Narandas Morardas Gaziwala & Ors.

Vs

S. P. Am. Papammal & Anr.

Civil Appeals Nos. 177 and 178 of 1964

(K. Subha Rao, V. Ramaswami-I JJ)

25.03.1966

JUDGMENT

RAMASWAMI, J.-

These appeals are brought, by special leave, from the judgment and decree of the Madras High Court dated September 20, 1961 in A.S. Nos. 45 and 202 of 1957.

Narandas Morardas Gaziwala and Lakshmi Chand & Co. were two firms of partnership carrying on business in lace and silver thread at Surat in the State of Bombay. They had dealings with another firm at Kumbakonam - Krishna and Company - who acted as their agents for selling their goods in the three districts of Tanjore, Tiruchirapalli and Mathurai in the State of Madras on commission basis. The two partners of Krishna & Co. were Murugesa Chettiar and his wife's sister's husband Gopal Chettiar. It appears that Krishna & Co. was acting as commission agents on behalf of the two firms at Surat from 1944 till 1951 when the partnership of Krishna & Co. became dissolved by mutual agreement between the partners. Murugesa Chettiar, one of the partners of Krishna & Co. tool over all the assets and liabilities of the firm on dissolution and the other partner Gopal Chettiar retired from the firm. In respect of the dealings of the two firms at Surat (hereinafter to be referred to as the Surat Firm) with Krishna & Co., the latter became indebted in 1951. On April 1, 1951 Murugesa Chettiar (hereinafter referred to as the plaintiff) executed a promissory note in favour of Narandas Morardas Gaziwala for a sum of Rs. 7,500/- the amount ascertained as due and payable by Krishna & Co. in respect of the dealings of that firm with the Surat firm on a settlement of account. It is the case of the plaintiff that on April 1, 1951 the Surat firm constituted Murugesa Chettiar as the sole agent for selling their goods bearing the trade mark - Napoleon"..... Vivekanada" and other marks for the three districts for a period of 5 years from April 1, 1951 agreeing to pay commission at a flat rate of Rs. 2/- per 'mark' for all sales effected in those territories either on orders booked by him or not. The case of the plaintiff was that the Surat firm circumvented the terms of this contract of sole agency and privately effected sales through others or direct to customers in those territories. The plaintiff's contention further was that the Surat firm as part of this agreement of sole agency agreed to have its indebtedness under the promissory note adjusted towards the commission that may be earned by him. The plaintiff therefore instituted O.S. No. 87 of 1954 in the District Munsif's Court, Kancheepuram praying for rendition of accounts from April 1, 1951 till the date of the suit in order to ascertain the amount due and payable to him. The Surat firm in its turn instituted O.S. no. 21 of 1954 in the court of Subordinate Judge, Chingleput against the plaintiff seeking to recover the amount due under the promissory note, viz., a sum of Rs. 7,500/-. By an order of the District Court, Chingleput O.S. no. 87 of 1954 on the file of District Munsif, Kancheepuram was transferred to the file of the Subordinate Judge, Chingleput and taken on his file as O.S. no. 35 of 1955. Both the suits were tried together by consent of parties. On December 12, 1956 the Subordinate Judge held that

the plaintiff was constituted as the sole agent on commission basis for the three territories, Tanjore, Tiruchirappalli and Madurai for a period of 5 years as pleaded and proved by him and the Surat firm was liable to render an account of their sales in those territories from April 1, 1951 and accordingly granted a preliminary decree for rendition of accounts. In O.S. no. 21 of 1954 the Subordinate Judge granted a decree for the amount covered by the promissory note but directed that the decretal amount should be adjusted out of the commission that may be found due and payable on taking of accounts in O.S. no. 35 of 1955. The Surat firm preferred an appeal against the decree in O.S. no. 21 of 1954 - A.S. no. 45 of 1957. They also preferred an appeal against the decree in O.S. 35 of 1955 to the District Court of Chingleput and that appeal was transferred to the High Court and heard along with A.S. no. 45 of 1957. The High Court, by its judgment dated September 20, 1961, dismissed both the appeals.

