

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánubhái Haridás.

1885
February 19.

JAGA'BHAI LALLUBHAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* RUS-
TAMJI NASARWANJI (ORIGINAL DEFENDANT), RESPONDENT.*

Equitable assignment—Contract—Power of Attorney—Hindu law—Undivided family—Contract made by member of such family in individual capacity—Right to sue alone—Firm—Partnership—Contract made by one member of firm binding on firm.

The firm of Sowerby and Co., the partners of which were W. Sowerby and Framji Edulji, took a contract from Government on 12th November 1877 to construct a barrel-house at the Gunpowder Manufactory at Kirkee, and on the 28th November 1877 the plaintiff agreed to advance monies "up to Rs. 15,000" for the purpose of enabling the firm to carry out the contract. Under the agreement the plaintiff was to receive all sums to become due from the Government on the contractors' bills and to pay the balance to the firm after repaying himself all advances with interest. On the same day the firm executed a power of attorney to the plaintiff, authorizing him to receive from the Government Engineer all such sums to become due to the firm under the contract, which power of attorney was deposited by the plaintiff in the office of the Executive Engineer at Poona. In March or April 1878 Sowerby left for England, up to which time Rs. 34,900 had been advanced by the plaintiff and a balance of Rs. 14,942-5-10 still remained due to him after giving credit for the sums received on the bills passed by the Executive Engineer. On 24th July 1878 the plaintiff entered into a fresh agreement with Framji Edulji, similar to the former one, to make further advances to the firm up to Rs. 16,000 in addition to Rs. 15,000 on the same terms as those mentioned in the previous agreement, and, by means of these advances, the contract was completed at the end of 1879. In 1878 the defendant obtained a decree against Sowerby and attached the right, title, and interest of Sowerby in a sum of Rs. 5,034-11-9 in the hands of the Executive Engineer which was then due to the firm on the contract. The plaintiff, who alleged that Rs. 13,700-1-11 were due to him from the firm, applied to have the attachment removed, which application was refused on 30th September 1879 and the sum attached was paid to the defendant. The plaintiff sued the defendant to recover from him Rs. 5,034-11-9.

Held, that although the plaintiff might be a member of an undivided Hindu family, still as the contract was entered into with the plaintiff in his individual capacity and as there was nothing on the face of the contract to show that the plaintiff was acting on behalf of the family, the plaintiff was entitled to sue alone.

Held also, that the first agreement of 28th November 1877, coupled with the execution of the power of attorney to him of the same date, amounted to an assignment to the plaintiff of the sums to become due to Sowerby and Co. on the bills passed by the Executive Engineer.

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Held also, that the second agreement although made by one member only of the firm of Sowerby and Co. with the plaintiff, was, under the circumstances, both necessary to the carrying out of the partnership business and in accordance with the ordinary practice of such partnerships as that of Sowerby and Co., and was therefore binding on the firm, and that the two agreements, accompanied by the power of attorney, operated as an assignment of all the monies to become due on the contractors' bills as a security for the plaintiff's advances with interest, and that the plaintiff was therefore entitled to recover the sum claimed from the defendant,

THIS was a regular appeal from the decision of Khán Bahádúr B. E. Modi, First Class Subordinate Judge of Surat.

The plaintiff Jagábhái sued the defendant Rustamji for a decree declaratory of his right to receive a sum of Rs. 5,034-11-9 paid by the Executive Engineer of Poona and Kirkee to the defendant in execution of a decree obtained by the defendant against one William Sowerby; and for the recovery from the defendant of the said sum with interest.

The firm of Sowerby and Co. (the partners of which were Sowerby and Frámji), on the 12th November 1877 took from Government a contract to build a barrel-house at Kirkee. Having no capital of their own, they and one Dorábji, a sub-partner of Frámji, on the 28th of November 1877, entered into an agreement with the plaintiff, whereby the plaintiff undertook to advance to the firm monies "up to Rs. 15,000" for the purpose of enabling them to carry out their contract. By the terms of this agreement the plaintiff was to receive all sums to become due from the Government on the contractors' bills, and to pay to the firm the balance after repaying himself all advances with interest. On the same day, *i. e.* the 28th of November 1877, the firm executed to the plaintiff a power of attorney authorizing him to receive from the Executive Engineer all sums to become due to the firm.

About April 1878 Sowerby went to England, leaving Frámji to carry out the work contracted for. At that time the advances made by the plaintiff amounted to Rs. 34,900 and the balance remaining due to the plaintiff was Rs. 14,942-5-10.

On the 24th of July 1878 the plaintiff entered into a fresh agreement with Frámji and his sub-partner Dorábji, whereby the plaintiff undertook to make, in addition to the Rs. 15,000, further advances up to Rs. 16,000 on the same terms as before.

