Akhoy Kumar Pal Vs Haridas Bysack

Court: Calcutta High Court

Date of Decision: Dec. 22, 1913

Judgement

Carnduff, J.
The Petitioner before us executed a promissory note for Rs. 300 in favour of one Nityamani Baisnabi. Nityamani handed this

note over without any endorsement to an idol through its pujari, and, having done so, died. The shebait, who is the Opposite Party, sued the

Petitioner for the amount due and obtained a decree. Hence this Rule. For the Petitioner it is contended that a promissory note to order cannot be

transferred otherwise than by endorsement and delivery, as contemplated by sec. 48 of the Negotiable Instruments Act, 1881. But there is

authority--see Benode Kishore Goswami v. Ashutosh Mukhopadhya 16 C. W. N. 666 (1912) and the cases and textbooks there cited--for

holding that this is not so ; and the argument of the Opposite Party that he can here rely on an assignment of the note as a chose in action or, failing

that, on a transfer by gift, requires examination.

2. A chose in action can now, under sec. 130 of the Transfer of Property Act, 1882, as amended by the Transfer of Property Act, 1900, be

assigned only by an instrument in writing signed by the transferor or his agent. But, it is contended, the section does not--see sec. 137-- apply to

instruments which are for the time being, by law or custom, negotiable, and under the former law there could apparently be an equitable assignment

without writing. That is obviously all that the Opposite Party can rely upon here : and he is put out of Court as soon as the fact is recalled that his is

the position of a mere volunteer. For equitable assignments were given effect to in equity only when supported by valuable consideration.

3. There remains the question of gift, which depends upon sec. 123 of the Transfer of Property Act, 1882. Under that section a gift of moveable

properly--and a chose in action is moveable properly within the meaning of the Act--may be effected by delivery made in the same way as goods

may be delivered. Now, the delivery required by sec. 90 of the Indian Contract Act, 1872, involves the doing of something which has the effect of

putting the goods in the possession of the receiver or his agent. Here what was done was the handing over of a piece of paper, which as it stands,

is, on the face of it, of no intrinsic value to anyone but Nityamani or a person nominated by her indorsement, and which, in the hands of a third

party unindorsed, is, at most, some evidence of an intention on the part of Nityamani to make a present of the debt indicated by it to that third

party. Nityamani having failed to nominate by indorsement, her intention was not carried out, and there was no completed gift : or, to employ the

language used in re Richardson; Shilleto v. Hobson 30 Ch. D. 396 (1885), the document was only an incident to the chose in action, and all that

was delivered was this incident, the handing over of which cannot be said to have had the effect of putting the representative of the idol in

possession of the debt. This view is, I think, in accordance with that taken in Merbai v. Perozbai I. L. R. 5 Bom. 268 (1881) in Khursedji

Rustomji Colah v. Jestonjee Koasjee Bucha I. L. R. 12 Bom. 573 (1888) and by the Judicial Committee in Aga Mohamad Jaffer Bindamin v.

Kulsum Bibi I. L. R. 25 Cal. 9 : s. c. L. R. 27 I. A. 196 (1897). It seems to me, therefore, that there was no completed gift, and that the

contention of the Opposite Party again fails. The Rule should, therefore, be made absolute, but I would not make any order as to costs.

4. I must add that the broadly stated proposition that the Negotiable Instruments Act, 1881, leaves untouched the rules of the general law which

regulate the assignment of chose in action and the transfer of chattels seems to me to require the qualification, that the latter must not be inconsistent

with the former." In England this qualification is expressly imposed by sec. 97 (2) of the Bills of Exchange Act, 1882 (45 & 46 Vict., C. 61), and,

though there is no corresponding provision in the Indian Act of 1881, the principle that a general and earlier rule must give way to a special and

later provision seems to be sufficient. Even if there had been in this case a valid transfer to the idol, whether by assignment or gift, of the debt due

to Nityamani, the assignee or donee would at once be confronted by the express provisions of the Ac of 1881, which not only enacts by sec. 48

that a promissory note payable to order is negotiable by indorsement and delivery, but also declares--see sec. 78--that payment of the amount due

on such a note must, in order to discharge the maker, be made to the ""holder."" The Petitioner is certainly not the ""holder"" and he cannot, therefore,

give the Opposite Party a valid discharge. How, then, can he obtain a decree in his own name? He might be entitled to the money promised, but,

before he could recover it, he would have to obtain the indorsement of the legal representative of the deceased promisor. The position would,

indeed, be similar to that described in Chalmers on Bills of Exchange, Ed. 7, at p. 140, where it is stated, on the authority of Bishop v. Curtis

[1852] 21 L. J. Q. B. 391, that, where C, the holder of a bill payable to order, dies after having specifically bequeathed it to X but without

indorsing it, X cannot sue on it unless and until he obtains an indorsement in his favour by C''s executor.

