(1953) 05 GAU CK 0001

In the Gauhati High Court

Case No : First Appeal No. 24 of 1951

Ramesh Chandra Bora — APPELLANT

Vs

Bank of Assam, Ltd. and others — RESPONDENT

Date of Decision : 01-05-1953

Acts Referred:
Stamp Act, 1899 — Section 35, 36, 61

Citation : AIR 1954 Guw 41

Hon'ble Judges : Sarjoo Prasad, C.J;Haliram Deka, J

Bench : Division Bench

Advocate : K.C. Goswami and B. Das, for the Appellant; D.N. Medhi and P.K. Lahiri, for the Respondent

Final Decision : Dismissed

Judgement

Sarjoo Prosad, C.J.—This appeal arises out of a claim for recovery of money from Defendant No. 2, who is the Appellant before us, as also from two other Defendants.

2. The facts on which the claim was based are simple. It appears that the Defendant No. 1 used to secure contract works under the Bengal and Assam Railway and took overdrafts from the Plaintiff-bank from time to time to finance the contracts. Under an arrangement with the Plaintiff, Bank in this case, he executed an agreement creating a charge in favour of the Plaintiff-Bank and authorising the latter to collect the amounts due under bills standing to his credit with the Railway Company. On the terms of the agreement, the claim of the Plaintiff Bank was made a first charge on the amounts payable by the Railway Company in satisfaction of Defendant''s bills. On this basis, the Defendant No. 1 secured overdrafts from the Bank and on adjustment of accounts in June, 1945, it was found that a sum of over Rs. 10,000/- was due to the Plaintiff.

3. So far as Defendants Nos. 2 and 3 are concerned, the facts disclosed show that they had instituted a money suit against the Defendant No. 1 claiming a

sum of Rs. 8,000/- and odd. In that suit, they applied for attachment before judgment in respect of a sum of money due to the Defendant No. 1 from the Bengal and Assam Railway Company. An attachment was allowed on 17-5-1945 by the Court where the suit was pending. The Plaintiff Bank then filed a claim case, being Miscellaneous Case No. 19 of 1945 objecting to the attachment on the ground that all the bills of Defendant No. 1 in that department had been assigned to the Plaintiff under the agreement aforesaid; and, therefore, the Defendants Nos. 2 and 3 could not attach the same in preference to the dues of the Plaintiff. The Plaintiff''s claim was allowed on 15-8-1945 and the attachment order was withdrawn. The Defendants Nos. 2 and 3 then instituted a suit under Order 21, R. 63, Civil P. C., against the order passed in the claim case. The suit was dismissed for default on 12-12-1946 and an attempt to revive the suit also failed.

In the meanwhile, it would appear that the Defendants Nos. 2 & 3 obtained an ex parte decree in the money suit which they had instituted against Defendant No. 1. This was on 4-4-1946. They forthwith proceeded to levy execution of that decree. The first execution case was Execution Case No. 12 of 1946. In that execution case they applied for the payment of the amount which had been attached before judgment as aforesaid by a previous order of the Court subsequently withdrawn. The amount nonetheless was in the custody of the Court and payment was ordered to be made to the Defendants Nos. 2 and 3. They levied another execution subsequently against Defendant No. 1 in which they were able to recover a small sum of money to the extent of about Rs. 475/- only. Plaintiff''s case is that the said Defendants obtained payment in execution case No. 12 of 1946 without disclosing the fact to the executing Court that the attachment order had been withdrawn in respect of the amount.

Plaintiff further alleged that, in any case, he was entitled by virtue of the arrangement to all the payments due from the Railway Company to the Defendant No. l on account of his contract bills in satisfaction primarily of the debt due to the Plaintiff. He accordingly submitted that the amounts of Rs. 3,486/13/- having been wrongfully withdrawn by the Defendants No. 2 and 3 to which the Plaintiffs were entitled, they had the right to get back the amount from those Defendants.

