CALCUTTA HIGH COURT

Khirod Behari Dutt

Vs

Man Gobinda

(Lort-Williams ,J.)

16.03.1934

JUDGMENT

Lort-Williams, J.

1. This appeal arises out of a suit for arrears of rent. The facts are not disputed. The plaintiff is the usufructuary mortgagee of the Zamindar (defendant 7). The Dutta defendants (defendants 1 to 6) are the Zamindar's tenants of the jama in suit consisting of seven moujas in pergana Shyamsundarpur. The Panda defendants (defendants 8 to 17) held the land in darmokarari lease under the Dutta defendants by a kabuliyat wherein it was stipulated that the Pandas would pay the Dutta's mokarari rental direct to the Zamindar and would indemnify the Duttas against any claim made by him. Further it was stipulated as security for the due discharge of my liabilities for the said jama and the said Trust (Barat) as described above in the present kabuliyat, I do hereby create a charge (pratibandhak) upon my mokarari interest in the moujas of Jharya and Shyampur, both in my khas possession,

2. This is an agreed translation. The kabuliyat was acted upon by all the parties interested, in respect of former payments of rent. That is to say the Pandas used to pay the Zamindar's rent direct, and the arrangement was accepted by him. The sole question for decision is, whether the plaintiff can rely upon this contract which was made between the Pandas and the Duttas, and get a decree for his rent against the Pandas. On this point what was the old rule of the English Common law is beyond dispute. 'No one but the parties to a contract can be bound by it or entitled under it': Anson, Law of Con-tract, (Edn. 16) 274. 'A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract,' Pollock, Principles of Contract: (Edn. 9), 212, 220. 'No man can enforce a contract to which he is not aparty, even though he has a direct interest in the performance of it': Salmond and Winfield, Law of Contracts, 18. The law was stated in positive and unmistakable terms in Twaddle v. Atkinson (1861) 1 B and S 393, and in Dunlop Tyre Co. v. Selfridge (1915) AC 847, Viscount Haldane,

L.C., said (p. 853): 'In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jusquaesitumtertio arising by way of contract.' But to this rule Courts of Equity introduced exceptions. 'A contract can create no right or liability in a person who is not a party to it; unless he can claim or be charged through a party, as in the case of a cestui que trust claiming through a trustee; or a principal claiming or being charged through an agent': Leake on Contracts (Edn. 7), P. 301.

3. The necessity for the Common law rule arose out of the implications of the old Common law action in assumpsit. The reason for the exceptions was the necessity to provide some escape from the harsh and inelastic bonds of the old rule. Like so much else in the progressive growth of English law, this expansion was achieved by means of the dual fictions of trust and agency. In India there are no reasons legal, historical or otherwise, why we should shrink from a frank recognition of this fact. A careful examination of the English decisions on the point leads inevitably to the conclusion that they were based upon fiction. This tendency began prior to the decision in Twaddle v. Atkinson (1861) 1 B and S 393. Thus in Dutton v. Poole, (1677) 2 Leave. 210, a donee beneficiary was allowed to sue in assumpsit, though she was not a party to the contract and gave no consideration. But its rapid extension was due to Courts of Equity which recognised a right in a contract beneficiary. Thus in Tomlinson v. Gill, (1756) Ambler 330 the defendant had promised a widow that if she would consent to his being appointed a co-administrator with her deceased husband's estate, he would pay the debts of the deceased to the extent of any deficiency in the assets. The plaintiff, a creditor of the deceased, brought a bill in equity to enforce this promise and obtained a decree on the ground, as stated by Lord Hard-wicke, that the promise was for the benefit of the creditors, and the widow was a trustee for them.

4. This was probably the origin of the use of the conception of a trust for the benefit of a contract beneficiary. It is clear that in that case this was a fiction. There was no trust fund to be administered either by the defendant or the promisee. Doubtless the defendant and the widow were trustees of the deceased husband's estate, but this was not the object of the contract, but the payment of any deficiency in the estate. For this neither he nor she ever held any property or money in trust, nor did Lord Hardwicke call him a trustee. It was the widow who was called the trustee for the creditors of the promisee made by the defendant, and calling her a trustee was merely a device for making the defendant keep his promise. But this conception was invented by the Chancery Court, and used to undermine and nullify the rule of the common law and to enforce rights in third persona which the common law refused to recognize. In particular it was used to avoid the common law doctrine of "lack of privity of contract" and "stranger to the consideration." Sometimes the theory of agency was used for the same purpose. The promisee was said to have received the promise as agent for the third party. The next case to be considered

is Gregory and Parkar v. Williams, (1817) 3 Mer 582. Parkar was indebted to both Williams and Gregory. In consideration of an assignment by Parkar of all his property to Williams. Williams promised Parkar that he would pay 900 to Gregory in settlement of Parkar's debt to Gregory. Later Gregory and Parkar brought their bill in equity against Williams to compel the performance of his promise made to Parker. The Master of the Bolls, Sir William Grant, held that the bill was maintainable and decreed the payment by Williams of 900 to Gregory, on the ground that Parker acted as trustee for Gregory and "Gregory may derive an equitable right through the mediation of Parker's agreement," though he was not a party to it, nor furnished any part of the consideration.

