

(1940) 12 CAL CK 0032
In the Calcutta High Court

Kurseong Hydro-Electric Supply Co. Ltd.	APPELLANT
Vs	
Lakshmi Narayan Sukhani and Another	RESPONDENT

Date of Decision : 17-12-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
English Partnership Act, 1890 — Section 23
Partnership Act, 1932 — Section 14

Citation : AIR 1941 Cal 364

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—The Kurseong Hydro-Electric Supply Co. Ltd., (hereafter called the company) was incorporated in August 1930. A firm carrying on business under the name and style of Sundar and Rai, of which P. M. Sundar and N. B. Rai were partners in equal shares, became the managing agents of that company. It is said by the company that the said firm Sundar and Rai, was also appointed its engineers to look after the construction of its works at a monthly remuneration of Rs. 700, with yearly increments of Rs. 25 a month, for a period of three years commencing from October 1930. The respondents maintain that P. M. Sundar and N. B. Rai were appointed engineers on those terms in their individual capacities. In our judgment, the controversy on this point is a material one. The learned subordinate Judge, however, did not record his finding on the same, but, on the other hand, proceeded upon the assumption that the firm, Sundar and Rai, had been appointed as engineers. In reciting the facts in our judgment we will for convenience use the phrase "Sundar and Rai" without denoting either the firm of that name or the individuals, P. M. Sundar and N. B. Rai. N. B. Rai was also the secretary and one of the directors of the company for a long time. The services of "Sundar and Rai" as engineers were continued after September, 1933 and up to March 1936 when they resigned. They were paid their engineering remuneration up to February 1931, but thereafter they received no remuneration from the company. For the period March 1931 to March 1936 they would be

entitled to get from the company Rs. 47,400 as engineering remuneration. On the footing that P. M. Sundar and N. B. Rai were the engineers of the company in their individual capacities each of them would be entitled to Rs. 23,700.

2. On 17th December 1934 respondent 2, Ramgopal Agarwalla, got a decree for Rs. 5693 against N. B. Rai and one Sridoyal Rai and on 29th April 1935 respondent 1, Lakshmi Narayan Sukhani, got another decree for Rs. 21,815 odd against those two persons. Both those decrees carried interest. Earn Gopal first applied for execution. His case was numbered. Money Execution Case No. 6 of 1936. Lakshmi Narayan followed suit and his case was numbered Money Execution Case No. 19 of 1936. Both the decree-holders applied for attachment of the moneys in the hands of the company due on account of, (a) the salary, emoluments and remuneration of the judgment-debtor N. B. Rai as engineer and employee of the company, (b) the remuneration of N. B. Rai as director and secretary of the company, and (c) his half share in the firm, Sundar and Rai, as managing agents of the company. Attachment processes were issued under the provisions of Order 21, Rule 46, Civil P.C., and the prohibitory notices were served on the company on 31st January and on 18th March 1936 in Execution Cases Nos. 6 and 19 of 1936 respectively. Thereafter, garnishee proceedings were started against the company. In those proceedings the company took up the position, that although the sum of Rs. 47,400 was payable to "Sunder and Rai" as engineering remuneration under the terms of service, there had been an adjustment between it and "Sundar and Rai" by which P. M. Sundar agreed to accept Rs. 13,700 partly in cash (Rs. 10,700) and partly in shares of the company (face value of Rs. 3000) and N. B. Rai agreed to accept Rs. 13,700 also partly in cash (Rs. 2400) and partly in shares of the company (face value of Rs. 11,300) in full satisfaction of their claims for engineering remuneration. Out of Rs. 2400 payable to N. B. Rai in cash under this adjustment the company paid Rs. 305-9-0 as income tax on his behalf. It deposited in Court a cheque for Rs. 1586-8-0 and shares of the face value of Rs. 11,300. The learned subordinate Judge, however, held in his judgment dated 1st February 1937 that the said adjustment with N. B. Rai was not binding on the two attaching creditors as the said adjustment was made after the attachments. He directed the company to deposit in Court Rupees 22,953-15-0 in cash. The learned subordinate Judge arrived at that figure in the following manner:

Rs. 23,700- 0-0 ... Due to N. B. Rai as engineer from 1st March 1931 to 31st March 1936. Rs. 1,096- 0-0 ... Due to N.B. Raion other ----- heads.
Total Rs. 24,796- 0-0 Less Rs. 305- 9-0 ... For income tax paid by company on behalf of N.B. Rai ----- Rs. 24,490- 7-0 Less Rs. 1,536- 8-0 ...
Deposited in Court by company by cheque ----- Rs. 22,953-15-0

