

(1936) 03 BOM CK 0015

In the Bombay High Court

Case No : O.C.J. Appeal No. 44 of 1935 and Suit No. 1641 of 1934

The National Petroleum Company Ltd.

APPELLANT

Vs

Popatlal Mulji

RESPONDENT

Date of Decision : 11-03-1936

Acts Referred:

Contract Act, 1872 — Section 2
Trusts Act, 1882 — Section 94

Citation : AIR 1936 Bom 344 : (1936) 38 BOMLR 610 : 165 Ind. Cas. 338

Hon'ble Judges : Rangnekar, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of Mr. Justice Chitre, in which the main issue raised was whether the plaint showed any cause of action. The learned Judge held that it did, and the question is whether he was right in so holding. The material facts are these. Defendant No. 2 carried on business under the name of the National Petroleum Company, and he entered into contracts with the plaintiff and others as selling agents. The contract with the plaintiff is dated April 22, 1933, and thereunder the plaintiff was appointed selling agent on behalf of defendant No. 2. By Clause 3 the selling agent agreed to indent for goods required by him and to pay to defendant No. 2 against railway receipts or shipping documents the market value of the goods as fixed by defendant No. 2 at the time of delivery. Under Clause 15 the plaintiff, as selling agent, had to deposit with defendant No. 2 a sum of Rs. 1,000, which was to be returned to the plaintiff on termination of the agreement. In the meantime the deposit was to carry interest at the rate of six per cent, if made in cash, but: if made in Government Securities, the actual interest collected from such securities was to be paid to the plaintiff. Defendant No. 2 was to be entitled to utilise and use the deposit, whether in "Cash or in Government Securities. The plaintiff duly made his deposit, of Rs. 1,000, which is one of the sums for which he sues. There was also at the date of the commencement of the suit a sum of Rs. 3,649

due to the plaintiff under the agreement in respect of the balance of moneys due to him in manner mentioned hereafter. On May 21, 1934, the first defendant company was formed, and it became entitled to commence business on July 17. On June 5, 1934, an agreement was entered into between defendant No. 2 and defendant No. 1 by which all the assets of defendant No. 2 were assigned to defendant No. 1. The sale was to take place, so far as the Bombay business was concerned, as from April 1, 1934. The consideration consisted partly of vash and partly of shares in defendant No. 1, and as the residue of the consideration for the sale the company, that is, defendant No. 1, undertook to pay, satisfy and discharge and fulfil all debts and liabilities, so far as the Bombay business was concerned, from April 1, 1934, contracts and engagements with defendant No. 2, and to indemnify him against all proceedings, claims and demands in respect thereof. On June 21, 1934, the plaintiff gave notice terminating his selling agency agreement, and shortly after that he demanded from defendant No. 1 the return of his deposit of Rs. 1,000, and. payment of the balance due to him on account. On November 16, he filed this suit as a summary suit. On January 21, 1935, defendant No. 1 was granted unconditional leave to defend, but on February 15 a decree was passed for the full amount claimed in the plaint against defendant No. 2.

2. In the plaint the plaintiff alleges that defendant No. 1 had taken over the business and liabilities of defendant No. 2, and that the latter was indebted to the plaintiff in a sum of Rs. 3,649 odd. Then it is alleged that the first defendant company had made up accounts with the plaintiff and sent to the plaintiff a statement duly checked and certified by their auditors; and the prayer is against both defendants for payment of the sum of Rs. 3,649 and the deposit of Rs. 1,000. But the plaintiff does not specify under what legal principle he claims" a right to sue defendant No. 1. Apparently he bases his case on an equity that defendant No. 1, having taken over the business and assets of defendant No. 2, and having covenanted with defendant No. 2 to discharge all the liabilities of defendant No. 2, one of which liabilities was-to the plaintiff, the plaintiff thereby became entitled to sue defendant No. 1 for the amount due. But it is to be noticed that no case of novation is made out in the plaint, and in view of the fact that the plaintiff had taken judgment against defendant No. 2, no case of novation could have been made out at the trial; and it is also to be noticed that no case of estoppel is pleaded, and no case of any independent contract, express or implied, by defendant No. 1 with the plaintiff. Plaintiff rests his case on his equitable right to sue for the money on a contract to which he was not a party, but under which he took: an interest, and the learned Judge decreed in favour of the plaintiff.

