
(1910) 08 BOM CK 0013
In the Bombay High Court
Case No : Suit No. 392 of 1909

R.D. Sethna

APPELLANT

Vs

The National Bank of India

RESPONDENT

Date of Decision : 11-08-1910

Acts Referred:

Contract Act, 1872 — Section 178

Citation : (1910) 12 BOMLR 870

Hon'ble Judges : Davar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Davar, J.—One Ambararn Motichand died on the 12th October 1900. Previous to his death, on the 3rd of October 1900, he made his will whereby he appointed his father Motichand Howji, the second defendant herein, Chunilal Pitamber his wife Samoo and his mother's sister Kashi, the executors and executrices thereunder. Probate of that will was granted to Motichand Howji and Chunilal Pitamher on the 13th of March 1902, the right of the two ladies to apply for probate being reserved. Ambaram left considerable property and amongst such property were twenty shares of the Textile Manufacturing Company.

2. By the 10th clause of his will, he directed that the residue of his property should be used for dharmada directing his trustees to use the same in such a way that his name should be perpetuated for ever.

3. In this case the Court is not concerned with the administration of Ambaram's estate or with the manner in which Ambaram's estate was administered till after the death of Motichand Howji which took place on the 9th of April 1905. On Motichand's death, Chunilal Pitamber, as the sole surviving executor, came into exclusive possession of the whole estate and remained in management thereof till he was ousted by an Order of this Court, made in Suit No. 31 of 1909 on the 1st of March of that year, whereby Mr. R. D. Sethna, the plaintiff in this case, was

appointed a Receiver of the estate of Ambaram Motichand. This suit No. 31 of 1909 is filed by Mulibai, the only daughter of Ambaram, who challenges the validity of the bequest to dharmada and claims to be entitled to the residue of the estate. It appears that in that suit grave charges were made against the defendant therein, Chunilal Pitamber, and the charges must have appeared prima facie well-founded to have induced Mr. Justice Russell to appoint a Receiver against an executor, depriving him of the possession and management of his testator's estate. Chunilal appealed against the order but the appellate Court confirmed the appointment of the plaintiff as Receiver of Ambaram's estate.

4. In Mulibai's suit, by an Order dated the 15th of April 1909, leave has been granted to the Receiver to file this suit.

5. In this suit the plaintiff asks for certain reliefs against the National Bank of India, who are the first defendants herein, in connection with twenty shares of the Textile Manufacturing Company which originally belonged to the estate of Ambaram Motichand and which were after Motichand Howji's death pledged by Chunilal Pitamber, who is the second defendant in the suit, with the first defendant Bank. Chunilal in September 1909 filed a most contentious written statement in which he raised several points of defence against the plaintiff's suit, giving a history of his dealings with the shares in question and maintaining that the plaintiff was not entitled to the reliefs he claimed.

6. At the hearing, the second defendant did not appear to contest the suit and it was with great difficulty that his presence was procured before the Court, sometime after this suit had proceeded to a hearing.

7. Before considering the contentions of the parties, it is necessary to see how the shares in question have been dealt with. Previous to Motichand Howji's death, these twenty shares of the Textile Manufacturing Company were deposited in the Bank of Bombay in the joint names of the executors and were registered in the Company's books in the name of the deceased Ambaram Motichand. Chunilal seems to have drawn out the share certificates from the Bank after Motichand's death and got them transferred to himself in the Company's books after obtaining possession of the share certificates from the Bank of Bombay. It appears from the endorsements at the back of the share certificates that the transfer to his own name was effected on the 13th of December 1905. On the 22nd of September 1908 Chunilal pledged ten out of the twenty shares with the National Bank of India and obtained a loan of Rs. 8,000 on the security thereof. On the 16th of October 1908 he pledged the remaining lot of ten shares with the same Bank and obtained another loan of Rs. 8,000.

8. The plaintiff in this suit contends that the second defendant " got the shares by fraud and by committing an offence," and he submits that he could not make a valid pledge to the first defendant Bank and that the first defendant Bank had not acquired a legal title to the said shares. He further submits that " his title to the said shares is superior to the equitable title (if any) of the first defendant to

the said shares." The plaintiff further contends that the first defendant is not a bona fide pawnee for value.

