
(1960) 10 AP CK 0009
In the Andhra Pradesh High Court
Case No : Appeal No. 90 of 1957

Dadi Bhogalingam

APPELLANT

Vs

Indo Commercial Bank Ltd. and Another

RESPONDENT

Date of Decision : 12-10-1960

Acts Referred:

Contract Act, 1872 — Section 191, 192

Citation : AIR 1961 AP 346

Hon'ble Judges : Syed Qamar Hasan, J;Kumarayya, J

Bench : Division Bench

Advocate : A. Kuppuswami, for the Appellant; S. Ramamurthy, for the Respondent

Final Decision : Dismissed

Judgement

Kumarayya, J.—This appeal entered on behalf of the plaintiff raises a short point of some interest in law. As a matter of fact two questions arise for determination. While the one pertains to the statute of limitation, the other which is rather vital to the case is concerned with the determination of the exact legal relationship between the 2nd defendant on the one hand, and the 1st defendant or the plaintiff on the other.

The question is whether the 2nd defendant is a sub-agent of the 1st defendant or an agent or a substituted agent of the plaintiff for the 1st defendant for purpose of collection of bill amount from the drawee. If it be found that the case is well within the pale of substituted agency or even if privity of contract in any wise be found established between the plaintiff and the 2nd defendant it is indisputable that this appeal must fail.

2 In order to appreciate the arguments advanced in this respect, it is necessary to relate the material facts of the case in all their essential particulars. The 1st defendant, the Indo Commercial Bank Ltd. is a banking concern with one of its branch offices at Anakapalli. The plaintiff is a general merchant and commission

agent at Anakapalle and is a constituent of the said Bank. He sold certain goods in the usual course of his business to one Sait Joharmal Prabhudayal of Belda near Calcutta and despatched the same by rail from Anakapalli Railway Station under R.R. No. 86.

Admittedly the 1st defendant had no branch office at Belda where the consignment was to be delivered to the vendee. Nevertheless the plaintiff drew a bill payable at sight for a sum of Rs. 6295-15-0 and delivered it along with R.R., to the first defendant. His case is that the bill was entrusted to the 1st defendant for collection from the drawee and that the first defendant in accordance with the terms of business and established practice of the Bank credited to the account or the plaintiff in advance the bill amount after deducting the usual commission subject of course to the condition that the drawer shall pay back the amount in Case the bill at the other end is not honoured and the amount not received; that for purposes of collection the 1st defendant appointed the 2nd defendant, the Bank of Calcutta Ltd., Belda Branch, the latter (2nd defendant) accordingly collected the amount from the drawee and sent a demand draft to the 1st defendant on the Head Office of Calcutta: the 1st defendant on receipt sent the same for collection to its Agent, Indo Commercial Bank Ltd. at Calcutta but that the 2nd defendant mean-while was black-listed and, therefore, the draft was left unpaid with the result that the 1st defendant demanded back from the plaintiff the money credited to his account in advance and that the plaintiff accordingly paid it back to the 1st defendant

3. The plaintiff contends that he was coerced into repayment of the bill amount on 30-12-1946, that the first defendant had also represented to him that he will take steps to collect the money but that he failed to be as good as his word, The plaintiff, after notice to the defendant on 13-9-1951 which was replied to on 12-11-1951 brought the present suit holding both the defendants liable for the bill amount

4. The 1st defendant resisted the claim on the ground that the 2nd defendant was appointed by the plaintiff and was constituted his (plaintiffs) own agent that he was not the 1st defendant's sub-agent in any sense of the term and, therefore, in no way, he (1st defendant) was responsible for the amount collected by the second defendant from the drawee. Referring to the nature of the transaction he stated that the plaintiff did not correctly mention the terms of business in his plaint, and that the bill drawn by the plaintiff contained Specific instructions that the said bill was to be sent to the 2nd defendant's branch office at Belda for collection from the drawee.

The 1st defendant avers that in accordance with these instructions he simply transmitted the bill and according to usual practice credited the amount to the account of the plaintiff. The bill amount was collected by the 2nd defendant and a demand draft was sent to the 1st defendant which was received on 21-12-1946. It was a draft on the Head Office at Calcutta. The 1st defendant without the least delay sent the draft to the agent at Calcutta for Collection but the draft was

returned unpaid with an endorsement "unable to collect as the drawee bank is black-listed". The result was that the 1st defendant had to demand back the amount from the plaintiff.

