

(1943) 01 CAL CK 0003
In the Calcutta High Court
Case No : Re: Suit No. 1332 of 1941

Sreemutty Tepi Bala Ash and Others

APPELLANT

Vs

Sreemutty Asima Sundari Ash and Another

RESPONDENT

Date of Decision : 28-01-1943

Acts Referred:

Citation : (1943) 01 CAL CK 0003

Final Decision : Dismissed

Judgement

Das, J.—This is an application on the part of Messrs. P.C. Ghose & Co., the recorded Attorneys of the Plaintiffs for equitable interference of the Court to enforce their lien for unpaid costs. It is well settled that the rules of English Common Law relating to solicitors' lien are applicable to solicitors in India. At common law a solicitor has two rights which are termed liens; the first is a right to retain property already in his possession until he is paid the costs due to him as solicitor and the second is a right to ask the Court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery. In India no distinction is made between real and personal property and therefore in India the last-mentioned lien which is called "particular lien" is operative against personal as well as real property recovered under a judgment. This particular lien may be actively enforced over a fund or the proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions. By virtue of this lien the solicitor has a right to ask for the intervention of the Court for his protection, whenever he finds, after recovering and preserving the property of his client and after obtaining judgment for the client, that there is a probability of the client depriving him of his costs. But the solicitor's lien on the property recovered by judgment is not an absolute bar against the ordinary right of the client to compromise his disputes with his opponent and therefore the solicitor's lien may be affected by a compromise and the Court will not, for the purpose of preserving the solicitor's lien, interfere with a bond fide compromise. Nor is there any rule that the parties may not compromise an action without the

intervention of their solicitor. They must, however, do so honestly and not intend to cheat the solicitors of their proper charges. If the compromise is a collusive one entered into between the Plaintiff and the Defendant specifically for the purpose of depriving the solicitor of his lien, the Court interferes for the solicitor's protection and orders payment of the solicitor's costs. In a proper case the Court has jurisdiction to enforce the solicitor's lien even by making a direct order for payment to the solicitor by the opposite party and it is now the settled practice of this Court.

2. A perusal of the reported decisions will show that the question of preserving the solicitor's lien has mostly arisen in connection with compromise by the client after judgment has been recovered and the solicitor's lien has attached to the property recovered. In such cases the Courts have had to ascertain whether the compromise was a bon? fide compromise or a collusive one entered into specifically for the purpose of depriving the solicitor of his lien. The assistance of Court has not been limited only to the protection of the solicitor's lien on the property recovered by judgment but has also been extended in protecting their costs against collusive compromise before judgment as in the cases of *Price v. Crouch* 60 L.J.Q.B. 767 (1891) and *In re: Margetson & Jones* [1897] 2 Ch. 314. In both those cases the Court found on the evidence that the compromise was a collusive one.

3. It will appear from the reported decisions that the Courts have interfered to protect the solicitor's lien whenever they have been satisfied, on the evidence before them, of the presence of "collusion" between the compromising parties. Broadly and generally speaking, they have inferred "collusion" when the evidence has established:--

- (a) that the negotiations were behind the back of the complaining solicitor,
- (b) that the opposite party or his solicitor knew that the complaining solicitor's costs were unpaid.
- (c) that the opposite party actually paid money or equivalent thereof to the complaining solicitor's client direct,
- (d) that the complaining solicitor's client was impecunious and there was no chance for the solicitor to recover the costs from his own client.

4. Such being the law, as I apprehend it to be after hearing the very able and lucid arguments of Mr. H. Bannerjee appearing in support of the application and reading the authorities cited by him and other authorities, the question is whether I have before me such evidence as would enable me to hold that the compromise complained of was in fact collusive in the sense that the motive of the parties was to deprive the applicants of their costs and that the parties knew that they were doing an unfair thing. This leads me to the consideration of the facts.

5. The suit in which this application has been made concerns the estate of one

Surendra Kumar Ash deceased. Surendra Kumar Ash was a much-married man. He started his matrimonial ventures by marrying Tepibala, the first Plaintiff in this suit. Thereafter, he took three more wives successively. Two of them are dead and the last one is Ashima Sundari, the first Defendant in this suit.

