

(1944) 02 CAL CK 0021
In the Calcutta High Court
Case No : Suit No. 1198 of 1942

Profulla Kumar Basu

APPELLANT

Vs

Gopee Bullabh Sen and Another

RESPONDENT

Date of Decision : 04-02-1944

Acts Referred:

Contract Act, 1872 — Section 125, 244

Citation : AIR 1946 Cal 159

Hon'ble Judges : Sen, J

Bench : Single Bench

Judgement

Sen, J.—The facts upon which this suit is based may be stated briefly as follows: Sometime in January 1940 the plaintiff, Profulla Kumar Basu, purchased for and on behalf of the defendant, Kampta Prasad Bhargava, 1500 ordinary shares of Rs. 10 each in the Bengal Electric Lamp Works Limited. These shares were not fully paid up. The plaintiff only paid the amounts payable with the application for shares, the balance of the amount payable for the shares still remains unpaid. Sometime in January or February 1941 the defendant Kampta Prasad Bhargava gave up all his claim in the shares to the plaintiff. The plaintiff then became the real and absolute owner of these shares. These facts are not denied. On 28th February 1941 the plaintiff sold these shares to defendant 1, Gopiballabh Sen. A deed of transfer was executed and signed by the plaintiff and Gopiballabh Sen. Gopiballabh then applied for registration of his name as transferee in the books of the company. This application was refused, the company relying upon Article 36 of the articles of association which gave the directors an absolute and uncontrolled discretion to decline the registration of the name of any particular transferee. A second attempt was made on 7th April 1941 by Gopiballabh to have the shares registered in his name. That attempt also failed. In the meantime the company forfeited the shares but the plaintiff applied to this Court and the forfeiture was set aside on 18th July 1941. Thereafter it was agreed between the plaintiff and the defendant Gopiballabh Sen on or about 28th July 1941 that the plaintiff would hold the shares in trust for Gopiballabh Sen and that the plaintiff

would, on the request of Gopiballabh, pass on to the company the balance of the money due on the shares which Gopiballabh would send to him from time to time and it was further agreed that the plaintiff would receive any dividends payable by the company and hand them over to Gopiballabh Sen. It was also agreed that the plaintiff would exercise the right of voting in respect of the 1500 shares in accordance with the directions of Gopiballabh Sen. This agreement was made binding upon the heirs of the plaintiff. The agreement is admitted.

2. Pursuant to this agreement the defendant Gopiballabh Sen gave the plaintiff a cheque for the sum of Rs. 3000 for the purpose of being forwarded to the company in payment of the allotment money outstanding. The company refused to accept cheque which was returned to Gopiballabh Sen. Gopiballabh Sen has not thereafter paid the value of that cheque to the plaintiff. Although in his written statement Gopiballabh Sen states that the agreement between him and the plaintiff was entered into on the distinct understanding that the plaintiff would get the name of Gopiballabh Sen registered in the company's book, that defence has been given up by learned Counsel appearing on his behalf. The company has made calls in respect of the said shares and the plaintiff duly forwarded notices of the said calls to the defendant Gopiballabh Sen, but the latter has not paid the calls. On 4th February 1942 the company filed a suit against the plaintiff, being Suit No. 152 of 1942, claiming from him as registered holder of the said 1500 shares the sum of Rs. 14,281-2-0 with interest thereon and costs. The plaintiff gave notice of this suit to Gopiballabh Sen and called upon him to satisfy the claim of the company but the latter has not done so. In these circumstances the plaintiff has instituted the present suit and he asks for the following reliefs:

(a) A declaration that the defendant Gopiballabh Sen is the real and beneficial owner of the said 1500 ordinary shares in the Bengal Electric Lamp Works Limited specified in para. 1 of the plaint, and that the plaintiff as registered holder thereof is the trustee in respect of the said shares for the said defendant, Gopiballabh Sen.

(b) A declaration that the plaintiff is entitled to be indemnified by the defendant Gopiballabh Sen against all calls and liabilities in respect of the said shares and be relieved forthwith from all such liabilities to the said company, which are the subject matter of the said Suit No. 152 of 1942 filed by the said company against the plaintiff.

(c) That the defendant, Gopiballabh Sen, be ordered and decreed to pay forthwith either to the company or to the plaintiff the amount of the claim of the company against the plaintiff in the said Suit No. 152 of 1942 including interests and costs.

(d) In the alternative the said defendant be directed to set aside or deposit with the Registrar of this Court a sum of Rs. 17,500 sufficient to meet the costs and claim of the said company in the said Suit No. 152 of 1942 to be available to

meet the decree that may be passed in that suit.

(e) Such further and other directions as may be necessary.

(f) Costs.