The 1st defendant contends that since the 2nd defendant was nominated and constituted by the plaintiff as the agent for collection and the 1st defendant was merely instructed to send the Bill for presentment which he did by following up his instruction, no liability for collection made by the 2nd defendant can attach to him, and that as a matter of fact on this basis alone the plaintiff had paid back the amount that was credited to his account, and that the plea that pressure was brought to bear upon him for recovery of money is false,

He admits that the draft was left with him but this was only due to the request of the plaintiff to pass on to him any amount that may be realised. A further plea taken by the defendant was that the suit is barred by limitation in view of the fact that the money was recovered from the plaintiff on 30-12-1946, itself but the suit was brought on 11-11-1954.

5. As the 2nd defendant-bank went into liquidation no relief against it could be legitimately claimed or enforced in a subordinate court. That is why the petition for impleading the liquidator was disallowed in the trial court. Though the 2nd defendant's name nevertheless continued on record obviously enough no steps could be or were in fact taken for adjudicating the case in its presence. In this appeal too no relief has been sought against him.

6. It would appear from the above pleadings which have been set out at great length that while it is the case of the plaintiff that the 2nd defendant is the nominee or appointee of the 1st defendant and had, therefore, no privity of contract with him (Plaintiff), the 1st defendant's positive assertion on the other hand is that the 2nd defendant was nominated and as a matter of fact was constituted by the plaintiff himself as his own agent for collection and that he was in no sense either a nominee or appointee of the 1st defendant to be considered as his sub-agent for purposes of collection and further that all that the 1st defendant was concerned with was to transmit the bill for presentment to the 2nd defendant which he did only by following up the instruction of the plaintiff and, therefore, had no control over the 2nd defendant nor was himself liable to the plaintiff for breach of any duty or misconduct or negligence on the part of the 2nd defendant.

7. In cases like these where it all turns upon the contract of employment and the terms and instructions subject to which the business was carried out, it is natural and reasonable to expect that the plaint shall contain a detailed statement as to the relevant course of business, the manner in which and the terms subject to which the transaction was to be pushed through. Curiously enough the plaint makes only a bald statement of facts. It is barren of all relevant and significant particulars.

Even though the defendant complained in his written statement that the

conditions have not been even fully and faithfully set out in the plaint, no attempt for giving better particulars was ever made. What is more strange is that most of the averments in the plaint do not accord with the documents relied on by the plaintiff. On the contrary, these documents render the case of the 1st defendant highly probable. It is common ground that the suit transaction with the 1st defendant started in drawing up a bill which was sought to be discounted. According to the defendant this bill contained the conditions and instructions which the plaintiff gave.

The bill is not forthcoming. Neither the plaintiff nor the 1st defendant can be in possession thereof for it was sent to the 2nd defendant. That could have been however summoned from the person who should be in possession thereof. Being a document embodying the terms of the employment as well it was indeed material to the case.

It was also open to plaintiff nay, it was his duty to testify to the facts so categorically denied by the defendant, on which he claims relief against him; but he did not offer himself as a witness nor did he cite any other as such.

Instead he put 3 letters of the 1st defendant, two of which are addressed to him and one to the United Commercial Bank Ltd. The legitimate or necessary inference that must be drawn from these letters evidently militates against his theory that the 2nd defendant is the sub-agent of the 1st defendant. The conclusion is irresistible that to the knowledge and belief of the plaintiff the 2nd defendant was his appointee and agent and was responsible to him.

It may be seen that the 1st defendant in his letter dated 8-12-1946 categorically stated that the bill drawn was sent to the second defendant under special instructions of the plaintiff and that though the bill amount was collected by the second defendant the 1st defendant was not in receipt of that amount. He therefore called upon the plaintiff to arrange remittance of the amount that was paid to him in anticipation of the receipt of bill amount.

