
(2000) 02 GUJ CK 0092
In the Gujarat High Court
Case No : First Appeal No. 460 of 1984

Nandlal Deepchand and Co.	Vs	APPELLANT
Dwarka Cooperative Housing Society Ltd.		RESPONDENT

Date of Decision : 17-02-2000

Acts Referred:

Citation : (2000) 02 GUJ CK 0092

Hon'ble Judges : H.K. Rathod, J; D.C. Srivastava, J

Bench : Division Bench

Advocate : B.G. Jani, for the Appellant; Kalpana R. Shah and B.G. Patel, for the Respondent

Final Decision : Allowed

Judgement

D.C. Srivastava, J.—This is an Appeal against the Judgment and Decree dated 13.1.1984 passed by Civil Judge (S.D.), Narol, whereby the appellant's Suit for recovery of money due on mortgage together with interest and cost was dismissed and the counterclaim of the defendant No. 1 was partly allowed whereby the plaintiff firm was directed to execute registered release Deed in favour of the defendant No. 1 at the cost of the defendant No. 1 releasing the suit property from mortgage security without recovering any mortgage debt.

2. Brief facts giving rise to this Appeal are as under :

The defendants No. 1 & 2 are Registered Co-operative Societies under the Gujarat Co-operative Societies Act, 1961. The defendant No. 2 is prior mortgagee from the defendant No. 1. The defendant No. 1 obtained loan of Rs. 1,80,000/- from the plaintiff on 20.5.1967 with 9 % per annum interest till repayment of loan. The Chairman of the defendant No. 1 society Bhagchand Sirumal and a member Sadhram Vasumal executed registered simple mortgage Deed on the same day i.e. on 20.5.1967. This mortgage Deed was executed under authority to these two persons flowing from resolution dated 9.5.1967. Aforesaid mortgage was subject to first mortgage for Rs. 1 lac in favour of Shri

Chimanlal Kiberdas and another. The property mortgaged was agricultural land, ground with compound wall, etc. fully described in the plaint. Part interest was paid upto 31.3.1974 whereafter the interest remained due. In this way the Suit was filed by the plaintiff for recovery of Rs. 1,80,000/- towards principal and Rs. 85,725/- as interest from 1.4.1974 to 15.7.1974 at the rate of 9 per cent. The total amount claimed was thus Rs. 2,65,725/- from the defendant No. 1. After serving a statutory notice under Sec. 167 of the Gujarat Co.Operative Society Act on 18.12.1978 the Suit was filed in the Court below.

3. The defendant No. 2 was added as proforma defendant.

4. The defendant No. 1 contested the Suit on various grounds taking pleas that the Suit is barred by limitation; that no property was mortgaged by the defendant No. 1 to the plaintiff and that the Suit was further barred by estoppel, acquiescence and waiver. It was also alleged that Dwarkadas Maniklal Israni was managing partner of the plaintiff and his son was carrying different business in the concerned partnership in different names. One Motilal Dwarkadas, son of plaintiff's managing partner Dwarkadas Israni was an employee of M/s. Dwarkadas Nandlal and M/s. Motilal Ashokkumar. Accounts were not given by Motilal. It was alleged that he had misappropriated the amount collected from members of the defendant society. Meeting was called for taking action against Motilal whereafter Dwarkadas realised the gravity of situation and wanted to get out of the said situation hence he started to talk about compromise. Therefore, Agreement was entered between the defendant society and the plaintiff on 18.4.1975 which was signed by Dwarkadas Israni as plaintiff's managing partner. Under the said Agreement parties agreed that the company, namely, the plaintiff shall release mortgaged property of the society from mortgage and will certify the debt having been satisfied without charging or taking any money from the society and thus the debt in question of the mortgage stand wiped off and registered Release Deed is required to be executed by the plaintiff and get it registered at the cost of the defendant No. 1 society. A counter claim was filed by the defendant No. 1 praying for a decree that the plaintiff should be directed to execute registered Release Deed in favour of the defendant No. 1 in terms of the Agreement dated 18.4.1975.

