
(1961) 07 KL CK 0040
In the High Court Of Kerala
Case No : A.S. No. 596 of 1959

Chacko

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-07-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 130, 3

Citation : (1961) KLJ 904

Hon'ble Judges : T.K. Joseph, J;M.S. Menon, J

Bench : Division Bench

Advocate : C.A. Ouseph and C.J. Antony, for the Appellant; K.P. Pathrose, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, J.—The plaintiff in O.S. No. 24 of 1958 of the court of the Additional Subordinate Judge, Trichur, is the appellant before us. The respondent is the Union of India, the 1st defendant in that suit. The suit was for the recovery of an amount of Rs. 10,000/- deposited by one T. P. Francis with the Southern Railway as security for the due performance of an agreement between him and the railway. The deposit was made on 17-5-1951, and Ext. P. 1 of the said date is the receipt issued by the Railway. The appellant derived the right to institute the suit by virtue of a Power of Attorney executed by T. P. Francis, Ext. P. 5 dated 10-7-1953.

2. The main question for consideration is the character of the rights conveyed by Ext. P. 5. According to the Union of India arrears of income tax to the extent of Rs. 30,591-14-0 were due from T. P. Francis at the time of the execution of Ext. P. 5 and the State is entitled to a preferential payment in respect of those arrears. This contention is stated as follows in paragraph 5 of the written statement dated 7-7-1956:

The liability of the 2nd defendant (T. P. Francis) for the aforesaid income tax

arrears appears to have accrued in the year 1124 M. E, long before July 1953 when the power of attorney was given to the plaintiff. The amounts due to the 2nd defendant from the Government, viz., the above-said security deposit, is liable to be set off and adjusted towards the amounts due to the Government as above. The Government are also entitled to priority.

3. As pointed out in 1960 K. L. T. 716 the State is entitled to a priority only when the debts due to it and a citizen are of equal degree and that proposition is not in dispute before us. It is also agreed that the State has no charge in respect of arrears of income tax due under the Indian income tax Act, 1922. The controversy, as already stated, centres round the rights conferred by Ext. P. 5.

4. According to the appellant that document should be construed either as effecting an immediate transfer to him of all the rights of T. P. Francis over the amount deposited or at least as creating a charge in his favor over that fund. We find it impossible to accept either of these contentions.

5. Ext. P. 5 is styled a Power of Attorney and is drafted like one. The only provisions emphasized before us are the clauses in which T. P. Francis says:

I also hereby authorize my attorney herewith to appropriate the amounts due from me to my attorney.

and:

This Power of Attorney is not revocable by me at any time under any circumstances without the consent of the attorney.

6. As the whole case turns on the construction of the power of Attorney we may with advantage extract the whole of it in this judgment. It says:

I, T. P. Francis, do hereby constitute and appoint A. C. Chacko (appellant) as my attorney for me in my name and on my behalf to ask or demand for or recover or sue for my civil or other appropriate proceedings all and every sums or sum of money that are or is now due and owing to me or that may fall due to me in respect of bills drawn on the Financial Adviser and Chief Accounts Officer, Southern Railway, Madras-23, in respect of the supply of timber logs to the consignee, the District Controller of Stores Southern Railway, Golden Rock, as per E. P. No. SS4/1231 of 28-3-1951 by the Controller of Stores Nagapatam, now officed at Madras-23, for and on behalf of the President of India and for receipt of payment thereof or any part thereof to sign and deliver for me and in my name proper receipts and discharges for the same and to claim, demand and take back the tender security deposit amount of Rs. 10,000/- deposited in the name of the Little Flower Trading Company, Ollur, as per cash receipt No. V/90 of 17-5-1951 (Ext. P. 5) for Rs. 10,000/- remitted at the Financial Adviser and Chief Accounts Officer's Office, Trichinopoly, and do all other lawful acts and things effectively as I could do the same if I were personally present and acting and all whatsoever the said A. C. Chacko (appellant) shall lawfully do. I also hereby authorize my attorney herewith to appropriate the amounts due from me to my

attorney. I, said T. P. Francis do hereby agree to ratify and confirm such act done by my attorney under this power. This Power of Attorney is not revocable by me at any time under any circumstances without the consent of the attorney.

