

(1932) 05 CAL CK 0009
In the Calcutta High Court

(Sri Sri) Gopal Sridhar Mahadeb and Others

APPELLANT

Vs

Sashi Bhusan Sarkar and Others

RESPONDENT

Date of Decision : 23-05-1932

Acts Referred:

Contract Act, 1872 — Section 239

Citation : AIR 1933 Cal 109

Judgement

1. This is an appeal from a decision of the Subordinate Judge, First Court, Faridpur, decreeing a suit for specific performance of a contract of lease. Defendants 1, 2 and 4 are the appellants. The case of the plaintiffs, who were eleven in number, was the following: There is a jalkar mehal which is the debuttar property of defendant 1, a group of deities, of whom the shebait is defendant 2 who is the mother of defendant 3, her only son. The jalkar was under an ijara lease with defendant 4, for a period of four years and a half which was to expire in Chaitra 1336 (=April 1929). On 16th Ashar 1335 (=30th June 1928) defendant 3 on behalf of defendant 2 having announced at Goalundo Ghat that on the expiry of the said lease the jalkar mehal would be again let out in ijara for a term of five years, there was a verbal contract between him and the first four plaintiffs to the effect that the said plaintiffs would be granted the said lease at an annual rent of Rs. 6,998; that they would pay defendant 2 Rs. 10,000 as rent in advance, out of which Rs. 2,000 was to be credited against the rent every year; that the remainder of the amount of rent would be paid in eight specified instalments every year; and that defendant 2 would execute a potta in favour of the said plaintiffs before the puja of 1338 and the said plaintiffs would also execute a kabuliat at the same time. In pursuance of the said contract the said plaintiffs paid Rs. 2,355 in several instalments up to 22nd Kartic 1335 (=8th November 1928).

2. On 24th Aswin 1335 (=10th October 1928) defendant 3 sent to plaintiff 4 a draft of the lease through an officer of his and informed him that the documents would be executed after the puja was over. On 14th Kartic 1335 (=31st October 1928) another officer was sent by defendant 3 for purchasing the stamps and

they were purchased on 16th Kartic 1335 (=2nd November 1928), the price thereof, Rs. 210, being paid by plaintiff 4 on the understanding that it would be credited against the ijara rent. Defendant 3 put off the execution of the document on one pretext or another and ultimately gave out in Aswin 1336 (=September 1929) that his mother, defendant 2, would not grant the lease. The plaintiff's case was that

defendant 3 was performing all acts of management, such as looking after, preservation and settlement, etc. of the said debuttar and other properties,

and

as a matter of fact defendant 3 was the authorized agent of defendant 2.

3. Their case further was that defendant 4, with full knowledge of the aforesaid contract and of the receipt of money thereunder got a fresh lease of the said jalkar executed in his favour by defendant 2, and that in fact it was he who had induced defendants 2 and 3 to break the aforesaid contract. Various defences were taken. Defendant 4 alleged inter alia that he was a bona fide transferee for valuable consideration. Defendant 3 pleaded that there was no concluded contract with the eleven plaintiffs but only a proposal on the part of the first four plaintiffs to take a lease from defendant 2 through him, they having asked him to recommend to her the granting of lease upon the terms alleged and having proposed to pay him Rs. 1,000 and having agreed to pay the advance rent of Rupees 10,000 before the puja of 1335 (=1928); that the said plaintiffs deposited some money but failed to pay up the entire sum of Rs. 10,000 before the puja of 1335 (=1928); that in Pous 1335 (=December 1928) the said plaintiffs asked for extension of time but he refused and asked them to take back the deposit, and in the same month defendant 2, on coming to know of the matter rebuked defendant 3 for making negotiations with the plaintiffs for the lease and asked him to return the money; and that the draft of the potta filed by the plaintiffs was not genuine.

4. Defendants 1 and 2 took the defence that defendant 3 was not an authorized agent for making such a contract; that she had no knowledge of the contract on the deposit; that when she came to know that such proposal and negotiations had been made she at once turned them down; that the plaintiffs were tenants and ijaradars under the zamindars of Teota with whom she had litigation and who had a jalkar adjacent to this one and so the proposed lease would be undesirable; that defendant 4 had connexion with the estate for a long time before, and his father, an old officer of the estate, held this jalkar in ijara from long before, and he himself was the ijaradar for the period that was running; and that on 18th Sravan 1336 (=3rd August 1929) the lease was granted to him by defendant 2 for five years (from 1337 to 1341) on receipt of an advance rent of Rs. 12,000 and at a yearly rent of Rupees 7,000 out of which the said advance was to be deducted in instalments. The Subordinate Judge decreed the suit in part. He ordered specific performance of the contract of lease as embodied in the