5. The defendant No. 2 in its written statement has pleaded that the defendant No. 1 under Mortgage Deed dated 20.5.1967 has created a charge for Rs. 1 lacs in favour of Chimanlal Kuberdas Moti and Kamlaben and another Mortgage deed was executed in favour of the plaintiff. It is also pleaded that the defendant No. 2 has advanced loan of Rs. 9,11,000/- and another loan of Rs. 4,06,000/- under two registered mortgage Deeds hence unless prior charge is cleared no relief can be granted in favour of the plaintiff.

6. The trial Court framed 11 issues for trial and recorded findings that the plaintiff advanced Rs. 1,80,000/- to the defendant No. 1 on 20.5.1967 and the defendant No. 1 executed Mortgage Deed on this date. It further found that the Mortgage Deed was executed with authority in favour of the executants. Payment

of interest upto 31.3.1974 was accepted and held by the trial Court. The trial Court found that the Suit was not time barred and that the counter claim of the defendant No. 1 was within limitation. It further found that the loan on Mortgage Deed stands wiped off on account of Agreement and that the defendant No. 1 is entitled to have a registered Release Deed of the mortgage in question executed from the plaintiff. It further found that that Suit of the plaintiff is barred by estoppel, acquiescence and waiver. It also found that the plaintiff's Suit is maintainable and that the defendant No. 2 was impleaded hence the charge in favour of the defendant No. 2 has to be first cleared and then any amount can be paid to the plaintiff. It further found that the Agreement dated 18.4.1975 was not executed under threat and that it was executed under the implied authority and that it is binding on the plaintiff. With these findings the Suit was dismissed but the Counter Claim of the defendant No. 1 was decreed in part hence this Appeal by the plaintiff.

7. Shri B.G. Jani, learned Counsel for the appellant has challenged the findings of the trial Court on Issue Nos. 5(A), 6, 7 & 8 (A). Since other findings were in favour of the plaintiff he did not agitate the findings on issue Nos. 1 to 5. However, issue No. 8 is also required to be discussed in this Appeal.

8. So far as findings on issue No. 8 are concerned the same require no interference. The defendant No. 2 claimed to be first mortgagee and the plaintiff is said to be subsequent mortgagee. Order : 34, Rule : 1 of the CPC provides that subject to the provisions of this Code all persons having an interest either in the Mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Explanation to Order : 34, Rule : 1 C.P.C. further provides that a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit, and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

9. In compliance of this provision the prior mortgagor, namely, the defendant No. 2 has already been joined as party to the Suit and the Suit cannot be said to be not maintainable. Ofcourse if the plaintiff prays that he is entitled to recover any amount from the defendant No. 1, the said decree will be subject to clearance of first charge of the defendant No. 2 and until the first charge of the defendant No. 2 is cleared no amount shall be paid nor shall be liable to be paid to the plaintiff. It is only after clearance of first charge that if any amount is found surplus the same can be paid to the plaintiff.

10. The trial Court has found that the plaintiff had advanced a sum of Rs. 1,80,000/- to the defendant No. 1 on 20.5.1967 and the defendant No. 1 through duly authorised officers executed a registered Mortgage Deed on the same day. There is no dispute now left regarding amount of loan and execution of mortgage Deed by the defendant No. 1 in favour of the plaintiff. Likewise the rate of interest was also not disputed by the defendant No. 1. As such the finding that the defendant No. 1 executed mortgage deed at the rate of 9% p.a. interest also requires no interference. In the plaint the plaintiff has alleged payment of

interest upto 31.3.1974. There is no allegation to the contrary from the side of the defendant No. 1 that more interest has been paid. Consequently, findings of the trial Court that the defendant No. 1 has paid interest upto 31.3.1974 also requires no interference.

11. The main question for consideration is whether any valid Agreement was executed by Dwarkadas Manikray Israni, Managing Partner of M/s. Nandlal Deepchand & Company and under this Agreement remaining mortgage debt together with interest stands wiped off.

