
(1971) 04 MP CK 0016
In the Madhya Pradesh High Court
Case No : First Appeal No. 26 of 1969

Lalchand Ramchand

APPELLANT

Vs

Pyare Dasrath Chamar and Another

RESPONDENT

Date of Decision : 27-04-1971

Acts Referred:

Contract Act, 1872 — Section 171
Evidence Act, 1872 — Section 91

Citation : AIR 1971 MP 245 : (1971) JLJ 601 : (1971) MPLJ 672

Hon'ble Judges : K.L. Pandey, J;G.P. Singh, J

Bench : Division Bench

Advocate : V.S. Pandit, for the Appellant; B.C. Verma and J.S. Verma, for the Respondent

Final Decision : Allowed

Judgement

Singh, J.

This Is a plaintiff's appeal against a decree passed by the Additional District Judge, Panna, dismissing his suit.

The facts are that the plaintiff filed the suit giving rise to this appeal on November 20, 1966, against the defendants on the allegations that on November 24, 1966, they approached the plaintiff for obtaining a loan of Rupees 14,717.68 for the purpose of depositing Government royalty and sales-tax in respect of a diamond. The defendants promised that after depositing the amount of royalty and sales-tax, they will deposit the diamond with the plaintiff as a pledge and will pay interest at the rate of 2 per cent per month on the amount of loan. The plaintiff agreed to these terms and a sum of Rs. 14,717.68 was got deposited by him in the State Bank towards the payment of royalty and sales-tax on behalf of the defendants. By virtue of this deposit, the defendants got possession of the diamond, but they did not deliver the same as pledge of the plaintiff. This action of the defendants, which amounted to cheating, shocked the plaintiff and he made a hue and cry on which some people gathered and on their persuasion the

defendants executed a pro-note in favour of the plaintiff in which the term of interest was omitted. In paragraph 4 of the plaint the plaintiff stated that the pronote, which was the basis of the suit, was being filed in evidence. The relief in the suit was for recovery of Rs. 16,727.73 inclusive of interest. Interest at the rate of 2 per cent per month was also claimed from the date of the suit till the realisation of the amount. It was also prayed that the plaintiff be given possession of the diamond as a security till the realisation of the decretal amount. The defendants denied the taking of loan or execution of pronote. The suit was dismissed on the ground that the plaintiff failed to produce the pronote which was the basis of the suit, and that he was not entitled to lead any oral evidence to prove the loan. It is against this decree that the plaintiff has come up in appeal.

The circumstances which led to the non-production of the pronote may now be stated, for the main contention raised by the plaintiff in this appeal is that he was prevented in producing the pronote because of a wrong order passed by the trial Court. The plaint was filed in the Court on behalf of the plaintiff by his Advocate Shri S.K. Shrivastava, who was also given the original pronote by the plaintiff. Instead of filing the original pronote, Shri Shrivastava filed a copy of the same along with the plaint. This was permissible under Order 7, Rule 14 of the Code of Civil Procedure. On the first hearing of the suit, the pronote was not filed. Another Advocate Shri R.D. Mishra was engaged by the plaintiff. A summons was obtained for Shri Shrivastava to file the original pronote. Instead of filing the pronote, Shri Shrivastava, on December 21, 1967, raised an objection that he had a lien for his fees enabling him to retain the document. This objection was decided on January 9, 1969, in favour of Shri Shrivastava and it was held that he could withhold the production of document until his lien was discharged by payment of fees. As already stated, on January 31, 1969, the suit was dismissed for non-production of the pronote.

The argument of the learned counsel for the appellant is that Shri S.K. Shrivastava had no lien enabling him to retain the pronote and the order of the trial Court allowing his objection on January 9, 1969, was erroneous. To consider the validity of this ground, we also issued notice to Shri Shrivastava, who appeared through counsel and was heard.

Shri Shrivastava claimed to retain the document in the exercise of his lien u/s 171 of the Contract Act, which reads as under:

"Section 171, Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

The lien under this section is in terms conferred on attorneys of a High Court and not on Advocates. It is contended for Shri Shrivastava that the word "attorney"

is used in the section in a wide sense including Advocates and other legal practitioners. For purposes of this appeal we will assume that it is so. The section operates "in the absence of a contract to the contrary." The contract to the contrary may be express or implied. If it is expressly stipulated that the attorney will have no lien in respect of a particular document, the section will not be operative. Similar will be the result if the document is delivered in such circumstances from which an implied contract that the lien shall not be exercised can be inferred. When a document, which is wholly or partly foundation of a suit, is delivered to an Advocate, who is engaged for filing the suit and prosecuting it, the necessary inference is that the Advocate is to file the document along with the plaint or at the first hearing of the suit. Since such a document is meant to be produced in Court at the earliest opportunity, exercise of right of lien over it, as conferred by Section 171, will be excluded by an implied contract to the contrary. Now, the pronote in the instant case was a document which Shri Shrivastava himself understood to be a document which at least partly formed the basis of the suit. Indeed, it was so stated in Paragraph 4 of the plaint and it was for this reason that a copy of the document was filed along with the plaint. It was then the duty of Shri Shrivastava to file the original at the first hearing and he had no right to retain the document for the balance of the fees.