3. No relief has been claimed against Kampta Prasad Bhargava. The plaintiff's case is that he was joined in the suit for the purpose of having the decree made in his presence. This defendant did not appear. Mr. B.C. Ghose appearing on behalf of the defendant Gopiballabh Sen said that he would not contest the suit on the merits. He urged a preliminary objection that the suit was premature. He stated that he would also urge that this Court has no jurisdiction to entertain the suit but later on Mr. Sarcar who appeared with him on behalf of Gopiballabh Sen gave up this point of jurisdiction. Mr. Ghose argued that there was no objection to the plaintiff getting the declaration prayed for in prayer (a) and the first part of prayer (b). He argued, however, that the plaintiff could not get the reliefs claimed in the last part of prayer (b) and in prayers (c) and (d) inasmuch as the suit so far as these reliefs were concerned was premature. His argument put shortly is this. Under the Contract Act an indemnity-holder would not be entitled to be indemnified until he had actually paid the amount in respect of which he claims to be indemnified. Equity, however, has extended the relief which an indemnity holder has and by virtue of this extension an indemnity-holder may get indemnified before he actually suffers any loss, i.e., before he actually makes the payment in respect of which he is entitled to be indemnified; but he is entitled to this relief only if there has been a decree passed against him with respect to the subject-matter of the indemnity. Equity will not come to his aid until a decree has been passed. In support of his argument, Mr. Ghose draws my attention to a passage in Pollock and Mulla's "Contract Act" appearing in the annotation to Section 244 which is to be found at pages 463 and 464 in the 6th Edn. of that work ; it is in the following terms:

It might be supposed that an indemnifier could not be called on till the indemnified had incurred actual loss, and this was at one time said to be the rule of English Common Law. But according to the equitable principles which now prevail, "to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given...if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance." Accordingly the existence of a clear enforceable claim--as under a judgment recovered -- suffices to call the indemnifier's obligation into action, and in general for the whole amount, without regard to circumstances which may affect the amount ultimately paid by the indemnifier or those who stand in his place.

4. Mr. Ghose relies very strongly on the words "as under a judgment recovered." He says that the only case in which an indemnity-holder can compel the

indemnifier to pay before the indemnity-holder has Buffered any loss is when there has been a decree passed against him. If there is no such decree the indemnity-holder cannot compel the indemnifier to pay unless he has actually paid the amount or actually suffered loss. In my opinion, the passage relied upon by Mr. Ghose certainly does not support this view. All that the passage says is that an indemnity-holder can recover against the giver of the indemnity even though he has not actually suffered loss, so long as he can show the existence of a clear enforceable claim against himself. The words "as under judgment recovered" are merely illustrative. They certainly do not indicate that it is only when a judgment has been recovered that the indemnity-holder can recover against the giver of indemnity. Mr. Ghose also relied upon two cases decided by the Courts in India, namely, 41 ALL. 395 : ("19) 6 A. I. R. 1919 All. 279 : 41 All. 395 : 51 I. C. 158 Chiranjilal v. Naraini and 37 Mad. 270 : ("15) 2 AIR 1915 Mad. 36 : 37 Mad. 270 : 25 I. C. 888 Nallappa Reddi v. Vridhachala Reddi. In both these cases the principle was laid down that it is not necessary that before a suit on an indemnity bond can be filed the plaintiff should have already been compelled to make payment in respect of which he is seeking to be indemnified. It was said that it was sufficient that a decree had been passed against him for such payment. It is true that in each of those cases there was a decree against the indemnity-holder but it does not follow from this that the cases decided that relief could only be granted when a decree has been passed against the indemnity-holder. The principle relied upon in these cases is a much broader one than that as I shall presently show.

5. Mr. Ghose drew my attention to Section 125, Contract Act, and he says that under that section the plaintiff would be entitled to re-cover only such sums as he would be bound to pay in any decree passed in the suit. The argument seems to be that once a suit has been instituted against the indemnity-holder by a creditor, the indemnity-holder is bound to wait until the suit has been decreed, and he would then be entitled to such amounts, as have been decreed against him, from the giver of the indemnity. I am not inclined to interpret Section 125 in this manner. This section is not exhaustive and does not set out all the reliefs which an indemnity-holder who has been sued may get. It leaves untouched certain equitable reliefs which he may get. These equitable reliefs have been granted by the Courts in England and the English decisions have been accepted as being applicable to this country in respect of this branch of the law. In the very cases relied on by Mr. Ghose, namely, 41 ALL. 395¹ and 37 Mad. 270,² the equitable principle laid down by the English Courts has been accepted and applied to contracts of indemnity in this country. In this connection I would also refer to the case in *Osman Jamal and Sons Ltd. Vs. Gopal Purshottam, Osman Jamal and Sons Ltd. v. Gopal Purshottam*. I have no hesitation in following these cases and I propose to set out what I consider to be the equitable principle which will apply in a case like the present one. The principle appears to be this : When A has agreed to indemnify B against any loss or injury, B is entitled to have recourse to this indemnity and to call upon A to discharge his liability as soon as

the loss or injury becomes imminent. B is not bound to wait until he actually suffers loss or injury, He may sue quia timet.