These categorical statements were not challenged by the plaintiff. On the Other hand, as would appear from the other letter, the plaintiff in acknowledgment of his liability readily made payment. Ex. A. 1 dated 30-12-1946 is that letter. It notifies to the plaintiff that the proceeds of that bill which were sent to the Bank of Calcutta Ltd. Belda, under his instructions, were collected by the said Bank, and were sent to the 1st defendant by means of a draft which draft was held by the 1st defendant on the plaintiff's account; that since the amount on presentation of the draft was not paid the plaintiff on demand from the 1st defendant had to make the payment of the same and that the amount so paid was in respect of the bill discounted in advance on 7-11-1946. The 1st defendant however gave assurance to the plaintiff of his assistance in future in the matter of collection of draft amount without of course accepting any responsibility on his part.

8. This letter also went unchallenged. It is manifest that the plaintiff far from

raising any demur or protest, fully accepted the contentious and statements in these letters. He made payment of the bill amount and made also a request to the 1st defendant to try his best to recover the draft amount to the extent possible and the 1st defendant accordingly assured of its assistance without incurring any liability.

There can be little doubt that these letters fully negative the contention of the plaintiff that there was no privity of contract between the 2nd defendant and himself or that the 2nd defendant was the sub-agent of the 1st defendant or that his payment of the amount to the Bank was not his voluntary act. Thus the conduct of the plaintiff as revealed by these documents is wholly inconsistent with the claim that the plaintiff has now advanced.

9. The learned counsel argues that the conduct so relied on cannot be decisive in the matter for it may be imputed only to his ignorance of law. As already pointed out, on the facts found a legitimate inference that may be drawn can be only that the 2nd defendant was not the agent of the 1st defendant but of the plaintiff being named and appointed by him, and that the first defendant in sending the bill to the second defendant did no more than follow up plaintiff's instructions.

Thus there is no scope for explaining away the conduct of the plaintiff on the ground of ignorance of law. It can be explained only on the hypothesis that under the terms of employment the liability rested with the plaintiff. The learned counsel stresses on the fact that the 1st defendant still holds the draft and has been in correspondence with the second defendant and that this circumstance coupled with the admitted fact that he sent the bill to the second defendant is sufficient to establish privity of contract between the first defendant and second defendant and it furnishes a sure indication of creation of sub-agency.

But a "sub-agent" within the meaning of Section 191 of the Indian Contract Act "is a person employed by and acting under the control of, the original agent in the business of the agency". There is nothing in the evidence to show that he had employed the 2nd defendant as his sub-agent or that he had been acting under his control. Except that on the instructions of the plaintiff he sent the bill to the defendant No. 2, who in turn after collection sent a draft, nothing between the first and second defendant has passed.

The 1st defendant had no branch at Belda nor had he any agent of his own at Belda. The 2nd defendant was the nominee and appointee of the plaintiff. It is difficult to comprehend how then mere transmission of the bill and receipt of draft and the step taken for its encashment to adjust the proceeds towards the amount paid in advance to the plaintiff can accord to him the status of the principal as against the 2nd defendant.

Learned Counsel's argument proceeds on the assumption that an agent appointing a person to carry out the purpose for which he is constituted as an agent is responsible to the principal for the acts of that person even though such appointment may be with the authority and knowledge of the principal. He (the

learned counsel) in this regard referred us to an unreported decision of this Court in Chandaji Kubaji and Co. v. Indian Bank Ltd., (Appeal No. 445, 446 and 454 of 1946 D/- 7-7-1960) and also to the case of Purushotham Haridas and Others Vs. Amruth Ghee Co. Ltd., Guntur and Others, besides to an English decision in Calico Printers' Association v. Barclays Bank Ltd. (1931) 145 LT 51.

The assumption on which the argument of the learned Counsel proceeds is erroneous. It is further manifest that the facts of the present case have no parallel in any of the above cases. In Purushotham Haridas and Others Vs. Amruth Ghee Co. Ltd., Guntur and Others, the question that arose was if an agent employs another person for sale of goods and to carry out instructions of the principal and the sub-agent corresponds not with the agent but with the principal, would it create any change in the legal relationship of the parties ?

Would the sub-agent be deemed to have established privity of contract with the principal? It was held that the mere fact that the sub-agent corresponds with the principal was not sufficient to establish privity of contract between the sub-agent and the principal. By the same parity of reasoning it may as well be held on the particular facts of the present case that inasmuch as the second defendant is the nominee or appointee of the plaintiff, mere transmission either of the bill to the second defendant or of the draft to the 1st defendant in consequence of the instructions given by the plaintiff himself would not effect any change in the legal relationship between the plaintiff and the second defendant.