3. It is against this judgment and the garnishee order for that sum that the appeal has been filed by the company. The garnishee order passed by the learned subordinate Judge for the sum of Rs. 22,953-15-0 would, in our judgment, have been a good order, if the sum of Rs. 23,700 was payable by the

company to N. B. Rai in his individual capacity and not to him in his share qua partner of the firm, Sundar and Rai. It is admitted by the company that the sum of Rs. 1096 and an additional sum of Rs. 64, total Rs. 1160, was due to N. B. Rai on account of his remuneration as secretary of the company and for his fees as director. In this sum the firm, Sundar and Rai, has no claim. The learned Counsel for the company admits that the garnishee order is valid to that extent. He further says that if the cheque for Rs. 1536-8-0 has not been cashed his client would deposit in Court in cash the sum of Rs. 1160. He, however, challenges the liability of the company to deposit any portion of the balance namely Rs. 23,330-7-0 (i. e., Rs. 24,490-7-0 less Rs. 1160-0-0). He attacks the garnishee order on two grounds: (i) the garnishee proceedings in respect of the engineering remuneration are misconceived and illegal, and (ii) if that point is decided against him, the Court below was wrong in not giving effect to the adjustment between the company and N. B. Rai.

4. He urges his first contention in the following manner: The sum of Rs. 47,400 due from the company for engineering remuneration was due to the firm, Sundar and Rai; the money was accordingly the property of that firm. It could not therefore be attached under the process laid down in Order 21, Rule 46. There could only be an order charging the interest of the partner N. B. Rai in the partnership under Clause (2) of O.21, Rule 49. A garnishee proceeding can only be started, says he, in respect of a debt which in law could be attached under Order 21, Rule 46. He further says that on the basis of an agreement between the company on the one part and Sundar and Rai on the other, the original liability of the company to pay Rs. 47,400 to the firm, Sundar and Rai, was put an end to and the company became liable to pay separately to P. M. Sundar and N. B. Rai and to each of them in their individual capacity the sum of Rs. 13,700 and that partly in cash and partly in shares. It was on the basis of that agreement only that the debt of the company was converted from a debt due to the firm, Sundar and Rai to two separate debts due to the individuals, P. M. Sundar and N. B. Rai respectively. The respondents, the judgment-creditors of N. B. Rai could by accepting that agreement attach that separate debt due to N. B. Rai under Order 21, Rule 46 and take garnishee proceedings against the company to realise Rs. 2400 in cash and shares of the face value of Rs. 11,300. But if the respondent take up the position that that agreement is of no validity against them and that they are entitled to proceed against the company on the basis of its original liability, they must accept the position, if that be the fact, that the original liability to pay Rs. 47,400 in cash was a liability to the firm, Sundar and Rai. In that event the attachments of half portion of Rs. 47,400 under Order 21, Rule 46 were illegal. There is great force in this argument of the appellant's advocate. We would accordingly proceed to examine the legal position on the footing that the debt of the company for the sum of Rs. 47,400 was to the firm, Sundar and Rai.

5. According to the Code of Civil Procedure, (garnishee proceedings in respect of a debt can be started only after the debt has been attached under Order 21, Rule

46. If a debt attachable under O.21, Rule 46 had not in fact been attached or if the debt is one which cannot be attached under the process laid down in Order 21, Rule 46, garnishee proceedings cannot be taken. This follows from the language of Order 21, Rule 46A, Civil P.C. The first question therefore is whether a debt due to a firm can be attached by the process prescribed in Order 21, R. 46 in execution of a decree obtained not against the firm or the partners as such, but against one or some of them not qua partner or partners but in his or their individual capacities. The rules of the CPC beginning from Order 21, Rule 43 and ending with Order 21, Rule 54 provide for attachment of different kinds of property and prescribe different kinds of processes for effecting attachment which are appropriate to the nature of the property sought to be attached. Order 21, Rule 49 is specific and mandatory. Clause (1) of that rule lays down that except as provided for in that rule property belonging to a partnership cannot be attached or sold when the decree under execution is not against the firm or against the partners as such. In such a case a. charging order, with or without the appointment of a receiver, is the mode prescribed by Clause (2) of that rule. The scheme is to provide satisfaction to the decree-holder of such a person either by intercepting the share of the profits due to the latter through a receiver and or by sale of his interest in the partnership.

