

(1956) 10 P&H CK 0012
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 162 of 1951

Babu Ram Budhu Mal and Others	Vs	APPELLANT
Dhan Singh Bishan Singh and Others		RESPONDENT

Date of Decision : 17-10-1956

Acts Referred:

Contract Act, 1872 — Section 2
Transfer of Property Act, 1882 — Section 68

Citation : AIR 1957 P&H 169

Hon'ble Judges : Mehar Singh, J;Gurnam Singh, J

Bench : Division Bench

Advocate : D.S. Nehra, for the Appellant; Vidhya Dhar, for the Respondent

Final Decision : Dismissed

Judgement

Gurnam Singh, J.—This regular second appeal arises out of a suit for recovery of Rs. 975 plus interest. The suit was decreed by the trial Court. In appeal the decree was reversed and the suit was dismissed. The facts which gave rise to this litigation were as follows:--

Jumma and others mortgaged (simple mortgage) 76 bighas of agricultural land for Rs. 3,500 with the plaintiffs. Some time later partition of the land took place. Out of the land falling to his share Jumma mortgaged with possession 25 bighas of land with defendants Kaka Singh and Dhanna Singh. Out of the mortgage money Rs. 875 were left with the defendants second mortgagees for payment to the plaintiffs. Defendants did not pay the money to the plaintiffs. The latter, therefore, instituted the present suit for the recovery of the money left by the mortgagor with the second mortgagees.

The suit was resisted by the defendants on the ground that there was no privity of contract between them and the plaintiffs and the latter therefore were not competent to sue. The finding of the trial Court was in favour of the plaintiffs. It was reversed by the lower appellate Court and the suit was dismissed on the

ground that the plaintiffs being strangers to the contract were not entitled to sue. Plaintiffs appeal.

2. Learned counsel for the appellants urges that the plaintiffs were entitled to a decree as the contract between Jumma the mortgagor and the defendants the mortgagees was for the benefit of the plaintiffs. They being beneficiaries were competent to enforce the trust. He further contends that at any rate on the principle of equity the plaintiffs were entitled to relief.

By now it is well settled that ordinarily a stranger to a consideration cannot take advantage of a contract even though it may be for his benefit. This rule is, however, subject to certain exceptions. One of the exceptions covers cases where a stranger holds the position of cestui que trust in relation to the obligee. In such a case he is entitled to sue order to enforce the trust. No objection can be taken that he is a stranger to the contract.

The question is whether in the facts and circumstances of this case any such trust is created. The answer obviously is in the negative. A stipulation by the mortgagee defendants in the mortgage deed to pay the mortgage money to the plaintiffs does not make the defendants trustees for the payment of money to the plaintiffs who were not party to the contract and thus cannot make the defendants personally liable for the discharge of the mortgage debt. In such a case there is no privity of contract for a right of action.

The contention of the learned counsel that in "justice, equity and good conscience" plaintiffs be given the relief claimed is equally devoid of force in the present case. "Justice, equity and good conscience no doubt are rules of English Law. The Courts in this country only invoke the aid of these rules in cases where there is no specific provision of law applicable to the facts of a particular case.

But there are ample indications in Section 2 of the Contract Act to take the view that a stranger to the contract has no right of action to enforce it. Learned counsel for the appellants places great reliance on the well-known authority of the Calcutta High Court, *Debnarayan Dutt v. Chunilal Ghose* ILR Cal 137: (AIR 1914 Cal 129) (A) to support his contention:--

"Where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the movable and immovable properties of the original debtor, and the acknowledgment was communicated to the creditor and accepted by him:--

Held, first, that the arrangement between the creditor and the transferee did not amount to a novation within the meaning of Section 62 of the Contract Act; secondly, that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and lastly, that the creditor is entitled to sue the transferee on the registered instrument."

