
(1945) 03 CAL CK 0015

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1665 of 1940

The Tripura Modern Bank Ltd.

APPELLANT

Vs

Nabadwip Chandra Das and Others

RESPONDENT

Date of Decision : 09-03-1945

Acts Referred:

Citation : (1945) 03 CAL CK 0015

Final Decision : Allowed

Judgement

1. The facts out of which this appeal arises are shortly as follows: One Amar Chandra Mukherjee, a contractor who was Defendant No. 3 in the suit, arranged with the Plaintiff bank for certain advances to be made to him against tenders of his for work for a municipality which had been accepted by the latter. In accordance with this arrangement the bank was to advance money from time to time as the Defendant No. 3 needed it, and the latter undertook that the bank would receive payment from the municipality of bills of the Defendant No. 3 as and when they became due for payment by the municipality. This agreement was expressed in two documents, one of which was a power of attorney granted by the Defendant No. 3 to the agent of the bank to draw the bills as they became due, and the other of which was a letter addressed to the agent of the bank by the Defendant No. 3 which document has been referred to throughout as a letter of lien. Admittedly the bank made certain advances to the Defendant No. 3 as arranged. Subsequently, two other creditors of the Defendant No. 3, who were impleaded in the suit as Defendants Nos. 1 and 2, obtained a money decree against the Defendant No. 3, and in execution thereof they attached a sum of money due upon some of his bills while that money was still in the hands of the municipality and before it had been paid to the bank. The bank thereupon preferred a claim under Or. 21, r. 58 of the Code of Civil Procedure, but this was disallowed, and the bank then brought the present suit under the provisions of Or. 21, r. 63 of the Code.

2. The defence taken on behalf of the attaching creditors, that is to say, the

Defendants Nos. 1 and 2 in the suit, was that the documents to which reference has been made above did not create any charge in favour of the bank, and alternatively that if any such charge had indeed been created, it would not prevail against the attachment effected by the Defendants Nos. 1 and 2. The trial Court held in the Plaintiff's favour and directed the attachment to be recalled. This decision was, however, reversed on appeal. The lower Appellate Court has held that the documents in question did not create any charge in favour of the bank, as the property in question, that is, the sum which was to become payable by the municipality to the Defendant No. 3, was not in existence when those documents were executed.

3. On behalf of the Respondents in this appeal Mr. Mookerjee has very fairly and correctly conceded that the position indicated in the judgment of the Court of Appeal below cannot be maintained. There is abundant authority for the proposition that a charge may be created upon property which is to come into existence in the future. In *Collyer v. Isaacs* L. R. 19 Ch. D. 342 (1881) the principle was stated by Jessel, M. R., in the following terms:

The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. 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 When this is clearly understood, it follows that until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence, it is a contract for the breach of which he will incur liability.

4. This passage has been repeatedly quoted in numerous decisions in which the principle laid down by the Master of the Rolls has been applied. [*Baldeo Parshad Sahu v. A. B. Miller* I. L. R. 31 Cal. 667 (1904). *The Co-operative Hindusthan Bank Ltd. v. Surendra Nath De* I. L. R. 59 Cal. 667 (1931), *Bansidhar v. Sant Lall* I. L. R. 10 All. 133 (1887), *Palaniappa v. Lakshnmian* I. L. R. 16 Mad. 429 (1893) and *Sonaram Dutta v. Sitaranu Chamaria* 45 C. W. N. 50 (1940)]. The last-mentioned case which was a decision by a single Judge of this Court, was cited by the learned Advocate for the Appellant chiefly for the reason that the facts in that case bear a strong resemblance to the facts out of which the present appeal arises. In that case the Defendants Nos. 2 and 3 who were contractors were doing certain work for a Town Union and in order to obtain finance for their undertaking they entered into an agreement with the Plaintiffs whereby the latter were to advance to them certain sums of money, and the Defendants agreed to endorse to the Plaintiffs all cheques paid to them by the Union for the work in question. The Defendants also hypothecated to the Plaintiffs as security for the

advances all amounts that might become due to them from the Union for work done. Later on another creditor of the Defendants Nos. 2 and 3 obtained a decree for money against these Defendants, and in execution thereof he attached a certain sum in the hands of the Union which was payable to the Defendants Nos. 2 and 3 in respect of work done by the latter. In a contest between the Plaintiff and the Defendants Nos. 2 and 3 it was held that the agreement which the Defendants Nos. 2 and 3 had entered into with the Plaintiff operated as a hypothecation of property which was to come into existence in the future, and that the charge thus created in the Plaintiff's favour must prevail over any claims of the other judgment-creditors who had no such security.

