

Ranjit Ray Vs. D.A. David

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Court : Kolkata

Decided On : Jun-01-1934

Reported in : AIR1935Cal218,155Ind.Cas.193

Appellant : Ranjit Ray

Respondent : D.A. David

Judgement :

Costello, J.

1. The facts of the case out of which this appeal arises are fairly simple. The point of law which has to be determined upon a consideration of those facts is however one of some difficulty. A suit was brought by the liquidator of the Co-operative Hindusthan Bank Limited to recover from certain persons, who are the Wardens of the Armenian Church, a sum of money for work and labour done on behalf of the Wardens of the church by a firm named Carr, Morrison & Co., Ltd. That firm has gone into liquidation and the liquidator of it, Mr. G.C. Read, is a party to this suit. The Wardens of the Armenian Church, so far as these proceedings are concerned, have in effect called upon the other two parties to interplead. They have paid into Court a sum of Rs. 2,971-12-9 which was the amount ultimately agreed as being owing in respect of the work done by Carr Morrison & Co. The conflict of claims between the liquidator of the bank and the liquidator of Carr Morrison & Co., arises from the fact that Carr Morrison & Co. borrowed from the

bank the sum of Rs. 3,000 and executed in favour of the bank a promissory note, dated 8th July 1930. In addition, the company assigned two bills, or rather 'invoices,' which were made out by Carr Morrison & Co. as builders and contractors, addressed to the Wardens of the Armenian Church of Calcutta. One of those bills was for a sum of Rs. 5,737-10-0 and the other bill was for Rs. 6,985-3-0. The bills were numbered respectively 166 and 167 and they were both dated 5th July 1930. On the same date, a letter was addressed by Carr Morrison & Co., to the Wardens of the Armenian Church in these terms:

Re: No. 2, Middleton Row.

We beg to hand you herewith our final bills in respect of the above work (repairs, sanitary and plumbing), for favour of payment, at your early convenience.

The enclosed bills aggregate Rs. 12,720-13-0, against which you have, from time to time, advanced the sum of Rs 7,000 only, leaving a balance of Rs. 5,720-13-0 still due.

These final bills cancel the running bills previously issued, viz., Nos. 122, 123, 125 and 126.

These bills are assigned and endorsed for valuable consideration to the Co-operative Hindusthan Bank, Ltd., Calcutta, and we will thank you to make payment to them direct to our a/c, at 12-2, Clive Row, Calcutta....

2. Upon the back of the bills there was the following endorsement:

Please pay to Co operative

Hindusthan Bank, Ltd.,

Carr Morrison & Co., Ltd.,

(Sd.) P.M. Morrison,

Managing Director.

Carr Morrison, & Co., Ltd.,

(Sd.) C. Carmichael,

Managing Director.

3. The position therefore was that by the endorsement on the back of the bills, coupled with the notification contained in the letter of the same date, Carr Morrison & Co., assigned to the bank the benefit of the debt then owing to them by the Wardens of the Armenian Church. The bills and the letter of 5th July were sent through the bank and, on 8th July, were forwarded by the bank to the Wardens of the Armenian Church, under cover of a letter, which is in these terms:

Please receive the following bills which have been endorsed to this bank for valuable consideration and the cheque for which when passed should be drawn in favour of this bank and sent to us for credit of the account of Carr Morrison & Co., Ltd., with this bank.

At the foot of the letter, there is a tabular statement in the following form:

No. Drawer. Currency. Amount.

Rs. as. P

26-493.. Yourselves.. D .. 5,720 13 O

Enclosures-

(1) One letter dated 5th July 1930 of Carr Morrison & Co., Ltd.

(2) Bills Nos. 163 and 167 dated 5th July 1930 for Rs. 5,737-10-0 and Rs. 6,935-3-0.

4. Certain correspondence passed between the bank and the Wardens of the Armenian Church, in which it appears that the Wardens of the Church disputed the amount said to be due from them to Carr Morrison & Co., but ultimately, after two of the Wardens had gone into the matter, they admitted liability to the extent of Rs. 2,971-12-9, which, as I have already said, is the amount claimed in the suit, out of which this appeal arises.