Richardson, J.

5. I agree that there was no complete legal transfer or gift of the promissory note by the deceased woman to the Plaintiffs or the deity whom the

Plaintiffs represent. It is conceded that the instrument represents an actionable claim but it is argued that inasmuch as it is a negotiable instrument

the case is taken out of the provisions of sec. 130 of the Transfer of Property Act relating to the transfer of actionable claims by sec. 137 of the

same Act. That may be so. But it nevertheless remains that there has been no valid or complete transfer of the instrument either as a negotiable

instrument or as an actionable claim. The procedure provided by the Negotiable Instruments Act has not been followed and there is nothing which

operates as such a transfer either under or outside the Transfer of Property Act. There is no writing to support the transfer. There is nothing which

amounts to an equitable assignment and in fact, the Plaintiffs claiming as volunteers have no equity in respect of which they can ask for the

assistance of a Court of Equity. The contention is, as I understand it, that sec. 123 of the Transfer of Property Act, which relates to gifts of

moveable property, applies and that this promissory note which is drawn payable to the promisee or order, is capable of being made the subject of

a gift by mere delivery under that section, although it is not indorsed by the holder. There is no question here as to the right to the possession of the

piece of paper on which the promise is written but the promise itself, or the debt of which the paper is evidence, or the claim to the debt, is an

intangible thing incapable of passing by delivery like an ordinary chattel. It is perhaps a possible view that actionable claims are not ""moveable

property"" within the meaning of sec. 123. But if the section applies to them, then it would seem that, delivery being impossible, a gift could only be

made under the section in the first of the two modes provided, namely, by a registered deed, attested by two witnesses. The law might say that the

delivery of the paper should in such a case as the present (as in the case of a currency note) carry with it the right to the debt but it does not say so.

6. The right to the debt can only be effectually transferred by some method authorised or recognised by the law. Something must be done to

enable the actionable claim or thing in action to be reduced to a thing in possession. The whole object and purpose of the Negotiable Instruments

Act is to legalize a system under which claims arising upon certain instruments of a mercantile character can be treated like ordinary goods which

pass by delivery from hand to hand. But except within the prescribed limits such claims cannot be so treated. It may be that claims arising upon

negotiable instruments may be transferred not only under the Negotiable Instruments Act but also by some means applicable to claims arising upon

instruments which are not negotiable, though the rights resulting from the adoption of one mode of transfer may be different from the rights resulting

from the adoption of another mode. The topic however need not be pursued because in the present case there has been no legal transfer of the

actionable claim by any authorised mode.

7. The case of Aga Mohamad v. Kulsom Bibi I. L. R. 25 Cal. 9 : s. c. L. R. 27 I. A. 196 (1897) illustrates the principle involved. The documents

there in question were not negotiable instruments but it might be said here with equal force (slightly paraphrasing the language of their Lordships)

that ""the instrument is not in a form which would entitle the bearer of it (without the holder''s endorsement) to the debt created thereby as holder

there of."" It may be well to add that we have not had to consider the provisions of sec. 178 of the Indian Succession Act in regard to gifts Made in

contemplation of death because these provisions are not applicable to Hindus.

8. But assuming that there was a valid transfer, the further question arises whether the Plaintiffs are entitled to sue on the note. It may be generally

true that a valid assignment of a negotiable instrument as an actionable claim gives the assignee the rights of the holder subject to equities. But this

broad proposition must be subject at any rate to the qualification that it is true only so far as it is not inconsistent with the special provisions of the

Negotiable Instruments Act. Under sec. 78 of the Act the only person who can give a good discharge to the maker of a negotiable instrument is

the holder. That being so, it would seem that the rights which might or would pass to an assignee by an assignment which does not constitute him

the holder (assuming any rights to pass at all) would not include the right to give a good discharge. And if they would not include the right to give a

good discharge, they could hardly include the right to sue in his own name. The assignee may have instead the right to compel the holder or the

holder''s legal representative to make the requisite endorsement on the instrument though apparently the Indian Act does not (like the English Act,

sec. 31 (4)) expressly say so. It is not, however, necessary in the present case to express a final opinion on this point or to say more than that in

the Madras cases which were cited in the course of the argument no reference was made to sec. 78. I agree that the Rule should be made absolute

without costs.