6. The scheme is not to break up the firm by a direct action on the part of the executing Court, or to paralyse or hamper the activities of the firm by intercepting any part of its gross income. The share of the judgment-debtor in the profits-the net income-can only be intercepted through the receiver for the purpose of making satisfaction to the judgment-creditor or the interest of the judgment-debtor in the partnership as a going concern can be sold leaving it to the purchaser at the court sale to take such steps as he may be advised to take. Even the receiver appointed by the Court will not have, during the continuance of the partnership, the right to interfere in the management or administration of the firm, or to require accounts of the partnership transactions, or to inspect the books of the firm without an express order of the Court and such an order would not be passed except in special circumstances, as for instance with a view to the dissolution of the firm. This scheme is based on a broad head, of public policy, namely the protection of commerce, which is considered to be an important source of national wealth. If the debt, in question is the property of the firm,, Sundar and Rai, garnishee proceedings in respect thereto would be inconsistent with the scheme of Order 21, Rule 49, which in substance, is a reproduction of Section 23, English Partnership Act, for the garnishee order would then have the effect of intercepting from the firm a portion of its gross income. The interest of a partner on which a charging order operates is the share of that partner in the firm and is nothing more than his proportion of the partnership assets which in turn is the gross assets converted into money less the debts and liabilities of, the firm.

7. On the principles we have discussed above a debt due to a firm from a customer is the property of the firm within the meaning of Order 21, R. 49. There

is an additional reason in support of this view, for the word "property" in reference to execution has been defined in Section 60, Civil P.C. It includes debts; we need not travel to other Acts, e. g., the Contract Act or the Partnership Act, for the purpose of finding out the definition of the word "property of the partnership," but we may observe that the definition of the term in Section 14, Partnership Act, is not exhaustive and does not exclude a debt due to a firm. If therefore the debt was due to the firm, Sundar and Rai, the garnishee order in respect thereto passed by the learned subordinate Judge against the company cannot stand. The materials on the record are not, however, sufficient to enable us to come to a definite conclusion on the point as to whether the engineering remuneration was payable by the company to the firm, Sundar and Rai, or to P. M. Sundar and N. B. Rai individually. The question of law was not argued in the lower Court from the point of view we have indicated above, and the learned subordinate Judge without appreciating the importance of that question of fact stated in reciting the facts that the debt was due to the firm, Sundar and Rai. The memorandum of agreement by which the company promised to pay the engineering remuneration is not on the record.

8. We cannot therefore accede to the argument of the appellant's advocate, which he at first advanced, that we must take the debt to be a debt due to the firm because it is on that footing that the learned subordinate Judge proceeded. In continuation of his argument he also drew our attention to some items of evidence which would suggest that the debt was due to the firm, Sundar and Rai, e. g., Exs. F to F (2) and the deposition of N. B. Rai. The resolutions of the shareholders which have been exhibited are equivocal in terms. We therefore accept the suggestion of the respondents' advocates, to which the learned advocate of the appellant agreed in the end, that for the ends of justice the point as to whether the engineering remuneration was payable to the firm, Sundar and Rai, or to P. M. Sundar and N. B. Rai individually should be further investigated in the lower Court on the evidence on the record and on such additional evidence as the parties may be advised to lead. We accordingly set aside the order appealed against, save and except for the sum of Rs. 1160, and remand the case to the lower Court for investigation of the point indicated above, the parties being at liberty to adduce additional evidence. If the Court finds that at the dates when the prohibitory orders issued under Order 21, Rule 46 were served on the company the debt was due to the firm, Sundar and Rai it would dismiss the garnishee proceedings except with regard to the above-mentioned sum of Rs. 1160. If, however, the finding be otherwise the questions which have been discussed in the judgment under appeal would be material questions. In order that the said questions may not be further mooted in the lower Court we give our decision thereon in the paragraph following.

9. If the debt in question was attachable under Order 21, Rule 46, we hold that it was in fact attached on 31st January and 18th March 1936 in execution cases Nos. 6 and 19 of 1936 respectively. The fact that execution case No. 6 of 1936 was thereafter dismissed and another execution No. 67 of 1936 was started by