The first question presented for determination in these appeals is whether the plaintiff is entitled to sue for accounts, he being the agent and the defendant-Surat firm being the principal. Section 213 of the Indian Contract Act specifically provides that an agent is bound to render proper accounts to his principal on demand. The principal's right to sue an agent for rendition of account is, therefore, recognised by the statute. But the question is whether an agent can sue the principal for accounts. There is no such provision in the Indian Contract Act. In our opinion, the statute is not exhaustive and the right of the agent to sue the principal for accounts is an equitable right arising under special circumstances and is not a statutory right.

In English law an agent has a right to have an account taken, and where the accounts are of a simple nature they can be taken in an ordinary action in the Queens' Bench Division (Halsbury's Laws of England, Vol. I, p. 196). In Bowstead on Agency, 12th Edn., p. 173 it is observed as follows :

> "Where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily dealt with in an action at law, the agent has a right to have an account taken in equity, but the relation of principal and agent is not alone sufficient to entitle an agent to an account in equity, when the matter can be dealt with in an section at law."

In the 14th edition of Story's Equity Jurisprudence the learned author, after setting out the general law that an agent is not entitled to sue his principal for accounts, observes as follows :

> "There are usually exceptions to all rules, and where the principal has kept the accounts between him and his agent and the matters and things transacted in the course of the agency are within his own peculiar knowledge, the agent may ask for accounting."

In 1852 it was held in Padwick v. Stanley [68 E.R. 664] that merely because the principal was entitled to have an account taken in equity as against his agent, it by no means followed that the agent had a similar right against his principal. Notwithstanding this ruling a suit by an agent against his principal for accounts was entertained by the Vice-Chancellor in Shepard v. Brown. [66 E.R. 681]. In that case, the plaintiff alleged that he was employed by the defendants to obtain orders for goods manufactured by them and that he was to be allowed remuneration in the shape of commission upon the amount of all goods sold under orders which were obtained through his efforts. The plaintiff sought an account of all orders received and executed by the defendants through his exertions and to have it ascertained how much was payable to him for commission in respect of the goods so sold. The Vice-Chancellor overruled the demurrer that the plaintiff might

recover in an action the whole amount of that commission which he was seeking to recover by account in the Equity Court and observed as follows :

> "Where the case of the plaintiff is one in which he seeks an account of transactions and dealings with the defendants, the evidence of which transactions must remain principally, it not entirely, in the hands of the defendants, it is extremely difficult to say that, upon a bill seeking an account of that kind upon a case so stated, this Court has no jurisdiction to entertain it."

The very next year the Appeal Court in Chancery ruled that a bill for an account in equity by an agent against his principal for his commission on orders obtained by the agent was demurrable. It was held in Smith v. Leveaux [46 E.R. 274] that the fact that the agent may be ignorant of the orders did not entitle him to file a bill for an account of what was due to him for commission, but that his remedy was at law. According to Lord Justice Turner, in the absence of an allegation as to complication of accounts, the bill could not be entertained in equity. The remedy at law was not however doubted, though that remedy was not as efficacious as the equitable remedy in matters of account. But the principle was affirmed by the Vice-Chancellor again in a later case, Blyth v. Whiffin, [(172) 27L. T.R. 330] that the agent can maintain a bill in equity against his principal for an account in special circumstances. It was observed by the Vice-Chancellor in that case :

> "With regard to that question, whether an agent can maintain a bill against his principal for an account, it is not necessary to go further than to say I entertain no doubt on the subject..... if there are complicated accounts it is just as much open to the suit of the agent against the principal as on the part of the principal against the agent; but in neither case is it to be permitted unless there be a complicated account."

The right of an agent to claim an account against the principal for the commission due to him on orders received by his principal from the customers introduced by the agent was recognised also in Bullen & Leake's Precedents of Pleadings, 11th Edn. at pp. 71-72.

