

(1926) 05 MAD CK 0017
In the Madras High Court

T. S. Raju Chettiar and Another

APPELLANT

Vs

A. Shukoor and Co. and Others

RESPONDENT

Date of Decision : 06-05-1926

Acts Referred:

Citation : AIR 1927 Mad 179 : (1927) 25 LW 44

Hon'ble Judges : Venkatasubba Rao, J;Krishnan, J

Bench : Full Bench

Judgement

Krishnan, J.—This is an appeal from the judgment of Mr. Justice Beasley sitting on the Original Side in a case brought by the plaintiffs against one Shukoor and Co., one Gaffor Sahib and one Swaminathier. Swaminathier was not originally in the suit but was subsequently added as the 3rd defendant. The plaintiffs are hardware merchants in Madras. Gaffor Sahib, the 2nd Defendant, was a partner with the plaintiffs, but inasmuch as he did not join the plaintiffs in filing the suit he was made the 2nd defendant in the suit. He is also a partner of the defendant firm. The plaintiffs claim that a sum of about Rs. 13,000 was due to them on dealings and the suit was brought to recover that money from Shukoor and Co. They subsequently joined the 3rd defendant on the allegation that the 3rd defendant having purchased the assets and liabilities of Shukoor and Co. in February 1921 made himself thereby liable to pay the debt of the plaintiffs. Shukoor and Co. denied that there was any liability on them to pay the plaintiff company; for they pleaded that if proper account of all the dealings between them and the plaintiff company were taken it would be found that a sum of Rs. 2,000 was due to them. Mr. Swaminathier denied all liability as he was not a party to the dealings and he pleaded that any arrangement between Shukoor and Co. and himself could not be taken advantage of by the plaintiffs as they were not parties to the transaction. The learned trial Judge who tried the case decreed the suit for a sum of Rs. 10,000 and odd against Defendants Nos. 1 and 2 with interest at 12 per cent. and costs but dismissed the suit against the 3rd defendant. He held that there was no privity of conduct between the plaintiffs and the 3rd defendant and that any contract made between the 3rd defendant

and Shukoor and Co. to pay certain specified debts of that firm could not be taken advantage of by the plaintiffs. The appeal is against the 3rd defendant by the plaintiffs, Shukoor and Co. not having appealed.

2. After hearing the case argued at considerable length by Mr. G. Krishnaswami Iyer for the appellants I feel no doubt whatsoever that his clients are not entitled to get a decree against Swaminathier at all. It is not pretended that Swaminathaier was a party to the transactions on which the suit is based. The claim against him is made because it is said he having taken over the assets and liabilities of Shukoor and Co. has thereby made himself liable to pay the debt due to the plaintiffs. It is a well-settled principle of law that a person who is not a party to the contract is not entitled to take advantage of it or enforce it. The well known case of *Tweedle v. Atkinson* [1861] 1 B. & S. 271 has laid down that. No doubt, there are certain exceptions to that case; but the present case does not come within any of the recognized exceptions. If we could hold that the sale of the assets of Shukoor and Co. made to Swaminathier was for the benefit of Shukoor and Co.'s creditors including the plaintiffs and there has been thereby created an equitable trust in their favour then we might be justified in holding that the plaintiffs are entitled to enforce that trust and that the assets which Swaminathier had got possession of were liable. It is abundantly clear in this case that there was no such position created. (His Lordship examined the evidence and proceeded.) It would seem, therefore, that on the contract between Shukoor and Co. and Swaminathier there was no undertaking by the latter to pay the plaintiffs' debts. It is difficult to understand how the plaintiffs could take advantage of the assignment under Ex. A and insist upon their debts being paid to them by Swaminathier. There is no question here of any trust at all, for it is perfectly clear that the arrangement under Ex. A was not one for the benefit of Shukoor and Co.'s creditors. It was an ordinary dealing by transfer of Shukoor and Co.'s firm as a going concern with the goodwill, assets and stock in trade and liabilities to a purchaser like Swaminathier. That does not create in the purchaser a liability as argued by the appellant to pay all the debts of the vendor company irrespective of what the assets obtained are and irrespective of the contract between the vendor and the vendee firms. A proposition like the one advanced before us seems to be absolutely unsupported either by authority or by reason. The learned trial Judge says:

It (the plaintiffs' debt) is not included in the list and, therefore, in my view it is under the agreement a liability in respect of which the 3rd defendant is entitled to be indemnified by the other defendant but that is nevertheless a liability which he has taken over himself subject to that indemnity.

3. I am inclined to go further and say that it is a liability which he never undertook to pay at all. If the final list did not make Swaminathier liable for this debt of Shukoor and Co., I fail to see how the plaintiffs can go behind that arrangement and claim the payment from Swaminathier now. The learned Judge has dealt with the various cases cited before him and they have been again cited

