Khetra Mohan Das Vs Biswa Nath Bera

Court: Calcutta High Court

Date of Decision: April 17, 1924

Acts Referred: Transfer of Property Act, 1882 â€" Section 6(e)

Citation: (1924) ILR (Cal) 972

Hon'ble Judges: Suhrawardy, J; Graham, J

Bench: Division Bench

Judgement

Suhrawardy, J.
This appeal arises out of a suit for accounts and is directed against an order of remand made by the learned Additional

District Judge of Midnapur.

2. The facts of the case have been shortly stated as follows in the judgment of the Court of First Instance:

This is a suit for accounts. The plaintiff''s case is that the defendant No. 1 was Gomastha under the pro forma defendant No. 2 in Mouzas Barkola

and Mirzapore and that he executed a security kabuliat for his work in favour of the pro forma defendant on the 7th Kartick 1306 A.S. mortgaging

the plaint schedule properties and on the strength of that kabuliat he did the Gomostha work from Kartick 1306 to Magh 1327 A.S., that on the

5th Falgun 1327 A.S. the pro forma defendant No. 2 sold off to plaintiff all his rights in the two Mouzas together with his rights to get accounts and

papers from defendant No. 1 and to recover from him the sums due thereon, by a registered kobala taking due and proper consideration thereof,

that on the basis of the security kabuliat this defendant No. 1 was to submit all collection papers and explain those and pay off all sums found due

thereon and he was to be liable for all rents and decretal dues barred by limitation owing to his default and to get 1 rupee 4 annas monthly pay for

his work: that the defendant No. 1 submitted and explained his accounts and papers till 1309 A.S. to pro forma defendant No. 2 and from 1310

A.S. he submitted no accounts and papers to him except a thoka only of 1327 A.S. and as per hisab given in Schedule ""Ka"" of the plaint the

plaintiff, on the basis of the kobala in his favour, asks for such accounts and papers provisionally valuing his claim at Rs. 937-15 annas 18 3/4

gandas. It is also stated in the plaint that after the plaintiff''s kobala such accounts and papers were demanded from defendant No. 1 on 11th

Falgun 1327 A.S. but no such accounts were submitted.

3. The learned Munsif, on a construction of the deed of sale, held (i) that the plaintiff did not purchase the rights of defendant No. 2 under the

mortgage kabuliat executed by defendant No. 1 in favour of defendant No. 2, and (ii) that the plaintiff, if he purchased anything at all, purchased

the right to sue for accounts, which is unassignable u/s 6(e) of the Transfer of Property Act. In the result he dismissed the suit. On appeal the

learned Additional District Judge reversed both these findings and remanded the case for determination on the merits, which, in the circumstances

of this case, must mean for taking accounts from the defendant No. 1.

4. When the Courts below have differed on the construction of the deed of sale executed by the defendant No. 2 in favour of the plaintiff it

becomes necessary to closely examine the terms thereof. In the heading of the document it is stated that the sale is in respect of the Mouzas

belonging to defendant No. 2 together with back rents from tenants for a sum of Rs. 720 which is the full consideration for the transfer. In

paragraph 2 after a description of the Mouzas sold and their appurtenances the following passage appears:

and Tahbil (cash due to me) and my dues from the Gomastha together with the right of taking accounts from the Gomastha and the right of taking

the papers from him.

5. Paragraph 6 runs thus: ""If the Thoka or the Karcha of the year 1327 filed by the Gomastha be not correct, you will make enquiries yourself and

will ascertain the correct amount: you will be entitled to realize the said amount together with the amount realised by the Gomastha from the date of

his kabuliat and the rents which had become time-barred through the negligence of the Gromastha together with damages according to your

calculation or as will be ascertained by Court from the said Gomastha."" Reading these clauses together and regard being had to the general tenor

of the deed, it seems clear that what the plaintiff purchased was the right to take accounts from the defendant No. 1 and to recover such sums as

might be found to be due from him upon an account being taken. The deed does not specify any consideration for the transfer of this right and the

amount recoverable from the defendant No. 1 if any is uncertain and dependent upon the taking of accounts. Indeed, as the learned Munsif has

observed, the suit is for accounts tentatively valued at a certain sum for purposes of jurisdiction and court-fee. The observations of the learned

