ORIGINAL CIVIL.

Before Ameer Ali J.

1934

Dec. 11, 12.

UDAYCHAND PANNALAL.

v.

THANSING KARAMCHAND.*

Wrongful attachment—Attachment of goods not in owner's possession—Right to sell goods unaffected by attachment—Injury to right in respect of goods—Damages —Partnership of two joint families.

The owner has a present right to sell his goods unaffected by any attachment and he can claim damages for injury to such right in respect of the goods by reason of their wrongful attachment, even though he is not entitled to their possession at the time.

In such a case the owner is entitled to nominal damages only unless he can show actual loss of business.

Two joint families cannot be brought into relation of partnership between one another by an agreement between the respective *kartâs*.

ORIGINAL SUIT.

Chandanmull Khanmull, a firm of jute dealers, were indebted to several creditors including the plaintiff and the National Bank. As security for their indebtedness to the bank, 41,000 bales of jute were deposited with the bank. Pursuant to an arrangement among the creditors, the plaintiff purchased 10,750 bales at a reduced price and later pledged them again with the bank, in whose possession the goods were left. In June, 1933, Thansing Karamchand, in a suit in which the plaintiff was not a party, attached before judgment "the 41,000 bales "of jute belonging to the defendant firm in the hands of "the National Bank." The plaintiff contended that their goods, *viz.*, 10,750 bales, were thereby also attached and claimed damages.

The other facts and arguments of counsel appear from the judgment.

*Original Suit No. 1837 of 1933.

S. N. Banerjee, Khaitan and *S. P. Chowdhury* for the plaintiff firm.

B. C. Ghose, Page and *B. Roy Chaudhuri* for the defendant firm.

AMEER ALI J. The short facts of this case are as follows:—

Shortly before the events in issue in this suit, the firm of Chandanmull Khanmull, big jute dealers, were indebted to the Bank of India, and, as security for this indebtedness, they had deposited with that bank a number of bales of jute to the extent of 41,000. Before the events in suit, the liability and the security had been transferred to the National Bank. This firm of Chandanmull Khanmull were also indebted to creditors other than the bank, in particular to a firm of the name of Udaychand Pannalal, the plaintiff in the present suit. As one means of obtaining payment, the plaintiff firm, in the beginning of 1933, instituted insolvency proceedings against Chandanmull Khanmull, whom I will call the debtor firm. Pending these proceedings, a system of payment or satisfaction was discovered and certain creditors, including Udaychand Pannalal, made an arrangement to take over certain bales at a certain price, paying to the National Bank a sum of Rs. 19 per bale, which represented the fractional or proportionate amount of the indebtedness of the debtor firm to the bank, the remaining value of the bales being applied in discharge of the debtor firm's indebtedness to the creditors other than the bank. In the case of the plaintiff firm, the number of bales was 10,750. Those are the goods in question in this suit. The transfer was prior to the 29th May. On or about that date, another arrangement was entered into between the plaintiff firm and the bank. I should have mentioned, earlier that the plaintiff firm, apart from the arrangements between themselves and the debtor firm, had guaranteed the total indebtedness of the debtor firm to the bank. A letter of guarantee was issued on the 27th May, 1933, and, in support of that

1934

Udaychand Pannalal v. *Thansing Karamchand.*

Ameer Ali J.

guarantee, the 10,750 bales were pledged to the bank, a letter of lien in the usual form being executed on the 29th May, 1933.

On the 30th May, 1933, the bank made over to the plaintiff firm a letter (see first letter in the brief of Correspondence) recognising the transfer from the debtor firm to the plaintiff firm, acknowledging payment of their dues from the plaintiff firm, and acknowledging that they held the goods "deliverable "to you in trust for you under an arrangement arrived "at with you." Something turns upon the language of that clause, the position being, unless it can be successfully argued that the declaration of trust nullifies the pledge that the bank were not only trustees of the goods but that it was also entitled to retain possession as pledgee. Shortly after this, the defendant firm, Thansing Karamchand, filed an application for attachment before judgment.