5. The defendants, Carr Morrison & Co. (in liquidation), by their liquidator, G.C. Read, contended in the suit that the plaintiff, as the liquidator of the Cooperative Hindusthan Bank, was not entitled to recover the amount from the Wardens of the Armenian Church and that the sum owing by the Wardens of the Armenian Church should be treated as a debt due to Carr Morrison & Co. (in liquidation), and the liquidator of Carr Morrison & Co. took the point that the assignment of the debt due from the Wardens to the bank was of such a nature that we ought to treat it as if it were a mortgage and being a mortgage, it ought to have been registered under the provisions of Section 109(d), Companies Act. That section provides that certain mortgages and charges are to be void, if not registered. The words of the section, so far as material for our present purposes, are these:

Every mortgage or charge created... by a company and being either a mortgage or charge on any book-debts of the company, shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration... within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable.

6. Then there are certain provisions which are not relevant to our present inquiry. The Liquidator of Carr Morrison & Co., contended that the assignment constituted by the letter of 5th July 1930, and the endorsement on the bills dated 5th July 1930, was of such a nature that it ought to be considered as a mortgage and therefore subject to the provisions of Section 109 which I have just read. The learned Judge at the trial, by his judgment dated 31st May 1933, stated the point which he had to determine in this form:

He (i.e., the liquidator of Carr Morrison & Co.) puts in issue the validity of the alleged assignment of the plaintiff bank. He says that the assignment was not

absolute but was by way of charge and that, inasmuch as it was not registered, it is inoperative against the defendant company by reason of Section 109(1)(d), Companies Act....

7. The matter falls to be decided upon a consideration of the provisions of Section 130, T.P. Act, which by Sub-section (1) provides that:

The transfer of an actionable claim, whether with or without consideration, shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent... shall be complete and effectual upon the execution of such instrument and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer... be given or not.

8. It seems clear that in this case there was a transfer by Carr Morrison & Co., to the bank of an actionable claim and that such transfer was by an instrument in writing signed by the transferors. It follows therefore that the transfer was complete and effectual upon the execution of the instrument in writing, that is to say, the letter of 5th July, taken in conjunction with the endorsements on the two bills Nos. 166 and 167. It also follows that on the execution of those documents all the rights and remedies of the transferors, that is to say, Carr Morrison & Co., vested in the transferees, the Co-operative Hindusthan Bank, Ltd. Actually in the present case, notice of the transfer was given to the debtors by the letter of 8th July 1930, which I have already quoted. Sub-section (2), S, 130 provides that:

The transferee of an actionable claim may, upon the execution of the instrument of transfer... sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

9. It is manifest from the judgment of the present Chief Justice in *Sadasook Ramprotap v. Hoare Miller & Co.* 1923 Cal 719 that Section 130, T.P. Act, contains a special scheme which has some of the features both of the English common law and of the principles of equity and it is analogous to the provisions which are contained in Section 25(b), Judicature Act, 1873, which are now enacted in

Section 126, Law of Property Act, 1925. It is unsafe however to endeavour to decide the point of the kind now before us by any extensive reference to the English authorities. For the purpose of the present case, it is important at the outset to recall that the Judicial Committee have decided that the assignment of an actionable claim, such as debt, although absolute in form may nevertheless in its effect operate by way of security only. The authority for that proposition is to be found in the judgment of Lord Moulton in *Mulraj Khatau v. Vishwanath Prabhuram* (1913) 37 Bom 198, where his Lordship said:

The appellant bases his claim on an assignment in writing... dated 13th August 1909. It is in form an absolute assignment and was according to the evidence given under pressure from the appellant to whom Dwarkadas Dharamsey was then indebted in a much larger sum. The validity of the assignment is therefore established. 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.

10. The assignment effected by the letter and the endorsement of 5th July 1930, was apparently intended to operate as an absolute assignment so as to pass to the bank the whole of the rights and interest of Carr Morrison & Co. It may be that, upon a scrutiny of the exact language used in the letter of 5th July 1930, it was the intention of Carr Morrison & Co. that the whole of the amount properly recoverable by them from the Wardens of the Armenian Church should be paid to the bank and credited to the account of Carr Morrison & Co., with the result that if the amount paid by the Wardens of the Armenian Church was in excess of the amount owing by Carr Morrison & Co., to the bank on their overdraft, the balance would remain to the credit of the account of Carr Morrison & Co. But it is not possible for us to consider or even to speculate as to what the result would have been upon the adoption of that view of the transaction, because the learned Judge found as a fact that the debts were assigned not as an out-and-out transaction but merely as security for the overdraft. The relevant passage in the judgment is in these words:

I should hold that the words were sufficient to effect a transfer of the debt to the bank, even if any of the parties were at liberty in view of their pleadings to dispute

that proposition-a matter of some doubt. The question then is whether evidence is admissible to show a collateral agreement between the parties that the assignment of the debt was not absolute but was by way of security for the loan by the bank. The evidence on which the liquidator relies and which the bank seeks to exclude is contained in a letter of 2nd March 1931, written by the bank's solicitor and stating that the bills were assigned by Carr, Morrison & Co. to the bank for security. It has also been pointed out that when the Wardens questioned the amount of the bills, the bank declined to discuss the question without reference to Carr, Morrison & Co., Ltd., thereby admitting that Carr, Morrison & Co., Ltd., had still an interest in the debt. I am prepared on the letter to say that the issue of fact raised by Carr, Morrison & Co., Ltd., should be decided in their favour. I am of opinion that there was an agreement between Carr, Morrison & Co., Ltd., and the bank that the debts were assigned not as an out-and-out transfer but as security for an overdraft. I have now to decide whether evidence is admissible in proof of an oral agreement to this effect having regard to the language of Section 92, Evidence Act.

11. We have not to concern ourselves in this appeal as to whether the learned Judge was right in resorting to the letter of 2nd March 1931, and the course of dealings between the parties subsequent to the assignment, in order to arrive at a decision as to what in substance was the nature of the transfer effected by the endorsement of 5th July 1930, because no objection has been taken on that score and moreover the learned Counsel who appeared for the liquidator of the bank have conceded that the assignment was by way of security only, even though in form it may have been an out-and-out transfer of all the rights and interest of Carr Morrison & Co. in the book-debt in respect of the liability of the Wardens of the Armenian Church towards Carr Morrison & Co. We, therefore, have to decide the matter on the footing that there was an assignment of a book-debt by way of security to ensure repayment by Carr Morrison & Co. to the bank of the overdraft. Put into figures, the position was that there was an assignment of the debt due on a bill for Rs. 5,720-13-0 in order to secure repayment of a debt to the amount of Rs. 3,500. In, those circumstances, Section 134, T.P. Act, comes into action, if I may so put it. S., 134, says:

Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the cost of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

12. Briefly stated, the effect of that section is this: that if a debt is transferred by way of security, the transferee is entitled to discharge the debt due by the transferor to him. Then, if there is any residue, that is after payment of the cost of recovery and the amount actually due by the transferor to the transferee, that belongs to the transferor. The position created by the precise language of Section 134 seems to be somewhat anomalous, because where there is a transfer under Section 130, all the rights and remedies of the transferor vest in the transferee. The expression 'all rights' must of course include the right of ownership, and yet Section 134 says that the residue, if any, belongs to the transferor which is only another way of saying that if there is anything left over, after the debt between the transferor and the transferee is satisfied, the transferor is the owner of the balance whatever it may be. The anomaly consists in this, that there is a contradiction between the provisions of Section 130 and those of Section 134. One would have expected that instead of saying any residue belongs to the transferor,' the section would have said 'the residue, if any shall be retransferred by the original transferee to the original transferor.' However, it seems reasonably clear that what is intended is that where a debt is transferred for the purpose of securing an existing debt then the whole matter should be interpreted, as far as possible, upon the analogy of a mortgage of any other kind of property. That the transferor still has some residuary interest in the transfer is clear from the fact that under the terms of Section 134 it would be possible for him to receive the original debt, and as I have already pointed out the residue actually belongs to him. It seems to me, therefore that even if there had been in form an absolute assignment and subsequently the transferor pays off his debt to the transferee then the transferor would be in the position of being entitled to receive from his debtor the whole amount of the debt which had been transferred upon the basis, that in those circumstances the residue would, in fact, be the whole debt. I have no doubt whatever, even without

referring to the marginal note, that this Section 134 is intended to deal with a case of mortgage debt.