9. The first defendants in their written statement say that they had no reason whatever for supposing, when they made their advances against the shares, that the said shares did not belong to the second defendant Chunilal absolutely. They say they took these shares as security for the loans they made bona fide and without notice that any other person or persons whomsoever had any interest in the said shares. They contend that as between Chunilal and themselves, Chunilal was entitled to deal with the shares and make a valid pledge thereof.

10. It would be convenient in the first instance to deal with the questions of fact as to how Chunilal got the said shares transferred to his own name and whether in doing so he was guilty of fraud or of having committed an offence. His own version, as given in his written statement, is that his co-executor Motichand Howji, a little before his death, suggested to him that these twenty shares should be sold. And in support of that contention he produced a letter, copy translation of which is annexed to his written statement and marked No 1, purporting to have been sent to him by Motichand Howji. This letter is challenged on behalf of the plaintiff as a forgery and on the evidence before me and having regard to the proved conduct of the second defendant, I have no doubt that it is not Motichand Howji's letter. Chunilal then goes on to say that on the 6th of April 1905, three days before Moti chand's death, he agreed to sell these twenty shares to one Talaksi Thakersi at the rate of Rs. 675, that he was not able to give delivery of the shares to Talaksi owing to difficulty in removing the shares from the Bank of Bombay consequent on the death of his co-depositor Motichand Howji, that in the meanwhile the shares had risen in value to Rs. 1000 and that on the 1st of September 1905 he agreed to purchase for himself the said twenty shares from Talaksi Thakersi at the rate of Rs. 1000 per share that subsequently he paid Rs. 6500 to Talaksi Thakersi as his profit in the transaction and obtained a receipt from him copy translation whereof is annexed to his written statement and marked No. 2. He says that he has given credit to the estate of Ambaram Motichand for Rs. 20,000, the value at which he purchased these shares less Rs. 6500 which had to be paid to Talaksi. In other words, he contends that the estate of Ambaram Motichand has been paid the value of these twenty shares at the rate of Rs. 675 at which they were sold to Talaksi. On the evidence before me I find that every statement made by Chunilal in respect of these shares is untrue. The alleged sale to Talaksi Thakersi was really never made and no sum whatever has been paid to him. Talaksi was produced before the Court and has given evidence in the case. He has denied having passed the receipt put forward by Chunilal, who now says this is not the man he referred to in his written statement. Chunilal is not able to point out any other Talaksi Thakersi, and I have no doubt that the man produced before me was the man he intended to indicate as the purchaser. I find that both the alleged letter of Motichand Howji suggesting the sale and the receipt purporting to be passed by Talaksi Thakersi are documents forged by Chunilal for the purposes of this suit. The active

measures taken on behalf of Mulibai in impounding these documents and detaining them in Court and the other circumstances surrounding Chunilal's administration of his testator's estate which subsequently came to light, have evidently frightened him into disappearing from this suit. As Mr. Bahadurji was in some difficulty about proving certain things necessary for his case, Chunilal's presence ". was required and that presence was not procured until he was arrested under a warrant issued by the Court. He had a book containing an account of the administration of Ambaram's estate; in that account he had made fictitious entries showing that he had paid out large sums of moneys for various charities, which he claims to have been authorized to do under the will. In that book he had also made debit and credit entries with a view to show that the estate had received from him Rs. 20,000, out of which Rs. 6,500 had been paid to Talaksi as his profit in the transaction on the original sale, and that the balance had been paid out in charities. Chunilal has suppressed this book but a copy taken on inspection has been proved before me and I find that all the entries showing credit of certain payments by Chunilal to the estate and by him to Talaksi and to charities are wholly fictitious entries. It is quite clear to my mind that under the false pretence of having paid out moneys in connection with certain charities he has deprived the estate of his testator of those 20 shares which he got transferred to his name, in doing which I find that he was clearly guilty of fraud towards the testator's estate. It is possible that the fraud, of which Chunilal was guilty in having these shares transferred to his own name, may amount to the commission of an offence. For the purposes of this case, it is sufficient to record the following findings on facts, namely, that the twenty shares of the Textile Manufacturing Company, Ext. D in this suit, originally belonged to the testator Ambaram Motichand, and that Chunilal, as the sole surviving executor under Ambaram's will, got those shares transferred to his own name with the intention of misappropriating the said shares to his own use and that in doing so he was clearly guilty of fraud towards his testator's estate. Although the plaintiff has contended in his plaint that the first defendants are not bonafide pawnees for value; and although the learned Counsel for the plaintiff did not specifically abandon that contention at the hearing, it is abundantly clear to my mind that the plaintiff has no grounds whatever for impugning the good faith of the first defendants. Before the dates of the pledging of these shares to the Bank, Chunilal had a current account with them. The Bank had no reason to suspect the honesty of their constituent. It is a/branch of their ordinary business to advance loans on shares and scrips of joint stock companies. Chunilal applied to them for a loan just as any other merchant in Bombay might do. The securities he offered were shares which were registered in his own name by the Company issuing them. There was not the smallest reason for presuming or suspecting that Chunilal was acting in any improper manner, and I have not the smallest hesitation in holding that the first defendants in receiving the twenty shares in pledge and advancing moneys on the security thereof acted in good faith and under circumstances which were not such as to raise any presumption or suspicion whatever that the pawnor Chunilal was acting improperly.