In the case referred to the provisions of Ss. 192 and 194 of the Indian Contract Act were also discussed and it was observed that if an agent nominates another person to act for the principal in the business of agency and that is accepted by the principal and the agent has no further concern with the business, mere naming of the person does not point to delegation of the duties of the principal. In such a case, direct relations are established between the principal and the person nominated and the latter becomes an agent substituted for the person who was authorised to nominate another.

10. In the instant case, as already said neither the second defendant was the nominee of the first defendant nor was the first defendant in any manner concerned with the collection of the bill amount from the drawee. He was concerned with only the acceptance of the amount to be adjusted to the account of the plaintiff, may it come from the proceeds of the bill or otherwise though of course the proceeds of the bill were of primary importance for it was in anticipation of the same the amount was credited to the plaintiff at his risk.

11. The unreported decision in Appeals 445, 446 and 454 of 1956 (AP) decided on 7th July 1960 provides rather a simple test for determination of substituted agency. It was observed therein :

"that the fact that the sub-agent was appointed with the knowledge and authority of the principal would not alter the legal relations as no privity of contract is established between the principal and the sub-agent. The position

remains unchanged even if the nomination of the sub-agent is made by the principal. It is only when the privity of contract is established between the principal and the sub-agent, in other words, when a substituted agency is created, that the agent is discharged from liability to the principal for the acts of the sub-agent. In such a contingency, the agent delegates the authority to the sub-agent and the latter in effect becomes the agent, the former disappearing from the scene".

We accord our respectful assent to the above enunciation of law. Under the provisions of Section 192 of the Indian Contract Act the sub-agent being responsible for his acts to the agent and the agent to the principal for the acts of the sub-agent only a privity of contract between the principal and the sub-agent can possibly shift the rights and liabilities of the agent as against the sub-agent to the principal. The relation then would be that of a principal and substituted agent, the original agent as a result of the privity being out of picture.

That there was privity of contract between the plaintiff and the second defendant in this case admits of little doubt. The duty of the 1st defendant bank was not collection of the amount from the drawee. That was the duty of the 2nd defendant and that was evidently as fixed by the plaintiff, whose nominee and appointee he was. The second defendant was for this purpose the agent of the plaintiff and not of the first defendant. As already observed the errand to the 1st defendant was only to transmit the bill to the 2nd defendant and to adjust the amount as and when received from the second defendant towards the payment made to the plaintiff in advance.

This could not constitute any privity between the 1st and 2nd defendant in the matter of collection of the bill amount from the drawee so as to render the collection by the second defendant the collection by the 1st defendant himself to be responsible to the plaintiff for the same. Then we are referred to the observations in (1931) 145 LT 51, but this case too does not render any assistance to the learned counsel. What has been stressed therein was that:

"the agent does not as a rule escape liability to the principal merely because employment of the sub-agent is contemplated. To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof."

Reference was also made to the judgment of Thesiger. L. J. in *De Bussche v. Alt* (1878) 8 Ch 1) 286, wherein it is pointed out that in certain cases, where the exigencies of business require it, an agent must be deemed to have authority to constitute a direct privity of contract between a substitute appointed by him and his principals.

12. It would appear not only that a substitute was necessary as the 1st defendant had no branch or agent of his own at Balda but also such substitute

was in fact appointed by the plaintiff himself. The facts of the case put to any known legal test would not render the 1st defendant liable for the acts of commission or omission of 2nd defendant with reference to bill amount realised from the drawee.

It is clear to our mind that where a constituent of a Bank draws a bill for collection at a place where the bank has neither a branch nor my agent and appoints therefore at the same time an agent of his own and instructs the bank mere transmission of the bill to his appointed agent, the collection of money by such agent would not bind the Bank as the said agent is in no sense a sub agent of the Bank. In this premises the plaintiff cannot lawfully claim back the amount in question from the 1st defendant. When the suit fails on the merits itself, the determination of the question of limitation is unnecessary. In our judgment the court below was right in dismissing the suit.

13. This appeal has no merits and is, therefore, dismissed with costs.