In our opinion, the legal position in India is not different. Though an agent has no statutory right for an account from his principal, nevertheless there may be special circumstances rendering it equitable that the principal should account to the agent. Such a case may arise where all the accounts are in the possession of the principal and the agent does not possess accounts to enable him to determine his claim for commission against his principal. The right of the agent may also arise in an exceptional case where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into. This view is borne out by the decision of the Madras High Court in Ramachandra Madhavadoss Co. v. Moovakat Moidunkutti Birankutti & Bros. Firm. Cannanore [A.I.R. 1938 Mad. 707], of the Lahore High Court in Ram Lal Kapur & Sons v. Asian Commercial Assurance Co. Ltd. [A.I.R. 1933 Lah. 483] and of the Nagpur High Court in Basant Kumar and others v. Roshanlal [I.L.R. [1954] Nagpur 453]. In the present case the High Court has found that the transactions in respect of which the plaintiff is entitled to commission are peculiarly within the knowledge of the principal alone, viz., of the Surat firm. There is also prima facie evidence adduced on behalf of the plaintiff in this case in support of his allegation that the Surat firm had made direct sales to customers in contravention of the contract of sole agency granted to the plaintiff. The High Court referred in this connection to the evidence of the plaintiff - Exs. A-26 and A-28 - which are complaints made by the plaintiff to the Surat firm with regard to direct sales made to Mr. M. K. Iyengar. The High Court has also observed that to none of the letters or telegrams from the plaintiff

the Surat firm or their accredited representative Ratilal cared to send any reply. We are, therefore, of the opinion that, in the special circumstances of this case, the plaintiff is entitled to sue the Surat firm for accounts for the material period.

We proceed to consider the next question involved in this case viz. whether the plaintiff is entitled to set up a perole agreement to prove the condition precedent as to the enforceability of the promissory note. The argument of the Solicitor-General on behalf of the Surat firm is that the plaintiff is precluded from setting up a parole agreement by reason of the provisions of s. 92 of the Evidence Act which states :

> "92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :
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> #Proviso (1) .....Proviso (2) .....##
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> Proviso (30) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> #.....".##

It was submitted by the Solicitor-General that the High Court has found that there is an agreement between the parties that the promissory note should be discharged by commission payable by the Surat firm. It was contended that the agreement was with regard to the mode of discharge of the obligation of promissory note and not a condition precedent to its enforceability. It was therefore argued that the bar under s. 92 of the Evidence Act operates and the plaintiff was not entitled to adduce any evidence with regard to a parole agreement. The contention was that the promissory note represented in law an unconditional undertaking to pay an amount which the plaintiff was already under a liability to pay and it was not open to him in law to plead a contemporaneous oral agreement contrary to the terms of that undertaking. We are unable to accept the submission of the Solicitor-General as correct. The finding of the High Court is that there was a collateral oral agreement that the obligation under the promissory note will not be enforced for 5 years and unless the amount was due after accounting for the period of the commission agency. In our opinion, the agreement was not related to the mode of discharge of the obligation under the promissory note but that it was a condition precedent to the enforceability of the promissory note and it is open to the plaintiff to adduce evidence of oral agreement under the 3rd proviso to s. 92 of the Evidence Act. The view that we have taken is borne out by the decision of the Judicial Committee in Rowland Ady and other v. Administrator-General of Burma [A.I.R. 1958 P.C. 198]. In that case it was observed by the Judicial Committee that it is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. It was therefore held by the Judicial Committee in that case that where the promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to

make demand until a certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Such an oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of s. 92 of the Evidence Act. On the facts of that case the Judicial Committee held that by terms of the oral agreement no liability under the note could arise until the happening of an event and that being so, the case fell within the 3rd proviso to s. 92 of the Evidence Act. It was further made clear that unless the agreement had the effect of making the liability conditional upon the happening of an event, proof of an oral agreement at variance with the terms of the note would not be permitted. At page 202 of the Report, Lord Wright observed as follows :

> "A case like the present is to be distinguished from that dealt with in Ramjibun Serowgy v. Oghore Nath Chatterjee - I.L.R. 25 Cal. 401. - in which the promissory note, though absolute in it terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. Sale J., in rejecting this evidence, expressed his opinion that the proper meaning of Proviso (3) was that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. This description in their Lordships' judgment applies to the present case. To the same effect Page J., in Walter Mitchell v. A. K. Tennent - I.L.R. 52 Cal. 677. - held that the collateral agreement alleged in that case constituted a condition precedent to the attachment of any obligation under the cheques in question so that they remained inoperative until the condition was fulfilled."

In that present case also we are of opinion that the oral agreement found to have been proved by the High Court constituted a condition precedent to the attaching of the obligation under the promissory note and falls within the terms of the 3rd proviso to s. 92 of the evidence Act and it was, therefore, open to the plaintiff to lead evidence and to prove such an oral agreement.

For the reasons expressed we hold that the judgment of the Madras High Court is correct and both these appeals must be dismissed with costs.

Appeals dismissed.

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