Ram Gopal Agarwala does not matter, for the attachment made in execution case No. 6 of 1936 was kept alive by an order of the Court passed at the time of the dismissal of that execution case. We do not also see any force in the contention of the appellant's advocate that P. M. Sundar and N. B. Rai gave up before the attachments their claim to the engineering remuneration from March 1931 to March 1936. The first letter on the record is Ex. F dated 27th September 1932 written by Sunder and Rai to the company. In that letter they say that they were prepared to forgo their monthly remuneration as engineers from March 1931 to March 1932, if the directors of the company paid them a lump sum to be fixed later on by the latter. Exhibit F 1 is another letter dated 30th June 1933 in which they stated that they were prepared to forgo their monthly remuneration from April 1932 to March 1933 on the same terms as in Ex. P. In Ex. F2, a letter dated 10th January 1935, they recite that a sum of Rs. 23,350 was payable to them by the company for their monthly remuneration from March 1931 to October 1933. They were prepared to forgo, as on previous occasions, their monthly remuneration from April 1933 to October 1933 provided a lump sum was paid to them. After the receipt of the said letters, the directors of the company submitted on 31st March 1935 their annual report to the shareholders. This report dealt with the affairs of the company for the year ending on 31st March 1935. In this report (Ex. E 2; II-7) the directors say thus:

It is also gratifying to note that the managing agents and engineers have in the interest of the . company foregone their claim to the extent of Rupees 20,000.

10. In the balance sheet they showed only Rs. 12,750 as the liability of the company for engineering remuneration at the rate of Rs. 750 a month from November 1933 to March 1935. The extraordinary general meeting of the shareholders was held on 10th April 1935. By a resolution passed at that meeting the remuneration due to the engineers from March 1931 to October 1933 was taken as the liability of the company and was to be shown in the balance sheet as liability. The balance sheet originally circulated to the share-holders was accordingly amended and the said amount was shown as an additional item of liability. By the same resolution the Board of Directors was authorised to settle the accounts with the engineers. The meaning is plain. The share-holders did not accept the proposal of Sundar and Rai to forgo Rs. 20,000 only but wanted the Board of Directors to negotiate with them further in order to induce them to forgo a sum larger than Rs. 20,000.

11. Up to 10th April 1935 there was thus no new agreement between Sundar and Rai and the company as to the engineering remuneration. That this was the position is shown by a letter (Ex. V; 11-15) which the managing agents of the company wrote to the learned subordinate Judge on 22nd February 1936. On 16th March 1936, Sundar and Raitendered their resignation as managing agents of the company (ex. F3; 11-19). In their letter of resignations they stated that they were prepared to accept the sum of Rs. 27,400 in lieu of Rs. 45,000 which was then due to them. They further said that they were prepared to accept

payment of the said sum of Rs. 27,400 partly in cash (Rs. 12,400) and partly in ordinary shares of the company (face value of Rs. 15,000). Those proposals were accepted by the share-holders at an extraordinary general meeting held on 15th April 1936 (exs. G (1) and G (2); n 23 and 24). The agreement between Sundar and Rai and the company was thus made on 15th April 1936 and not before. It was after the attachments in execution cases Nos. 6 and 19 of 1936. This agreement is therefore of no effect against the claims enforceable under the two attachments effected by Earn Gopal Agarwalla and Lakshmi Narayan Sukhani. We fully endorse the reasons given by the learned subordinate Judge in this respect.

12. The result is that this appeal is allowed in part. The garnishee order is maintained to the extent of Rs. 1160 (on the footing that the cheque has not been cashed). The order holding the company liable to pay to the respondents the further sum of Rs. 23,330-7-0 (Rs. 24,796 less Rs. 1160 less Rs. 305-9-0 paid on account of income tax) is set aside, and the case remanded for determining the question as to whether the engineering remuneration of Rs. 47,400 was payable by the company to the firm, Sundar and Rai, or to P. M. Sundar and N. B. Rai individually. This question is to be decided on the evidence on the record and on such additional evidence that the parties may adduce. If the Court finds that the said remuneration was payable to the firm, Sundar and Rai, no further garnishee order against the company would be made. If the finding be that the engineering remuneration was payable to P. M. Sundar and N. B. Rai individually at or before the dates of the attachments a garnishee order would be passed against the company for the sum of Rs. 23,330-7-0. We name this sum on the supposition that the cheque for Rs. 1536-8-0 deposited by the company in the lower Court has not been cashed and cannot by reason of the efflux of time be cashed now. If, however, the said cheque has been cashed and the money has either been paid over to the respondents, the judgment-creditors of N. B. Rai, or is lying in Court and available to them the said sum of Rs. 1536-8-0 has to be deducted from Rupees 23,380-7-0 and the garnishee order in the contingency we have indicated above would then be for Rupees 21,793-15-0. Cost of this appeal would abide the result. Further costs are left to the discretion of the lower Court.