12. On these findings of facts arise questions of law as to whether these twenty shares are validly pledged with the first defendants and whether they are entitled as against the estate of Ambaram to hold the same as security against the loans they made to their ostensible owner Chunilal Pitamber. Mr. Bahadurji, who has argued the plaintiff's case with great care and much ability, contended in the first instance that the question must be decided under the provisions of Section 178 of the Indian Contract Act, that the shares in question in the suit were "goods" within the meaning of that section, that Chunilal was guilty of fraud and having committed offence in getting the shares transferred to his own name and that therefore even if the Bank acted in good faith and under circumstances which did not raise a reasonable presumption that the pawnor was acting improperly, the pledge was invalid, the property having been obtained by means of fraud or offence. The learned Counsel further contended that even if the transaction was not covered by Section 178 of the Indian Contract Act, the equitable title of Ambaram's estate was superior to the equitable title, if any, of the first defendants to the said shares. And in support of that contention he has relied on the case of *The Shropshire Union Railways and Canal Company v. The Queen* (1875) L.R. 7 H.L. 496.

13. These are very interesting questions of law and are not questions free from difficulty. In the first place, it is necessary to consider whether shares in a joint stock company are "goods" within the meaning of Section 178 of the Contract Act. The opening section of Chapter VII of the Contract Act, namely, Section 76 says : " In this Chapter the word goods means and includes every kind of moveable property." There is no doubt that under this definition shares in Joint Stock Companies would be " goods ". But the qualifying words "In this Chapter " raise a presumption that it was possibly the intention of the legislature to give the word " goods ", when used in other parts of the Act, a more restricted meaning. Section 178 comes under Chapter IX and therefore the definition given in Section 76 does not apply to the word " goods " as used in Section 178. It was argued by Mr. Shortt that Section 178 was a reproduction from the Indian Factors Act and that shares were not within the contemplation of that section.

14. Let us turn for one moment and see what is meant to be included in " goods " under the English Law.

15. In section 62 of the Sales of Goods Act 1893, "goods" are said to "include all chattels personal other than things in action and money." In Benjamin on Sales, 5th Edition, p. 173, referring to this definition, it is stated as follows:-"Things in action" include all personal chattels that are not in possession. Stocks, shares in companies, policies of Insurance and debts are therefore not goods. But I find that in 1886, previous to the enactment of the Sales of Goods Act, in the case of *The Colonial Bank v. Whinney* (1886) 11 A. C. 434, Lord Blackburn says: "There can, I think, be no doubt that shares in a Railway Company, though not goods in ordinary sense of the word, are personal chattels" and at page 440 he observes, "I think it was hardly disputed that in modern times lawyers have accurately or

inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession." It must, however, be remembered that in this case the House of Lords was concerned in giving the meaning to a particular section of the Bankruptcy Act.