3. The first point taken by the appellants is that under the agreement of June 5, 1934, defendant No. 1 only covenanted to pay the debts of defendant No. 2 arising after April 1, 1934. The language of the agreement in this respect is certainly open to doubt. The purchasing company was taking over the vendor's business as from April 1, 1934, and as from that date, therefore, defendant No.

1 would necessarily be liable for the debts of the business, because it was his business, and it is impossible to say that an obligation to pay those debts formed part of the consideration for the sale, and yet the obligation to pay the debts of the vendor is expressed to be part of the consideration for the sale. It is also to be noticed that the obligation to discharge the contracts and engagement of the vendor is not limited in point of time by the terms of the agreement. Taking the agreement as a whole, I think it does amount to a contract by defendant No. 1 to pay all the debts and liabilities of defendant No. 2 in respect of the business assigned. It is,.. I think, the ordinary type of agreement for purchase entered into by a company formed to acquire a going concern.

4. The questions which then arise are, first, whether the plaintiff can sue on this agreement to which he was not a party, but under which he took a benefit, and secondly, if he can so sue, whether in taking judgment against defendant No. 2 he precluded himself from proceeding further against defendant No. 1. I will take the second point first, and will, for the moment, assume that the plaintiff had a right to sue defendant No. 1 under this agreement. If that is so, the obligation which he could enforce under the agreement would be the obligation of defendant No. 1 to pay the debt of defendant No. 2 to the plaintiff, and it seems to me plain that the moment the plaintiff took judgment against defendant No. 2, and thereby destroyed the debt of defendant No. 2 and merged it in the judgment, there was nothing left which defendant No. 1 could be called upon to pay under his contract of indemnity with defendant No. 2. It seems to me that the claim (if any) which the plaintiff had against defendant No. 1 and defendant No. 2 was an alternative claim, analogous to the sort of claim which a man may have against both principal and agent, and that the case falls within the principle of the decisions of the House of Lords in *Scarf v. Jardine* (1882) 7 App. Cas. 345 and *Morel Brothers & Co., Limited v. Westmorland (Earl of)* [1904] A. C. 11, I am, therefore, of opinion that the plaintiff having elected to pursue his claims against defendant No. 2 to judgment has abandoned any claim he preferred against defendant No. 1.

5. In that view of the matter it is not strictly necessary to consider the first question; but as it has been argued, and as there is considerable conflict of authority on the point, I think it desirable to deal with the matter. The question really is, whether, where A and B enter into a contract under which A agrees to indemnify B against all his debts, a creditor of B can sue A on the contract. The rule of English law is clearly established that the only persons who can sue upon a contract are the parties to that contract. No doubt there are many cases in the books in which persons who are not in terms parties to a contract have been allowed to sue upon it. But those cases are based on the view that the plaintiff is claiming through a party to the contract, that he is in the position of a cestui que trust or of a principal suing through an agent, that under the old procedure he could have filed a suit in equity, even if he could not have sued at common law. Those cases are a recognized exception to the general principle that only parties to a contract can sue upon it. There seems to me to be nothing in the Indian

Contract Act which suggests that that principle does not apply in India. It is true that the definition of "consideration" in Section 2 of the Indian Contract Act gives a wider meaning to that term than is accepted in English law, because it includes consideration moving from the promisee or any other person. But the fact that consideration may move from a third party does not involve the proposition that a third party may sue upon a contract. The learned trial Judge based his judgment very largely on *Debnarayan Dutt v. Chunilal Ghose* ILR (1913) Cal. 137. But the facts of that case were peculiar, because the plaintiff, who was not a party to the contract sued upon, had given up something, which was believed to be a charge upon property, to the defendant, who had undertaken with the other contracting party to pay the debt of that party to the plaintiff. Therefore there was communication to the plaintiff of the contract between the defendant and the other party, and the plaintiff had acted upon that contract to his detriment by handing over something to the defendant, and in those circumstances it was held that the plaintiff could maintain an action directly against the defendant on the contract to which he was not a party. The decision seems to be in accordance with the authorities, although I am not sure that I should be prepared to go as far as the learned Chief Justice went in some of his observations. Later cases in the Calcutta High Court have applied the principle underlying that case to cases where the facts were quite different. In *Dwarika Nath Ash v. Priyanath Malki* 22 C. W. N. 279 the principle of the case of *Debnarayan Dutt v. Chunilal Ghose* was applied, although the contract on which the plaintiff sued had not been communicated to him, and he had not acted upon it. In the latest case in Calcutta, *Kshirodebihari Datta V. Mangobinda Panda* ILR (1934) 61 Cal. 841, the Court, after reviewing all the authorities, English and Indian, came to the conclusion that under Indian law any person who took a benefit under a contract to which he was not a party could sue directly upon that contract, and that it was not necessary to invoke the doctrine of trust or agency. With all respect to the learned Judges who decided that case, I am not prepared to adopt that view. The decision seems to me to be opposed to established principle and authority, and if the rule is to be introduced into this country that any person may sue upon a contract if he takes a benefit under it, although a stranger to such contract, I think that such rule must be introduced by the legislature, and not by the Courts. From the point of view of practical convenience there seems to me to be quite as much to be said against the introduction of such a rule, as in favour of it. The reasoning in the Calcutta case is in conflict with a decision of the full bench of the Madras High Court in *Subbu Chetti V. Arunachalam Chettiar* ILR (1929) Mad. 270, where it was held that a person not a party to a contract could not sue upon the contract except in the special cases there enunciated. I prefer the Madras decision to the reasoning in *Kshirodebihari Datta's* case.