3. The facts of that case were peculiar be-cause the plaintiff who was not party

to the contract sued upon, had given up something, which was believed to be a charge upon property, to the defendant, who had undertaken with the other contracting party to pay the debt of that party to the plaintiff. Therefore there was communication to the plaintiff of the contract between the defendant and the other party, and the plaintiff had acted upon that contract to his detriment by handing over something to the defendant, and under those circumstances it was held that the plaintiff could maintain an action directly against the defendant on the contract to which he was not a party,

Learned Chief Justice in that case places reliance on *Khawaja" Muhammad Khan v. Husain Be-gam* ILR 32 All 410 (PC) (B). It was a case of contract made by a guardian for the benefit of a minor in contemplation of marriage. Thus it is obvious that it was a case of family arrangement creating charge on the property. ILR Cal 137: (AIR 1914 Cal 129) (A) was followed in *Dwarka Nath v. Priya Nath* AIR 1918 Cal 941 (C) & *Khired Behari Dutt Vs. Man Gobinda and Ors*,

In all these cases general principle is accepted that a stranger to a contract is not entitled in law to sue on it but the Court may grant relief to him on principles of equity. It appears that in none of these cases the Privy Council authorities which are opposed to the view taken in ILR Cal 137: (AIR 1914 Cal 129) (A), were cited and considered.

4. In ILR 34 All 63(PC) it was held "(affirming the decisions of the Courts in India in *Jamna Das v. Ram Autar* (E)), that the purchaser of the mortgaged property was not a person from whom the balance of the mortgage debt was "legally recoverable" within the meaning of Section 90 of the Transfer of Property Act, IV of 1882." Again in *Nanku Parshad Singh v. Kamta Prasad Singh* AIR 1923 PC 54 (F), it was observed:--

"On the facts held that the purchaser of equity of redemption did not become personally liable to the mortgagee to discharge the mortgage debt." ILR Cal 137: (AIR 1914 Cal 129) (A) was not followed by the Calcutta High Court in a large number of cases. In *Jnan Chandra Mukherjee Vs. Manoranjan Mitra and Others*, it was observed by B. K. Mukherjea, J., at page 252:--

"So far as the first point is concerned, the law seems to be fairly well settled. A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian Law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine.

The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party.

There are numerous authorities, both English and Indian, which have laid down

these propositions of law and relevance may be made, among others, to the decisions in *In re, Empress Engineering Co.* (1881) 16 Ch D 125 (H); *Lloyd's v. Harper* (1881) 16 Ch D 290 (I); *Gandy v. Gandy* (1885) 30 Ch D 57 (J); *Dunlop Pneumatic Tyre Co. v. Selfridge* 1915 AC 847 (K); *Jiban Krishna Mullik Vs. Nirupama Gupta and Another*, *Krishna Lal Sadhu v. Promila Bala Dasi* 32 CWN 634: (AIR 1928 Cal 318) (M); *Adhar Chandra Mondal Vs. Dolgobinda Das and Others*, ; *District Board Vs. Rai Bahadur Chandra Ketu Narayan Singh*, and *V. Ramaswami Ayyar and Others Vs. S.S. Krishnasa and Sons and Others*,

There are a number of cases in India where under marriage settlements or in connection with family arrangements or otherwise a charge is created on specific immovable property for the benefit of a third person or provisions are made for the maintenance or marriage expenses of female members. In such cases the beneficiaries, though not parties to the contract, are entitled to sue; vide 37 Ind App 152 (PC) (B); *Suppu Animal v. Subramaniam*, ILR Mad 238 (Q); *Sundararaja Aiyangar and Another Vs. Lakshmiammal through her Husband and Next Friend Srinivasa Aiyangar*, A Full Bench of the Madras High Court, vide *Thirumulu Subbu Chetti Vs. Arunachalam Chettiar*, has placed these cases under different categories and treated them as additional exceptions under the Indian Law to the general doctrine.

