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SooperKanoon Citation : sooperkanoon.com/851110

Court : Kolkata

Decided On : Aug-25-1938

Reported in : AIR1940Cal179

Appellant : Kumar Gonesh Chunder Mullick and ors.

Respondent : Sm. Narayani Dassi

Judgement :

ORDER

Sen, J.

1. The facts giving rise to this application briefly are as follows : Kumar Gonesh Chunder Mullick hereinafter described for convenience as the client engaged Messrs. Charu Chunder Bose & Co. as his attorneys for the conduct of Suit No. 950 of 1934 instituted by him against one Sm. Narayani Dassi for the recovery of a sum of money. The suit was decreed in favour of the client on 17th August 1934 for the sum of Rs. 17,206-6-0 with interest and costs. Premises No. 13, Bentinck Street which belonged to the estate of the defendant Narayani Dassi's husband was acquired by the Calcutta Improvement Trust and the compensation money paid therefor lay in deposit with the Calcutta Improvement Trust Tribunal. In execution of the aforesaid decree the client through his attorneys, Messrs. Charu Chunder Bose & Co., attached the sum of Rs. 18,000 lying in, deposit with the said tribunal on 20th December 1934. Thereafter, the two daughters of Narayani

Dassi, namely 8m. Lajabati Dassi and Sm. Lilabati Dassi, objected to this money being attached on the ground that the decree passed against their mother Sm. Narayani Dassi was not binding on the estate of their father. On 6th April 1936 the decree was amended on the application of Sm. Narayani Dassi, and it was directed in the decree that the decretal amount was to be paid out of the estate of Narayani Dassi's husband whose name is Brojonath Chunder. Thereafter the writ of attachment was amended and the property was again attached. Upon this the two daughters of Narayani Dassi mentioned above instituted a suit in this Court being Suit No. 1230 of 1936, inter alia, for a declaration that the decree passed against Narayani Dassi in Suit No. 950 of 1934 was not binding upon the estate of their father Brojonath Chunder.

2. In this suit Kumar Gonesh Chunder Mullick was one of the defendants and the solicitors Messrs. Charu Chunder Bose & Co. acted on behalf of Gonesh Chunder Mullick. The suit ended in a compromise decree. Among the terms of the compromise decree the following only need be stated. It was declared that the decree passed in Suit No. 950 of 1934 was binding on the estate of Brojonath Chunder deceased and on his reversioners. The defendant Gonesh Chunder Mullick agreed to accept the sum of Rs. 16,000 in full settlement of his claim and costs under the aforesaid decree, and it was declared that he was entitled to realize and recover this sum out of the estate of Brojonath Chunder. It was also declared that the attachment on the moneys lying with the Calcutta Improvement Trust Tribunal in execution of the decree passed in Suit No. 950 of 1934 should remain subsisting. This decree was passed on 4th February 1938. The petitioners who are the attorneys of Kumar Gonesh Chunder Mullick state that the costs due to them by the client in respect of both these suits amount to Rs. 3100 which is yet unpaid.

3. After the consent decree was passed, the client was adjudicated insolvent on 22nd February 1938. Thereafter the Official Assignee applied to the Calcutta Improvement Trust Tribunal for payment of the sum of Rs. 16,000 direct to him. The petitioners claim that before this sum is paid over to the Official Assignee the sum of Rs. 3100 should be paid to them on the ground that they have a lien for this amount on the sum of Rs. 16,000 which was procured for the client by the

exertions of the petitioners as his attorneys.

4. The facts alleged are in the main unchallenged. The Official Assignee resists this application on grounds of law. Learned Counsel on his behalf says that the sum of Rs. 16,000 not having come into the possession of the petitioners they could have no lien on this sum in the strict sense of the word. Next he points out that this sum being the property of the insolvent vested in the Official Assignee and became divisible among the creditors of the insolvent under the Presidency Towns Insolvency Act on the making of the order of adjudication. He argues that the petitioners have no higher right with respect to this sum than any other creditor of the insolvent and that their remedy lies in proving their debt in the insolvency proceedings. Certain other technical objections were raised in the affidavit in opposition but these were not pressed. It has been established and indeed it is not challenged that this sum of Rs. 16,000 was procured for the client by the exertions of the petitioners. It is also established that the client has not paid the attorneys their costs of the suits. The costs have not yet been taxed but I shall assume for the moment that they amount to Rupees 3100. Now

a solicitor has at Common law and apart from any order of the Court or statute a lien over property recovered or preserved or the proceeds of any judgment obtained for the client by his exertions : (Halsbury Vol. 26, para. 1342).

5. Subject to any statute to the contrary, the Courts in India will follow the Common law of England in this respect. This is now well established by a series of cases decided by the High Courts not only of this province but of other provinces also. A number of such cases has been collected together and noticed in *Tayabji Dayabhai & Co. v. Jetha Devji & Co.* : AIR1927 Bom542 . So far as this type of lien is concerned, it does not matter whether the solicitor has got actual possession of the property over which he proposes to exercise his lien or not. In this connexion I propose to deal with the argument of learned Counsel for the Official Assignee that there can be no lien without possession. He referred me to the case in *Mercer v. Graves* (1872) 7 Q.B. 499 where Cockburn, C.J. remarked that there is no such thing as a lien except upon something of which you have possession. His Lordship however goes on to say

that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs.