6. Mr. Munshi for the plaintiff argued that under the contract between him and defendant No. 2 the moneys which were payable to him were not a mere debt, but were moneys held in trust for him, and if he could establish that defendant

No. 2 had in his hands moneys or assets which belonged to the plaintiff, and transferred those moneys or assets to defendant No. 1 with notice of the trust, then no doubt the plaintiff could sue defendant No. 1 as cestui que trust suing a constructive trustee. But, in my opinion, the facts do not establish that the moneys were trust moneys. The deposit of Rs. 1,000, under the terms of the agreement, could be utilised by defendant No. 2, and that being so, I think that the obligation to return the deposit was a mere obligation in contract, that is to say, a mere debt. It has been held by this Court in *In re Manekji Petit Manufacturing Co.* (1931) 34 Bom. L.R. 728 that a deposit of that nature must be proved for in insolvency, and cannot be claimed as moneys subject to a trust. The other sum claimed by the plaintiff, namely, Rs. 3,649, arose in these circumstances. As I have pointed out, the plaintiff had to pay, when he ordered goods, the market value fixed by defendant No. 2. When the goods were subsequently sold at a greater or less price, the plaintiff was credited or debited with the balance, and this sum of Rs. 3,649 represents moneys which had been credited in that way to the plaintiff. It seems to me even more difficult to contend in the case of these moneys, than in the case of the deposit of Rs. 1,000, that they constitute anything but a mere debt. In my opinion both sums constitute a mere debt. Mr. Munshi also desired to argue that on the correspondence which took place before action between the plaintiff and defendant No. 1, in which defendant No. 1 sent the account to the plaintiff and acknowledged the amount due, there arose an implied contract on the part of defendant No. 1 to pay the amount. But that case has not been pleaded, and we cannot, therefore, go into it. Nor, as I have said, is any case of estoppel pleaded. The only case is this alleged right of the plaintiff to sue defendant No. 1 direct for the debt under the contract between the two defendants. In my opinion, for the reasons which I have given, that right never existed, and if it ever did exist, it was lost when the plaintiff signed judgment against defendant No. 2. For those reasons, I think, the appeal must be allowed with costs throughout. Charging order obtained by plaintiff vacated.

Rangnekar, J.

7. The suit which has given rise to this appeal was brought by the respondent (the plaintiff) against the appellants, defendant No. 1, and one Ishwardas Ramchand, defendant No. 2. The material facts were that prior to May, 1934, defendant No. 2 was carrying on business in kerosene and petroleum in the name and style of the National Petroleum Company. On April 22, 1933, he appointed the plaintiff as his selling agent in the territory of Cutch under an agreement, exhibit D. Under the agreement the plaintiff had deposited a sum of Rs. 1,000 with defendant No. 2 as security for the performance of his obligations under the agreement. As the result of dealings between them a sum of Rs. 3,649 became due to the plaintiff by defendant No. 2 in December, 1933. In May, 1934, the appellant company was formed and a certificate was issued by the Registrar of Companies on July 17, 1934, and the company then became entitled to commence business. The main object of the company was to take over the