4. The Defendant No. 2 in his written statement denied the alleged contract between the Plaintiff Bank and the Defendant No. 1 and the case of the Plaintiff that there was any agreement creating a charge in respect of the Plaintiff''s debts. He also pleaded that the suit was barred by estoppel and limitation. According to him, the money had been rightly realised by the Defendants Nos. 2 and 3 in satisfaction of their decretal dues and Plaintiff had no cause of action so far as these Defendants were concerned.

5. The learned Subordinate Judge decreed the Plaintiff''s suit. On the point of limitation specifically urged before him, he held that the suit was saved by virtue of an acknowledgment dated 17-7-46. It was contended before him that the

acknowledgment embodied in exhibit 2 was a fraudulent document but the learned Subordinate Judge rejected that contention. He also found in favour of the Plaintiff that under an agreement between the Plaintiff and the Defendant No. 1, the Plaintiff had a first charge on all the monies payable by the Bengal and Assam Railway Company to the Defendant No. 1 in respect of the latter''s contract bills; and that by virtue of that charge, the plaints was primarily entitled to the payment of those bills. He also found that the sum realised by the Defendants Nos. 2 and 3 in execution case No. 12 of 1946 was the amount which had been attached in the original suit and in regard to which the attachment had been subsequently withdrawn. He was accordingly of the view that payment in the execution case had been obtained by these Defendants on suppressing the real facts and by perpetration of a fraud upon the Court. On these findings, the learned Subordinate Judge rightly decreed the suit. The appeal has been preferred by Defendant No. 2 only and not by the Defendant No. 3.

6. On appeal, Mr. Goswami has raised two contentions before us. His first contention is that it has not been definitely shown that the sum of Rs. 3,000/- & odd was the identical amount which had been attached in the original suit. The answer to that is contained in the order of the executing court passed in Execution Case No. 11 of 1946 itself which is exhibit "A" in the case. The relevant order is dated 6-5-46, the Executor case itself having been filed on 22-4-1946. The order runs thus:

A cheque for a sum of Rs. 3,011/13/- has beet sent by the Bengal Assam Railway Company. The cheque has been sent to this Court ''as money attached in the original suit''. Let the amount be paid to the decree-holders to obtain from then actual payee''s receipt. Credit the amount to the decree. Execution case dismissed on part satisfaction. (Underlined (herein '' '') are mine)

It is, therefore, obvious that this money, in spit of the fact that the attachments had been with drawn, was held by the Court; and in the execution case was erroneously paid to the decree-holder who did not appear to have drawn the attention of the Court to the fact that the attachment order had been withdrawn. It was the clear duty c the decree-holders to appraise the Court of the fact and it is not surprising for this reason that the Court below regarded their conduct in with drawing this amount as fraudulent. Moreover this point that the amount complained of we not the identical amount attached before judgment in the original suit, was not specifically raised either in the pleadings or in the issued before the Court below. Paragraphs 3 and 4 of the written statement do not raise any such plea Probably in view of Exhibit "A" it was not considered worth while to raise such a contention. The learned Counsel has also commented on the evidence of the Plaintiff''s agent, Purnanand Sarma. This witness naturally admitted that I could not give the number or the date of the bill which were the subject-matter of the claim ca nor did he remember the amount. He also could not say what bills were attached in the execution case of the Defendants Nos. 2 and 3 and for (sic) amount.

On this statement, it has been argued that the identity of the amount attached before judgment and the amount actually realised by the Defendant Nos. 2 and 3 by process of execution had not be established, because this was the only oral evidence in the case on behalf of the Plaintiff. It quite natural that the witness, at that distance of time could not have orally given the details of the bills. But the recitals in Exhibit "A" are quite conclusive on the point and In my opinion, the argument is without any substance whatsoever. There has been no separate argument advanced in respect of the amount realised in the second execution case. It is obvious from the decision in the claim case (Exhibit 5) that the Plaintiff was held to have a charge in respect of all bills of Defendant payable by the Railway Company and the Defendants Nos. 2 and 3 had therefore full notice of the charge by which they are bound, the judgment being inter partes.