draft in favour of plaintiffs 1 to 4 and khas possession of the jalkar to be delivered to them on their paying the balance of the advance rent, i.e.. Rs. 7,435. He dismissed the suit in so far as it was of the plaintiffs other than Nos. 1 to 4. (Their Lordships in disposing of these matters held that the case was to be decided on the footing that defendant 3 was to be regarded as agent of defendant 2 and proceeded). The two questions that have to be primarily considered are: first was there a concluded contract which can be enforced; and second, if so, had defendant 3 authority to enter into it on behalf of defendant 2? To take the first question first. Upon the evidence which the plaintiffs have adduced there can be no reasonable doubt that there was a contract as alleged on their behalf. That the terms were proposed and agreed upon as between plaintiffs 1 to 4 and defendant 3 was also admitted on behalf of the latter except that it was alleged on his behalf that the understanding was that he would be paid Rs. 1,000 and would recommend to defendant 1 the granting of the proposed lease. Defendant 3 did not depose nor was any evidence adduced to support his version of the transaction. We think the Subordinate Judge was right in holding that defendant 3 deliberately omitted to put himself forward and we think that even though he was ill he could have given his deposition on commission if only he was not unwilling to face the trial. The points, upon which reliance was placed for the purpose of establishing that there was no complete contract but only a proposal depending on the acceptance of defendant 2 on the recommendation of defendant 3, are that the receipts for the moneys paid show that the moneys were to be held in deposit, that the terms of the alleged contract were not put into writing at the time, that as has been deposed to by plaintiff 1, when the latter suggested to defendant 3 that they should be put down in writing, defendant 3 replied that he would send a draft patta which would be enough, that even so late as on 31st October 1928 [Ex. 2 (d)] defendant 3 was inquiring as regards the names of the persons in whose favour the lease had to be executed, and further that the draft itself contained many new terms and conditions which were admittedly not thought of by the parties at the time of the said contract.

5. In our opinion these facts do not necessarily show there was no completed contract. It is quite true that the contract that can be enforced is the original contract and not the contract embodied in the draft; and in this respect the Subordinate Judge's judgment can only be upheld on the footing that the plaintiffs raised no objection to take the lease in that form. But we are unable to hold that merely because the moneys received were allowed to remain in deposit in anticipation of the due execution and exchange of documents between the parties or that the details were left to be settled in future when the draft would be tendered, or that the names of the actual parties in whose favour the lease would be executed were not known to defendant 3, the contract, the essential terms of which had been agreed upon, is to be regarded as being incomplete so as to be incapable of specific performance or unfit to be enforced. If the essential terms of a contract are settled, the contract may well be regarded as complete

and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. Judged by this test, the terms contained in the draft Ex. 3 may not satisfy its requirements. But the plaintiffs not having raised any objection and on the other hand being willing to have the lease in that form, it is not open to the appellants to contend that there was no complete or concluded contract on 16th Ashar 1335 (30th June 1928) to the extent that the terms, which are all the essential terms of a contract of this description, were settled between the parties. In the result we hold that there was a complete and concluded contract between the parties as alleged on behalf of the plaintiffs. We are also of opinion that the plaintiffs' version of the subsequent events, except as regards a few matters which however are of no real consequence, is true in the main. We think that the plaintiffs' account of the deposits and payments that were made, of the sending of the draft patta by defendant 3 to them, of the purchase of the stamp paper for the documents and of the subsequent refusal of defendant 3 to have the lease executed has been satisfactorily proved.

6. Of the points on which we feel doubtful about the truth of the plaintiff's story, a few require to be mentioned in view of the defence taken, namely that the plaintiffs themselves abandoned the contract or at any rate failed to perform their part of it. (Their Lordships, after dealing with these matters, concluded that it was not established that the plaintiffs had abandoned the contract or were in default.) The second question is the question of authority. It is admitted that there was no express authority from defendant 2 in favour of defendant 3. An implied authority in his favour however has been sought to be established. Defendant 2, in her anxiety to repudiate the contract, has, it seems, endeavoured to put her case too high in her own evidence, and consequently her own evidence in this respect cannot be trusted. Equally unconvincing is the evidence of her witnesses who have endeavoured to make out that defendant 3 took no part whatever in the affairs of the estate. The evidence which has been adduced on behalf of the plaintiff sufficiently establishes that defendant 2 trusted defendant 3 and it was the latter who really did the works necessary to be done for the management of the estate. He was her only son, and however wayward he may have been, she does not appear to have withdrawn her confidence from him or excluded him from conducting the affairs of the estate. It is quite possible that in matters relating to the management of the estate it was his voice that used to carry weight, that the officers of the estate would look upon him as their master and carry out his bidding and that the lady herself did not in fact interfere with his doings. Notwithstanding all this it will still be necessary to find, in order to bind defendant 2 by any act of defendant 3 that the latter had authority not necessarily express, but such as may be implied by the facts and circumstances of the case. The term "agency" is very wide in its import. In *Bh Blackburn Low & Co. v. Vigors* (1887) 12 AC 531 Lord Halsbury observed:

I cannot but think that the somewhat vague use of the word "agent" leads to

confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge and intentions of their principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

7. In the case of *Bombay Burma Trading Corporation Ltd. v. Mirza Mahmedally* (1880) 4 Cal 116 their Lordships of the Judicial Committee referred to an earlier decision of the Board in *Mackay v. The Commercial Bank of New Brunswick* (1874) 5 PC 394 in which the rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority but still within the scope of the authority of the agent. Their Lordships also quoted with approval the observation of Willes, J., in *Barwick v. The English Joint Stock Bank* (1868) 2 Ex 259 as containing as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows:

With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and in the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit.... In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

8. For instance where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him which authority under circumstances of emergency must be deemed to include a power to borrow on exceptional terms outside the ordinary course of business, it was held that the lender was not bound to inquire whether the emergency had arisen or not, but that he was entitled to recover from the principal if he lent to the agent bona fide and without notice that the agent was exceeding his mandate: *Montaignac v. Shitta* (1890) 15 AC 357. So also where an agent in contracting on behalf of his principal has acted within the terms of a written authority given to him by his principal, but the existence of which was not known to the other party to the contract, that principal cannot, if the other party has acted bona fide, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests and those of the principal: *Hambro v. Burnand* (1904) 2 KB 10. That if the act of the agent falls within the class of acts delegated to him, the mere fact that the interest at stake

is considerable or extraordinary, would not make any difference appears sufficiently from the decision in *In re, Drabble Bros.* (1930) 2 Ch 211. Bearing these observations in mind we have to examine the materials which have a bearing on this question. (Their Lordships summarized the evidence for the plaintiff and proceeded). The Subordinate Judge upon the above evidence has come to the conclusion that defendant 3 had been acting as if he was the malik or the shebait and that it shows that he and not defendant 2 was the real shebait of the deities, defendant 1. We are of opinion that all this evidence, giving to it the fullest weight, would not go anywhere near what has to be proved in this case to enable the plaintiffs to succeed. Moreover, this finding of the Subordinate Judge, even if correct, would not in our opinion sufficiently support his decision. What has to be found in this connexion is that defendant 3 had implied authority to enter into a contract of the present nature, and for that it would be necessary to find that he had been authorized by defendant 2 to do some work of this class to which the contract belongs.

9. Of course if an authority to settle this jalkar could be inferred from the facts and circumstances, it would have been more than enough; or if it could be established that he had authority generally to make all settlements, that also would have been sufficient; or if the settlement of this jalkar was necessary in order to do an act which defendant 3 was authorized to do, that also would have sufficed. But in our opinion no such thing can be held to have been established in the present case. It may be that defendant 2 ordinarily left the affairs of the estate in the hands of defendant 3 and so long as she did not interfere everything went on all right. But it has not been proved that she ever granted him any power or authority to enter into a contract of this kind or class on her behalf. Some evidence has been given by the plaintiffs as witnesses in this case to show the nature of work which they had seen defendant 3 do in connexion with the estate. That too is very general evidence and falls far short of establishing a liability on the part of a principal on the ground that his words or conduct induced third parties to believe that the acts of the agent were within the scope of the agent's authority, on the principle underlying Section 239, Contract Act. It may also be pointed out here that the plaintiffs have not rested their claim on any such estoppel. Defendant 2 has not produced the Jama Kharach of the estate for the year 1335. We are not satisfied that the explanation given for its non-production is true. It is possible that if produced the Jama Kharrach would have shown that the moneys received under the contract were credited in it. But this fact, even if it be assumed to be proved, would not in our opinion carry the case any far. In our judgment, the plaintiffs have failed to prove any facts or circumstances which would justify us in holding that defendant 2 was bound by the contract which defendant 3 had made. What we have just said is sufficient for the disposal of this appeal. But some of the other conclusions of the Subordinate Judge have also been either challenged or sought to be supported before us and so we propose to express our opinion on them though quite briefly. (Their Lordships after agreeing with the lower Court in holding that

the contract was not injurious to the defaulter and that defendant 4 had knowledge of the contract when he took the lease, proceeded). It has been argued that the deities are perpetual minors and so no contract made on their behalf should be specifically enforced. The analogy of minority of deities, in our judgment, is a pure fiction for which no authority is to be found in Hindu law itself and we can conceive of no principle on which on such analogy a contract, otherwise good and valid, can be taken out of the class of contracts of which specific performance may be granted under the law.

