum of Rs. 2,500. Instead of doing this a question was put to Mr. Mack, the plaintiff, in cross-examination, in which a reference was made to one Solomon Rodrigo, a person who figures in the list of witnesses of the defendant. Mr. Mack stated that " nothing of the sum of Rs. 2,500 was paid to him by Solomon Rodrigo ". The defendant when giving evidence said that he heard from Solomon Rodrigo that the plaintiff had discharged Seneviratne from all liability when the payment was made. This suggests that the defendant's position was that Solomon Rodrigo was present when Seneviratne paid this sum. If so I fail to see why he omitted to call Solomon Rodrigo to prove what was in Seneviratne's mind when the payment was made. In my opinion the defendant has failed to discharge the onus that was on him under issue 5. In the case of *Wright v. The London General Omnibus Company*,[1] an award of compensation was made by the Magistrate against the driver of a hackney carriage upon an information for furious driving and the party injured accepted the compensation. It was held that this was a bar to a subsequent action against the driver's employers by the party injured in respect of his injuries. In that case provision was made in the English Act for the awarding of compensation by a Magistrate either against the proprietor or the driver for the injuries sustained by the injured person. As Cockburn C.J. remarked, the intention, no doubt, was that the provisions of the section should only be put in force when the damage done was slight; but the intention of the Act as held by Cockburn C.J. was that the award should be binding on the injured person and should in fact prevent the subsequent action. The fact that the plaintiff stated to the Magistrate that the compensation would not be enough made no difference to this interpretation, because he drew the money and by so

[1] *(1876-7) L. R. Q., Pt. 2, P. 271.*

doing he consented to the principle that no further action should be brought. I do not think this authority applies to this case because the sole question here is whether the payment by Seneviratne of Rs. 2,500 was made by Seneviratne on his expressed intention that such payment would release all liability. This does not mean, however, that the plaintiff is entitled to the full sum of Rs. 5,000 claimed by him. It will be noticed that he claimed in the plaint a sum of Rs. 5,000 as the only damage suffered by him in consequence of the injuries. He did not disclose in his plaint the fact of the payment of Rs. 2,500 by Mr. Seneviratne, which he had to admit in cross-examination. It does not matter that in point of fact he has suffered damages amounting to nearly Rs. 25,000 and that the letters of demand were for the sum of Rs. 30,000 each. Any judgment against a joint tort feasor for damages suffered by the plaintiff would operate as an accord and satisfaction and would discharge other joint feasors from all liability. This being the case the sum of Rs. 2,500 already paid must be deducted from the Rs. 5,000 now claimed and therefore judgment should be entered in favour of the plaintiff for the sum of Rs. 2,500 and interest as claimed by the plaintiff and for costs incurred in the lower Court; but I will make no order as to the costs in this appeal.

MAARTENSZ A.J.—I agree.

Appeal allowed.