Sonaram Dutta Vs. Sitaram Chamaria and ors.

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Court : Kolkata

Decided On : Jul-29-1940

Reported in : AIR1941Cal28

Appellant : Sonaram Dutta

Respondent : Sitaram Chamaria and ors.

Judgement :

Sen, J.

1. The plaintiff's case is as follows: Defendants 2 and 3 are contractors who had obtained a contract to do certain work for the Doomdooma Town Union. They were short of funds and approached the plaintiffs who are bankers for financial help. An agreement was entered into between the plaintiffs and these two defendants whereby the plaintiffs agreed to advance them money up to a sum of Rs. 1000 charging interest thereon at 12 per cent. per annum. The defendants agreed to endorse to the plaintiffs all cheques paid to them by the union for the work done in connexion with the contract in payment of the advances made. The plaintiffs allege that they also hypothecated to the plaintiffs as security for the advances made all the amount that may become due to them from the aforesaid union for the work done by them. There was a sum of Rs. 861 due from the union to defendants 2 and 3 on a bill for work done by them pursuant to this contract. The plaintiffs claim that this sum is hypothecated to them. Defendant 1 instituted a suit against defendants 2 and 3 for the recovery of a sum of money and obtained a decree therein. In execution of the decree defendant 1 attached this sum. The plaintiffs objected to the attachment and claimed that the sum had been hypothecated to them. The claim was disallowed by the Munsif. The plaintiffs accordingly brought the present suit for a declaration of their rights and for release of the amount from attachment.

2. Defendant 1 contested the suit. The defence taken was that there was no valid hypothecation of this sum, that the plaintiffs had not advanced any money, that the proper court-fees had not been paid, and that the suit was bad as the proper consequential reliefs were not sought. Fraud was also alleged but no attempt was made to support this last plea. The learned Munsif in an unsatisfactory, judgment in which the issues have not been clearly framed dismissed the suit after arriving at certain findings. As far as I have been able to follow his judgment the learned Munsif holds that the plaintiffs have sought for a consequential relief and that they should have paid court-fees for this relief. He also finds that there has been no valid hypothecation and that there was no good evidence to show that the plaintiffs had advanced money. On these findings he has dismissed the plaintiffs' suit. The plaintiffs appealed. The learned District Judge has interpreted the agreement between the plaintiffs and the defendants 2 and 3 differently from the Munsif. He holds that by the

deed of agreement the money lying to the credit of defendants 2 and 3 with the Doomdooma Town Union was hypothecated to the plaintiffs. He holds also that no court-fees are payable for the consequential relief prayed for and decrees the plaintiffs' suit.

3. Defendant 1 appeals. The first contention raised is that by the agreement between the plaintiffs and defendants 2 and 3 there was no intention to hypothecate any sum which may become due from the aforesaid union for the work done by defendants 2 and 3. There is no substance in this ground. The agreement is before me and there can be no manner of doubt that defendants 2 and 3 purported to hypothecate to the plaintiffs any sum that may become due to them from the union for work done by them. I cannot understand how the learned Munsif could come to any other conclusion. This is what is said in the agreement:

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

4. After this clear expression of the intention of the parties there is no room for the contention that there was no intention to hypothecate. Next it was argued that as this was a hypothecation of property not in existence at the time of the hypothecation the agreement will operate not as a hypothecation but only as an agreement to hypothecate which would have to be enforced by a suit for specific performance. It was argued that until a decree was obtained in such a suit the plaintiffs could not claim any right in the property. This contention must also fail. I assume for the present that the plaintiffs have advanced sums to defendants 2 and 3 which have not yet been repaid. The agreement between the parties was that any sum which became due to defendants 2 and 3 from the union for work done by them would stand hypothecated to the plaintiffs as security for the sums advanced. It is true that these dues were not then in existence and until they came into existence there could be no mortgage or hypothecation in favour of the plaintiffs as there cannot be a mortgage or hypothecation of non-existent property; I agree that there was only an agreement to hypothecate or mortgage; but as soon as the dues came into existence, equity treating as done that which ought to be done fastened upon the dues and the contract to hypothecate them became a complete hypothecation. This is the principle, laid down in Collyer v. Isaacs (1882) 19 Ch D 342 and Holroyd v. Marshall (1863) 10 HL 191 and it has been applied in this Court in Baldeo Prashad Sahu v. A.B. Miller ('04) 31 Cal 667 and Co-operative Hindusthan Bank v. Surendra Nath De : AIR1932Cal524 . Assuming that defendants 2 and 3 owe money to the plaintiffs for advances made I hold that the dues owing from the aforesaid union to defendants 2 and 3 stand hypothecated to the plaintiffs as security for those advances.