In our opinion, they do really come under the first exception and the third parties are allowed to sue entirely on the footing that the instruments created a trust in their favour. This would be clear from the latest pronouncement of the Judicial Committee which is to be found in AIR 1938 245 (Privy Council) ." The same view has been accepted in *Krishna Lal Sadhu and Another Vs. Mt. Promila Bala Dasi*, *Jagadambya Debya Vs. Bibhuti Bhusan Sarkar and Others*, , *Adhar Chandra Mondal Vs. Dolgobinda Das and Others*, , and *District Board Vs. Rai Bahadur Chandra Ketu Narayan Singh*,

5. Learned counsel for the appellant also places reliance on *Torabaz Khan v. Nanak Chand* AIR 1932 Lah 566 (W), *Daw Po v. U Po Hmyin* AIR 1940 Rang 91 (X) and *Abdul Ghafar Butt v. Moham-road Salim* 52 Pun LR 117 (Y).

6. AIR 1932 Lah 566 (W) was a Division Bench case. The Division Bench consisted of Sir Tek Chand and Agha Haidar, JJ. The leading Judgment was written by Agha Haidar, J. In coming to his conclusions, learned Judge placed reliance on the authority of ILR Cal 137: (AIR 1914 Cal 129) (A) and ILR All 410 (PC) (B). Sir Tek Chand, J., agreed with the conclusions arrived at by the learned Judge. In the course of his Judgment Agha Haidar, J., also referred to ILR 34 All 63 (PC) (E), and observed as follows:--

"With due respect I submit that the Privy Council ruling relied upon by the learned Judges dealt with the provisions of the old Section 90, T. P. Act, and the provisions of Section 2(d), Contract Act, were, for obvious reasons, not considered by their Lordships."

Another similar case, *Ganesh Das v. Mt. Banto* AIR 1935 Lah 354 (Z), came

before a Division Bench of the Lahore High Court consisting of Harrison and Agha Haidar, JJ. On difference of opinion between the two learned Judges the case, was heard by Sir Tek Chand and Jai Lal, JJ. AIR 1932 Lah 586 (W), was cited before the Bench. Sir Tek Chand distinguished that case with considerable ability. He observed "Mr. Sawhney, however, strongly relies on AIR 1932 Lah 566 (W), which was decided by a Division Bench of which I was a member, the main Judgment in the case having been recorded by my learned colleague, Agha Haidar, J.

The facts of that case, however, were very peculiar. As will appear from the Judgment of Agha Haidar, J., the then plaintiff was a signatory to the deed, which had been executed by one of the defendants in favour of the other, and on the evidence it was found that the plaintiff had full notice of the stipulation contained in it. He was accordingly held to be a party to a tripartite contract, and on this finding he was clearly entitled to sue.

The decision of the case really proceeded on the facts, and if I may say with all respect, the discussion of the legal point by Agha Haidar, J., was Obiter, and it was for this reason that I did not consider it necessary to discuss the matter at that time, but contented myself with expressing my concurrence with the conclusion that the plaintiff's suit should be decreed. It is quite clear however that in his discussion of the law Agha Haidar, J., relied principally on ILR All 410 (PC) (B) and adopted the interpretation which had been put on the observation of their Lordships of the Privy Council Judgment in that case, by the Calcutta High Court in AIR 1918 Cal 941 (C).

In the present case also the learned Judge has adhered to that view. As has been shown above however ILR All 410 (PC) (B) was one in which an obligation in the nature of a trust had been created in favour of the plaintiff, and the broad propositions laid down in the Calcutta cases cited, have been explained in the recent Judgments of that Court, as not being of general application. In the circumstances slated above, the decision in AIR 1932 Lah 566 (W) also must be taken to be limited to its own peculiar facts and not an authority for the dicta on the legal points discussed therein."