10. It has also been contended that even if defendant 2 had authorized defendant 3 to enter into the contract, such authority should not be upheld and so specific performance should be refused, on the principle laid down by the Judicial Committee in the case of *Bannerji v. Sitanath Das* AIR 1922 PC 209. In that case it was held that neither a trustee nor a person in a representative capacity can delegate his authority; consequently a lease is invalid if it is granted by a person as attorney for one who is either a trustee or manager of the property leased and who did not negotiate or consider the lease or know of it until after its execution; this is so whether the executant acted under a general power of attorney or under a power specially relating to the management of the property. Their Lordships observed:

Their Lordships therefore have considered what the position would be supposing such document had, in fact, been proved and had been shown to be a special power purporting to authorize dealings with the trust estate, and they are of opinion that in that event it could not have availed the defendants. The reason for this is plain. In whatever capacity Pratap held the land in question the capacity must have been a representative one. It was said that he was not in the strictest language a trustee: but be it so, his position was none the less a representative one, and it being plain that he never negotiated nor knew of the lease until after it was executed; if what was done, was done by virtue of a power of attorney it could only have been done because the power had delegated the representative authority that he possessed to a third party. The duties of Pratap, however they may be defined, were in their nature fiduciary, and fiduciary duties cannot be the subject of delegation. If therefore the document had been before their Lordships it would have been impossible to have supported the contention that it conferred the power to negotiate and execute the document upon which the whole of the defendant's case rests.

11. In the present case the plaintiff's case rests wholly on the foundation that defendant 3 had authority to conclude the contract for the lease, without any reference to defendant 2 and that for the completion or the conclusion of the contract no knowledge or consent of defendant 2 was necessary. Immediately, as it is conceded that her sanction was necessary, the contract would lose its character as a final agreement fit for specific performance. It is open to a trustee or a shebait to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of

delegating those duties by means of such appointment. As Bowen, L.J., observed in, *In re Speight*, *Speight v. Gaunt* (1883) 22 Ch D 727, at p. 763:

The proposition that as trustees or agents they cannot delegate means this simply: that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others, he may do so.

12. In *Learoyd v. Whiteby* (1887) 12 AC 727 Lord Watson observed:

Whilst trustees cannot delegate the execution of the trust they may, as has been held by this House in *Speight v. Gaunt* (1883) 22 Ch D 727, avail themselves of the services of others wherever such employment is according to the usual course of business.

13. The principle has been explained by Kekewich, J., in *Re, Weall* (1889) 42 Ch D 674 in these words:

A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not however follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is his conclusion, that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs.

14. It cannot be denied that the granting of a lease of this character was a matter with regard to which defendant 2 as shebait, was bound to exercise her judgment, and when it is found that defendant 3 under a supposed authority which must have purported to delegate that exercise of judgment to him made the contract, and when defendant 2 repudiates the contract at the earliest opportunity available to her it is impossible to uphold this delegation, which is a good deal more than the mere employment of a machinery for carrying out the duties which attach to defendant 2 in the fiduciary character she occupies, it is impossible to hold that specific performance should be granted in respect of it. The result is that in our judgment the plaintiff's claim for specific performance must fail. But we see no reason why plaintiffs 1 to 4 should not get a decree in terms of prayer cha of the plaint. The decree of the Court below therefore should be set aside, and in lieu of it a decree should be passed in favour of the plaintiffs and against the heirs of defendant 3 for a sum of Rs. 2,565, carrying interest at 12 per cent per annum from 1st October 1925 up to the date of realization. The said plaintiffs will also get their costs from those heirs in respect of the suit and of this appeal, hearing-fee in the appeal being assessed at 15 gold mohurs. The decree will be realized from the assets of defendant 3 in the hands of the said

heirs. All other parties will bear their own costs in this litigation. The cross-objection has not been pressed and it is dismissed, but with no order as to costs.