business of defendant No. 2 as a going concern. On June 5, 1934, an agreement was entered into between the appellants and defendant No. 2 by which the appellants took over the assets and liabilities of defendant No. 2 as from April 1, 1934. In June, 1934, the plaintiff gave notice terminating the agency agreement, and in August, 1934, he made a demand on defendant No. 1 for the payment of two sums, Rs. 3,649 in respect of the dealings between him and defendant No. 2, and Rs. 1,000, the amount deposited with defendant No. 2. Some correspondence took place, and thereafter the plaintiff drew certain bills of exchange in respect of these two sums, which were not honoured by the appellants. He then filed this suit as a summary suit. Defendant No. 2 applied for leave to defend the suit, which was granted on his depositing Rs. 3,500 within two weeks; but as he failed to deposit the amount, an ex parte decree for the amount claimed by the plaintiff was made against him. Defendant No. 1, the appellants, were given unconditional leave to defend. The suit came on for hearing before Mr. Justice Chitre. The appellants contended that there was no cause of action as against them. This contention was negatived by the learned Judge, who held that having regard to the agreement of June 1934 between the appellants and defendant No. 2, an obligation in the nature of a trust arose in equity, the plaintiff was a beneficiary under that trust, and was therefore entitled to maintain the suit against the appellants, although he was not a party to the contract between the appellants and defendant No. 2.

8. Sir Jamshed Kanga on behalf of the appellants has taken three points. The first is that under the agreement the appellants became liable to discharge the debts of defendant No. 2 as from April 1, 1934, and as the liability in the suit was incurred in December, 1933, when the company was not in existence, the appellants were not bound to satisfy it. The next contention is that the plaintiff's remedy against the defendants was in the alternative, and he having obtained a decree against defendant No. 2, the suit against the appellants was barred. The last point urged by the learned counsel is that the liability, if any, of the appellants was not in trust, but in a contract as between a creditor and a debtor, and it was wrong, therefore, to hold that an obligation in the nature of a trust arose in the circumstances of this case.

9. Before proceeding to discuss these contentions, it would be convenient to refer briefly to the two material agreements on which the respective contentions of the parties before us are founded. The first agreement, which is between the plaintiff and defendant No. 2, is dated April 22, 1933. By Clause 3 of that agreement the selling agent agreed to indent for goods required by him and to pay to defendant No. 2 against railway receipts or shipping documents the market value of such goods despatched by the company. Clause 10 provided that the selling agent should sell the goods at a price which was not to be under or above the rates fixed by defendant No. 2. Clause 15 related to the deposit of Rs. 1,000. It provided that this sum was to be deposited with the 2nd defendant firm as security for the due performance of the terms of the agreement, and the deposit was to be returned to the selling agent on the termination of the

agreement and after his liabilities had been fully satisfied. In the meanwhile, if it was made in cash, it was to carry interest at six per cent., but if in Government Securities, then the actual interest accrued thereon was to be credited to the selling agent. Then the clause provided that defendant No. 2 shall be entitled to utilise and use the deposit whether in cash or in Government Securities. Now, although the agreement provided that the selling agent should pay to the firm the approximate market value of the goods indented by him as against the railway receipts sent to him, in practice it appears the plaintiff used to send moneys on account to the firm, sometimes much in excess of the market value of the goods actually sent to him at the time. The moneys so sent by him were credited to him in his account, and when the goods were despatched to him for sale, and sold, the price realized was debited, and interest was allowed on both sides of the account, both on the value of the goods as well as on the moneys advanced by the plaintiff.

10. The second important agreement is dated June 5, 1934, which was between the second defendant firm and the appellants. It was in the nature of the usual preliminary contract by which a company takes over a business as a going concern. The material provisions of that agreement are these. Clause 1 says :

It is hereby agreed that the vendor shall sell, assign, transfer and hand over and the company will purchase and take over the entire concern of the National Petroleum Company together with the goodwill of the said business in continuation of the vendor's firm and in succession thereto.

11. By Clause 4 it was agreed that all book debts and other debts and outstandings due to the vendor in connection with the said business and the securities therefore should also be taken over by the company. By Clause 5 it was agreed that the full benefit of all contracts, agency agreements and other engagements to which the vendor was entitled should similarly be taken over. Clause 6 related to the transfer of the cash in hand and the securities from the selling agents and cash deposits from the selling agents and all bills and notes of the vendor, to the company. Then the consideration was set out, namely, Rs. 28,43,510, which consisted partly of cash, partly of shares in the newly formed defendant No. 1 company and partly as provided in the following important clause which is in these terms :-

As the residue of the consideration for the said sale the company shall undertake to pay satisfy and discharge and fulfil all the debts liabilities so far as the Calcutta business is concerned from March 1, 1934, and so far as Bombay business is concerned from April 1, 1934, contracts and engagements of the vendor including costs, charges, expenses, etc., incidental and in relation to the said business and shall indemnify him against all proceedings, claims and demands in respect thereof.