16. In the year 1893, the very year in which the Sale of Goods Act was passed, we find Mr. Justice Kekewich discussing the meaning of the word "goods" in the case of *Evans v. Davies* [1893] 2 Ch. 216. In that case the Court had to consider whether shares in a limited company were " goods " within the meaning of Order XL, Rule 2, of the Supreme Court Rules of 1893 and he answered the question in the affirmative. His Lordship, in the course of his judgment, observes: "Now are shares goods which can be sold under that Rule? It was held in *Bartholomew v. Freeman* (1878) 3 C.P.D. 316 that goods included a horse; and in *Regina v. Slade* (1888) 21 Q. B.D. 433, it is held...that the word included a dog.... In *Coddington v. Jacksonville Railway Company* (1878) 39 L.T. N.S. 12 it was held by the Court of Appeal that certain foreign bonds came within the rule and an immediate sale of them was ordered. Accordingly, with these authorities before me, I have no hesitation in holding that the word "goods" does include shares", Turning to the provisions of Indian Contract Act itself, we find, looking at ill. (a) to Section 150 and ill. (a) and (b) to Section 154, that a horse is included within the meaning of the word "goods". And looking again at ill. (a) to Section 163, we find that a cow is also included within the meaning of the word "goods". But for the words "In this Chapter" in the beginning of Section 76 of the Indian Contract Act, there would have been no difficulty in holding that shares in limited liability companies were, so far as the Contract Act is concerned, included within the meaning of the word "goods." It is not easy to understand why the de-finition of goods given in Section 76 is confined by the legislature to the Chapter in which that section occurs. After much anxious consideration, I have come to the conclusion, though not without some doubts, that shares in joint stock companies must be held to be included within the meaning of the word "goods", as used in Section 178 of the Indian Contract Act, and I am of opinion, therefore, that the transaction in this suit is governed by the provisions of that section. If I am right it is quite clear that if Chunilal Pitamber as the pawnor had obtained these share certificates from their lawful owner or from the person in lawful custody of them by means of an offence or fraud, the first defendants would have no right to withhold the shares from the plaintiff. The question is, were the shares so obtained by Chunilal as to make the last proviso to the section applicable to the transaction under consideration in this suit ? I am of opinion that the transaction does not fall within the proviso having regard to the language used therein. Chunilal Pitamber must be regarded as acting in this matter in two capacities and the best test would be to regard him as a separate individual in each of his capacities. Chunilal Pitamber, as the sole surviving executor under the will of his testator Ambaram Motichand, was the lawful owner of the shares and was a person in lawful custody thereof as contemplated by the proviso to Section 178. His possession of those shares was not mere custody but he was in juridical

possession of these goods, such as is referred to by Sir Lawrence Jenkins in *Seager v. Hakina* (1900) 2 Bom.L.R. 406. The shares belonged to his testator. This Court by the grant of probate clothed the executor with power and authority to deal with and dispose of all the property belonging to his testator's estate according to the provisions of the will. The will clearly contemplates the sale of these shares for the purpose of utilising residue in charitable disbursements. Chunilal, as the sole surviving executor, was entitled at any moment to sell these shares or to dispose of them in any manner he liked. I have found as a matter of fact that he got these "shares transferred to himself fraudulently with a view to misappropriate the shares themselves or their sale proceeds; and it is also found that sometime considerably, after the transfer to himself in 1908 he pledged them with the first defendant Bank. Here we have therefore Chunilal the executor and Chunilal the pawnor doing certain acts. Under the proviso to 178 of the Indian Contract Act, before the Bank's claim to hold the shares as security for their loans is defeated, it must be established that the shares had been obtained by Chunilal the pawnor from their lawful owner and custodian Chunilal the executor by means of an offence or fraud. As I read the proviso, the fraud or offence must be committed by the pawnor against the lawful owner or custodian who in this instance was the executor. Can it be pretended that Chunilal the executor was defrauded of his possession of the shares by Chunilal the pawnor? On the contrary it is perfectly clear that the lawful owner and custodian himself was the guilty party. He actively divested himself of the possession of these shares as executor of the estate and the pawnor had not to resort to any fraud or offence for the purpose of obtaining possession of those shares. The executor himself was the party who was guilty of fraud and it could not be said with any sense of show or reason that Chunilal Pitamber in his capacity as pawnor had obtained possession of these shares from the lawful owner and custodian the executor by means of fraud or offence.

