(1929) 31 BOMLR 414

Bombay High Court

Case No: O.C.J. Suit No. 585 of 1924

Durgabai		APPELLANT
	Vs	
Sarasvatibai		RESPONDENT

Date of Decision: Nov. 12, 1925

Acts Referred:

- Penal Code, 1860 (IPC) - Section 406

Citation: (1929) 31 BOMLR 414

Hon'ble Judges: Fawcett, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Fawcett, J.

This suit relates to a diamond, which is of some size and weight. The plaintiff Durgabai is the wife of Nandlal Haribux, a Marwari residing in Bombay. It is alleged that this diamond belonged to her, being presented to her by her father-in-law, or mother-in-law at the time of her marriage in 1905, and that accordingly it was her stridhan property. The plaint alleges that some time in August or September 1922 she handed a ring, in which this diamond was set, with some other ornaments to her husband, who in turn entrusted them to one Durgadutt Shrilal Gondka, a broker in jewellery and precious stones. There is some difference between the terms stated in paragraph 3 of the plaint as those on which this delivery to Durgadutt was made, and the evidence which plaintiff and her husband have given in Court. According to paragraph 3 of the plaint, these ornaments were given by the plaintiff to her husband with a view to selling the same on account and on behalf of the plaintiff, and her husband delivered the ornaments to Durgadutt on jangad terms, that is to say that the broker was to show the ornaments to intending purchasers in the market and secure offers for their purchase, and that in the event of his securing such offers he was to bring the same to the plaintiff"s husband, who after asking the plaintiff was either to accept the offers or reject them. In the event of the broker not succeeding in getting such offers, he was bound to return the said ornaments to the plaintiff"s husband. The

case as put at the trial is, however, that the ornaments were entrusted to Durgadutt merely with a view to ascertaining their value, without any direct intention to sell them, although the plaintiff and her husband had in view the possibility of selling, if the result of Durgadutt''s enquiry was to make such a sale profitable. Durgadutt, according to the plaintiff''s case, brought back the ring some days later and suggested that the diamond would fetch a better value in the market, if it was taken out of the ring. Accordingly it was taken out and both the ring and the diamond were handed back to Durgadatt. The latter, however, did not either return the ornaments or inform Nandlal of their value and it is not now disputed that on October 2, 1922, he pledged this diamond, with some other diamonds, to defendant No. 2, the firm of Messrs, Ganpatrai Rukmanand, for a sum of Rs. 10,000. According to the plaint and some evidence that has been given, Durgadutt had obtained other jewellery or precious stones from other people in Bombay, and complaints were filed about his conduct, with the result that he was arrested by the police on November 28, 1922, according to the statement in Exhibit 9. On November 30, 1922, the plaintiff''s husband Nandlal made a complaint to the police against Durgadutt u/s 406, Indian Penal Code, that Durgadutt had committed criminal breach of trust in respect of those ornaments, including the diamond and the ring. Durgadutt was prosecuted, but he is stated to have got off in the Sessions Court. The learned Presidency Magistrate passed an order that this diamond should be kept in the custody of the police until February 14, 1924, and unless a suit was filed by any claimant in the meantime to establish ownership over it, the diamond was to be returned to the person from whose possession it was obtained. The present suit was accordingly brought by the plaintiff on February 13, 1924.

2. The defendants joined are No. 1, the widow of Durgadutt who had died; defendant No. 2, the firm claiming the diamond as pledgee; and defendant No. 3, the Official Assignee. The named was joined, because on February 23, the plaintiff''s husband was adjudicated as an insolvent. The plaintiff claims that the pledge to defendant No. 2 is not valid and asks for a declaration that the diamond belonged to the plaintiff and that the pledge in question was not valid; also for an order for its delivery to the plaintiff. Subsequently orders were obtained, under which the Official Assignee was appointed as receiver in respect of this diamond pending the decision of the suit. Defendant No. 1 has put in no appearance. Defendant No. 2''s defence is that the pledge is valid and that the suit against them should be dismissed with costs. Defendant No. 8 filed a written statement in July 1924, disputing the allegation that the diamond was really the plaintiff''s and claiming that it belonged to the estate of her husband and therefore vested in him as the Official Assignee, Since then, however, the adjudication of the plaintiff''s husband has been annulled on July 21, 1925, owing to a composition made by Nandlal with his creditors, and accordingly the Official Assignee has not appeared at the trial.

3. The issues raised are:ï¿½

(1) Whether the suit diamond belonged to the plaintiff as alleged in the plaint?

(2) Whether the suit diamond was delivered to the broker Durgadutt by the plaintiff"s husband?