5. Mr. Mookerjee on behalf of the Respondents has pointed out that the language of the agreement between the Plaintiff and the Defendants Nos. 2 and 3 in that case was as follows:

And all the amount due for the said contract Work remains as security for the amount advanced by you with interest.

6. His contention is that these are clear and unambiguous words of hypothecation. In the present case, however, there is nothing in the power of attorney or in the so-called letter of lien which creates any sort of charge in favour of the Plaintiff bank in respect of sums due to the Defendant No. 3 so long as those amounts still remain in the hands of the Municipal Board. Mr. Mookerjee's argument is that the power of attorney operates merely to appoint the bank's agent as the agent of the Defendant No. 3 to receive payment upon bills of the Defendant No. 3 which would in future be presented to the Municipal Board. His contention in regard to the letter of lien further, is that the word "lien" must be construed to mean the right which this word strictly imports in law, that is, a right to retain the property of another which happens to be in my possession until some debt due by that other to me has been satisfied. All that the Plaintiff bank was getting by this letter of lien was the right to apply the money to the satisfaction of the debt due to it by the Defendant No. 3 after the money came into the hands of the bank. Mr. Mookerjee's argument amounts to this that no charge in favour of the bank was being created upon any sums in the hands of the municipality, so long as those moneys remained with the municipality.

7. An examination of the power of attorney and the letter of lien shows that, apart from the word "lien" used in the letter, there are no words anywhere which suggest the idea of any charge in favour of the bank. But even when that is conceded, the two documents have got to be carefully examined for the purpose of ascertaining whether it was the intention of the parties that the Defendant No. 3 should assign to the Plaintiff bank a debt which was to become due to the Defendant No. 3 in the future. The relevant portions of the power of attorney and of the letter of the lien have to be set out. In the power of attorney those words are as follows:

I appoint Babu Monoranjan Sarma, the agent, Tripura Modern Bank limited, Kariangunge Branch, my true and lawful attorney for me.

I hereby authorise my said attorney Babu Monoranjan Sanma, the agent of the Tripura Modern Bank Ltd., Karimgunge Branch to receive all payment for me and for my behalf from the Karimgunge Municipality regarding my local contracts granted by the Municipality.

I also hereby authorise my said attorney to do everything regarding the drawing of the bill or bills

So much as that the Agent of the Tripura Modern Bank Ltd. can have the cheques in connection with the payment of the said work issued in his own name.

8. The relevant words in the letter of lien are these:

I hereby give you lien on all any bills of my accepted tender for the Municipal works of the Karimgunge Municipalityfor the outstanding general balance of all and every loan and other accrued with you with power to you to draw and collect all any bills.

9. It may at once be conceded that the language of these two documents is infirm both in point of grammar and of legal provision, but we are satisfied that the words just quoted, such as they are, when considered along with the admitted facts, indicate a clear intention to bring about an assignment by the Defendant No. 3 in favour of the Plaintiff bank of something to which the Defendant No. 3 is to become entitled in the future. The power of attorney does make it clear that the bank through its agent is acquiring a certain right, that is to say, the right to take the money due on the bills of the Defendant No. 3 as soon as this will fall due. In the letter of lien the word "lien" is in our opinion loosely used merely for the purpose of indicating that the assignment of moneys which were to become due to the Defendant No. 3 in the future was an assignment by way of security for the loans advanced by the Plaintiff to the Defendant No. 3. We are accordingly led to the conclusion that here, by the joint operation of the power of attorney and the letter of lien, there was an assignment in favour of the bank of a future fund and that it was not an absolute assignment but only one by way of security for the loans advanced to the contractor by the bank. That such an assignment is recognised by the law has been clearly stated in *Mulraj Khatau v. Vishwanath Prabhuram Baidya* L. R. 40 I. A. 24 : s. c. 17 C. W. N. 209 (1912). In that case the Privy Council laid it down that sec. 130 (1) of the Transfer of Property Act (1900) which provides that the transfer of an actionable claim shall be effected only by an instrument in writing, applies not only to absolute assignments but also to assignments by way of charge. In *Buck v. Robson* L. R. 3 Q. B. D. 687 (1878) it was held that an assignment of a future debt was validly effected by a letter in these terms:

I hereby assign to (Messrs. Robson and Son, boat Guilders, Sunderland, the sum of 40 lb, or any other sum now due or that may hereafter become due in respect

of the steam-launch which I am building for you.