17. Under these circumstances it is abundantly clear to my mind that the proviso to Section 178 has no application to the transaction in question in the present suit and that the first defendants, having acted in good faith and under circumstances which were not such as to raise any presumption whatever that the pawnor had been acting improperly, are entitled to retain possession of the shares as security for their loans made to the second defendant.

18. The only other point that requires to be discussed is whether the estate of Ambaram Motichand has a superior equitable title to that of the first defendants to these shares. When the learned Counsel for the plaintiff was reading to me the case of *The Shropshire Union Railways and Canal Coy. v. Reg.* (1875) L.R. 7 H.L. 496 in support of the contentions set out in para 6 of his plaint, I tried to point out to him that the facts in that case were very distinguishable from the facts in the present case. Since the hearing came to a termination and I reserved judgment I have, been able to lay my hands on a case in which almost the same distinction between *The Shropshire Union Railways and Canal Coy.* case and this is very tersely pointed out by Mr. Justice Chitty. In *Lloyds Bank Limited v. Bullock*

[1896] 2 Ch, 192, Mr. Justice Chitty distinguishes the case of The Shropshire Union Railways from the case he was trying, in these words:-

In support of this argument the decision of the House of Lords in *Corop-shire Union Railways and Canal Company v. Keg.* was relied on. But what case is distinguishable. As between himself and the equitable owner, the trustee there had 110 authority whatever to deal with the trust property. Here the testator, the author of the trust, had confided to Newbrook authority to sell the property and give a receipt for the purchase money. New-brook was acting within the scope of his authority. The essential part of the breach of trust was the giving of the receipt without in fact receiving the purchase money, &c. &c.

19. In this case, too, it must be remembered that Ambaram Motichand, the testator, the original owner of the property and the author of the trust created in favour of charity, had confided to his executors the authority to sell the shares forming part of his estate. Chunilal, in selling the shares to himself, may have acted fraudulently, may have committed an offence, but he certainly was acting within the scope of his authority in selling those shares. Supposing instead of selling those shares to himself, he had sold the shares outright to a bona fide purchaser who had paid proper value for the same and Chunilal had misappropriated the sale proceeds for his own purposes, could it possibly have been contended that the estate of Ambaram had a superior equitable title to that of the purchaser and could the plaintiff as the Receiver of that estate have successfully recovered those shares from the purchasers for value? To my mind it makes no difference whether the sale by the executor was to himself in the first instance and then later on the pledge of the same shares by himself to an innocent party. The position is exactly the same. The first defendant Bank stands in the position of a bona fide purchaser for value and I hold that as against the Bank the estate of Ambaram has not any superior equitable title to recover the shares without paying what is justly due to the Bank for the loans made to Chunilal on the security of these shares. [Here his lordship recorded findings on issues.]

20. There will be a decree for the plaintiff declaring that the twenty shares of the Textile Manufacturing Company now in possession of the first defendants, Ext. D in this case, formed a portion of the estate of Ambaram Motichand and that the plaintiff is entitled to redeem the said shares by paying to the first defendants Rs. 16,000 and interest due on the two loans of Rs. 8,000 each from the dates of their respective advances. The shares to be redeemed within a month. If not redeemed within that period the first defendants to be declared entitled to apply for transfer of the shares to themselves or their nominee and take all necessary steps to realise their security. Interest on judgment after the period fixed for redemption to be at 6 per cent per annum if the first defendants hold the shares for a longer period.

21. I do not think it is necessary to refer the matter to the Commissioner to take an account of the interest. I have no doubt parties will be able to ascertain the

interest due on the loans which is to be calculated at 2 per cent, over the current rate of interest of the Bank of Bombay. The plaintiff will pay all the costs of the first defendants including costs reserved if any.

22. The second defendant to pay the plaintiff's costs of the suit limited to one day's hearing. The second defendant also to pay all such costs of the suit as the plaintiff is ordered to pay to the first defendants.