Calcutta High Court
Kumar Sattya Priya Ghoshal And ... vs Gobinda Mohun Roy Chowdury And ... on 10 December, 1909
Equivalent citations: 5 Ind Cas 110
Bench: Caspersz, Doss
JUDGMENT

1. This is an appeal by the defendant No. 1, Satya Priya Ghosal, minor son of Satyanga Ghosal, who was one of the five sons of Satya Krishna Ghosal, at whose death, his widow Soudamini became possessed of the one-fifth share of her deceased minor son; Satya Kanti Ghosal. Two of the other sons sold, each a one-fifth share, and Saudamini purchased the same, namely, from Satya Bhusan (defendant No. 2) and Satyeswar Ghosal. The remaining son, Satiyajit Ghosal, is the defendant No. 3 in this litigation. This appeal relates to a five annas fifteen gundas share of pargana Selimabad.

2. On the death of Saudamini, which took place in December 1898, her estate came to be represented by the defendant No. 4, Noba Gopal Mukherjee, as executor; but this gentleman was also an agent to manage the entire property, that is, the four annas share, each, of the defendants Nos. 1 and 3, and the 16 gundas share, each of Apoorba Coomari, widow of Satyeswar Ghosal, and Satya Bhusan Ghosal. It is clear, therefore, that with, respect to a share of 6 annas 8 gundas, the defendant No. 4 stood forth, as an executor, independently of the other shares mentioned which he merely managed on behalf of the four co-owners.

3. The defendant No. 4 was acting as an agent under a power-of-attorney, dated the 16th December 1901, executed in his favour by three of the sons of Satya Krishna; namely, Satyaanga, Satya Bhusan and Satyajit. It is stated in the document that he had authority to borrow money. As a matter of fact, he did borrow money and executed six hand-notes; dated the 27th March 1903, (one hand-note), 13th July 1903 (two hand-notes) and the 25th September 1903, which date is borne by three hand-notes.

4. In conjunction with these handnotes must be considered the letters of which Exhibit 2 may be taken as a specimen. In this letter it is recited by Noba Gopal: "I have this day (27th March 1903) borrowed from your tahabil at Barisal by executing a note of hand, the sum of Rs. 5,000 for paying the Government revenue for the March kist of hissa 5 annas 15 gundas zemindary No. 3840 belonging to Kumar Satya Bhusan Ghosal Bahadur and others. I deposit with you the Agentnama showing that I am the agent of the said Ghosal Bahadurs. You will file the said Agentnama in Court, if called upon by me to do so, when it wilt be required by me. I shall take back the original agent-nama from you after taking out an attested copy from the Court in which it wilt be filed, and giving the same to you".

5. The plaintiff, from whom these several sums aggregating Rs. 27,000, were borrowed, brought his suit to recover the money, and, of the 4 defendants, the defendant No. 1 alone contested the claim.

6. The Subordinate Judge, of Bakarganj has decreed the suit against the defendants Nos. 2, 3 and 4 and the estate of Satyanga Ghosal represented by his minor son; the defendant No. 1, who is under the Court of Wards.

7. In appeal on behalf of the defendant No. 1, it has been contended by the learned senior Government pleader that, in terms of the notes of hand, which are identical in all cases, the defendant No. 4 bound himself to be wholly liable for the several amounts borrowed, and that the plaintiff, although he the who were the principal for whose benefit the money was borrowed, elected to treat the defendant No. 4, Noba Gopal, as his sole debtor, and in support of this general contention, it has been urged that the letters to which we have referred, were not executed simultaneously with the several handnotes but were the result of some after-thought whereby the liability might be fixed on the Kumar principals for whom the defendant No. 4 purported to have acted.

8. The point for determination is a simple one. It has been found by the Subordinate Judge that the letters were written along with the notes of hand. There is nothing intrinsically improbable in this finding, and no evidence has been indicated to us from which we could safely infer that these papers were prepared on later dates. We have the positive evidence of Noba Gopal that the letters were written with the notes of hand, that is to say, that they were executed by him as part of the same transaction, and, as a result, the power-of-attorney, dated the 16th December 1901, was actually delivered into the hands of the lender of money.

9. The circumstances in which it had become necessary for the defendant No. 4 to borrow these large sums of money were perfectly well-known to the parties, and it is not conceivable that a banker would advance money to an agent on the latter's personal responsibility without looking to the principals also as being liable for the repayment of the loans. It is true that, in the accounts of the plaintiff's firm, the defendant No. 4 was entered as the borrower, but the natural explanation is that his name appeared in the notes of hand.

10. Among a variety of reported cases to which our attention has been called, we may cite a decision of this Court. In the matter of the Ganges Steam Tug Co. Limited 18 C. 31 at p. 36, where Petheram, C.J., observed: "It is well-established law that a person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so and that whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only."

11. We have already said that when the notes of hand were executed, the reasons and necessity for borrowing the money were present to the minds of all the parties. It was necessary to super add a personal liability on the defendant No. 4 because he was acting as executor to the estate of Saudamini, the person most interested in the property of the Ghosals to the extent of 6 annas 8 gundas.

