

(1957) 12 BOM CK 0016
In the Bombay High Court
Case No : Second Appeal No. 828 of 1953

Madan Manohar Ramchandra Gupta	Vs	APPELLANT
Narayan Sadashio Phutane		RESPONDENT

Date of Decision : 06-12-1957

Acts Referred:

Partnership Act, 1932 — Section 69
Transfer of Property Act, 1882 — Section 130

Citation : (1958) 60 BOMLR 1012

Hon'ble Judges : Mudholkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mudholkar

1. This is a plaintiff's appeal from the dismissal by the lower appellate Court of their suit for a declaration that a certain amount lying in deposit with the Divisional Engineer, Government Electricity Department, Nagpur, was not liable to attachment in execution of a decree obtained by respondent No. 1 as against respondent No. 3.

2. The relevant facts may be briefly stated. Respondent No. 3 took a contract for constructing certain buildings at Pulgaon from the Divisional Engineer, Government Electricity Department, Nagpur. That was in the month of October 1949. He deposited a sum of Rs. 4,500 with the Divisional Engineer as security for the performance of the contract. This amount was eventually raised to Rs. 8,000. The difference between this amount and the original deposit was agreed to be made good by deducting 10 per cent, from the running bills. It is common ground that ultimately an amount of Rs. 8,394 lay with the Divisional Engineer by way of security to the credit of respondent No. 3.

3. On April 8, 1950, respondent No. 1 instituted a suit against respondent No. 3 for the recovery of a certain amount of loan due to him on a promissory note

executed by the latter. In the course of that suit, he applied for and obtained an order for attachment before judgment, on May 2, 1950, with respect to this amount. After a decree was passed in his favour, he made an application for execution. In the execution proceedings, the Divisional Engineer remitted the sum of Rs. 3,276-6-0 to the executing Court for satisfying the decree in favour of respondent No. 1.

4. According to the appellants, the contract of partnership was entered into between them and respondent No. 3 on November 17, 1949. The firm was to be known as the Lucky Construction, Kamptee, and the object was to execute the work of building construction at Pulgaon and other places. Under this agreement, respondent No. 3 had agreed to contribute Rs. 5,000 as his share of the capital for the business of the firm. The case of the appellants is that the initial amount of Rs. 4,500 deposited by respondent No. 3 with the Divisional Engineer was to form part of the contribution of respondent No. 3 towards the capital of the partnership. Since the decree of respondent No. 1 was only against respondent No. 3, the partnership was not liable for it and, therefore, according to them, the amount in question could not be attached. They also contended that by a letter dated March 12, 1951, respondent No. 3 has relinquished his interest in favour of appellant No. 1, and for that reason this amount could be said to have become the exclusive property of appellant No. 1.

5. The suit was contested by respondent No. 1 alone. He denied the agreement of partnership and contended that the security deposited by respondent No. 3 initially with the Divisional Engineer could not be converted into a partnership asset. He also denied that the amount had become the property of appellant No. 1.

6. The suit was decreed by the trial Court, but was dismissed by the lower appellate Court.

7. The lower appellate Court has dismissed the suit on the ground that it was barred by the provisions of Section 69 of the Partnership Act because the partnership was not registered. In my opinion, the view taken by the lower appellate Court is not correct. In the first place, this is not a suit by persons in their capacity as partners, nor is this suit by a partnership firm. Apart from that, a suit of this kind would not fall either under Sub-section (1) or Sub-section (2) of Section 69 of the Partnership Act. No doubt, the lower appellate Court has observed that the suit is barred by Sub-section (2) of Section 69. That provision runs as follows:

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

As already stated, this is not a suit by or on behalf of the firm. In addition, it may be said that this is not a suit in which it is sought to enforce a right arising out of

a contract.

8. However that may be, I am clear that the appellants are not entitled to succeed. The reason is that the amount of Rs. 4,500 was unquestionably deposited by respondent No. 3 and, therefore, it belonged to him. Now, unless it was shown that before the attachment he had assigned this amount either to the partnership or to appellant No. 1, it would continue to be his own property. A reference is made of the deed of partnership (exh. P. 3), and reliance is placed upon term No. 9 thereof. That term reads as follows:

Partner No. 1 will make all arrangements for enabling the party No. 3 to recover the bills of the partnership concerned from the Government. Partners Nos. 1 and 2 will have no right whatsoever to recover any amount due to the partnership either from the Government or from anybody else concerned with the partnership. Partner No. 1 will thus empower partner No. 3 to recover the amount due to the partnership by executing a power of attorney in favour of the partner No. 3 empowering him to make the recoveries of all the amounts due to partnership and register the power of attorney in the name of the partner No. 3 in the Government record. The intimation of the recoveries will be given by partner No. 3 to partners Nos. 1 and 2 within reasonable time.

