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GREAVES J.

result does occur, I mean the discontinuance of the suit, it is open to the landlord himself to commence a suit to have the matter determined.

Under the circumstances which I have indicated we make the Rule absolute.

The matter will go back to the Munsif in order that a formal order may be passed.

The petitioners are entitled to costs of this rule,

MUKERJI J. I agree.

G. S. *Rule absolute.*

APPELLATE CIVIL.

Before Cuming and Page JJ.

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May 6.

JIBAN KRISHNA MULLIK

v.

NIRUPAMA GUPTA.*

Agreement—Patni—Patnidar created darpatni and darpatnidar created sepatni, if there is valid agreement between patnidar and sepatnidar to sue for rent—Equitable rule.

A, a *patnidar* created a *darpatni* in favour of B for Rs. 244 per annum. B created a *sepatni* by an instrument in favour of C for Rs. 344 per annum, out of which Rs. 244 was to be paid to A for the *darpatni* rent, and Rs. 100 was to be paid to B, the *darpatnidar*. C paid the Rs. 244 to A for some time, and then fell in arrear. A sued C for rent :—

Held, that mere payment of a sum of money by C to A could not be made the foundation of a legal obligation on the part of C to pay to A a like sum in like circumstances in the future. Moreover, there was no consideration passing to C from A to bind any such agreement.

*Appeal from Appellate Decree, No. 457 of 1924, against the decree of Maulvi Osman Ali, Subordinate Judge of Nadia, dated Jan. 30, 1924, reversing the decree of Bama Charan Chakravarti, Munsif of Meherpur dated March 29, 1923.

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Held, further, that as the instrument creating the *sepatni* was not executed for the purpose of conferring a benefit upon A, A was not entitled to sue C upon the agreement therein contained either at law or in equity.

Deb Narayan Dutt v. *Chuni Lal Ghose* (1) and other cases referred to and discussed.

SECOND APPEAL by Jiban Krishna Mullik, the plaintiff.

This appeal arose out of a suit for recovery of rent. The plaintiff created a *darpatni* in favour of one Umesh, who again created a *sepatni* in favour of the defendant by an instrument in which it was provided that the defendant should pay Rs. 244 as the *darpatni* rent to the plaintiff, and a further sum annually to Umesh. The defendant failed to pay the Rs. 244 for which she was sued. The trial Court decreed the suit in part, but the lower Appellate Court dismissed the suit altogether. Hence this appeal to the High Court.

The arguments appear clearly from the judgment, and, therefore, they are not repeated here.

Dr. Radhabenode Pal and *Babu Panchanan Ghosal*, for the appellant.

Mr. Gunada Charan Sen and *Babu Arun Kumar Roy*, for the respondent.

PAGE J. The suit in respect of which this appeal arises was brought by a *patnidar* against a *sepatnidar* for arrears of rent. The *patnidar* had created a *darpatni* in favour of one Umesh Chandra Biswas under which Umesh became liable to pay rent at the rate of Rs. 244 per annum. Subsequently Umesh executed a document by which he created a *sepatni* in favour of the defendant under which a *jama* of Rs. 344 was fixed. It was further provided that—

"By virtue of the *sepatni* right you shall be in title and possession of the same and out of the settled *sepatni jama* of Rs. 344 you shall pay

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"Rs. 244 the *darpatni* rent to the *patnidar* and shall take the rent receipt "in my name and you shall pay me the said rent receipt and the remaining "Rs. 100 as *per kist* in the schedule below."

It is unnecessary to consider the other provisions in the document creating the *sepatni*.

The trial Court decreed the claim in part. But the lower Appellate Court allowed an appeal by the defendant, and dismissed the suit.

The question which we have to determine in this appeal is whether the plaintiff has made out any claim to recover from the defendant the monies in suit as rent or otherwise.

Dr. Pal on behalf of the *patnidar* contended that the plaintiff was entitled to recover the sum claimed either in the form of rent, or by virtue of the instrument under which the *sepatni* was created upon three grounds.

He contended that the plaintiff was entitled to recover the arrears of rent as the assignee of the rent from the *darpatnidar*. But it was neither found by the lower Courts nor has it been contended before us that there was any evidence of an assignment of the rent to the plaintiff by the *darpatnidar*. It is enough to say that there is no substance in the contention that any assignment of the rent by the assignor to the plaintiff was proved.

The learned vakil further contended that inasmuch as the defendant had paid Rs. 244, which was payable as rent under the *sepatni* to the *patnidar*, over a period of years the Court ought to hold that there was an implied contract that the said rent should be paid by the defendant to the plaintiff in future. We are unable to accede to this view. The mere payment of a sum of money by A to B cannot be made the foundation of a legal obligation on the part of A to pay to B a like sum in like circumstances in the

future. Moreover, there was no consideration passing to the defendant from the plaintiff to bind any such agreement. In our opinion, this contention also fails.

Thirdly, Dr. Pal contended that inasmuch as under the document by which the *sepatni* was created an obligation was undertaken by the *sepatnidar* to pay Rs. 244 to the plaintiff that obligation conferred a benefit upon the plaintiff which in equity entitled the plaintiff to enforce the obligation against the defendant. In support of his contention the learned vakil referred to the case of *Deb Narayan Dutt* v. *Chuni Lal Ghose* (1). In that case in the course of his judgment Jenkins C. J. observed that—

"There is a valuable exposition of the law by Lord Hatherley in the "first of these last two cases (that is *Touche* v. *Metropolitan Railway* "*Warehousing Company* (2) which was adopted by Lord Justice Cotton in "the second. The Lord Chancellor said the case comes within the authority "that where a sum is payable by A B for the benefit of C D, C D can "claim under the contract as if it had been made with himself".

