

(1986) 11 MAD CK 0009
In the Madras High Court
Case No : L.P.A. No. 57 of 1980

State Bank of India, Madras

APPELLANT

Vs

Venkateswara Stores

RESPONDENT

Date of Decision : 25-11-1986

Acts Referred:

Contract Act, 1872 — Section 172

Transfer of Property Act, 1882 — Section 130

Citation : AIR 1987 Mad 221 : (1987) 100 LW 263

Hon'ble Judges : V. Ramaswami, J; Ratnam, J

Bench : Division Bench

Advocate : K.S. Natarajan, for Anand Das Gupta and Sagar, for the Appellant;
T.S. Subramaniam, for the Respondent

Judgement

V. Ramaswami, J.—This Letters Patent appeal is filed against the order of a learned single Judge of this Court in A.A.O. No. 612 of 1977,

which has reversed the order of the Third Asst. City Civil Court Judge, Madras dated 17-9-1977 and made in I.A. 26126 of 1976 in O.S.No.

7545 of 1976.

2. The respondent in this appeal filed O.S.No. 7545 of 1976 against two canteen contractors who were running a canteen in , Madras Fertilizers

Complex at Manali. The suit was for the recovery of a sum of Rs. 12100 being the price payable for the rice supplied to the canteen contractors

who will hereafter :be referred to as the defendants. The supplies were effected during the period from 9-12-1975 to 2-6-1976. Then defendants

had "borrowed money from the appellant-Bank and had on 16-5-1975 executed an agreement hypothecating the goods, machineries, book debts

and other assets. The hypothecation extends to ""all the borrowers, present and

future book debts, outstanding moneys, receivables, claims bills, contracts, engagements, securities, investments, rights and assets". Simultaneously, the defendants: also executed a power of attorney in favour of the Bank authorising them to receive and, give full discharge of all the debts due to the firm and all those future debts and other goods hypothecated under the document. The power of attorney was irrevocable. Pending: the suit, the plaintiff-respondent filed an application for attachment before judgment and the Madras Fertilisers who owed a sum of Rs. 15000 to the defendants, brought the money to the credit of the suit. Thereafter, the bank filed I.A. 26126 of 1976 claiming that this money is payable to them and that, therefore, a direction may be given to pay "the money to the bank. The learned Third Assistant Judge, City Civil court, Madras, by his order dated 17-9-1977 held that the Bank's claim for the amount was valid, raised the attachment on the money and directed the payment of the same to the Bank.

3. On appeal by the respondent, a learned, single Judge of this Court allowed the appeal on the ground that the hypothecation of the:, debt itself does not give a right to the bank to either claim the debt or recover the money and that until a suit is filed by the Bank and a decree is obtained, the hypothecation is not effective.

4. The question for consideration therefore relates to the right of the Bank under the hypothecation deed and the power of attorney executed by the defendants. As already stated, the hypothecation was followed by the execution of a power of attorney enabling and conferring a right to receive the debt and give discharge to the debtor. The hypothecation deed relating to an actionable claim and followed by a document vesting a right to receive the money and give full discharge to the debtor is normally adopted whenever a transfer of an actionable claim is intended. If the actionable claim takes the form of a negotiable instrument like a promissory note, mere hypothecation will give the hypothecatee an equitable right of charge or to proceed against it as security. In such a case, of course, the hypothecation itself will not enable recovery of the money due under the promissory note, until a decree is obtained. However, if there is an endorsement transferring the right under the promissory note, the actionable claim itself is transferred and the transferee would be in a position to recover the

money due under the promissory note without obtaining a decree

on the debt itself. But where the actionable claim is merely an intangible asset, the transfer is effected only by execution of a hypothecation bond

with a right to recover "the same or a regular transfer by a document of the debt itself. In this case, since the hypothecation was intended to be in

the form of a floating charge on all the movables and debts outstanding, in addition to the execution of the hypothecation bond, the defendants have

also executed a power of attorney. In "such a case, we have no doubt that if a debt comes into existence, that debt gets transferred to the Bank so

that no third party could claim any right over the same.