13. The main difficulty which confronts us in the present instance is to determine whether an assignment for the purpose of securing an existing debt is a mortgage of Such a character as falls Within the ambit of Section 109(d), Companies Act. To put the matter tersely, the difficulty which I first felt in the matter is the determination of the question whether or not an assignment of a book-debt is really a mortgage of that book-debt, but I think that difficulty is entirely solved by the judgment of Lush, J. in 8. *Saunderson & Co. v. Clark* (1918) 29 TLR 579. In that case, a limited company, in consideration of an advance from their bankers, executed an assignment which, after reciting that the company were entitled to 80. 7s. from the defendant, that it had been agreed that debt should be assigned to the bankers, and that by a letter of even date the defendant had been directed by the company to pay the debt in question to the bankers, assigned unto the bankers so much of the defendant's debt 'as may be necessary to indemnify the assignees' for the amount advanced by them to the company. After executing that deed, the company wrote to the defendant requesting him to pay the debt due to them to the bankers. A few days later the company went into voluntary liquidation. The assignment to the bankers was not registered. The liquidator claimed to recover the debt from the defendant on the ground that the assignment to the bankers being unregistered, was void as against him, but the defendant insisted upon paying the debt to the bankers. It was held that the liquidator was entitled to recover, inasmuch as by Section 93, Companies (Consolidation) Act 1908, the unregistered assignment was void as against him, and because it was impossible for the parties to a transaction by way of mortgage or charge to alter the effect of Section 93, Companies (Consolidation) Act 1908, by adopting a form which does not accord with the real transaction between them. Section 93, Companies (Consolidation) Act 1908, was the section corresponding to Section 109, Companies Act. The corresponding provisions of the English Law are now contained in Section 79, English Companies Act (1929). The passage in the report of the judgment of Lush J., which has most bearing on the present problem occurs at p. 580 and is in these word s:

Mr. Schiller on behalf of the defendant had contended that the deed operated as an absolute assignment of the book debt, a sale in fact, in consideration of the advance. He (Lush, J.) did not think that the deed was capable of that construction. The recital appeared to suggest it, but the operative part treats the book-debt as given only as an indemnity, which must mean as a security, and it provides for payment of interest by the company on the advance, thus treating them as debtors. Moreover, it had been given along with a director's guarantee, and the banking account, which was in evidence, showed that the company were debited as debtors with the amount of the advance. The bankers themselves called their interest in the book-debt a charge in a letter they wrote to the defendant, dated 4th January 1910.

14. In passing I may recall that the bankers in the present case in their letter of 2nd March 1931, described the assignment as being a further security. Lush, J., continued thus:

The legal effect of the deed of 24th December 1909 therefore was thus. 'The company accepting the loan as a loan to themselves, transferred their interest in the book-debt to the bankers as a security, and were consequently entitled to a re transfer on paying off the loan. In other words, they mortgaged the book debt to secure an advance. On 1st January 1910, the company went into voluntary liquidation, and the mortgage therefore became subject to the provisions of the Companies Act 1908, Section 93.

15. The words of Lush, J., to my mind indicate that if there is an assignment of a book-debt as security (to use the words of Section 134) for the purpose of securing an existing debt, then that constitutes a mortgage of that debt. Therefore the provisions of Section 134 are applicable and the matter must be dealt with as directed by that section. The moment one comes to the conclusion that a mortgage has been effected by means of an assignment, even though the transfer might in form be an absolute assignment, it inevitably follows that the transaction should have been registered as required by Section 109, Companies Act; or to put the matter the other way round it follows that unless it is registered as required by the provisions of that Act, the assignment will be inoperative as against the

liquidator and the creditors of the company. In that view of the matter, and having regard to the fact that counsel for the appellant admitted that this was an assignment by way of security, it follows that the decision arrived at by the learned Judge was correct and this appeal must be dismissed with costs. As regards payment of costs in this appeal, we make the appellant liable personally.

Lort-Williams, J.

16. I agree. But I desire to say that, in my opinion, the letter of 2nd March 1931, upon which Panckridge, J., has relied, was not admissible in evidence within the meaning of Section 92, proviso (2), Evidence Act, or otherwise. The three documents dated 5th July 1930, coupled with the covering letter dated 8th July 1930, in my opinion, are unambiguous, and amount to an absolute transfer of the debts to the bank, and not one by way of security only. The agreement sought to be established by reference to the letter of 2nd March is inconsistent with these documents and may not be proved. If and when the bank had collected the debt, they would have become the debtors of Carr Morrison & Co., to the extent of the sum collected, subject of course to the state of Carr Morrison & Co.'s account, and to whether they were in debt or credit at that time.

17. In view however of the fact that counsel for the bank has conceded, for the purpose of the decision in this case, that the documents amount to a transfer by way of security, such as is contemplated by Section 134, T.P. Act, and that, in my opinion, such an assignment is a mortgage of book-debts within the meaning of Section 109, Companies Act, and is void against the liquidator unless registered, this appeal must be dismissed with costs.