It is on this clause that Sir Jamshed relies in support of his first contention. Now as the clauses to which I have referred stand, the contention is not without force,

and if the agreement had to be construed literally, then it does appear that the appellants undertook the liability to discharge the debts of the firm from April 1, 1934. But it is clear on the record that the appellants took over the whole of the liabilities from April 1, 1934, and the business then belonged to them, and all debts which would come into existence since then would be the debts of the company. Now the clause says that the liability to discharge these debts was to be undertaken as part of the consideration for the sale of the business. To accept the learned counsel's argument would lead to this absurdity that that liability of the company to pay its own debts was part of the consideration for the sale by defendant No. 2 of his business to the company. Clearly there can be no consideration for such an undertaking. It seems to me, therefore, reading the agreement as a whole, that the parties really intended that the appellants should undertake to discharge the liabilities of the firm whenever they were incurred, but up to April 1, 1934, when they became the owners of the business, and I think the learned Judge was right in construing the agreement in that way.

12. Coming now to the second contention raised on behalf of the appellants, the question is what really is the nature of the liability, if any, of the appellants in the circumstances of the case ? Was the claim against the defendants jointly, severally or in the alternative ? The appellants say that the remedy was alternative. The respondent says that it was joint or several, and that the taking of the decree against one of the co-promisors would not bar a suit against the other co-promisor. It is clear on the English authorities that if the claim was joint, then only a judgment against defendant No. 2 would bar the suit against the appellants. It makes no difference whether the claim was several or in the alternative (see judgment of Collins M. R. in *Morel Brothers & Co., Limited v. Westmoreland (Earl of)* [1903] 1 K. B. 64. Section 43 of the Indian Contract Act deals with this matter. It is in these terms :-

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Then it provides for the right of contribution, with which we have nothing to do in this case. Now it is well-established by decisions of the Indian High Courts that the sections of the Indian Contract Act beginning with Section 43 make all joint contracts joint and several. It is not necessary to refer to these decisions. The effect of Section 43 is that it is open to a promisee to enforce the contract either against one or some or all of the joint promisors. In this respect it is clear that the section marks a wide departure from the rules of the common law in England. According to the English law the rule is that joint contractors must be sued jointly in respect of a breach of the contract, and if only one of the joint promisors is sued, it is open to him to plead that the co-promisors should also be joined in the suit. It follows from this that in a case of a joint promise each one of the promisors is liable for the whole debt. Under this section, however, as I have pointed out, it is open to the promisee to elect to sue either the one or the

other or all the joint promisors. So far, there does not seem to be any dispute at all. All the decisions that I know of have accepted this position. There is, however, considerable diversity of opinion as to whether a judgment obtained against one or some of the joint promisors is a bar to an action on the same contract against the others. The question is whether the rule in *King v. Hoare* (1844) 13 M. & W. 494 and *Kendall v. Hamilton* (1879) 4 App. Cas. 504, that a judgment recovered against one of two or more joint debtors is a bar to an action against the other, applies in this country. The Allahabad, Madras, and, latterly, the Patna High Courts have held that the rule does not, having regard to the underlying principle of Section 43 and Section 44 of the Indian Contract Act. The Calcutta High Court says that the rule still applies in this country. As far as our High Court is concerned, it started with assuming that the rule does apply. The leading case on the subject is the case of *Muhammad Askari v. Radhe Ram Singh* ILR (1900) All. 307. In that case it was held by Strachey C. J. that a decree obtained against a joint promisor is not a bar to a suit against other joint promisors. It is not necessary, in view of the contentions raised before us, to refer to the decisions of the Calcutta or the Bombay High Court, which seem to take a different view. These decisions, however, it may be pointed out, are criticised by the learned authors, Pollock and Mulla, in their commentary to Section 43 of the Indian Contract Act, and on this question they observe as follows (6th edn., p. 295):-

We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in British India, to be held a bar to a subsequent action against the other promisor or promisors.