5. The point is also not *res integra*. In one of the earliest judgments reported in *Gopalakrishna Iyer v. Gopalakrishna Iyer* ILR (1910) Mad 123, a

Division Bench of this Court held that -

Where a creditor hypothecates a debt due to him and authorises the person to whom the debt is hypothecated by power of attorney in writing to

recover the debt from the debtor the debt is absolutely transferred to the transferee under S. 130 of the Transfer of Property Act.

In *Ramasami Pillai v. Muthu Chetti*, ILR (1911) Mad 53, the instrument which came up for construction, was an instrument hypothecating a debt.

It was held that-

The holder of a charge on a debt due to his debtor by way of security for his own loan, is a transferee of an actionable claim and entitled to

recover the debt from the transferor's debtor.

In *Navajee and Another Vs. The Administrator General of Madras and Others*, , another Division Bench held that-

When an agreement contained a clause, viz., "it is agreed that you should have a lien or charge over cheques or moneys received for works done

with your capital", the instrument operated to create a charge on cheques or moneys payable for work done after the instrument.

They had also extracted a passage from *Collyer v. Isaacs*, (1881) 19 Ch D 342, where the Master of Rolls says -

A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into

existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and

the contract to assign thus becomes a complete assignment.

The law does not forbid hypothecation of future debts. As held by the Master of Rolls,"" when the property comes into existence, equity treating as

done that which ought to be done, fastens upon that property and the contract becomes a complete assignment. The learned counsel for the

respondent strongly relied on a decision of this Court reported in Union of India (UOI) and Another Vs. CT. Shentilanathan, formerly known as

PL. CT. M.P. Palaniappa Chettiar and Another, . That was a case of a simple hypothecation of specified goods without any delivery of possession

of the same. In such a situation, this Court had held that it creates only an equitable charge and that it was only a right to seek for the sale of the

hypothecated goods and not amounting to a transfer of the actionable claim. In that case, no right to recover the money and give full discharge of

the same was given to the hypothecatee. The decision relates to the position of a simple hypothecation and not a case which is followed by a right

to recover money and give full discharge. The learned counsel also referred to some passages in M.K. Tatman"s Banking Law and Practice in

India, 10th Edn. at page 330, dealing with hypothecation, we find the following passage -

Hypothecation :- In law, to create mortgage of movables, appropriate words of transfer and conveyance are necessary for a pledge, possession is

essential. A transaction intended to be a security over chattels, in which there are no words of transfer and where the possession remains with the

borrower, will therefore amount to an equitable charge which is generally known as hypothecation. Lord Macnaughten has characterised

hypothecation as being ambulatory and shifting in its nature; hovering over and so to speak, floating with the property until some event occurs or

some act is done which causes it to settle and fasten on the subject within its grasp. "Singularly enough, according to the Calcutta decisions, a

mortgage of moveables in India stands on the same footing as an hypothecation under English law.

Far from helping the learned counsel, this is clearly against the proposition which he had urged. The question whether the debtor will be absolved

of his obligation, if he had paid the money to the original creditor, is in the realm of notice and the consequence of not giving notice. If the debtor

was not aware of the hypothecation or a transfer of the actionable claim, surely, that will enable him to get a full discharge on payment of the money to the creditor. But, if he had notice of the assignment, then, different consequences will follow. But, in this case, that question does not arise for consideration, because the debtor had not decided to pay either the creditor or the Bank, but deposited the money so as to enable the Court to decide the rights of parties. Since we have held that the hypothecation of the debt with a power of attorney given to recover the money from the debtor amounts to an absolute assignment, the amount in deposit belongs to the bank and it could not be the subject matter of attachment in order to satisfy a debt due to the respondent.

6. In the circumstances, therefore, we are unable to agree with the learned Judge that the amount is not liable to be paid to the Bank and, therefore, we set aside the order and restore the order of the Third Assistant Judge, City Civil Court, Madras. The appeal is allowed and the appellant will be entitled to its costs.

7. Appeal allowed.