All that this term lays down is that appellant No. 1 as partner No. 1 would be entitled to recover all amounts due to the partnership. It does not say that the amount of Rs. 4,500, which was initially deposited by respondent No. 3 with the Divisional Engineer, was to form part of the partnership assets. Mr. Rajkarne for the appellants says that respondent No. 3 having undertaken under term No. 2 to provide Rs. 5,000 as his share of the capital but failed to pay this amount to the partnership, the amount of Rs. 4,500 should be taken to be his contribution towards the partnership capital. There are no pleadings on the question as to whether respondent No. 3 did or did not pay Rs. 5,000 to the partnership. From the mere fact that he was liable to contribute Rs. 5,000 towards the partnership capital, even assuming that he had not paid that amount to the partnership, it would not follow that the amount which was lying to his credit with the Divisional Engineer would necessarily become or represent his contribution to the partnership capital.

9. Reliance was next placed on exh. P. 4, which is a power of attorney or Mukhtyar Patra executed by respondent No. 3 in favour of appellant No. 1. Under that document appellant No. 1 was empowered to receive money from the Government and to give acquittance in respect of it. He was also empowered under this document to take such actions in the name of respondent No. 3, whichever were necessary in connection with, the security deposit and to withdraw and recover the security deposits. It is urged by Mr. Rajkarne that by giving this power to appellant No. 1 there was an assignment of the security deposit in favour of appellant No. 1 or in favour of the partnership. It is difficult to appreciate how mere conferral of power to withdraw an amount or to receive an amount would be tantamount to transferring interest in that amount to the

person in whose favour the power has been given. Mr. Rajkarne has referred me to two decisions: one reported in *Tripura M. Bank. v. Nabadwip Chandra* (1945) 49 C.W.N. 494 and another in *Alkash Ali v. Nath Bank* AIR[1951] Ass 56. In the first mentioned case, one Amar Chandra Mukherjee, a contractor, had executed a power-of-attorney in favour of the agent of the Tripura Modern Bank authorising him to receive monies on his behalf from the Karimgunge Municipality due to him on contracts entered into with the municipality. In addition to this, he had executed a letter of lien in his favour which said:

I hereby give you lien on all my bills of my accepted tender for the municipal works of the Karimgunge Municipality for the outstanding general balance of all and every loan and other accrued with you with power to you to draw and collect all my bills....

Now, these documents were construed by the learned Judges to constitute an assignment of the debt due from the municipality. In the instant case, all that Mr. Rajkarne has been able to show is the execution of a power-of-attorney in favour of appellant No. 1 and nothing more. If the power to collect money were coupled with the grant of any interest in that money, then there would have been room for the contention that the transaction was an assignment of the money. In the *Calcutta* case such an interest had definitely been created. The case is, therefore, distinguishable.

10. In the *Assam* case, a power-of-attorney was executed by the contractor in favour of the bank embodying an arrangement between the parties, according to which the bank agreed to advance monies to the contractor on the security of the bills that were due and gave the necessary authority to collect the bills. It was held that such an authority complied with the requirements, of Section 130 of the Transfer of Property Act. That case is also distinguishable on the simple ground that an interest in the amount to be collected was created in the bank in whose favour the power-of-attorney was executed.

11. There is not a word either in the power-of-attorney or in the partnership deed to show that any interest in favour of the partnership or in favour of appellant No. 1 was created by respondent No. 3. That being the position, it must be held that the amount of Rs. 4,500 remained that of respondent No. 3.

12. I have omitted to mention one more document on which reliance was placed by Mr. Rajkarne, and that document is a letter dated March 12, 1951 which, appellant No. 1 says, has been executed in his favour by respondent No. 3. That document, however, came into existence after the attachment, and whatever rights accrued to appellant No. 1 by virtue of that document would be subject to the rights acquired by respondent No. 1 by virtue of the prior attachment.

13. There is thus no substance in the appeal. It is, accordingly, dismissed with costs.