12. Learned Counsel for the parties placed reliance upon the Agreement which is mentioned in the Judgment as Exh.55. The zerox copy of the said Agreement is Ex. 12/1 which was referred by the learned Counsel for the parties in the course of hearing of Appeal. The trial Court has held that it was not executed under threat or pressure by Dwarkadas. However, the Agreement itself appears to be suspicious. In the last para of the Agreement the date is 13.4.1975, whereas in the opening portion of the Agreement it is recited that it was entered into on 18th day of April 1975. This contradiction could not be reconciled by the learned Counsel for the respondent No. 1. If the Agreement is prima facie found to be suspicious it cannot be of any help to the respondent No. 1. The trial Court found that this Agreement was voluntarily executed by Dwarkadas. It further found that Dwarkadas had implied authority to execute this Agreement and as such this Agreement has wiped off the debt of the plaintiff. The trial Court further found that the Agreement was not without consideration and that the consideration was to save Motilal, son of Dwarkadas, its executant, from being prosecuted in a criminal case for misappropriation of funds of other society.

13. Dwarkadas was examined and he stated that he had no authority from other partners either express or implied to execute this Agreement and that this Agreement was got executed under duress and pressure. The Agreement was written in the Chamber of an Advocate. The Advocate in his statement has given evasive reply that he does not remember what happened on that date except that the contents of the Agreement were proved by him to have been written under his instruction.

14. On the point of implied authority of Dwarkadas to execute this Agreement we have examined the material on record and the Judgment of the trial Court. In our view the trial Court has incorrectly appreciated the provisions of the Partnership Act under Sections 18 & 19. It is evident from the record that no express, oral or written authority, was given by other partners to Dwarkadas to execute this Agreement. It has been contended by the learned Counsel for the respondent No. 1 that other partners have not been examined to challenge that Dwarkadas had no express authority or implied authority from them to execute the Agreement Ex. 55. However, it is on record that one partner Shri Ashok Israni is staying in America, other partner Nandlal was also in America where he had gone for heart surgery. The third partner is a lady who is handicapped. Nandlal filed the Suit and signed the plaint. Subsequently he had to go to America for heart

surgery. Consequently these three partners could not be examined by the plaintiff. Non-examination of these partners in the above background is hardly a ground for drawing adverse inference against the plaintiff. The fact that the plaint was signed by Nandlal itself shows that the action of Dwarkadas in executing the Agreement was challenged. In the plaint it was specifically pleaded that Dwarkadas had no authority from the partners to execute Agreement Ex. 55. Dwarkadas also stated on oath that he had no such authority to execute such agreement binding the partners of the firm. Though the trial Court disbelieved Dwarkadas that the said Agreement was got executed under duress and pressure yet from the evidence on record and the circumstances of the case it is clear that there was no express authority given by other partners to Dwarkadas to execute such Agreement. Dwarkadas himself did not state that he had express authority from the other partners to execute such Agreement.

15. Then comes implied authority of Dwarkadas to execute such Agreement. On this point also Dwarkadas stated that he had no such implied authority from other partners. For appreciating the scope of implied authority of a partner of firm the provisions of Sections 18, 19 and 20 have to be kept in mind.

16. Section 18 of the Partnership Act provides that"Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm." This section, therefore, establishes the principle of agency amongst the partners and they are considered to be Agents of the Firm for the purposes of carrying on business of the firm and for no other purpose.

17. Implied authority of the partner as an Agent of the firm is explained and incorporated in Section 19 of the Partnership Act. Section 19(1) of the Act provides that ..."Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm."

18. Thus, under Sub. Section 1 of Section 19, subject to the provisions of Section 22 if the partner of a firm does any act to carry on the business of the firm in usual way and that too for the business of the kind carried on by the firm then only such act binds the firm and such act will be called to be within the implied authority of the partners. Thus, the act of a partner of the firm in the nature of implied authority which can bind the firm should be of such a nature which is done in the usual way of the business of the firm or for carrying on business of the firm and the act should be in relation to the business carried on by the firm. Sub.Section 2 of Section 19 imposes certain limitations on the implied authority of the partners. There are several restrictions under this provision. It inter alia provides that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of a claim by the firm. In this Appeal we are concerned with limited restriction on implied authority as contained in Section 19(2)(c) of the Act, inasmuch as the Agreement Ex. 55 amounts to total relinquishment of the claim of the firm. In view of section 19(2)(c) such relinquishment is prohibited. It

can be made permissible only if there would have been usage or custom of the trade permitting such relinquishment. No such usage or custom of the business carried on by the plaintiff has been established by the defendant - respondent No. 1.