before us. It is sufficient to say that the present case will come under such a case as *Gregory v. Williams* [1817] 3 Mer. 582. He has also discussed a case of this Court decided by *Kumaraswami Sastri, J.*, in *Ramaswami Aiyar v. Deivasigamani Pillai* A. I. R. 1922 Mad. 397. It was there held that the creditor of the transferrer to whom the transfer is communicated has a right to proceed against the transferee, and that a suit by the creditor against the transferee is in such a case not open to the objection that there is no privity of contract between the parties. I am unable to follow this decision. I think, there must be something more than a mere transfer, something in the nature of a trust created so as to enable a third party to contract to take advantage of the contract and insist upon his debt being cleared. As pointed out by the learned trial Judge a stranger to the contract like the plaintiff firm in this case cannot sue the 3rd defendant to get the benefit of the contract entered into between Shukoor and Co. and Swaminathier. This will be sufficient to dispose of this appeal, but I would like to add that I am unable to agree with the learned trial Judge in the view taken by him regarding what he considers is a set-off which ought to have been claimed in the case. It is true there were various accounts between Shukoor and Co. and the plaintiffs' firm and the learned Judge has treated them as being different transactions giving rise to different causes of action. As I understand the case, different accounts were kept not because the transactions were different but to earmark certain particular transactions for ascertaining the profits easily in those transactions. The transactions are one and the same because they all refer to the same dealings between the same two companies. If it were necessary I would have directed an account to be taken of the entire transactions between Shukoor and Co., and the plaintiffs' firm to know whether anything was really due to the plaintiffs. If nothing was due the plaintiffs' case is bound to fail at once. But it is not necessary to go into the accounts now; for, on the facts of the present case the plaintiffs are not entitled to get a decree against Swaminathier, the 3rd defendant, and the learned trial Judge's decision on this point is correct. I, therefore, dismiss the appeal with the costs of the 3rd respondent.

Venkatasubba Rao, J.

4. The judgment of Mr. Justice Beasley, the learned trial Judge may, I think, be supported on a short ground. For the plaintiffs, it has been contended that although they were strangers to the contract between Shukoor and Co. and the 3rd defendant, they still can take advantage of it because under that contract they derive some advantage. This argument presupposes that there is an obligation which Shukoor and Co. can enforce as against the 3rd defendant. If this element is wanting, the plaintiffs' case is bound to fail. The arrangement between Shukoor and Co. and the 3rd defendant is that contained in Ex. I dated 14th December 1921. Shukoor and Co. sold their concern to the 3rd defendant and he agreed to discharge certain liabilities. A list was made of them and was appended to the deed. The alleged debt due to the plaintiffs is not one of the liabilities included in that list. It thus follows that as between Shukoor and Co. and the 3rd defendant, there is no agreement by the latter to discharge the debt

due to the plaintiffs.

5. There is a clause in Ex. I by which Shukoor and Co. agreed to indemnify the 3rd defendant against any other liabilities not mentioned in the list. In other words, if the 3rd defendant is obliged to meet liabilities other than those he has expressly agreed to discharge, it is the duty of Shukoor and Co. to save the 3rd defendant from such loss and make good the amount actually paid. This provision,--far from being a covenant to pay, clearly negatives any such liability and I fail to see how on these facts there arises a case for the application of the doctrine for which the plaintiffs contend.

6. It is contended that when all the parties who are affected are before the Court, a stranger to a contract may directly enforce its terms in order to secure an advantage intended for him; and for this position Ramaswami Aiyar v. Devasigamani Pillai A. I. R. 1922 Mad. 397 and Areti Singarayya v. Areti Subbayya A. I. R. 1924 Mad. 861 have been relied on. This argument again seems to beside the point. If the 3rd defendant is bound to pay this amount, the plaintiffs may, on the strength of these decisions, probably urge that by some kind of subrogation, they (the plaintiffs) must be allowed to take the place of Shukoor and Co., and enforce the right which is possessed by the latter. But as I have shown, even if it should so chance that the 3rd defendant is obliged to pay this amount, he has a right of recourse against Shukoor and Co. Without expressing any opinion of the correctness or otherwise of Ramaswami Aiyar v. Devasigamani Pillai A. I. R. 1922 Mad. 397 and Areti Singarayya v. Areti Subbayya A. I. R. 1924 Mad. 861 I must hold that these rulings are not applicable to the facts of the present case.

7. Mr. G. Krishnaswami Iyer, the learned vakil for the plaintiffs, next contends that the terms of Ex. A are different in this respect. This is however, a preliminary agreement executed in February 1921, and it merely marks a stage in the negotiations which finally culminated in Ex. I executed in December 1921. I accept the view of the learned trial Judge as to the circumstances in which the conveyance came to be executed. I do not believe that there is any foundation for the charge that it is tainted with fraud. The reason for omitting the plaintiffs' debt in the list annexed to Ex. I is to me obvious. There were dealings with the plaintiffs and Shukoor and Co., but instead of one account being maintained three different accounts were kept. This was so done for purpose of convenience. While under one of these account a sum was due to the plaintiffs under the other accounts, an amount was due by them to Shukoor and Co. So it was resolved to make no mention at all of the amount which was to the credit of the plaintiffs or the amount due by them. I am prepared to accept the learned trial Judge's view that the rights of the parties must be determined with reference to Ex. I and not with reference to Ex. A.

8. A decree has been passed against Shukoor and Co. by the learned trial Judge. The dealings which form the subject of the other two accounts were not taken into consideration. The learned Judge seemed to think that this was the only

course open to him as the pleadings were defective. The correctness of this conclusion may be open to question. But as Shukoor and Co. have not appealed against the decision, I am not prepared to interfere with the decree. I advert to this matter only to show that the plaintiffs cannot in any event get a decree without all accounts being taken even if the other points on which I have held against them are found in their favour.

9. I agree in the order dismissing the appeal.