7. Under the Common Law of England a chose in action was not assignable. English equity, however, recognized such assignments on the principle that equity considers that as done which ought to be done. In *Rodick v. Gandell*, Lord Truro said:

"An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers." (Snell's Principles of Equity, 25th Edition, Page 74).

8. After the passing of the Judicature Act the assignments of choses in action in England are either statutory u/s 25(6) of the Act or equitable. Mulla summarizes the distinction between them as follows:

A statutory assignment -

- (1) must be an absolute assignment,
- (2) must be in writing,
- (3) takes effect from date of notice to the debtor,
- (4) enables the assignee to sue in his own name and to give a valid discharge.

An equitable assignment-

- (1) may be an assignment by way of charge,
- (2) need not be in writing,
- (3) takes effect as between the assignor and the assignee from the date of the assignment, notice being necessary only to bind the debtor,
- (4) must be made for value and the assignee cannot give a valid discharge unless expressly empowered by the assignment.

(Transfer of Property Act, 4th Edn., Page 737)

9. Section 130 of the Transfer of Property Act, 1882, is the provision that controls the transfer of actionable claims in this country. The expression "actionable claim" is defined in section 3 of that Act and it is not disputed that the claim to the deposit of Rs. 10,000/- is an actionable claim within the meaning of that definition.

10. Section 130 shares some of the features of both the statutory and the

equitable modes of assigning a chose in action in England. As pointed out by Mulla:

It resembles the equitable assignment in that it applies to assignments by way of charge as well as to absolute assignment; and takes effect as between the assignor and the assignee from the date of the assignment. On the other hand it resembles a statutory assignment in that it must be in writing and that it enables the assignee to sue in his own name and to give a valid discharge.

(Transfer of Property Act, 4th Edn., Page 737)

11. In view of the insistence on writing embodied in section 130 it is impossible to transfer an actionable claim in this country-whether with or without consideration-without the execution of an instrument in writing signed by the transferor or his duly authorized agent. The only instrument on which reliance is placed is Ext. P. 5. We are unable to hold that the terms of that document spell either an assignment of the fund in question or the creation of a charge over it. All that Ext. P. 5 seems to contemplate is a collection of the amounts due, and a subsequent appropriation by the appellant, neither of which has happened in this case.

12. It is true that no particular form of words is necessary in order to effect an assignment. The language is immaterial provided the meaning is plain, and the intention to transfer is manifest from the language adopted.

13. A Power of Attorney, in many ways similar to the one before us, came up for consideration in AIR 1958 Ass. 22. The head-note to the report summarizes the contents of the document and the conclusion reached as follows:

The defendant who was a contractor under the Forest Department, Government of Assam, entered into a financial arrangement with the plaintiff bank for advancing him money on overdrafts against his bills on the Forest Department and to collect which, he gave a sole power of attorney in favor of the plaintiff bank by an irrevocable Power of Attorney. He surrendered all his rights to receive any payment of any bill direct from the said department so long as he remained indebted to the plaintiff bank. Under this agreement, the bank granted accommodation to the defendant by starting a cash credit account.

The subsequent clauses of the deed also clearly showed that the amounts of the bills, when realized by the bank, had to be credited to the accounts of the contractor, and thereafter they went towards the discharge of the liability of the bank.

Held, that the power of attorney was only an authority given to the bank to receive payments from the department concerned of the amounts, if and when they became due to the contractor. It neither created a charge nor was it a transfer of any debt due to the contractor from the Government and the provisions of section 130 of the Transfer of Property Act were therefore not attracted.

14. In the light of what is stated above we must hold that the sum of Rs. 10,000/- still belongs to T. P. Francis, that the claims of the appellant and the respondent to be paid out of that fund are of equal degree, and that the respondent has a priority which will entitle a preferential payment as claimed in the written statement.

15. Section 46(7) of the Indian income tax Act, 1922, provides that no proceedings for the recovery of any sum payable under that Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under that Act, and it was suggested that the claim of the respondent is barred by limitation. It is, however, not disputed that the bar will not operate if Ext. D9 dated 28-7-1953 can be considered as constituting a commencement of the proceedings for recovery.