(3) Whether its delivery to Durgadutt was on terms specified in para 3 of the plaint?

(4) Whether it was obtained by the said Durgadutt by means of an offence or fraud?

(5) (a) Whether it was pledged by Durgadutt to defendant No. 2, and (b) whether such pledge was valid?

(6) General.

4. [His Lordship discussed the above issues one by one, and found issues Nos. 1, 2 and 3 in the affirmative. No finding was recorded on issue No. 4. The judgment then proceeded :] The main issue is the fifth, whether there was a valid pledge by Durgadutt to defendant No. 2. Evidence has been given of this pledge and it is not now disputed, nor is there anything which suggests that defendant No. 2 did not act properly in the matter and in good faith in treating the diamond as the property of Durgadutt. The latter was a dealer in jewellery, and he had, at any rate, one previous transaction with defendant No. 2, namely in November 1920, Exhibit 12. The case falls under the first proviso to Section 178, unless Durgadutt was not in possession of "the goods" within the meaning of that section. This is the point which has been mainly relied upon by Mr. Munshi for the plaintiff. He contends that Durgadutt was not in possession of the diamond within the meaning of this section. The various cases on this point and the connected law in England have been brought to my notice, but I do not think that there is any need to discuss them at length. No doubt the possession u/s 178 must be juridical, and also it must not be the possession of a mere custodian, or of a person who has a limited interest of his own in the goods of the kind referred to in Section 179. In my opinion the view taken in Naganada Davay v. Bappu Chettiar I.L.R.(1903) Mad. 424 gives the right distinction. At p. 428 it is said : "The possession must be such a possession as an owner has, not a qualified possession such as the hirer of goods has or where the possession is for a specific purpose". Again at p. 427, the true relation is stated to be the fact of the possession being directly attributable to the possessor"s character an agent, in other words attributable to the agency irrespective of whether it is one coupled with interest or not. The same view is taken in Seshappier v. Subramania Chettiar ILR (1916) Mad. 678 and in Nandlal Thakersey Vs. The Bank of Bombay, . I do not agree with Mr. Munshi"s contention that, to come under the expression, an agent must have a right of control over and above that given by possession for a limited purpose, and must be an agent entrusted with a power to sell or pledge. Ordinarily an agent who is engaged to try and sell a thing on behalf of the owner is entrusted with a power of sale on behalf of the owner, and the mere fact that the owner gives him instructions not to sell except at a certain price, or to get cash and not give credit, or not to sell without first reporting the offer and getting his acquiescence, does not, in my opinion, make the slightest difference. These are only "directions to the contrary" of the kind mentioned in Section 108 of the

Indian Contract Act, and such as are referred to in illustration (6) to that section. That illustration is very similar to the law laid down in Folkes v. King [1921] 1 K.B. 282 which was relied upon by Mr. Kamdar, for defendant No. 2. In my opinion, Durgadutt was entrusted with this diamond as an agent for obtaining offers for it, and, if any such otter was approved by the owner, selling it; and although he acted contrary to the instructions of Nandlal in pledging it, that does not prevent the case falling u/s 178. He was in possession of it as such agent and invested with the indicia of ownership, especially as the diamond had been taken out of the ring in which it was formerly set. The natural result was that a firm like that of defendant No. 2 could reasonably assume that it was a diamond belonging to Durgadutt, who as doing business in jewellery, would be likely to have diamonds in his possession and ownership. Therefore, in my opinion, the case does fall u/s 178.

5. [His Lordship here dealt with a contention raised on behalf of defendant No. 2 and went on:] It is perhaps more probable that he subsequently came to know of this pledge made without authority, and that Nandlal under his pressure made some attempt to try and get back the diamond; but as I have already mentioned, the question is really immaterial having regard to the terms of Section 178. I answer both parts of issue No. 5 in the affirmative.

6. The result is that the plaintiff is not entitled to the declaration that she seeks against defendant No. 2, nor for an order against him for the delivery of the diamond to her without any qualification. On the other hand, she is, I think, entitled to "further relief" against the pledgee on the basis of the pledge of this diamond having been made by Durgadutt as if he were an agent in the matter and the case falls u/s 231 or 232 of the Indian Contract Act. I do not think that an amendment of the plaint is necessary for the purpose of giving her such relief, if it is desired; and I think the requisite inquiry as to accounts etc. can be made by the Commissioner so as to ascertain on what payment she should be allowed to redeem this diamond on the basis of a valid pledge having been made by Durgadutt. [The rest of the judgment is not material to this report.]