19. Section 20 of the Partnership Act can also be referred, which provides for extension and restriction of partner's implied authority. The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner. Nothing has been brought on record by the defendant No. 1 that the implied authority of Dwarkadas were extended under any contract to relinquish the debt in question secured by a mortgage. On the other hand Shri B.G. Jani, pointed out that in the partnership Deed there is specific restriction in making such relinquishment. However, since partnership deed or its copy was not filed it can not be said what is contained in the partnership deed nor the same can be referred in this Judgment. In any way there is nothing on record to show that the implied authority of the partner Dwarkadas was extended through any contract between other partners lifting the restrictions contained u/s 19(2)(c) of the Partnership Act.

20. Likewise Section 22 of the Act has also to be referred. It provides that, in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. If section 19(1) and Section 22, are read together, then executing the Agreement Ex. 55 by Dwarkadas will be an act to execute this Agreement as partner of the firm. That alone will not be enough for holding the validity of the Agreement so as to bind other partners of the firm. It should have been indicated in the Agreement expressly or by implication the intention to bind the firm from such Agreement. After going through the contents of the Agreement we are unable to find that Dwarkadas had ever expressly or impliedly shown his intention to bind the firm. It was argued that Dwarkadas was Managing Partner of the firm and the Managing Partner had authority to execute such Agreement. In the Agreement, Para : 1 it is mentioned that Dwarkadas Manikray Israni is Managing Partner, but there is no evidence on record that Dwarkadas was doing everything as Managing Partner of the firm. The Suit was not filed by Dwarkadas nor the plaint was signed by him nor it can be said that Dwarkadas was Managing Partner in real sense and the other partners were either dummy or sleeping partners.

21. The scope of implied authority of partner was considered in various decisions of this Court as well as by the Apex Court. It was not within the implied Authority of Dwarkadas to wipe off the entire debt. Learned Counsel for the respondent No. 1 had argued that those cases are distinguishable on facts. Needless to say that the facts of each case will differ but the ratio laid down in this case is the same. In Porbandar Commercial Co.Operative Bank Ltd. v/s. M/s. Bhanji Lavji & ors., reported in 1985 (1) GLH 49, it was laid down that ..."Mere look at the provisions contained in Sec.19 of Indian Partnership Act, shows that before an act of a

partner can bind the firm and, therefore, rest of the partners, it must be shown that the concerned act was done in usual way to carry on business of the kind carried on by the firm. This is nothing, but reproduction of Section 19(1) of the Partnership Act. Of course, on facts the case is distinguishable but the ratio of this case regarding implied authority of the partner is fully applicable to the facts of the case before us.

22. In *Dalichand V. Parekh Vs. Mathuradas Ravji*, , again it was held that "it is not within the implied authority of a partner to set off his own separate debt against the debt due to the firm. And if payment by way of set-off is made, the payment not being within the implied authority of one partner would be deemed to be fraudulent and not binding on the partnership firm." This case also cannot be said to be distinguishable. It was urged by the respondent's Counsel that the executant Dwarkadas had not set off his personal debt against the debt due to the firm hence the case is distinguishable. This distinction hardly holds goods. The scope of implied authority was expressly discussed in this case. From the ratio of this case it can be said that Dwarkadas could not have executed the Agreement to save his son Motilal from being prosecuted in a Criminal case for mis-appropriation of money from the firm of the respondent No. 1.