7. The other contention put forward by Mr. Goswami relates to the question of limitation. It is argued that the transactions between the parties ceased in June 1945 and the suit, having teen filed on 4-7-1949, Is evidently barred by limitation and the endeavour of the Court below to save limitation on the basis of Exhibit 2, an acknowledgment dated 17-7-46 was unjustified. The whole attack of the learned Counsel is concentrated on the genuineness and validity of this document, Exhibit 2. Exhibit 2 is a letter which was written by Defendant No. 1, Mati Miah, to the Agent of the Plaintiff Bank. In this letter, the Defendant No. I said as follows:

With reference to my Railway Bills, I beg to say that now I have bills worth (both running and final) Rs. 7,000/- lying with the Railway Company. Moreover, a sum of Rs. 1,075/- security deposit is also lying with them, the receipt of which are lying with you. I now propose to liquidate the balance by a monthly payment of Rs. 200/- which I hope kindly be allowed.

It has been faintly suggested that this document is either collusive or not genuine. The document has been proved by Plaintiff''s agent, the said Purnananda Sarma. He says that the Defendant No. 1 promised to pay the amount by monthly instalment and Exhibit 2 was a letter containing that promise. He also proved the signature of the Defendant No. 1 on the document, as he knew the signature of that Defendant. In cross-examination, it was suggested to him that it was with a view to defraud the Defendants Nos. 2 and 3 that this document had been subsequently fraudulently prepared in collusion with the Defendant No. 1. This suggestion, the witness has denied; and there is nothing to show on behalf of the Defendants that this was a creation of any fraud or collusion on the part of the Plaintiff and the Defendant No. 1. The document seems to have been written in normal course because the Defendant No. 1 wanted to be allowed to pay the balance of his debt in monthly instalments. The learned Subordinate Judge was perfectly right in rejecting the suggestion of fraud and we see no reason to differ from that conclusion.

8. It is next argued that this document cannot be an acknowledgment because it is unstamped. Attention has been drawn to S. 35, Stamp Act, and also to Article

1 of Schedule 1 of the Act. I confess that I have not been able to appreciate the argument of the learned Counsel in this connection. If his contention is that the document should have been duly stamped and not being stamped, it could not be taken in evidence, then it is in ignorance of S. 36, Stamp Act, which itself provides that where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Therefore, the admission of the document on that point could not the challenged and in fact it had not been (sic) before the court below either.

Under Section 61 of the Act, of course at an appellate court, it would be open to us to impound the document and call for the payment of the stamp duty and the compounding charges, but we do not consider that this document did require any stamp duty at all. Section 35 is also concerned with instruments which are chargeable to duty. The learned Counsel lays stress on the proviso to S. 35, but in my opinion, the proviso has obviously no application to this case. He next turns to Article 1 to Sch. 1 of the Act which requires a stamp of one anna upon an acknowledgment of a debt exceeding Rs. 20/- in amount or in value. This article again does not apply to the document with which we are concerned, because on the face of it, it contains a promise to pay the debt. The counsel then suggests that it should be treated as a promissory note. In my opinion, this is again based upon some misconception. The letter Exhibit 2 does not mention the amount of the debt at all. It is an ordinary letter addressed to the creditor and signed by the debtor in which the debtor acknowledges that a certain debt is payable to the creditor and that he wants the payment of this to be made in monthly instalments. It is merely for the purpose of extending limitation that this document is being used by the Plaintiff in the present case and I do not see how, In spite of all the Ingenuity of the learned Counsel, we can bring it either under Article 1 to Sch. 1 or u/s 35 of the Stamp Act. These arguments were, therefore, advisedly not urged before the Court below. In my opinion, the appeal is wholly without substance and must be dismissed with costs and the decree passed by the learned Subordinate Judge must be affirmed.

Deka J.

9. I agree.