It is obvious from paragraphs 4, 5, 6 and 7 that the defendant firm must have had fairly accurate information from some source or other of what had taken place between the debtor firm and the other creditors. The paragraphs in question read as follows :—

On 2nd June, 1933, upon the allegations contained in those paragraphs, an order was made in terms of the notice of motion attaching "the 41,000 bales of "jute belonging to the defendant firm in the hand of "the National Bank of India Limited subject to the "claim of the said bank." On the same date, Messrs. Khaitan & Company for the plaintiff firm called upon the defendant firm to withdraw the attachment and claimed a sum of Rs. 50,000 as damages. On the 5th June, the bank wrote to the solicitors of the defendant firm stating "the number of bales in the bank's hands "belonging to the defendant firm is approximately "25,302."

So far as the correspondence relates to negotiations for settlement between the attaching creditor and the debtor firm I need not refer to it.

On the 5th June, the attorneys for the defendant firm answered Messrs. Khaitan & Company's letter (see page 10 of brief) denying knowledge of the sale by the debtor firm of 10,750 bales and stating that they had "not attached any goods belonging to the "plaintiff firm" and quoting the words of the writ of attachment. On the 5th June also the sub-manager notified the parties concerned of the order of attachment, treating it as an attachment of 41,000 bales of jute. On the 5th also an application was filed by the plaintiff firm to have the attachment removed, and on the 7th (see page 23 of brief) the attorneys for the defendant firm refused to discuss the matter further with Messrs. Khaitan & Company, as the matter had been argued in Court and was subject to the proceedings in Court. The attachment in question, and apparently another attachment with which we are not concerned, were removed by the 10th June, although actually the plaintiff firm did not receive notice of withdrawal of the attachment until, I think, the 13th. I should mention that the motion for removal of the attachment came up for hearing on the 13th or thereabouts and the attachment having already been removed no order was made except that the plaintiffs in this suit were awarded the costs of the application. The plaint in this suit was filed on 16th August, 1933.

The issues raised were as follows:—

1. Did the defendant cause 10,750 bales to be attached as alleged in the plaint?
2. If so, did the defendant act with malice and/or negligence? (see paragraph 6 of the plaint).
3. If so, were the said bales by reason of such attachment withheld from the plaintiff until the 13th June, 1933? (see paragraph 4 of the plaint).
4. Was the plaintiff by reason of such attachment deprived of possession of the goods, or power of disposing same? (see paragraph 4).
5. Damages.

At the time the issues were raised I suggested that issues Nos. 3 and 4 were not issues essential to the action being merely questions of fact having a bearing on issue No. 1 (the *factum* of the attachment) and issue No. 5 (*quantum* of damage).

1934

Udaychand Pannalal v. *Thansing Karamchand.*

Ameer Ali J.

During the course of the trial a further issue was raised on the results of cross-examination by counsel for the defendant, namely, whether the suit was maintainable in its present form.

Evidence was given of the matters in issue by the plaintiff's *gomastâ*, one Chunilal, and by one of the proprietors Johorimull on the incidental question raised as to joint family or partnership. The evidence of Chunilal was directed to show that he could not get the goods from the bank on the 2nd June because of the attachment. He spoke of a certain interview, and also attempted to bring out throughout his evidence that but for the attachment the bank would not have retained the goods notwithstanding the letter of lien.

No evidence was called on behalf of the defendant firm.

I propose to deal with the technical point as to the maintainability of the suit last.

Counsel's contentions on behalf of the defendant firm were as follows :—

First of all, that no property of the plaintiff was attached. For his argument on this point Mr. Page relied upon the following: First, the form of order itself, *i.e.*, the words "belonging to the defendant." Secondly, he relied upon the fact there was in fact no physical attachment, the order being made effective by a notice to the bank. Thirdly, he suggested that the bank in fact was aware that the order related only to such goods as had not been transferred to the plaintiff firm, *i.e.*, the goods other than the 10,750 bales. He contended, that, on the terms of the order, the case was precisely analogous to the case of an attachment of a certain sum to the credit of a customer in a bank, a sum which before the order for attachment had been reduced by being drawn on.