23. The Madras High Court in *Chainraj Ramchand Registered Partnership Firm of Bankers v/s. V.S. Narayanaswamy & ors.*, reported in AIR 1982 Mad 326, while deciding the application under Order : 23, Rule : 3 of the CPC had an occasion to examine the scope of Section 19(2) of the Partnership Act and it observed that Section 19(2) of the Partnership Act makes it clear that unless there is an express authority given to a partner by all the partners, that partner cannot compromise or relinquish any claim by the firm. An authority express or implied on the part of a partner to compromise suit claim cannot be assumed merely because he had been conducting the suit filed by the firm or had been claiming the suit amount from the defendants even before filing of suit. This case, therefore, expressly rules that the partner can not compromise or relinquish the claim due to the firm unless there is express or implied authority from other partners to do so.

24. In *M/s. Sarabhai Hathising & Anr. v/s. Shah Ratilal Nathalal Share Broker*, reported in 20 GLR 484, the principle of agency between the partners vis-a-vis firm was reiterated. In this context it was held that "the Partner is an agent of the firm and has authority to do all acts necessary for the benefit of the firm, in particular to keep its business running. Section 19(1) provides that subject to the provisions of Section 22 the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Sub.Sec. 2 which lays down exceptions to the implied authority of a partner does not lay down that a partner cannot acknowledge the subsisting debt of the firm in favour of its creditor. It indeed, inter-alia, provides that a partner cannot compromise or relinquish a claim or a portion of a claim by the firm, nor can he admit any liability in a suit or proceeding against the firm. Of course the acknowledgement

of liability was considered to stand on different footing in this case and it was held that acknowledgment of liability does not amount to acting beyond the implied authority. This Court, thus in this case laid down that the partner can not compromise or relinquish the claim or a portion of claim nor can he admit any liability in a Suit or proceeding against the firm. The ratio of this case is equally applicable to the facts of the present case before us.

25. The Trial Court has observed that the Agreement was not without consideration, but we are unable to subscribe to this view. The trial Court has observed that the Agreement was executed to save Motilal from being prosecuted for misappropriation of money of respondent society. It is difficult to understand how the said Agreement is binding. It is not mentioned in the Agreement that the consideration or one of the considerations for the Agreement was to save Motilal, son of Dwarkadas from prosecution. Further, Motilal was not a partner of the plaintiff company or its firm. Consequently there arose no occasion for Dwarkadas to save his son from prosecution.

26. Further, from Para : 1 of the Agreement it is clear that this theory of possible prosecution of Motilal is hardly convincing. It is mentioned in Para : 1 of the Agreement that the out-going office bearers have got the accounts audited and the Balance sheets prepared and audit reports were given by them to the new Committee. It is further mentioned that the old Managing Committee has handed over the charge of the records of the society to the New Chairman and Secretary and it is agreed that the Society has not to enquire or to hold responsible the members of the old managing committee and the office bearers for any act done by them or on behalf of the society. Motilal was no doubt connected with the old managing committee of the defendant society. If this is the recital in the agreement and the audited accounts were found to be correct and acceptable there was no reason to prosecute Motilal.

27. Even if it is believed that this was consideration of the Agreement, such Agreement will be void in view of Section 28 of the Indian Contract Act which provides that the agreement in restraint of legal proceedings is void. Section 28 reads as under :

"28. Agreement in restraint of legal proceedings void - (Every agreement -

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights is void to that extent."

Thus, this Agreement will be in the nature of restraint of legal proceedings and is

rendered void hence it cannot be enforced.

28. Learned Counsel for the respondent No. 1 argued that this was not the only consideration in the Agreement and the other consideration is said to be that some disputes have arisen between the company and the society regarding management, etc. of the society. What were those disputes or nature of disputes are not disclosed in the opening portion of the Agreement or in the body of Agreement. Consequently, this has to be read as vague disclosure and it cannot be considered to be valid consideration of the Agreement. Agreement without consideration cannot be enforced. In any event if consideration of the Agreement was to save Motilal from prosecution such object was unlawful which will render the Agreement void within the meaning of Section 24 of the Indian Contract Act.

29. Thus, for the reasons given above the Agreement cannot be said to have wiped off the mortgage debt because it is not proved that it was executed for valid consideration or that it was executed by Dwarkadas with express or implied authority of other partners. The view to the contrary taken by the trial Court appears to be erroneous, hence it cannot be sustained.