6. Surendra Kumar Ash was also a man of business. He used to carry on two hardware businesses at No. 202/5, Harrison Road and No. 113, Monohar Das Street. In his business he had two employees named Sital Chandra Mallick and Prafulla Kumar Ash, one of the Plaintiffs in this suit.

7. Surendra died on or about the 17th June, 1941, leaving him surviving Tepibala his first wife and Ashima his fourth wife and, if the genealogical table set out in paragraph 2 of the petition be correct, three agnatic relations Ananda, Prafulla and Nripati who would be the presumptive reversioners to the estate of Surendra expectant on the death of the two widows. Of these three alleged reversioners Prafulla was one of the employees in the business of Surendra. Sital Chandra Mallick, the other employee, also continued to be employed in the business by Ashima as her constituted attorney.

8. This suit was filed on the 23rd July, 1941. The Plaintiffs are Sm. Tepibala, the 1st wife of Surendra and Ananda and Prafulla, two of the three persons who claim to be agnatic relations of Surendra and as such his presumptive reversioners. The attorneys for the Plaintiffs are Messrs. P.C. Ghose & Co., the applicants before me. The Defendants are Sm. Asima Sundari, the 4th wife of Surendra and Nripati being the 3rd person also claiming to be a reversioner. This suit is for a declaration that the Plaintiff Tepibala and the Defendant Asima are each entitled to an undivided half share in the estate of Surendra, for a declaration that the Plaintiffs Ananda and Prafulla and the Defendant Nripati are each entitled to 1/3rd share in the estate of Surendra expectant on the death of the two widows, for accounts and other reliefs. On the same day the Plaintiffs took out a notice of motion for the appointment of a receiver and on the 24th and 28th July, 1941, certain interim orders were made pending the hearing of the application. The Defendant Asima appeared on that application and in the suit through Mr. Kishor Ghose.

9. While the application for the appointment of a receiver was pending it is alleged that certain terms of settlement were arrived at between the parties on the 29th July, 1941. The terms are said to have been recorded in a writing signed by all the parties, Sital Chandra Mallick having signed for the Defendant Asima. This writing is said to have been attested by amongst others Johurilal Saha, the father of the Defendant Asima. A copy of the said terms is annexed to the present petition. Broadly speaking, the terms are that certain properties were given exclusively to the Defendant Asima and the rest were divided between the parties, the Defendant Asima taking half share absolutely and the three Plaintiffs and the 2nd Defendant taking the remaining half share jointly. It is to be noted that no provision was made in the terms for payment of costs to either of the solicitors and it was provided that each party should pay and bear his or her

respective costs.

10. On the 31st July, 1941, Mr. Kishor Ghose wrote a letter to Messrs. P.C. Ghose & Co. as follows:

I understand that the suit has amicably been settled between the parties. I shall be glad to know if you have been similarly instructed.

11. From the papers before me it does not appear whether any further correspondence passed between the solicitors on the subject.

12. On the 8th December, 1941, the application for the appointment of receiver came up for hearing and an order was made appointing Mr. Subodh Bose, an attorney of this Court, as receiver of the two businesses and other movable properties. This was without prejudice to the Plaintiffs' contention that the suit had been settled and without prejudice to the Plaintiffs' right to apply for recording the terms of settlement.

13. No step, however, was taken for recording the terms of settlement said to have been arrived at on the 29th July, 1941, until the 8th May, 1942, when a notice of motion was taken out on behalf of the Plaintiff Tepibala for recording the terms of settlement. It will appear from the records of this suit that the Defendant Asima was in the meantime taking steps in the suit by filing her written statement and obtaining order for discovery against the Plaintiffs.

14. The application for recording the terms of settlement was hotly contested and an affidavit in opposition was filed by the Defendant Asima denying that any settlement had been concluded between the parties. Her case was that the Plaintiff Tepibala had left her husband long prior to his death and was leading an unchaste life which disentitled her from inheriting as a Hindu widow and further that Surendra had prior to his death made a gift of his businesses and other movable properties to the Defendant Asima. The application came up for hearing before McNair, J., on the 20th May, 1942, and after hearing the matter at some length the learned Judge ordered the application to stand to trial and directed that the issue as to whether there was a concluded settlement should be tried as a preliminary issue.