16. Sub-section (2) of section 46 provides that the income tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. Ext. D9 is a certificate under the sub-section and we see no reason why it should not be considered as a commencement of the proceedings for recovery. Kanga's comment on sub-section (7) of section 46 reads as follows:

Proceedings under this section are required to be commenced within the one-year period. If they are commenced within the prescribed period, they may be completed at any time. Proceedings for recovery commence when the income tax Officer forwards a certificate to the Collector under sub-section (2) of section 46." (The Law and Practice of income tax, 4th Edn., Vol. I page 774)

17. To the same effect is *Arunadevi Jajodia and Others Vs. The Collector of Madras and Others*, . In that case Subba Rao J. summarized the contention urged before him as follows:

Learned Counsel contends that the words "no proceedings for the recovery, in Sec. 46(7) refer only to the proceedings taken by the Collector for the recovery of arrears under the Revenue Recovery Act, and therefore the proceedings having been commenced by him one year after the prescribed time are barred under that sub-section, whereas learned counsel for the income tax Officer argues that the proceedings for the recovery of the sum commence from an earlier point of time when the income tax Officer forwards a certificate under S. 46(2), and he has forwarded certificates in the present case on 25-3-1947, 23-3-1948 and 24-3-1948, which dates are within the prescribed time.

and said:

The question therefore is, what do "proceedings for the recovery" mean in S. 46(7). The process of assessment involves three stages: (1) the factum of assessment, (2) demand of the amount assessed, and (3) proceedings to recover

the amount if a default is made by the assessee. The income tax Officer starts the proceedings to recover the arrears in the prescribed manner after the default is made.

The procedure prescribed for the recovery of the arrears is embodied in S. 46 of the Act. The proceedings for the recovery therefore start when the income tax Officer forwards the certificate to the Collector. But the learned counsel for the petitioner argued with some force that the words used in S. 46(2) brought about a distinction between the issuing of a certificate by the income tax Officer and the starting of proceedings to recover from the assessee. He relied upon the words in S. 46(2) "on receipt of such certificate, shall proceed to recover from such assessee the amount", and compared those words with the words in S. 46(7) "proceedings for the recovery of any sum payable under this Act", and contended that the said proceedings for recovery related to the stage when the Collector proceeded to recover the amount from the assessee. The word "proceeding" relates to the "modes in which judicial transactions are conducted". In its general acceptance it connotes "a prescribed mode of action for carrying into effect a legal right" (See P. Ramanatha Aiyar's Law Lexicon).

The meaning of the word is wide enough to include the entire procedure prescribed by the Act for realizing the amount. The fact that the Collector proceeds to recover the amount from the assessee is not inconsistent with the circumstance that the proceedings for recovery start earlier. I therefore hold that the issue by the income tax Officer of a certificate is the first step to the proceedings for the recovery of the arrears. So construed, it follows that the proceedings were started within the time prescribed by S. 46(7) of the Act.

18. Arunadevi Jajodia and Others Vs. The Collector of Madras and Others, was followed in Kashiram Agarwalla and Another Vs. Collector of 24-Parganas and Others, . In that case Das Gupta J. said that it was necessary to take note of the explanation in section 46(7) that a proceeding for the recovery of any sum shall be deemed to have commenced within the meaning of that section, if some action is taken to recover the whole or any part of the sum within the period referred, and:

In my opinion, forwarding of the certificate by the income tax Officer is "some action" taken to recover the dues within the meaning of the explanation and consequently the proceedings for recovery commenced as soon as the certificate was forwarded. It is important to remember that the limitation is provided against the person seeking to recover. The person seeking to recover is the income tax department. It would be odd to think that the action taken to commence the proceedings would be action by somebody other than the person who seeks to recover. The Collector or any other authority that may under the law take action to recover after the Income tax Officer has taken the initial action by forwarding the certificate may act quickly or otherwise. It cannot be believed that the legislature intended that delayed action on their part would have the effect of barring the remedy of the income tax Department. For these reasons I

am of opinion that the action by the income tax Officer in forwarding the certificate to the Collector under S. 46(2) is action on the taking of which a proceeding shall be deemed to have commenced.

19. It was agreed that if our conclusions are as stated above, the other contentions raised by the respondent need not be considered in this judgment and they are not considered by us. The appeal fails and is dismissed with costs.