No doubt the point is open, and it is not necessary for me to express any definite opinion on it, but since the question has been argued, I am inclined, as at present advised, to think that the reasoning of Strachey C. J. has considerable force in it, and the criticism of the learned commentators on the decisions taking the opposite view is justified. And I say so with all respect to the learned Judges who have taken a different view. It seems to me that the underlying principle of Section 44 also lends support to the conclusion to which the learned Chief Justice came in that case. The nature of the alternative claim is illustrated by Section 233 of the Indian Contract Act, from which it appears that where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. The same principle applies in English law. Similarly, Section 234 is a good illustration of what an alternative remedy really means. Liability in this case is not at all joint, but is in the alternative, and if the plaintiff chooses to sue the agent who has contracted in his own name to judgment, he cannot subsequently bring an action against the principal, and as the Privy Council have pointed out in *Somasundaram v. Subramanian* AIR [1926] P. C. 136, even if the judgment against the agent remains unsatisfied.

13. The question then is, what is the nature of the liability in this case ? Mr. Munshi argues that this is a case of a joint liability. It is difficult, in my opinion, to accept the contention in view of the facts of this case. The liability of defendant No. 2 came into existence under their agreement of 1933. The liability, if any, of the appellants came into existence in virtue of their agreement with defendant No. 2 made in June, 1934. It is difficult to see, therefore, how the liability of defendants Nos. 1 and 2 is a joint liability. Nor can it be a several liability for the simple reason that the contract which defendant No. 1 made was with defendant No. 2 and not with the plaintiff. Mr. Munshi, therefore, was driven to argue that this is a case of an implied promise to pay, and that implied promise to pay came into existence by reason of the conduct or representations made by the appellants when the company was formed and after it was formed. No doubt, if this case had been pleaded and established, as Sir Jamshed Kanga has conceded, the position might have been different. The plaint, however, clearly shows that the claim is not founded upon an implied promise to pay given by the appellants, but the claim is founded upon an equity arising under the appellants' contract with defendant No. 2 and in virtue of the fact that the appellants had taken over the liability to discharge the obligations of defendant No. 2. There is nothing in the whole of the claim to suggest that any representations were made by defendant No. 1 whereby they led the plaintiff to adopt a particular course of conduct to his prejudice. There is no case of estoppel, there is no case of an implied promise to pay. It seems to me the claim really was in the alternative. The plaintiff's case is that by virtue of the contract of 1933 defendant No. 2 are liable to pay the amounts to him, and by virtue of the agreement between defendant No. 2 and defendant No. 1 made in 1934 defendant No. 1 are liable, as they on behalf of defendant No. 2 agreed to pay the debt which was due by the latter. That is the very highest at which the case can be put, if it rested in contract. That clearly is a case which comes very near to the case referred to in Section 233 of the Indian Contract Act, and if so, the case is clearly one of election, and if the promisee chooses to proceed against one of the co-promisors and obtains a judgment, then it is clear that he has no right to proceed against the other co-contractors or co-promisors, and the case, in my opinion, falls within the principle of the decision in *Scarf v. Jardine* (1882) 7 App. Cas. 345 and *Morel Brothers & Co., Limited v. Westmorland (Earl of)* [1904] A. C. 11. In that view, I think the plaintiff's suit as against the appellants must fail. I may mention here that it is clear from the facts, and it was also conceded, that there is no case of novatio in this case.

14. This brings me now to the third contention raised by Sir Jamshed Kanga. It resolves itself into this, that the plaintiff, who is a stranger to the contract, cannot enforce the contract even though it may have been made for his benefit. The answer made by the respondent is that having regard to the agreement of 1934 between the appellants and defendant No. 2, a trust arises, and that being so, he, as beneficiary, is entitled to enforce the contract even though he was not a party to it. Mr. Munshi puts his case in this way. He says that the sum of Rs.

1,000 clearly was earmarked and was a deposit, and therefore held by defendant No. 2 in trust for the plaintiff, and the appellants having taken over that sum with notice of the trust, he is entitled to follow that sum in their hands, and therefore to maintain this suit as against them for the recovery of that sum. As regards the other sum of Rs. 3,649, his argument is that that also was in the nature of a deposit, having regard to the course of dealings between the parties and a similar obligation in equity would arise against the appellants as in the case of the deposit of Rs. 1,000.