12. The case of Paterson v. Gandasequi 15 East 62 : 2 S.E.C. (o.s.) 184 : 13 R.R. 368 has been strongly relied upon, and reference has also been made to certain observations in the judgments in Thomson v. Davenport 9 B. & C. 78 : 3 S.E.C. (o.s.) 171 : 4 M. and R. 110 (Smiths' Leading Cases 11th edition, Vol. 2, 379). In the first mentioned case, the principal in the presence of his agent inspected the articles, and selected such of them as he required, and yet it was the agent who, afterwards ordered the goods. The seller gave credit to him, and made the invoices in his name and sent them to him.

On these facts, the Court held that the seller had elected to treat the agent as his sole debtor, and thereby precluded himself from recoverings over against the principal. In other words, the seller having trusted the agent exclusively had elected to treat him as principal in law. This latter case scarcely bears any resemblance to the facts of the present case. The letters, which accompanied the handnotes, were handed over to, and the power-of-attorney deposited with, the plaintiffs with no other object than that of enabling them to retain in their possession indubitable, proof of the fact that the monies had been advanced on the credit of the principals also.

13. In Thomson v. Davenport 9 B. & C. 78 : 3 S.E.C. (o.s.) 171 : 4 M. and R. 110, the agent purchased goods representing that he bought them on account of persons resident in Scotland, but he did not mention their names, the seller did not enquire who they were, and he debited the agent. It was held that the seller might afterwards sue the principals for the price. This case does not help the appellants.

14. From these and other cases three rules on the subject of election have been deduced by the learned commentators of Smiths Leading Cases (Ed. 11, Vol. 2, pp. 391, 392). The first rule is that where A contracts with B without stating himself to be an agent, B may, on discovering his principal, elect between them. The second rule is the same where he states himself to be an agent, but does not name his principal, and even where A names his principal, if the seller does not, at the time of making the contract, trust the agent B exclusively. The third rule covers the case if A state himself to be an agent, but have no principal: he is personally liable.

15. These three rules are concisely summarised in Section 233 of the Indian Contract Act, which provides that, in cases where the agent is personally liable, a person dealing with him may hold either him, or his principal, or both of them, liable, and, by way of illustration of the section, the case is mentioned that where A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for 0, A may sue either B or C or both, for the price of the cotton.

16. In this case, defendant No. 4 is within the second part of the second Rule. We have already said that the plaintiff did not lend the money to defendant No. 4 alone, and that all the persons really to be benefited were perfectly well-known.

17. These observations dispose of the appeal on the ground taken by the learned senior Government Pleader. In his concluding address, Babu Ram Charan Mitra adopted the arguments of the learned Counsel for the defendant No. 2, though he did not urge them-when he opened his case. These arguments turn on a consideration of the provisions of the Negotiable Instruments Act, so far as they refer to promissory-notes. It is urged that the defendant No. 2 cannot be made liable on the handnotes because his name does not appear on them.

18. We do not think it necessary to deal at any length with this question because the promissory-notes in this litigation do not appear' to be Negotiable Instruments. If they are not negotiable, Section 28 of Act XXVI of 1881 does not arise for consideration, nor does Section 4 of the Act apply to this case. In these handnotes Noba Gopal promised and held himself wholly liable to

repay the sums borrowed. There is no covenant that the repayment would be made to the plaintiff or to his order. There is no evidence that, in virtue of any custom or usage, instruments of this description were negotiable in the District of Bakarganj. Then, with reference to the definition of Section 4, we attach no importance, to second illustration (b) upon which, no doubt, some argument might be founded in favour of the learned Counsel's contention. It has been held, and is now settled law, that illustration cannot control the plain meaning of the words of a statute. Lastly, the defendant No. 2, on whose behalf this technical plea has been raised neither defended the; suit in the Court below nor raised it in the grounds of appeal to this Court. When he was examined, he very candidly said in answer to the question, "what is the reason for your not having filed a written statement in this case?" "When I believe that I owe the money, what is the necessity of increasing the costs by filing a written statement." This was a very proper attitude for him to adopt, and we do not think that his liability is seriously contested at the present stage.

19. A suggestion has been put forward by the learned senior Government pleader that the defendant No. 1 is perfectly willing to pay his own quota of the debt incurred by Noba Gopal, and that the lady Apurba Kumari (widow of Satyeswar Ghosal) should have been made a party to the suit by the plaintiff in order that the dispute might be adjusted between all the co-sharers.

20. From what we have already found, it is impossible to allow the defendant No. 1 (who is said to be the only solvent defendant) to pay his share of the plaintiff's demand; The transaction was entered into by the defendant No. 4 for himself, as executor, and as agent for the three co-sharers who, had given him the power-of-attorney, and one of three co-sharers was the father of defendant No. 1. In these circumstances, the joint liability cannot be distributed in the manner in which it is sought to be done, and it is, also, impossible to say that the plaintiff ought to have impleaded Apurba Kumari. The latter was not a party to any of the loan transactions. She was not living in Calcutta at the time, and, when subsequently informed, she merely did not disapprove of the action of Noba Gopal.

21. In no view of the case, therefore, can the judgment of the Subordinate Judge be disturbed. The appeal is dismissed with. costs which are payable to the plaintiff-respondents.