6. The stage at which the loss or injury may be deemed to be imminent must depend upon the particular facts of each case and no fixed rule can be laid down in this respect. Mr. Ghose's argument is that the loss or injury can be said to be imminent only when a decree has been passed against the indemnity-holder and not otherwise. He can produce no authority which will support his attempt to crystallise that which should be left amorphous. On the contrary, certain English cases which have been placed before me by Mr. P.C. Ghose, appearing on behalf of the plaintiff, indicate that there is no such artificial limitation to the principle upon which equity will relieve a person to whom an indemnity has been given. There is a passage in vol. 16 of Halsbury's Laws of England at p. 15 where the learned author after saying that in law an action on a contract of indemnity normally does not lie until the promisee has been actually damnified by paying a third party's claim, makes the following observation:

But in equity, the rules of which now prevail in all Courts, even in the absence of such a special agreement, the person entitled to an indemnity, may enforce his right as soon as the liability to a third person has arisen and therefore he can obtain relief before he has actually suffered loss.

7. It is clear from this passage that the point of time at which an indemnity-holder can proceed against an indemnity giver is when the indemnity-holder's liability to pay a third party has arisen. It cannot be argued that the liability does not arise until a decree has been passed. A decree is merely a declaration of liability. It does not create a liability. The liability arises on the date when payment should be made. In (1888) 40 Ch.D. 370 : (1888) 40 Ch. D. 370 : 57 L. J. Ch. 730 : 58 L. T. 933 : 36 W.R. 779 In re Blundell: Blundell v. Blundell, there is a passage at p. 376 which supports the view which Mr. P.C. Ghose appearing on behalf of the plaintiff has urged and which I consider to be the correct one. This is what is said:

What is the right of indemnity ? I apprehend that in equity at all events it is not the right of a trustee to be indemnified until after he has made the necessary payment to his solicitor or to the auctioneer or to the stock-broker, but that he is entitled to be indemnified not merely against payments actually made, but against his liability, for example, a trustee in whose name shares in a company are standing, is entitled to an indemnity from his cestui que trust against payment of calls made upon the shares and he is not bound before having recourse to the indemnity to pay the calls, but he is entitled to come to the Court and ask that he may be paid by his cestui que trust personally the amount of the calls in order that he may be able to pay them.

8. Nothing is said in this case which would support Mr. B.C. Ghose's contention that an indemnity-holder must wait until a decree has been passed against him. I may mention that in the case under decision the plaintiff is not only an indemnity-

holder; he is also a trustee. The remarks quoted above would apply to this case. The same view was taken in (1909) 2 Ch. 401 : (1909) 2 Ch. 401: 78 L. J. Ch. 697 : 101 L. T. 519 *Ascherson v. Tredegar Dry Dock and Wharf Co. Ltd.*. I would draw attention to a passage which appears at p. 408 which reproduces the observations of Vice-Chancellor Giffard in another case. The observations are as follows:

In this case the bill, which is in the nature of a bill quia timet, is one of a kind which is rather unusual in modern times. The objections which are taken to it were, first, that a state of circumstances had not arisen to give the plaintiff the right which he claims of filing the bill; and secondly, that it was not a bill on behalf of the plaintiff and all other creditors. Now as regards the right of a plaintiff to file a bill quia timet, the principle is clearly laid down by Lord Redesdale in these terms : "A Court of Equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has sometimes been called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances.

9. This case makes it quite clear that even before a suit has been filed against the indemnity-holder, the indemnity-holder has the right to have recourse to the person giving the indemnity. In this connection I would also refer to the, case in (1893) 2 ch. 514 : (1893) 2 Ch. 514 : 68 L. T. 753 *Wolmershausen v. Gullich*. There is a passage at the bottom of p. 527 which I think will be of help in deciding this matter. The passage is as follows:

Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified.

10. In ray opinion the law is quite plain. When the injury becomes imminent the indemnity-holder can come to Court and ask that he be protected, and the Court must decide whether or not the claim of the third party against the indemnity holder is well founded; if it so decides it must grant relief to him and not postpone the indemnity-holder until a decree has been passed against him. If the Court were to postpone relief in this fashion it would encourage litigation and this has certainly never been the object either of law or of equity. There is no suggestion that the claim against the plaintiff in the suit instituted against him by

the company is not a good one and from the admitted facts I have no hesitation in holding that that suit must succeed. If the plain-tiff is now refused relief he would be in the position of having a decree passed against him which may be executed forthwith. In these circumstances to suggest that he is not in imminent danger of loss or injury would be to ignore realities. I hold, therefore, that the plaintiff is entitled to the reliefs that he has prayed for. The plaintiff will therefore get a decree in terms of prayers (a), (b) and (d). The defendant Gopiballabh Sen will have the option to come to terms with the company in respect of their dues and to pay off their dues and thus save further costs in suit No. 152 of 1942. If that is done the defendant will be at liberty to withdraw his deposit. The defendant will pay the costs of the suit. Liberty is given to either party to apply for the purpose of working out this decree. Certified for two counsel.