The contract was completed in 1879. The defendant Rastamji had in the meantime, that is in 1878, obtained a decree against Sowerby and one Dhanji Sháh for Rs. 5,034-11-9, and had attached this sum in the hands of the Executive Engineer. The plaintiff applied to raise the attachment, but his application was refused and the said sum was paid to the defendant. The plaintiff now claimed to recover it.

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The defendant amongst other things contended that the plaintiff had four undivided brothers and could not therefore sue alone; that there was no cause of action against him; that the plaintiff had colluded with Sowerby, Frámji, and Dorábji to deprive him of his money.

The Subordinate Judge was of opinion that joint creditors must all sue as joint plaintiffs, and that the omission of his brothers as parties was fatal to the plaintiff's suit. He accordingly rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

Gokuldás Kahándás Párekh appeared for the appellant:—The brothers of the appellant were not necessary parties as the contract made by the appellant was in his individual capacity and not as a member of his firm or family (Lindley on Partnership, p. 477). In the case of *Dulárechand v. Balrámdás*⁽¹⁾ the contract was with the firm and the Subordinate Judge was wrong in relying upon it. If any defect existed it was cured by the concurrence of the appellant's brothers to allow appellant to proceed with the suit. At the date of the attachment of the money in the hands of the Executive Engineer the firm of Sowerby and Co. was indebted to the plaintiff to the extent of over Rs. 14,000. The two agreements passed to the plaintiff, coupled with the deposit of the power of attorney, amounted to an assignment to him of the sums to become due on the contractors' bills. The Executive Engineer could not pay them to the firm but to the plaintiffs alone. The defendant's decree was not against both the partners of the firm of Sowerby & Co. and no attachment could properly be made of the monies due to the whole firm. *Karimbháí v. The Conservator of Forests*.⁽²⁾ The second agreement was as much binding on the

(1) I. L. R. 1 All. 453.*

(2) I. L. R. 4 Bom. 222.

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firm as the first, for, although Sowerby had not signed it, he had ratified it by his conduct.

Máneksúth Jhingirsháh Táleyarkhán for the respondent:—
The suit by the plaintiff alone was unsustainable—*Kábidás Kevaldás v. Nathu Bhagwán* ⁽¹⁾; *Krishnaráv v. Govind*; ⁽²⁾ and *Rájendronáth v. Shaikh Mahomed Lál*. ⁽³⁾ The agreements do not operate as an assignment. Under the first agreement the plaintiff undertook to advance no more than Rs. 15,000, and when that was advanced the agreement was fully and completely satisfied and the contract between the plaintiff and the firm of Sowerby came to an end. The second agreement was not signed by Sowerby and was not binding upon him. The plaintiff's suit must therefore fail.

SARGENT, C. J.—This suit arises out of the following undisputed facts. The firm of Sowerby & Co., the partners of which were William Sowerby and Frámji Edulji, took a contract from Government, on 12th November 1877, to construct a barrel-house at the Gunpowder Manufactory at Kirkee, and, on the 28th November 1877, agreed with the plaintiff to advance monies up to Rs. 15,000 for the purpose of carrying out the contract, the plaintiff to receive all sums to become due from the Government on the contractors' bills, and to pay the balance to the firm after satisfying the advances, with interest. On the same day the firm executed a power of attorney to the plaintiff, authorizing him to receive from the Government Engineer all such sums to become due to the firm under the contract, which power of attorney was deposited by plaintiff in the office of the Executive Engineer at Poona.

In March or April 1878 Sowerby left for England, up to which time Rs. 34,900 had been advanced by plaintiff, and a balance of Rs. 14,942-5-10 still remained due to him after giving credit for the sums received on the bills passed by the Executive Engineer. On 24th July 1878, Frámji Edulji, with the view to complete the contract, entered into a fresh agreement with the plaintiff similar to the former one, to make further advances up to Rs. 16,000 in addition to the Rs. 15,000 on the same terms

(1) I. L. R. 7 Bom. 217.

(2) 12 Bom. H. C. Rep. 85.

(3) I. L. R. 8 Calc. 42 P. C.

as those contained in the previous agreement, and by means of these advances, the contract was completed at the end of 1879.

In 1878, the defendant obtained a decree against Sowerby, and attached the right, title, and interest of Sowerby in a sum of Rs. 5,034-11-9 due to the firm on the contract. The plaintiff, who alleges that Rs. 13,700-1-11 are still due to him from the firm, applied to have the attachment removed, which application was refused on 30th September 1879, and the sum attached was paid to defendant. Hence the present suit to determine the rights of the parties. The Court below found that the plaintiff could not sue alone, but that in any case he was not entitled to recover the money attached and received by defendant. Against that decree the plaintiff now appeals.