The same view has been expressed in Manghi-mal v. Dnshara Singh AIR 1933 Lah 695 (Z-1); Gurdit Singh v. Chunni Lal AIR 1932 Lah 66 (Z-2); and Muhammad Sadiq v. Mt. Sahib Bibi 54 Pun Re 1902 (Z-3). From the perusal of these authorities it is obvious that the legal view adopted by Agha Haidar, J., has not been followed in any other authority of the Lahore High Court, In the circumstances of that particular case the view adopted in ILR Cal 137: (AIR 1914 Cal 129) (A) could undoubtedly be followed.

7. 52 Pun LR 117 (Y) is a Division Bench. authority of the Punjab High Court. It was held:--

"As a general rule, the only persons who could sue upon a contract are. the parties to that contract. To this rule, however, the Courts of equity introduced

certain exceptions, one of such exceptions is where a contract is made for the benefit of a third person. In such a case there is an equity in the third person entitling him to sue upon the contract."

On the facts of the case learned Judges found that the contract in that case was in the nature of a trust and the beneficiary was entitled to enforce the trust. In the course of his Judgment Harnam Singh, J., followed the rule laid down in Full Bench authority of the Madras High Court reported in Thirumulu Subbu Chetti Vs. Arunachalam Chettiar, Kapur, J., agreeing with his learned colleague wrote a separate Judgment. In this Judgment he preferred to follow " ILR 41 Cal 137: (AIR 1914 Cal 129) (A). Learned Judge has considered large number of English authorities. Almost all these authorities have been discussed in the Full-Bench case of the Madras High Court referred to above and also in other cases to be mentioned later. At page 127 of his Judgment, Kapur, J., observed:--

"It is true that their Lordships of the Privy Council in *Jamnadas v. Ham Autar* (E), held that a purchaser's contract to pay off a mortgage cannot be enforced by a mortgagee who was no party to the contract, and it may also be conceded that decisions in India favour the view that a person not a party to the contract cannot sue on the contract unless the case comes within one of the recognised exceptions as is indicated by the provisions of Sub- sections (a), (b), (c) and (i) of Section 2, and on this principle in *Ganesh Das v. Mst. Banto* (Z), a Division Bench of the Lahore High Court, *Tek Chand and Jai Lal*, JJ., held that where in a registered sale-deed the pay ment of an unsecured debt of Rs. 600, due from the vendor to a third party, was recited as party of the consideration and the vendee undertook to pay this debt, the third party in whose favour this recital was entered being wholly ignorant of the sale could not recover the sum because no trust was created in his favour and he was not a party to the contract, the general rule being that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit." After making these observations and referring to *Khawaja Muhammad Khan v. Husaini Begam* (B) and other cases the learned Judge preferred to follow Sir Lawrence H. Jenkins, C. J.'s Judgment in ILR Cal 137: (AIR 1914 Cal 129) (A). It was observed that the definition in Section 2(d) is wider than in English Law and that there is nothing in the Indian Contract Act which prevented the recognition of a right in a third party to enforce a contract made by others, which contained a provision for its benefit. The aspect of the case was also considered by Rankin, C. J., in *Krishna Lal Sadhu and Another Vs. Mt. Promila Bala Dasi*, the learned Judge observed:--

"I agree. Clause (d), Section 2, Contract Act, widens the definition of "consideration" so as to enable a party to a contract to enforce the same in India in certain cases in which the English Law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground nudum pactum.

Not only however, is there nothing in Section 2 to encourage the idea that

contracts can be enforced by a person who is not a party to the contract but this notion, is rigidly excluded by the definition of "promisor" and "promisee". The decision of *Tweedle v. Atkinson*, (1861) 1 B & S 393 (Z-4) was a decision at law and was unaffected by the rules of equity. For this reason the Judicial Committee in *Khawaja Muhammad Khan v. Husaini Begam (B)*, regarded it as inapplicable to the facts of the case before them where the agreement included a specific charge on immovable property.

