

Muthukrishnier and Three ors. Vs. Veeraraghava Iyer and anr.

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Court : Chennai

Decided On : Apr-22-1913

Reported in : (1915)ILR38Mad297

Judge : Charles Arnold White, Kt., C.J., ;Miller and ;Oldfield, JJ.

Appellant : Muthukrishnier and Three ors.

Respondent : Veeraraghava Iyer and anr.

Judgement :

Charles Arnold White, Kt., C.J.

1. Under Exhibit A the defendants mortgaged to the plaintiffs a house and a promissory note which had been executed to the defendants, by a third party as security for money owing by the defendants to the plaintiffs. The promissory note was not endorsed to the plaintiffs. It became time-barred, and the question is whether on the taking of accounts the plaintiffs should be debited with the amount due on the note. It was not suggested that the plaintiffs could sue on the note. It was contended that the note was evidence of a pre-existing debt due by the third party to the defendants, that debt was by the mortgage assigned to the plaintiffs, and that the plaintiffs being the parties who were entitled to sue for the assigned debt were under an obligation to the defendants, to do so before the right to recover the debt became barred by limitation. The promissory note refers to a pre-existing debt due by the third party to the defendants, but I have had some doubt

whether on the documents alone, coupled with the fact that the maker of the note attested the mortgage to the plaintiffs and that is all we have to go on—there is evidence of a pre-existing debt. No attempt appears to have been made to show that there was no debt (in the Court of First Instance the defendants sought to show that the amount due on the note had been paid) and I think we are warranted in holding that there was a debt. The mortgage thereof was, in my opinion, a transfer of an actionable claim within the meaning of Section 130 of the Transfer of Property Act, which vested in the transferee the rights and remedies of the transferor, subject to the equities which remained in the transferor by reason of the fact that the transfer was by way of security. This is in accordance with the decision of the Privy Council, in the recent case of *Mulraj Khataw v. Viswanath Prabhuram* I.L.R., (1913) Bom., 198, which does not appear to have been reported when this appeal was argued before Sundara Ayyar, J., and Sadasiva Ayyar, J. In the Privy Council Case the contest was between a party who held an assignment in writing of a policy and parties holding a deposit of the policy by way of security which was earlier in date than the assignment in writing. Their Lordships held in favour of the parties holding the written instrument. In the judgment they observe with reference to the assignment in writing 'It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case.' And again 'He (the party claiming under the instrument) has an absolute right to the proceeds of the policy.'

2. The rights of the transferor being vested in the transferee by the express words of the section, the transferee is the only party entitled to sue, and this being so, he is, I think, accountable to the transferor for having allowed the remedy to become time-barred.

3. I do not think any useful purpose would be served by a discussion of the English authorities. The cases turn on the language of Section 25(6) of the English Judicature Act, 1873. In the Privy Council decision to which I have referred, their Lordships observe 'The error (of the Court in India) arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they based their

decision.'

4. I only propose to refer to one authority, the decision of the Privy Council in *Shyam Kumari v. Rameswar Singh* I.L.R., (1905) Calc., 27 . There the mortgagors assigned to their mortgagee a debt due to them from a third person, and in taking the account of what was due to the mortgagee, the Courts in India debited him with the amount of the debt, though he had not received it. It was held, that it lay upon the mortgagee to use reasonable diligence to recover it from the debtor, and it appearing that no serious attempt had been made to do so it was held that it had been rightly debited in the account.

5. I think this appeal fails and should be dismissed with costs.

Miller, J.

6. I am of the same opinion. After the recent decision of the Privy Council in *Mulraj Khataw v. Viswanath Prabhuram* I.L.R., (1913) Bom., 198, it seems impossible to contend that a hypothecation of a debt is not a transfer of an actionable claim within the meaning of Section 130 of the Transfer of Property Act. Their Lordships held that by that section a writing is required to effect a charge on an actionable claim. It follows that the remedies of the mortgagor are transferred to the mortgagee of the debt and he is entitled to recover the sum due from the debtor and if so entitled then he is rightly made liable if he without justification allows the debt to become irrecoverable *Shyam Kumari v. Rameswar Singh* I.L.R., (1905) Calc., 27 .

7. In the present case an attempt was made in the Court of First Instance to show that by agreement the first defendant was to recover the amount of the debt, but the District Munsif held that the provisions of Exhibit A were clear, and there was no need to consider the oral evidence: and it seems that point was not pressed either in the District Court or here at the hearing of the Second Appeal, and we were not asked by the appellant to re-open the question on the evidence and must therefore proceed on the footing that there was no contract altering the position of the parties. We must deal with the case on the provisions of Section 130 apart from any contract. The plaintiffs endeavoured, but failed, to prove that the debt

mortgaged had been paid to the first defendant and did not, so far as I can see, ever allege that the promissory note which was handed over to the plaintiffs did not represent a debt which could be assigned. I find no difficulty therefore in accepting the view taken by all the Courts which have dealt with the matter so far, that what was mortgaged was a debt evidenced by a promissory note.

8. That being so, it lay upon the plaintiffs to show that they were not in fault in allowing the recovery of the debt to be barred by limitation, and they made no attempt to show that. Then it was contended that the first defendant was equally entitled to recover the debt and therefore the plaintiffs cannot be made liable: the default was as much that of the one as of the other.

9. But the remedy open to the first defendant as creditor had passed by the Section 130 of the Transfer of Property Act to the plaintiffs: what was retained by the first defendant was his right to redeem the mortgage. This contention is therefore of no avail, and moreover was not, so far as I can see, raised at any previous stage of the case.

10. I concur in dismissing the appeal with costs.

Oldfield, J.

11. I concur in the decisions of my learned colleagues for the reasons given by them and have nothing to add.

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