15. In English law consideration has to move from the promisee, and it is well-established there that a stranger to the consideration cannot sue on the contract, unless it is made on his behalf by an agent or a trustee. In *In re Empress Engineering Company* (1880) 16 Ch. D. 125, Jessel M. R. observed as follows (p. 129):-

Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a cestui que trust. As a general rule that will not be so. A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a cestui que trust it would have that effect. I am far from saying that there may not be agreements which may make C. a cestui que trust.

16. *Dunlop Pneumatic Tyre Company, Limited V, Selfridge and Company, Limited* [1915] A. C. 847 is also an authority for both these propositions. In that case Viscount Haldane L. C. observes as follows (p. 853):-

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

Another equally well-established principle is that there must be privity of contract for a right of action. The Indian law, however, differs from this rule of the English law as to the necessity of consideration moving from the promisee. The definition of consideration in Section 2 of the Indian Contract Act is much wider, according to which consideration may move from a third party. But, in my opinion, in spite of the decisions to the contrary, to some of which we have been referred, the other proposition still remains good in Indian law, and a person not a party to the contract is not entitled to maintain an action for breach of that contract, and that seems to me to be clear from Section 2 of the Indian Contract Act itself read as a

whole, and in particular the Sub-clauses (a), (b) and (c). The whole scheme of the section is that a promise comes into existence when one person signifies to another his willingness to do or abstain from doing anything, and the other person signifies his assent thereto, the person making the proposal is the promisor. The person accepting the proposal is the promisee, and every promise and every set of promises, forming the consideration for each other, is an agreement between those two persons. In my opinion it is wrong to say that there is no provision in Indian law in support of this principle, which has been well-established in England from very old times. Now in England, since the decision of *Tweddle v. Atkinson* (1861) 1 B. & S. 393, the doctrine of constructive consideration enunciated by cases like *Button v. Poole* (1661) 2 Lev. 210 has gone by the board, and it is settled law that a stranger to a contract cannot sue. But, as I have just pointed out, there are two exceptions made to this general rule. The first exception is where the contract is made by a trustee for the benefit of a beneficiary, in other words, where there is a case of trust, and the other exception is where by acknowledgment or part payment or by estoppel privity may be established as a ground of agency. These two exceptions are also recognised by the decisions in this country. The Privy Council decision in *Khwaja Muhammad Khan v. Husaini Begam* ILR (1910) All. 410 : 12 Bom. L.R. 638. is relied upon as making a third exception. I do not think so. The underlying principle of that decision is that where a contract between A and B is intended to secure a "benefit to C as a cestui que trust, C may sue in his own right to enforce the trust. This case was followed by the Calcutta High Court in *Debnarayan Dutt V. Chunilal Ghose* ILR (1913) Cal. 137, on which Mr. Munshi relies and on which the learned Judge also relied in support of the conclusion to which he came. In that case A advanced Rs. 300 to B on the security of a pattah relating to Immovable property and deposited by him with A. B executed a registered instrument of transfer of all his property to C for a sum of Rs. 2,000. This sum of Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the kabala that out of this consideration money of Rs. 2,000, a sum of Rs. 300 due to A should be paid by C. A sued C for Rs. 300, basing his claim on the kabala. It was found that there was no agreement between A and C, nor was there a novatio, but on that very day on which the kabala was executed C acknowledged the obligation to pay Rs. 300 to A, that the acknowledgment was communicated to, and accepted by A, and that as a result of this the pattah, which was believed by the parties as constituting a charge, was handed over by A to C. Upon these facts it was quite clear that the decision to which the learned Chief Justice came was perfectly correct, and well within the principles to which I have referred. There are, however, certain observations in the decision of the eminent Chief Justice, which, with all sincere respect to him, seem to me to go much beyond the facts of the case, and with which, in my humble opinion, it is difficult to agree. This decision, in my opinion, has gone the farthest limit as regards the right of suit in contract. Another exception to this well-established rule which the Courts have accepted is the case of a family settlement, where there is a provision for payment of maintenance or marriage expenses for the