15. It appears that on the 11th September, 1942, the Plaintiff Tepibala and the Defendant Asima settled their differences. An affidavit was affirmed by the Plaintiff Tepibala before one of the Presidency Magistrates of Calcutta on the 11th September, 1942, whereby it was recorded that the parties had settled their differences and that the terms of settlement were contained in a letter written by the Plaintiff Tepibala to the Defendant Asima which was annexed to the affidavit. The letter was also dated the 11th September, 1942. In that letter the Plaintiff Tepibala admitted the whole of the case of the Defendant Asima and expressed regret for having instituted the suit at the instance of designing persons. She also repudiated the alleged terms of settlement as being the production of designing persons and offered not to proceed with the suit or the application for

recording the terms of settlement and prayed that the Defendant Asima should not make her, the Plaintiff Tepibala, liable for the costs.

16. On the 14th September, 1942, the present applicants wrote a letter to Mr. Kishor Ghose recording the facts leading up to the filing of the suit and the application for recording the terms of settlement and the order made thereon and stating that they were to receive a large sum of money from their client for acting for her in this suit and expressing an apprehension that Tepibala and Asima were colluding with each other to deprive them of their costs and finally giving notice that they would look to Asima for such costs if any settlement were arrived at behind their back in order to deprive them of their legitimate dues.

17. On the 22nd September, 1942, the Plaintiff Tepibala wrote a letter to her own solicitors, the present applicants, stating that the parties had come to a settlement and enclosing a copy of her letter to Asima and a copy of her affidavit and instructing them to have the suit struck off without incurring further costs. This letter as well the enclosures are type-written, a fact which has been commented upon by Mr. H. Banerjee.

18. On the 26th November, 1942, the present summons was taken out by Messrs. P.C. Ghose & Co.

19. On the 14th December, 1942, a notice of motion was taken out by Mr. Kishor Ghose as solicitor for the Defendant Asima for recording the said terms of settlement arrived at between the parties on 11th September, 1942.

20. Mr. H. Banerjee has drawn my attention to the terms of settlement said to have been arrived at on 29th July, 1942, and the benefits that the Plaintiff Tepibala was to receive thereunder. He argues that having secured those terms it is inconceivable that Tepibala should suddenly change her mind and agree to withdraw the suit unconditionally unless she had secretly received some consideration therefor. This argument would have been fairly irresistible, had the fact of that settlement of the 29th July, 1941, been an undisputed fact. The fact that the Defendant Asima totally disputed the right of Tepibala to any share in the inheritance and the fact that the Defendant Asima denied the alleged settlement from the beginning and was vehemently opposing the application for recording the terms of settlement do, in my opinion, to a great extent, detract from the force of Mr. Banerjee's argument. The settlement having been denied one cannot rely on the terms thereof as proof, or affording any support for the argument, that the subsequent settlement of the 11th September, 1942, was illusory or collusive. In other words the major premise, viz., that Tepibala was getting a considerable amount being in dispute, the conclusion based thereon that the subsequent settlement must have been collusive cannot be sustained.

21. Mr. Banerjee has strongly relied on Mr. Kishor Ghose's letter dated 31st July, 1941, as establishing the fact of the settlement of 29th July, 1941. It has, however, been explained that the Defendant Asima never gave Mr. Ghose to understand that any settlement had been arrived at and that the instructions for

that letter must have been given by the man Sital Chandra Mallick. She charges that the alleged terms of settlement of 29th July, 1941, were brought about by Sital Chandra Mallick who had been got at by the Plaintiff Prafulla who was his co-employee and that the same Sital Chandra Mullick had also given instructions to Mr. Kishor Ghose to write the letter in the way he did. Further having regard to the fact that McNair, J., after hearing the application for recording the terms of settlement at some length, ordered the same to stand to trial, it is clear that the learned Judge was of opinion that the letter of Mr. Kishor Ghose did not conclude the matter and the issue was to be tried on evidence. In the circumstances I cannot treat the alleged terms of settlement of 29th July, 1941, as an established fact and rely thereon for the purpose of holding that the subsequent settlement of 11th September, 1942, must have been the outcome of collusion.