The matter seems to me to depend not very much upon how the bank understood the position, although it appears to me clear (notwithstanding the letter of

explanation by the bank of 5th June) that the bank regarded the attachment as an attachment of the whole 41,000 bales. It appears to me to depend upon whether the property attached is 41,000 bales described as belonging to the defendant, or such of the 41,000 bales as belonged to the defendant. I read the order as an attachment of 41,000 bales. Goods, therefore, of the plaintiff were attached.

Mr. Page's further argument was upon the two intermediate issues that were raised, namely, whether the goods had been withheld and whether the plaintiffs had in fact been deprived of their use. He suggested from the correspondence that the bank in fact would have delivered notwithstanding the attachment. That I am not prepared to find. He suggested also that it was the duty of the plaintiffs to have sold forward so as to minimise the loss. That argument, again, does not appeal to me. He lastly relied upon the fact of the pledge. Mr. Page used it to show that the plaintiff in fact could not have obtained possession of the goods, that, therefore, the attachment was not the effective cause of the detention. Hence there was no attachment in fact. Alternatively no damage was in fact caused.

Mr. Page, on this question of pledge, suggested that the bank would notwithstanding the attachment have delivered if there had been no pledge. Neither side called the bank, which I find would not have been prepared either to waive their pledge or to disregard the order of attachment.

As regards the effect of the pledge, I am not prepared to accept Chunilal's evidence so far as it was directed to show that the bank would have delivered had there been no attachment, an impression which he sought to give from his evidence of the conversation of the 2nd June and of the relationship between the plaintiff firm and the bank. As regards that interview, I am of opinion that so far as the statement by the officer of the bank is sought to be used for this purpose it is inadmissible.

1934

Udaychand Pannalal v. *Thansing Karamchand.*

Amcer Ali J.

In my opinion, the fact of pledge as a matter of law assumes an importance considerably greater than that originally attributed to it by counsel on either side.

Yesterday, Mr. Banerjee contended, simply—Attachment of the plaintiff's goods, detention from the 2nd to the 13th June, therefore, damages must be assessed on the difference between the highest rates between those dates and the market price at the date of release. It appeared to me that this could not possibly be the position when the person claiming damages was not entitled to possession, and that if the case was based upon a right to damages for any interference with a reversion or reversionary right the basis of damages must be entirely different. I, therefore, asked Mr. Banerjee to consider that point further. Mr. Khaitan, who followed Mr. S. N. Banerjee this morning, apparently anticipated the further difficulty which appeared to me last night on looking into Arnold on Damages, namely, whether an owner not entitled to possession is at all entitled to claim for trespass.

If I may say so, Mr. Khaitan dealt with the matter logically and frankly. He conceded and, I think, on the authorities referred to in Arnold on Damages, he was bound to concede that *qua* action for trespass simply an owner would not be entitled to sue unless entitled to possession. On this point, he had to fall back, therefore, upon the conversation of the 2nd June, 1933, and upon the further argument, namely, whether, having regard to the form of the letter of trust, the pledge could be regarded as having been superseded. In other words, had the plaintiff firm the right, notwithstanding the pledge, to call for an immediate possession?

As to the first point, the conversation of the 2nd June, I have already expressed my view. On the second also, I am of opinion that the transaction of pledge and the transaction of acknowledgment or declaration of trust by the bank must be regarded as one, neither transaction giving place to the other.