6. This is precisely the right which is now being claimed by the petitioners. It seems to me that at the present time and in the circumstances of this case the objection that the word lien cannot be used to describe the rights claimed by the attorneys over the sum of Rs. 16,000 is merely pedantic. The word has been so used by high authority in numerous decisions and textbooks. In Halsbury's Laws of England, Vol. 26, para. 1334 the lien of a solicitor is said to be of three kinds : (1) A passive or retaining lien; (2) a Common law lien on property recovered or preserved by his efforts; (3) a statutory lien enforceable by a charging order. In India the first type of lien or the possessory lien corresponds to the lien described in Section 171, Contract Act. This case is concerned with the common law lien and this lien attaches to property procured by the labour of the solicitor whether or not the property is in the possession of the solicitor. Paras. 1342 to 1345 of Halsbury's Laws of England, Vol. 26 deal with the Common law lien. In para. 1343 it is said that this lien does not attach to real property but with this exception it attaches to property of every description, 'such as for instance, money payable to the client under a judgment.' This is precisely, the kind of property involved in the present application and I propose to follow the learned author and describe the solicitor's rights over such property for his unpaid costs as a lien. Thus, if there had been no insolvency proceedings the petitioners would be entitled as a matter of course to ask this Court to direct the payment of their costs out of this sum of Rs. 16,000 before any of it was made over to the client or to anybody else. The Court in such case would act summarily in aid of its officer and would direct payment upon a motion *In re Tyabji & Co.* (1905) 7 Bom L.R. 547 and *Harnandroy Foolchand v. Gootiram Bhuttar* (1920) 7 A.I.R. Cal. 122.

7. The question is whether the insolvency of the client will have any effect on this right of the petitioners. The argument of learned Counsel for the Official Assignee is shortly this. He refers me to Section 52, Presidency Towns Insolvency Act which describes what does not constitute property divisible among the creditors of the

insolvent and says that the sum of Rs. 16,000 does not fall within this description. Next he refers to Section 17 of the said Act which enacts that the property of the insolvent upon his adjudication shall vest in the Official Assignee and become divisible among his creditors and which prohibits creditors from proceeding against such property in any other way except as provided by the Act. There is an exception made in the case of secured creditors. Learned Counsel for the Official Assignee points out that the petitioners are not secured creditors and relying on the said two Sections argues that they can have no higher right over this sum of Rs. 16,000 than any other creditor now that the client has become insolvent.

8. I am not inclined to accept this view. 'Property' has not been denned in the Presidency Towns Insolvency Act except by saying that it includes certain things. Property consists of a bundle of rights which a person possesses over or in a thing. The property of the client in this sum of Rs. 16,000 is curtailed to this extent: that the solicitors have the right to get their costs out of this sum first, before the client can get possession of or deal with it. This right of the solicitors has not been taken away either expressly or impliedly by the Presidency Towns Insolvency Act. All that has vested in the Official Assignee by virtue of Section 17, Presidency Towns Insolvency Act, is the proprietary right which the insolvent possessed in this sum of Rs. 16,000 and nothing more. In my opinion, the insolvency of the client makes no difference to the Common law right of the solicitors to be reimbursed for their costs put of the property obtained by their exertions. This right is based on the principle that it is not just that the client should get the benefit of the solicitors' labour without paying for it. Here the Official Assignee, representing the client and the creditors, wishes to get the benefit of the sum of Rs. 16,000 without paying the solicitors by whose labour it was procured. This should not in my opinion be permitted. This is the principle, laid down in *Guy v. Churchill* (1887) 35 Ch. D. 489. In *In re Meter Cabe Ltd.* (1911) 2 Ch. D. 557. Swinfen Cady, J., states that this Common law lien prevails notwithstanding the bankruptcy of the client.

9. Learned Counsel for the Official Assignee says that this is an 'obiter dictum'. That is so, but an 'obiter dictum' from such high authority is entitled to the greatest respect and consideration, and should be followed unless any authority to the contrary is shown or unless there is other good reason not to follow it. No case has

been placed before me which would justify me in not following this dictum which I may say with great respect is grounded on principles of justice and equity. As regards the case in *Guy v. Churchill* (1887) 35 Ch. D. 489 in which the Official Receiver was not allowed to take the property of the insolvent without the costs of the solicitor who obtained the property being first deducted, learned Counsel for the Official Assignee argues that these, costs were incurred and the property procured after the adjudication, whereas in the present case the costs were incurred and the property procured before adjudication. This, in my opinion, is a distinction without a difference. The case in *Mercer v. Graves* (1872) 7 Q.B. 499 relied on by learned Counsel for the Official Assignee is not, in my opinion, helpful for the decision of this case. The point for decision there was whether the defendant could claim a set-off against the claim of the plaintiff. The plaintiff contended that in the property for which he was suing the defendant, his attorney had a lien for costs incurred in obtaining that property and that he should be considered as trustee for his attorney and that therefore there could be no set-off. This contention was not given effect to. The point for decision was very different and I do not think that I need consider that case any further.

10. In my opinion, the insolvency of the client has made no difference to the rights of the solicitors. Their Common law lien remains unimpaired and they are entitled to get their costs incurred in both suits out of the sum of Rs. 16,000. I direct therefore that the sum of Rs. 3100 be paid out of this sum to the solicitors. The costs will be taxed and if it be found that anything in excess of the taxed costs has been taken, the excess shall be refunded to the Official Assignee. The petitioners give an undertaking to this effect. The Official Assignee shall pay the costs of this application out of the assets of the insolvent. The balance of Rs. 16,000 shall be paid to the Official Assignee. The interim injunction is dissolved. The Official Assignee shall be entitled to retain his costs out of the assets as between attorney and client.