Additional District Judge on the point seem to be somewhat inconsistent and inaccurate. He says: ""The present suit is one to recover sums of

money realized on behalf of defendant No. 2 but embezzled by defendant No. 1. In view of the allegation, that the respondent has submitted no

accounts, it is not possible for the plaintiff to say what precise sum is due, until an account is taken. Although the plaintiff has been compelled to sue

for accounts his claim is really one for a sum of money received on behalf of defendant No. 2 and misappropriated by defendant No. 1."" He

further observes that the transfer was not a mere right to sue but of a right to a specific sum of money which has been embezzled. It seems to me,

however, that the transfer was not of a right to a specific sum but of a right to call for accounts and to recover any sum at present indefinite which

may be found to be due on the taking of accounts. The learned vakil for the respondents has argued on the same lines and contends that what the

plaintiff purchased was the right to money due from defendant No. 1 which is an actionable claim. It is conceded that a right to sue for accounts is

not assignable in law but it is maintained that the right to a sum of money found due on the taking of accounts is so assignable. I am unable to

accede to the proposition of law thus broadly stated. To so hold would be to encourage an evasion of the law which prohibits the transfer of a right

to sue for accounts. One useful, test for determining the transferability or otherwise of an inchoate right is whether it can be attached in the

execution of a decree. That the right to demand accounts or to an indefinite sum which may or may not be found due on the taking of accounts

cannot be attached will not, I think, be disputed.

6. It has been further argued that Section 6, Clause (e),. declares rights to damages arising from torts to be incapable of transfer, but does not

prohibit the transfer of rights or obligations ex contractu. This is not an altogether correct view of the law. Rights arising out of torts are

undoubtedly unassignable but there may also be rights arising out of contract which offend against the rules as formulated in the section. Abu

Mahomed v. S.C. Chunder I.L.R.(1909) Cal 345. This is indicated by the alteration in Section 6(e) in 1900 by eliminating the words ""for

compensation for a harm illegally caused"" which formed part of the clause before the amendment.

7. On a proper construction of the document and regard being had to the frame of the suit it seems, to me that the plaintiff is not entitled to maintain

the suit since he has purchased, if anything, a mere right to sue for accounts. A number of cases, English and Indian, have been cited by the learned

vakils on both sides, but I do not consider it necessary to refer to them as none of them is exactly in point and every case must be decided with

reference to its own particular facts. Some of the reported cases may however be briefly referred to. In Varahaswami v. Ram Chandra Rani I.L.R

(1913) Mad. 138, it was held that a mere right to recover damages for the negligence of an agent in failing to collect rent is not assignable. There

does not seem to be much difference in principle between failure to collect rent and failure to pay rent collected. A claim for mesne profits is not

transferable. Sham Chand Kundu v. The Land Mortgage Bank of India Ld. I.L.R (1883) Cal 695 Seetamma v. Venkataramanayya I.L.R (1913)

Mad. 308. The principle followed in these cases is applicable in the present case. The learned Additional District Judge has relied on the case of

Madho Das v. Ramji Patak I.L.R (1894) All. 286. There a sum of money was in the hands of the agent on his principal"s account to be spent for

certain purpose. It was held that that sum or so much of it as had not been actually spent could be attached in execution of a decree. That case

having regard to its particular facts is no authority for the view which found favour with the learned Judge. The learned vakil for the respondent has

laid great stress on the case of County Hotel and Wine Coy. Ld, v. London and North, Western Railway Coy. [1918] 2 K.B. 251, 260. If

anything, that case supports the view that we have adopted. There the subject of transfer was an option under a lease and McCardie J. held that a

mere right of litigation cannot be transferred.

8. In view of the conclusion at which I have arrived above the question whether the plaintiff purchased the rights of the defendant No. 2 under the

security kabuliat ceases to be of any importance. I may state however that I am unable to agree with the view of the learned Additional District

Judge on this point also. The kobala does not mention the transfer of defendant, No. 2"s right as mortgagee nor does it contain any description of

the properties covered by the kabuliat. The only mention thereof is to be found in a Schedule at the end of the document. The learned Judge held

on two grounds that the defendant No. 2 transferred his lien on the property mortgaged to him by the defendant No. 1(i) that that was the intention

of the parties and (ii) that the mortgage kabuliat was delivered by defendant No. 2 to the plaintiff at the time of the execution of the kobala. 1 am

unable to accept the learned Judge"s reasoning. Where the document is not itself ambiguous, the intention of the parties should not be taken into

consideration and the mere delivery of a document of title does not constitute a transfer of the right to the property. There are certain well

recognised rules relating to the mode of transfer of interest in immovable properties and transfer of such interest can be effected in no other way.

9. In the above view of the matter, the appeal succeeds. The judgment and decree of the lower Appellate Court are set aside and those of the first

Court restored with costs.

Graham, J.

10. I agree.