benefit of the female or minor members of the family. This, however, clearly falls within the limits of the rule in *Khwaja Muhammad Khan v. Husaini Begam*, The learned counsel for the respondent also relies on *Kshirodebihari Dalta v. Mangobinda Panda* ILR (1934) 61 Cal. 841. In that case it was held that there was nothing in the Indian Contract Act which prevented a stranger to a contract from suing on it if it was for his benefit, even though the circumstances did not bring into existence an obligation in the nature of a trust in his favour. It was said in that case that the definition of " consideration" in the Indian Contract Act is much wider than the definition in England, and that in British India, the aim should be to do complete justice in one suit, and therefore, the rights of the parties should be determined according to general principles of " justice, equity, and good conscience." This decision in my opinion has gone even beyond *Debnarayan Dutt v. Chunilal Ghose*, and it broadly lays down that on general principles of justice, equity and good conscience a contract between A and B may be enforced by C if there is a provision in the contract for the benefit of C, whether there is a trust or not. It was pointed out by their Lordships of the Privy Council in the well-known case of *Waghela Rajsanji v. Shekh Masludin* (1887) L.R. 14 I. A. 89 that the words " justice, equity, and good conscience " mean nothing more than the rules of English law so far as they are applicable to Indian society and circumstances in this country. Since then the Courts in this country have invoked the aid of these words in cases where there is no specific provision of the law in this country applicable to the facts of a case. I have said above that there are ample indications in Section 2 of the Indian Contract Act to take the view that the legislature in this country also has accepted the well-established principle that a stranger to the contract has no right of action to enforce it. With the utmost respect to the learned Judges, therefore, I have no hesitation in dissenting from that judgment. It seems to me to be contrary to all recognised decisions in English law as well as to all modern decisions in Madras and other High Courts, and also to the decision of their Lordships of the Privy Council in *Jamna Das v. Ram Aular Pande* ILR (1911) All. 63 : 14 Bom. L.R. 1 (See *Subbu Chetti v. Amnachalam Chettiar* ILR (1929) Mad. 270.)

17. These then being the principles, the question is whether an obligation in the nature of a trust arises in this case, as the learned trial Judge has held, and whether the plaintiff is a cestui que trust. As regards the first sum, undoubtedly the clause in the agreement between the parties shows that it was a deposit, but it also shows that it was deposited as a security for the performance of the services which the plaintiff had to render under the agreement. It further shows that the moneys were not ear-marked, and that it was open to defendant No. 2 to mix them up with their own moneys and use them, and if they used them, they were liable to pay interest as in the ordinary case of a deposit in a bank. It was held in *G.K. Malvankar Vs. The Credit Bank of India Ltd.*, by Scott C. J. that in such a case where a deposit is made by an employee as a guarantee for the faithful services under his agreement of employment, it constituted a mere debt from the employer to the employee which had to be repaid on the termination of

the service and in accordance with the contract. This case was followed by B. J. Wadia J. in *In re Manekji Petit Manufacturing Co.* (1913) 34 Bom. L.R. 728. As regards the other sum of Rs. 3,649, there is no clause in the agreement which shows that the moneys paid in by the plaintiff in respect of the goods supplied or to be supplied to him were to be held as a deposit by defendant No. 2. But Mr. Munshi relies upon the course of dealings, which, in my opinion, do not establish that these moneys were a deposit. It seems to me that these moneys were paid on account of the value of the goods which defendant No. 2 were to entrust to the plaintiff for sale in Cutch, which was a foreign territory, and an account in respect of that was to be made up on the realisation of the sale proceeds of the goods so entrusted and the balance due to or from either party was brought into account from time to time. In my opinion, therefore, that sum also was a debt on the termination of the agency due by defendant No. 2 to the plaintiff. Having regard to the clauses of the agreement of 1934, to which I have referred, which is no more than an agreement to take over a going concern, the effect of the agreement is not to make all selling agents beneficiaries or to create a trust in their favour, or to make all the creditors of defendant No. 2 beneficiaries. The clause in the agreement on which Mr. Munshi relies is the usual clause one finds in preliminary agreements whereby a company which is about to be incorporated undertakes to pay the debts of the vendor and to indemnify the vendor against the same. I think, therefore, the circumstances do not establish a case of trust, or even of fiduciary relationship between the parties.

18. Mr. Munshi has relied upon Section 94 of the Indian Trusts Act. The obvious answer to the point is that in the case provided for by that section, the person who comes into possession of the property gives no consideration for it, and he certainly holds it in a fiduciary capacity. In this case the company gave consideration for taking over the assets as well as the liabilities. That being so, the case does not come within Section 94 of the Indian Trusts Act.

19. I agree, therefore, that the appeal must be allowed with costs throughout.