As to the first point, we think that as the contract was entered into with the plaintiff in his individual capacity, and not on behalf of the family, there was nothing on the face of the contract to show that he was acting on behalf of the family firm, and the plaintiff was entitled to sue alone—(see Lindley on Partnership, p. 477). In *Dularchand v. Bulramdas*⁽¹⁾, relied on by the Subordinate Judge, the contract was with the family firm. So also in *Kilidás Kovalhús v. Nathu Bhagván*⁽²⁾ referred to by Mr. Máneksha:

The next question for determination is, whether the agreements entered into between the firm of Sowerby and Co. and the plaintiff, that the latter should make advances to them for the purposes of the contract with Government, operated as an assignment to the latter of the sums to become due to Sowerby and Co. on the bills passed by the Executive Engineer. As to the first agreement of 23th November 1877, it was entered into with the firm, and, coupled with the power of attorney of even date, had, we cannot doubt, the effect of an assignment. Taken together the two instruments amount, in the language of Sir John Leach in *Watson v. Duke of Wellington*⁽³⁾, “to an engagement to pay out of a particular fund,” which the Master of the Rolls says amounts to an assignment of the fund. Again, in *Burn v. Carvalho*⁽⁴⁾, Lord Cottenham held that a letter to the

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(1) I. L. R. 1 All. 453.

(2) I. L. R. 7 Bom. 219

(3) 1 Russ. and Myl. 602.

(4) 4 Myl. and Cr. 690.

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plaintiff telling him that he would write to his agent to meet his bills out of funds in his hand, followed by a letter to the agent directing him to do so, amounted to an equitable assignment of the funds. Here the power of attorney must be deemed to have been intended to be deposited by plaintiff with the Government Engineer, and we have therefore in this case virtually, although in a different form, all the elements which existed in the latter case for constituting an assignment of the monies in the hands of the Executive Engineer.

It was contended, however, for the defendant, that the above agreement was satisfied when Rs. 15,000 had been advanced, but we agree with the Subordinate Judge that upon the right construction of that document (a construction which is assisted by the conduct of the parties themselves), the expression "up to Rs. 15,000" must be read as meaning that the plaintiff should make advances subject to there not being at any time a larger balance than Rs. 15,000 against the firm. However, it is clear that before the date of defendant's attachment, all monies advanced under the agreement of 28th November 1877 had been paid out of the monies due on the contractors' bills, and that the advances, in respect of which plaintiff claims to have had a lien upon the monies attached by the defendant, were made under the second agreement entered into by Framji with plaintiff on 24th July 1878. The question, therefore, arises, whether that agreement, which is in the same form as the first one, was binding on the firm. It appears from the correspondence between Sowerby and Framji that the former contemplated the carrying out of the Poona contract by Framji during his absence with the aid of advances from the plaintiff. This is shown clearly by Sowerby's letters of 24th July 1878 and 10th October 1879. In the former, he says: "Mind you take care about Poona works, and finish properly in good time." In the latter, he talks of coming out "to settle the accounts"; and it was not suggested that the firm had any capital of its own. It further appears from Framji's evidence that there being a sum of Rs. 14,000 due on first agreement, the plaintiff refused to make further advances unless a fresh agreement was entered into with him, and that he, accordingly, passed the agreement of 24th July 1878 to him

and that without further advances the work must have stopped, in which case the deposit money would have been forfeited; and lastly, we think we may take judicial notice of the fact that it is the ordinary practice for contracts of this nature to be carried out, at any rate to a great extent with borrowed capital.

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Under all these circumstances, we think that the second agreement was both necessary to the carrying out of the partnership business and in accordance with the ordinary practice of such partnerships as that of Sowerby and Co., and that it was therefore binding on the firm—(see 7 M. and W., 595, and Lindley on Partnership). That being so, the two agreements, accompanied by the power of attorney, remained in force throughout, operated as an assignment of all the monies to become due on the contractors' bills as a security for plaintiff's advances with interest. The Subordinate Judge is of opinion that the plaintiff's books and sámádaskats are genuine, and have not been successfully impeached by the defendant, and we see no reason to differ from that opinion; and as they show that the plaintiff's advances, with interest, exceeded the sums received by him from the Executive Engineer under the contract by more than the sum of Rs. 5,035-11-9, which was paid to the defendant under the attachment, the plaintiff is entitled to recover the latter sum as money belonging to him under the assignment from the firm, with interest from 30th September 1879 when it was so paid to the defendant.

The decree must, therefore, be reversed, and judgment passed for plaintiff for Rs. 5,034-11-9 and interest at 9 per cent. from 30th September 1879 until payment, and costs throughout.

Decree reversed.