In my Judgment it is erroneous on the basis of that case or on the observations of Jenkins, C. J., in ILR Cal 137: (AIR 1914 Cal 129) (A), to suppose that in India persons who are not parties to a contract can be admitted to sue thereon, except where there is an obligation in equity amounting to a trust arising out of the contract.

I say nothing as to whether special rules of law may be applicable to communities among whom marriages are contracted for minors by parents and guardians, but putting aside such cases, I see no reason to think that the law in India contains a series of exceptions to the principle that a contract can only be sued upon as such by a party thereto. A trust may be founded on a contract and is capable of being enforced by a party to the trust in appropriate proceedings as was pointed out in *Page v. Cox* (1851) 10 Hare 163 (Z-5).

It is another matter altogether to say that a person not a party to a contract may bring a suit upon the contract by reason of near relationship to the promisee. Nearness of relationship is a fact which, like many other facts, cannot be disregarded in determining the question whether or not a trust arises out of or is founded on contract, but it has no other importance."

8. AIR 1940 Rang 91 (X) relied upon by the learned counsel for the appellants also does not help him. It was held therein:--

"A stranger to a contract can sue upon it at any rate in the following circumstances, namely (a) where a party to the contract agrees with the stranger to pay him direct or become estopped from denying his liability to pay him personally, and (b) where the contract creates a trust in favour of the stranger." Learned Judge placed reliance on the authority of ILR Cal 137: (AIR 1914 Cal 129) (A).

9. Learned counsel for the respondents cited *Thirumulu Subbu Chetti Vs. Arunachalam Chettiar*, Full Bench, in support of his contention that a stranger to a contract cannot sue upon it. In the Madras Full Bench case large number of authorities including those relied upon by the learned counsel for the appellants have been considered and discussed. It was held by the Full Bench:--

"Where all that appears is that a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie."

A reference was made to Privy Council case, *Jamnadas v. Ram Autar Pandey (E)*,

in which Lord Macnaghten observed:--

"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that He was no-party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay the mortgage debt." In the course of his Judgment, it was observed that the Privy Council decision in *Jamna Das v. Ram Autar Pandey* (E) and in *Nanku Prasad v. Kamta Prasad Singh* (F), were conclusive that the reservation of part of the purchase money to pay a previous mortgagee does not of itself Create a trust in favour of that previous mortgagee nor could the error mortgage make the purchaser personally liable. The rule of common law laid down in *Tweddle v. Atkinson* (Z-4), that a stranger to the consideration cannot sustain an action on the promise made between two persons unless he has in some way intervened in the agreement was approved by the Full Bench. The view taken by the Full Bench of Madras High Court, has also been taken in other High Courts, *Kali v. Ram Autar* AIR 1945 Oudh 65 (Z-6); *Gangadhar Bapurao Gadre Vs. Hubli Municipality*, and *Achuta Ram and Others Vs. Jainandan Tewary and Others*,

10. From the perusal of these authorities it is obvious that there is abundant authority in favour of the view that a stranger to a contract cannot sue to enforce it unless the case falls within one of the exceptions mentioned in the earlier part of the Judgment. The cases relied upon by the learned counsel for the appellants are distinguishable and in most of those cases Privy Council authority was not cited. Even in those authorities general principle is accepted that a party who has no privity to a contract is not entitled to sue. It therefore appears to be well settled that in case trust is created the beneficiary is entitled to enforce it.

Keeping this principle in view and following the authorities of the Privy Council and Madras Full Bench I am of the view that the present case does not fall in any one of those exceptions. The money is merely left with the mortgagee to pay off the mortgage debt of the first mortgagee. This by itself does not create any trust in favour of the plaintiffs. Thus they being strangers to the contract were not competent to sue. The suit was, there-fore, rightly dismissed by the lower appellate Court.

11. In the result the appeal is dismissed with costs and the Judgment and decree of the lower appellate Court are maintained.

Mehar Singh, J.

12. I agree.