The case of Narayandas Sundarlal Rathi Vs. Narayandas Harbhagat, , was relied upon in support of the proposition that Shri Shrivastava was entitled to retain the document in the exercise of his lien for the balance of fees. The reliance, in particular, was placed on the following passage in the report:

"He has however a general lien upon all his client's papers and documents for payment of all taxable costs, charges and expenses incurred by him on behalf of his client; and the lien entitles him to refuse production of the papers and documents to his client except on certain conditions. There is however a distinction according to English law, and the same law also applies in India according to which the rule is quite different when the solicitor discharges himself from what it is when the solicitor is discharged by his client. If a solicitor discharges himself, the client or his new solicitor is entitled to an order not merely for inspection or production of the papers and documents in the former solicitors possession, but also for delivery thereof on an undertaking to hold them without prejudice to the former solicitor's lien, and subject to the redelivery thereof after the hearing of the suit, and if necessary subject also to an undertaking to prosecute the suit in an active manner. If, on the other hand, the client discharges the solicitor; the solicitor is under no obligation to deliver, nor even to produce or allow inspection of the documents and papers in his possession for the client's benefit, until all his taxed costs are paid." (p. 365)

In our opinion, Narayandas Sundarlal Rathi Vs. Narayandas Harbhagat, does not help Shri Shrivastava, for, in that case the attorney, who was first engaged, was discharged by the client by a notice issued on his behalf and it was only after the notice of discharge that the attorney claimed to exercise his right of lien. In the

instant case nothing has been shown from the record to enable us to infer that the engagement of Shri Shrivastava as an Advocate was terminated by the plaintiff. Simply because the plaintiff did not pay his fees or that he engaged another lawyer, it cannot be held that Shri Shrivastava's engagement came to an end or that he was discharged by the plaintiff. Until Shri Shrivastava was discharged by the plaintiff, he was not entitled to retain the papers delivered to him for production in the case. That is clearly brought out from the following passage in *Narayandas Sundarlal Rathi Vs. Narayandas Harbhagat*, .

"It is however clear that when a solicitor takes up a case and undertakes to conduct it he is bound whether his client is rich or poor to proceed with due diligence and honesty to prosecute or to defend the claim even if he is not put in funds, for it is open to him when he takes up the case to assure himself whether his client is a person of substance. It may be said that this rule will operate harshly on a solicitor because a dishonest client can turn round and not pay his solicitor's dues. To that the answer is that the solicitor can protect himself if he doubts the credit and honesty of his client by insisting on a sufficient advance at the outset to cover all probable costs. It will be really dangerous if a solicitor can be heard to say in the middle of a case that he refuses to act any further for his client unless he is paid all the costs incurred by him and at the same time object to give the papers over to another solicitor." (p. 366).

Reference in this connection may also be made to Order 3, Rule 4 (2) of the Code of Civil Procedure. The engagement of a pleader under this provision is deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. Even if it were held that the permission of the Court is not essential to make the discharge of an Advocate by his client effective so as to enable the Advocate to exercise his right of lien, there must be some notice or communication from the client bringing about the discharge of the Advocate or the termination of his engagement. Nothing of that kind has been shown to exist in the instant case. We are, therefore, constrained to hold that the engagement of Shri Shrivastava continued, at any rate, till the stage when he was called upon to produce the document in Court and, therefore, he was not entitled to claim the lien. In our opinion, the order of the Court passed in favour of Shri Shrivastava on January 9, 1969, was erroneous.

For the aforesaid reasons, we accept the contention that the plaintiff was prevented in producing the pronote by an incorrect order passed by the trial Court in favour of Shri Shrivastava who had the custody of the pronote.

It was next contended that the trial Court also erred in holding that the plaintiff could not be allowed to prove the loan except by producing the pronote. We have briefly stated the case set up in the plaint. The contract of loan was not contemporaneous with the pronote. The contract pleaded contained terms relating to the pledge of diamond and payment of interest. These terms do not

find place in the pronote, which according to the plaint was executed by the defendants not at the instance of the plaintiff, but at the instance of other persons after the defendants had already committed the breach of the original contract by refusing to deliver the diamond to the plaintiff. On the case pleaded in the plaint, it cannot be held that the pronote was intended to constitute the contract, or that the original contract of loan merged in or was extinguished by the promissory note. In these circumstances, the original contract of loan could be proved apart from the promissory note and the Court below clearly erred in not permitting the plaintiff to prove the original contract; see *Ananda Namdeo v. Pundalik Tukaram*, AIR 1936 Nag 225. 227-228.

In the result, the appeal is allowed. The judgment and decree passed by the Court below are set aside. The interlocutory order of the Court dated January 9, 1969 relating to the lien of Shri Shrivastava is also set aside. The Court shall now proceed with the trial of the suit in accordance with law. The costs of this appeal" will abide the result of the suit.