Jenkins C. J. added:

"that appears to me to be a principle which is of distinct use in the "consideration of this case."

Now, if the broad proposition laid down by Lord Hatherley is to be accepted without qualification it would support Dr. Pal's contention. But these observations of Lord Hatherley must be taken with reference to the context in which they appear, and in *Touche's* case (2) it is clear that Walker was treated as holding the sum which he received from the company under the agreement between himself and the company as a trustee for the plaintiff. Lord Hatherley's observations in *Touche's* case (2) were considered in *In re Empress Engineering Company* (3). In that case Jones and Pride were solicitors who

(1) (1913) I. L. R. 41 Calc. 137. (2) (1871) L. R. 6 Ch. App. 671.

(3) (1880) 16 Ch. D. 125.

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claimed in the liquidation of the company for work done upon instructions received by one of the promoters. In the course of the argument Jessel M. R. observed, in reference to *Gregory* v. *Williams* (1) that—

"In that case Sir. W. Grant appears to have considered that there was "a declaration of trust. I know of no case where, when A simply contracts "with B to pay money to C, C has been held entitled to sue A in equity".

Referring to *Touche* v. *Metropolitan Railway Warehousing Company* (2) Jessel M. R. observed that—

"In that case the Lord Chancellor finds, as a fact, that Walker was "to receive the money as a trustee for the plaintiffs. If you can make out "that Jones and Pride are *cestuis que trust* that alters the case. It appears "to me that they are not. The promoters were liable to Jones and Pride "who are simply their creditors. A being liable to B, C agrees with A to "pay B. That does not make B a *cestui que trust.*"

In the course of his judgment Jessel M. R., after holding that, inasmuch as the agreement by the promoters with the solicitors was made by agents for the company which then was non-existent such a contract could not subsequently be ratified by the company after incorporation, and, therefore, the company was under no liability to the solicitors, added:

"Supposing, however, that it was, it is then contended that a mere "contract between two parties that one of them shall pay a certain sum to "a third person not a party to the contract will make that third person a "*cestui que trust.* As a general rule that will not be so. A mere agree- "ment between A and B that B shall pay C (an agreement to which C is "not a party either directly or indirectly) will not prevent A and B from "coming to a new agreement the next day releasing the old one. If C "were a *cestui que trust* it would have that effect. I am far from saying "that there may not be agreements which may make C a *cestui que trust.* "There may be an agreement like that in *Gregory* v. *Williams* (1) where "the agreement was to pay out of the property and one of the parties "the agreemnt may constitute himself a trustee of the property for th "benefit of the third party. So again, it is quite possible that one of th

(1) (1817) 3 Mer. 582. (2) (1871) L. R. 6 Ch. App. 671.

"parties to the agreement may be the nominee or trustee of the third "person".

In *Gandy* v. *Gandy* (1) the equitable principle again came under consideration by the Court of Appeal, and the true rule was laid down by Cotton L. J. in the following terms:

"Now, of course, as a general rule, a contract cannot be enforced "except by a party to the contract, and either of two persons contracting "together can sue the other, if the other is guilty of a breach or does not "perform the obligations of that contract. But a third person, a person "who is not a party to the contract, cannot do so. That rule, however, is "subject to this exception; if the contract, although in form it is with A "is intended to secure a benefit to B, so that B is entitled to say he has a "beneficial right as *cestui que trust* under that contract; then B would, in a "Court of equity, be allowed to insist upon and enforce the contract. That, "in my opinion, is the way in which the law may be stated."

His Lordship proceeded to refer to *Touche* v. *Metropolitan Railway Warehousing Company* (2) and, after citing the passage from Lord Hatherley's judgment which I have stated, observed:

"Now if that is intended to lay down the rule as a general proposition "of law in the general terms there used, it is not consistent with the other "cases referred to *In re Empress Engineering Company* (3) but it may that "on the facts of the former case it was considered that the contract "between Walker and the Company was entered into by Walker as a "trustee for and on behalf of the plaintiffs; and, if so, that is in accordance "with what I understand to be the law."

His Lordship then added that the observations of Jessel M. R. in *In re Empress Engineering Company* (3) which I have cited above—

"show that the general terms used by Lord Hatherley must be taken "with some qualification as laying down the general law".

The rule laid down by Cotton L. J. in *Gandy's* case (1) is illustrated by *Khwaja Muhammad Khan* v. *Husaini Begam* (4) and the cases of *Deb Narayan Dutt* v. *Chuni Lal Ghose* (5) and *Dwarika Nath Ash*

(1) (1885) 30 Ch. D. 57.
(2) (1871) L. R. 6 Ch. App. 671.
(3) (1880) 16 Ch. D. 125.
(4) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(5) (1913) I. L. R. 41 Calc. 137.

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v. *Priya Nath Maiki* (1), in my opinion, must be taken to have been based upon the same ground, namely, that under the contract a trust was created in favour of the third party.

Applying the equitable rule to the facts of this case it is clear from a consideration of the terms of the instrument by which the *sepatni* was created that that instrument was not executed for the benefit of the plaintiff in any sense, and that so far as the plaintiff was concerned the only effect of the instrument was that the *sepatnidar* agreed with the *darpatnidar* to pay to the plaintiff as a nominee of the *darpatnidar* a portion of the rent due under the *sepatni*. The equitable rule should only be applied in rare cases and under exceptional circumstances, and can have no application in a case such as the one under appeal.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

CUMING J. I agree.

B. M. S. *Appeal dismissed.*

(1) (1916) 22 C. W. N. 279.