10. In *Rodick v. Gandell* 1 DeG M. G. 763 (1851), Lord Truro after reviewing earlier authorities stated as follows (page 777):

I believe I have adverted to all the cases cited which can be considered as having any bearing upon the present case; and the extent of the principle to be deduced from them is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a deflator to his creditor upon a person owning money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund, in other words will operate as an equitable, assignment of the debts or fund to which the order refers.

11. The case of *Probodh Chandra Mitra v. Road oils (India), Ltd.* I. L. R. 57 Cal. 1101 (1929) related to a suit brought against a limited company by a person who had been appointed the agent of the company upon certain terms. The Plaintiff had been appointed Treasurer, Banian or Financial Agent, and one of the clauses of the instrument by which the appointment was made was in these terms:

That you alone will have the right to collect all moneys due on bills and appropriate the same in satisfaction of your advances of money and remuneration.....

12. Certain other creditors of the company obtained a decree against the company and in execution thereof attached certain moneys of the company in the hands of a receiver. In a contest between the Plaintiff and the other creditors the question argued was whether the Plaintiff, in respect of his advances to the company, had any, valid equitable charge or security at all, or whether he was merely an unsecured creditor of the company in respect of the advances that he had made. It was held that under the terms of his appointment and in view of the clause just quoted, the Plaintiff had a valid equitable charge upon the moneys which had been attached. The two cases to which reference has just been made were followed by Mukherjea, J., in the case of *Legdir Nanji v. Surendra Mohan Nag* 42 C. W. N. 971 (1938). The facts of that case were as follows: By a document executed between the Plaintiff and the Defendant No. 2 it was provided that the former would advance money to the latter from time to time for the purpose of, enabling the latter to carry out his contracts with the A. B. Railway Company. It was stipulated that all bills made out by Defendant No. 2 against the Railway Company would be forthwith made over to the Plaintiff who would have the exclusive right to collect the moneys due on the bills under an irrevocable power of attorney to be executed by Defendant No. 2 in his favour. The amounts thus realised were to be appropriated by the Plaintiff in the first place towards the repayment of the advances made by him. In accordance with this agreement loans were made by the Plaintiff to the Defendant No. 2. In due

course, the Defendant No. 2 drew bills upon the Railway for a certain sum of money due to him in respect of work done. Before the money could be drawn by the Plaintiff in terms of the agreement, the Defendant No. 1, another creditor of the Defendant No. 2, obtained a decree against the latter and in execution thereof attached the money in the hands of the Railway Company, The question which arose for decision was whether by virtue of the agreement between the Plaintiff and the Defendant No. 2 the former acquired an interest by way of an equitable assignment which would prevail over the claims of the Defendant No. 1, the attaching creditor. Mukherjea, J., said that the test was whether there was really an intention to assign or create a charge which would give the assignee an equitable interest in the fund itself, and that on a careful reading of the indenture of agreement in the case, there was an intention to create a charge in favour of the Plaintiff in respect of the money due on the railway bills, and that the attachment must give way to the Plaintiff's claim.

13. As already stated, we are satisfied that the intention clearly was to make an assignment in favour of the bank of moneys which were to fall due in future to the Defendant No. 3 by the municipality. Such a right must, upon the authorities referred to above, prevail over the claim of the judgment-creditors, the Defendants Nos. 1 and 2 and the attachment effected in execution of their decree must be re-called.

14. Mr. Mookerjee for the Respondent has further argued that if the transaction is to be regarded as an assignment of a future debt, it must be shown that the assignment is of the whole debt and not of a mere part of a debt and he relied upon the case of Doraiswami Mudaliar and Thangavchi Mudaliar & Co. v. M. Doraiswami Aiyangar 48 M. L. J. 432 (1924) which was approved in the case of Ghisulal Goneshilal v. Gambhirmall Pandiya 39 C. W. N. 606 (1934) at 612 .

15. In our judgment there is no difficulty in the present case. Upon the language of the power of attorney as well as of the letter of lien there is no room for doubt that the assignment by Defendant No. 3 in favour of the Bank was of the entire amount which would be due to the former by the municipality. The power of attorney says:

I hereby authorise my said attorney Babu Monoranjan Sarma, the agent of the Tripura Modern Bank Ltd., Karimganj Branch to receive all payment for me and for my behalf from the Karimganj Municipality regarding my local contracts granted by the Municipality.

16. The letter of lien contains the words:

I hereby give you lien on all my tills of my accepted tender for the Municipal Works of the Karimganj Municipality for the year 1938--1930.

17. This point accordingly fails. The appeal is allowed. The decree of the lower Appellate Court is set aside and that of the Court of first instance is restored. The Appellant is entitled to his costs of the appeal.