The next point I asked Mr. Khaitan to deal with was whether, irrespective of an ordinary suit for trespass or detinue, the owner, not entitled to possession, could sue for damages at all, *i.e.*, had the right to sue. On that point, I think, there is some difficulty. According to the authorities, he can do so if there has been some "permanent injury" to the goods in respect of which the trespass has been committed. The words in Clark and Lindsell, 8th edition being a little wider, namely, "loss or permanent damage of his chattel." It is contended, therefore, by the defendant firm that there is no right to cover unless it is a case of actual injury to the goods. On the other hand, the question which troubles me is this, assuming that an attachment does affect the capacity of an owner to sell, should that not give a right of action? It might in certain cases be a matter of great importance. I am not prepared to hold that there is no such cause of action. I think, there is, even though the injury is not to the goods but to a right in respect of the goods.

But it appears to me, and this brings one back to the original point discussed yesterday with Mr. Banerjee, that, as regards measure of damage, to apply the principles which would be applied in the case of trespass to or detention of the goods of a person entitled to possession would be utterly wrong.

Mr. Khaitan contended on this point that, even so, he would not be obliged to prove that the plaintiff had in fact obtained any contract; there I agree. He contended further that the measure of damages would, at any rate, be analogous. There I do not agree. I think the plaintiff has to show circumstances pointing to an actual loss of business of some kind. On the facts before me I do not find that he has established such loss.

That would yet entitle the plaintiff to nominal damages. The question remains whether in this case the damages should be increased upon the basis of malice using the expression in its extended meaning. On this point, the petition for attachment before

1934

Udaychand Pannalal v. *Thansing Karamchand.*

Ameer Ali J.

judgment has been relied upon. The matter depends again upon the inference to be drawn from paragraphs 5, 6 and 7. The plaintiffs contend that the defendants must have known the full facts of the transfer of the 10,750 bales, that they knew it to be genuine, but in order to obtain attachment before judgment they alleged that it was surreptitious and with a view to defeat their claim. The defendant's counsel suggest that the allegations really relate to matters in insolvency and that no suggestion was made against the plaintiff firm of the genuineness or honesty of the plaintiff firm's transactions.

I do not think it is possible to go quite as far as this. On the other hand, there were all sorts of arrangements going on between the plaintiff firm and other creditors with the debtor firm from which the defendant firm in this case had been left out. They were naturally agitated and desired to get in. Some allowance must be made for that. I assess the damages at Rs. 500.

The point as to the maintainability of this suit, although one for which I feel no great enthusiasm, is yet substantial. Its determination depends upon the construction to be put upon a certain document and the very scanty oral evidence. It is this: The first question asked in cross-examination of Chunilal was the names of the partners of the plaintiff firm. The witness gave Hazarimull, Johorimull and three others. He also stated that a few minors were interested in the business. In question 22 he stated those other than Hazarimull were members of the joint family (see also question 23). There was re-examination to show that Hazarimull and Johurimull had certain shares covering the whole of the 100 per cent. interest in the firm.

Johurimull put in an award purporting to provide for adjustment or dissolution of the alleged partnership. This has been relied upon by the defendant firm, who asked me to infer from it that the alleged partnership was an arrangement between Hazarimull and Johurimull as respective *kartâs* of two joint

families, the result of the arrangement being a union of two joint families through their *kartâs* which cannot in law be a partnership. The defendant relies also upon the evidence of Chunilal which if it is to be taken as correct would indicate that there was one joint family not two. Mr. Page has been good enough to address me on this point and I fully accept his contentions that neither can one joint family be a partnership of itself, nor can two joint families be brought into relation with one another by an agreement to be a partnership. The whole question, to my mind, is whether I should so read what evidence there is and the documents as showing that there was an agreement of partnership between Hazarimull and Johurimull, both members of joint families, and having rights and duties *vis a vis* those families but not an agreement between the joint families through the persons named.

On the whole that is the view I take, namely, that there was a partnership between Hazarimull and Johurimull, the fact being that each was a member of joint family and *kartâ*.

Attorneys for plaintiff firm: *Khaitan & Co.*

Attorneys for defendant firm: *H. C. Banerjee & Co.*

G. K. D.