5. The next point argued is that proper court-fees have not been paid for the consequential relief sought. There is absolutely no substance in this contention. This is a suit under Order 21, Rule 63, Civil P.C., and it is a suit to establish the right claimed in the execution proceedings which had been negatived. It is a suit to set aside a summary order of a civil Court not establised by Letters Patent and Article 17 of Schedule 2, Court-fees Act, applies to it. The fact that the plaintiffs ask for the removal of the attachment makes no difference to the nature of the suit. The Munsif attached the property' and rejected the plaintiffs' claim in the proceedings in execution. The plaintiffs now want that order set aside and if it is set aside the attachment will automatically be released. That a suit under Order 21, Rule 63 is one which falls within the purview of Article 17 of Schedule 2, Court-fees Act, has been

held by the Judicial Committee of the Privy Council in Phulkumari v. Gansyam Misra ('08) 35 Cal 202. There also the plaintiff asked for several reliefs instead of merely asking the Court to set aside the order passed by the Munsif refusing to raise the attachment. Their Lordships held that notwithstanding the several prayers in the plaint the suit was really one for setting aside the order of the attaching Court and that the only court-fee payable was that prescribed by Article 17 of Schedule 2, Court-fees Act. The contention regarding the insufficiency of the court-fees therefore fails.

6. Learned advocate for the appellant raised another point. He showed that the learned Judge has not reversed the finding of the trial Court that the plaintiffs had not been able to prove the advances made and contended that without a finding in favour of the plaintiffs on this point the plaintiffs' suit could not be decreed. This contention must be upheld. The learned Judge has omitted to consider this vital part of the case. The plaintiffs obviously cannot get any relief unless they can show that they have made advances which have not been repaid. The amount due by the union to defendants 2 and 3 will be the subject of a hypothecation only if there is something due to the plaintiffs from defendants 2 and 3 under their contract and only to the extent of these dues. The trial Court has found, as I have said before, that the plaintiffs have not been able to prove their advances. The learned District Judge says nothing about this point. After interpreting the contract between the plaintiffs and defendants 2 and 3 he made certain observations which I have not been able to understand and which learned advocate for the respondents has not been able to explain. This is what he says:

There is no dispute that if the terms of the contract are as I find them to be that the amount for which the appellants sued is not covered by that contract and in my opinion they were entitled to a decree for that amount in terms of the prayer in the plaint.

7. As I have said before I am not able to appreciate what the learned Judge means by these observations. The plaintiffs were , not suing for the recovery of any amount. Whatever the learned Judge may have intended to say the fact remains that he has not decided whether there is any sum owing from defendants 2 and 3 to the plaintiffs for any advances made in terms of the agreement between them. The case must therefore be remanded to the learned Judge for a decision on this point. If the learned Judge finds that the plaintiffs have failed to prove that any sum is due he will dismiss the suit. If he finds that the plaintiffs have proved that a sum is due for advances made in terms of their contract he will release so much of the sum which is under attachment as will meet the amount due together with interest calculated up to the date of the attachment. It was suggested by the learned advocate for the appellant that defendant 1 had already realized the sum which had been attached and that the suit is not maintainable as the plaintiffs have-not sued for the recovery of this money. There is no mention of this in the pleadings or anywhere in the judgments and I can take no notice of this suggestion The decree passed by the learned District Judge is set aside and appeal is remanded to the lower appellate Court for re-hearing in the light of the observations made above. The costs of the appeal in this Court will abide the result of the appeal below.