30. The findings of the trial Court that the suit is barred by estoppel, acquiescence and waiver also cannot be sustained.

31. Section 115 of the Indian Evidence Act provides that when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. There is no evidence on record about any declaration or act or omission either on the part of Dwarkadas or on the part of other three partners of the appellant firm which prompted the respondent No. 1 to believe that Dwarkadas had authority to relinquish the claim. The Agreement Ex. 55 cannot be pressed in service for upholding the plea of estoppel. Thus, the view of the trial Court that the suit is barred by estoppel is incorrect and contrary to law.

32. There is also nothing on record to show that the plaintiff firm or its partners had acquiesced in the action of Dwarkadas in executing the Agreement or had acquiesced in not claiming the dues of the firm on the basis of mortgage. There is also no evidence that the plaintiff firm had waived its right to recover the mortgage debt. Learned Counsel for the respondent No. 1 argued that at no point of time interest was demanded from the defendant No. 1. This contention is found to be incorrect, because learned Counsel for the appellant had shown to us notice from the appellant demanding principal and interest from the respondent No. 1. Its reply was also brought to our notice. Thus, findings of the trial Court on issue No. 7 cannot be sustained. The findings on issue No. 6 also cannot be sustained because on the basis of agreement Ex. 55 it cannot be said that the mortgage debt stands wiped off.

33. Findings on Issue No. 5(A) also cannot be sustained on the basis of mere

recital in the Agreement Ex. 55 entitling the defendant No. 1 to get the release deed executed from the plaintiff. Since the validity of the Agreement and authority to execute such an Agreement has not been upheld by us in the foregoing portion of the Judgment, we are of the view that the defendant No. 1 is not entitled to get the release Deed executed. It may be mentioned at this stage that if the Agreement Ex. 55 was executed either on 13.4.1975 or on 18.4.1975 in either case the Suit for specific performance, namely, registered Release Deed executed from the plaintiff firm could have been filed within three years from the date of refusal to execute. On this point also the learned Counsel for the respondent No. 1 could not show to us how the counterclaim was set-up in the written statement which was filed in a Suit filed in the year 1979 and registered on 18.7.1979.

34. For the aforesaid reasons, in our view, the trial Court was in error in dismissing the Suit of the plaintiff and decreeing partly the counter claim of the defendant respondent No. 1. As such the Judgment and Decree of the trial Court cannot be upheld; rather it has to be reversed.

35. Coming to the question of relief which can be granted to the plaintiff in this Appeal and the Suit, we have to look to the provisions of Order : 34, Rule : 4 of the Code of Civil Procedure. Admittedly it was a case of simple mortgage. As such preliminary decree for sale has to be passed under Order : 34, Rule : 4 C.P.C. The plaintiff has claimed decree for Rs. 2,65,725/including principal and interest upto 15.7.1974 at the rate of 9%. For this amount the plaintiff is entitled to a decree. The plaintiff is further entitled to interest at the rate of 9 % per annum over the principal from 15.7.1974 till the date of deposit in Court or its realisation. However, this amount shall be first utilised in clearing the first charge of the respondent No. 2 on the previous mortgage and the balance, if any, left shall be paid to the plaintiff firm in full or part satisfaction, as the case may be, of the claim arising out of the mortgage in question. The counter claim is liable to be dismissed.

36. In the result the Appeal is allowed with costs throughout. The plaintiff firm is entitled to a decree for Rs. 2,65,725/- including principal and interest upto 15.7.1974 and to pendentlite and future interest at the rate of 9 per cent p.a. from 16.7.1974 till actual payment or deposit in the court below. The counter claim of defendant - respondent No. 1 is dismissed. Preliminary Decree be drawn up in terms of Order : 34, rule : 4 of the CPC and the preliminary decree for sale and final decree for sale which may be prepared under Order : 34, rule 4 and rule 5 C.P.C. will be subject to first clearance of claim of the respondent No. 2, prior mortgagee, and the balance if any, left shall be paid to the plaintiff appellant applying the principle of rateable distribution.