22. Mr. Banerjee has also relied upon the affidavit of Sudhendu Kumar Bose being one of the affidavits filed in reply wherein it is stated that the Defendant Asima had offered to pay Rs. 4,000 to the Plaintiff Tepibala but that Tepibala declined to accept Rs. 4,000 and made a counter proposal for Rs. 6,000. Mr. Banerjee has relied on this affidavit as showing that the subsequent conduct of Tepibala in foregoing all her claims was the outcome of collusion. These allegations lose their force in view of the fact that they are contained in an affidavit in reply and that the Defendant Asima had no opportunity to meet the same and it will not be right for me to rely thereon as proof of fraud and collusion.

23. The evidence before me shows that the ultimate settlement was between the parties without the intervention of their respective solicitors. It is not a case of the settlement being brought about by the Defendant's solicitor in consultation with the Plaintiff Tepibala behind the back of her solicitors. Further this fact by itself does not help the applicants, for there is no rule that parties cannot themselves settle their case.

24. Nor is there any allegation or proof on which I can act and hold that the Defendant Asima had any knowledge or notice that the applicants' costs were outstanding. The settlement had been arrived at on the 11th September, 1942, i.e., three days prior to the notice of lien given on the 14th September, 1942.

25. Again there is no allegation or suggestion in the petition that Sm. Tepibala in fact received any secret consideration. In the affidavit in reply it has been suggested that it is unthinkable that Tepibala should give up all her claims under the settlement of the 29th July, 1941, unless she was induced to do so for consideration offered to her behind the back of the applicant. This inference, however, is based on the assumption that the settlement of July, 1941, is an established fact, an assumption which, as I have said, I cannot make.

26. Further, there is no allegation or proof before me that the applicants cannot get their costs from their own clients except a bare statement that Plaintiff No. 1 (Tepibala) has no property. The reason for which the Court interferes is that the

settlement was brought about with the knowledge that the solicitors would be deprived of their costs. If the clients are capable of paying the costs to the solicitors then there can be no question of the solicitors being deprived of their costs, for they can realise their costs from their own clients by virtue of the warrant of attorney. The two relevant paragraphs in the petition are paragraphs 18 and 19. The verification of these paragraphs by the attorney's clerk makes it clear that the relevant allegations cannot be relied on as statements of facts. The only allegation in paragraph 19 of the petition is that the Plaintiff No. 1 has no personal property out of which the applicants' costs could be recovered. This has been verified as true to information but no source of information has been disclosed. Further in the affidavit in opposition it has been specifically mentioned that the applicants can realise their costs from their other clients but even in the affidavit in reply it is not alleged that those other clients or Tepibala are impecunious.

27. Having regard to the fact therefore that I have no evidence before me that the Defendant Asima or her attorney was aware that the applicants' costs were outstanding or that any money had passed from the Defendant Asima directly to the Plaintiff Tepibala or that all the three clients of the applicants are impecunious, I cannot hold as a fact that this settlement was arrived at in collusion between the parties expressly for the purpose of depriving the applicants of their unpaid costs.

28. Tepibala's application for recording terms of settlement having been made to stand to trial and she being faced with the actual trial of the suit involving certain costs and uncertain results it might not have been unreasonable for Tepibala to reconsider her position. If, on a consideration of the facts, she apprehended that she had no case then it would be intolerable if she be prevented from withdrawing her suit and be compelled to go on with it merely because the costs of her attorneys remain unpaid.

29. There are matters in this case which raise a good deal of suspicion, but the Court cannot act on suspicion and I am not prepared to hold, in the absence of evidence, that the settlement must have been due to collusion and could not possibly be referable to a proper motive. In short, I have not before me such evidence as the learned Judges who decided in favour of the solicitors in the cases referred to by Mr. Banerjee had before them.

30. In view of my above observations I consider it unnecessary to deal with the preliminary point raised by learned Counsel for the Defendant Asima as to the competency of the applicants to make this application in view of the death of the senior partner of the applicant firm. In the circumstances I do not think the applicants have made out a case for equitable interference of the Court for preserving their rights and accordingly I dismiss this application, but I make no order as to the costs.