5. This decision rested on Lord Hardwicke's theory as stated in Tomlinson v. Gill, (1756) Ambler 330 and it was not suggested that the property conveyed by Parker to Williams was held by Williams as a trust fund for the benefit of Gregory. Williams was required to pay Gregory because he made a promise to Parker for the benefit of Gregory. Parker, the promisee was the trustee; and Williams, the promisor was not. The word trust was not used in the contract. The money was to be paid to Gregory and not to Parker, the promisee. Parker was not intended to become and never, in fact, became a trustee of the 900. In Gandy v. Gandy, (1884) 30 Ch. D 57 a husband contracted to pay money to trustees for the support of his wife and children. The trustees refused to sue; and the Court said there was no trust by virtue of which the children could sue in their own names. But the wife, as a beneficiary who had the children to support, obtained a decree for everything promised. She was not the promisee, and the promise was not to pay money to her. In Fletcher v. Fletcher, (1844) 4 Hare 67, a father executed a sealed covenant in which he promised certain persons named therein that his executor or administrator would pay to them the sum of 60,000 in trust for the benefit of the promisor's illegitimate sons. The promisees named as trustees declined to act or to enforce the contract. One of the beneficiaries brought his own bill against the executors of his father's will and obtained a decree for the payment of the money direct to him. Here no money was ever held in trust. There was merely an executory covenant to pay money to be held in trust. The Vice Chancellor held that the covenantees were trustees of the covenant, even though they never assented to it, and that the beneficiary could enforce it. But it is clear that no trust fund was ever created. The Court was merely enforcing an executory contract to create a trust fund, and did it by declaring that the named promisees were trustees of the covenant. The covenantor said nothing of such a trust as this. Until the fund was created, the plaintiff was merely a beneficiary of the contract, if he could enforce a contract to create a trust fund, he should be able to enforce a contract to pay money in any other manner.

6. There are several cases holding that a creditor can give an enforceable right to a third person by merely directing his debtor to pay the debt to the third person or to make an investment for him, the debtor assenting thereto. Thus in Paterson v. Murphy, (1853) 11 Hare 88, Paterson

borrowed 300 and promised the lender to repay part of it by investing in consols for the promisee's children. The debtor never made the investment and paid the debt to the lender, because the lender countermanded the direction to make it. A bill by the children in the administration of the promisee's estate was sustained, even though they had known nothing of the transaction until after the attempted revocation. No fund was ever in the hands of the defendant as a trustee. In Parker v. Stones, (1868) 38 LJ Ch. 46 at the creditors's request his debtor promised to pay the amount of the debt to third parties creditor saying that he "could trust him to pay the money according to directions." In these cases the creditor can be held to have made himself a trustee of the right to performance by the debtor; but it seems that the Court may have regarded the debtor as the trustee, although he merely made a promise to pay his debt in a new way, and did not segregate any part of his general assets as a trust fund. These cases might have been, but were not, regarded as cases of oral assignments of the debt; otherwise, they were merely contracts by a debtor to pay to a third person. Courts of equity having declared the promisee to be a trustee, the Court of exchequer proceeded to hold that the promisee could sue on the contract and recover, not merely nominal damages, but the full amount promised for the benefit of the third party. In Lamb v. Vice, (1840) 6 M and W 467, the defendant, as an officer of the Palace Court, had given a bond to the Knight Marshal of that Court, as security for the due performance of the duties of his office, and that he should take sufficient bail from all persons arrested by him. In an action by a creditor against the debtor, the defendant released the debtor on insufficient bail, with the result, that the creditor lost his money. Thereupon the Knight of Marshal brought an action of debt on the defendant's bond for the benefit of the creditor. It was argued that the plaintiff could recover only nominal damages, because the defendant's breach had caused him no loss. The Court held however that the plaintiff could recover the full amount of the injury suffered by the creditor.

7. The bond was a contract between the defendant and the plaintiff which partly benefited third parties, but there was not a word in the bond itself to indicate that the plaintiff was acting as a trustee for them. Clearly, the concept of a trust was used in this case only for the purpose of enabling a third party, who was one of a class benefited by the contract, to recover damages in a common law action for its breach. The performance promised by the defendant was not payment of money to anybody. The damages awarded belonged to the creditor. They were not a trust fund which the defendant had promised to pay to the plaintiff, or that the plaintiff had promised to hold in trust. In Robertson v. Wait, (1853) 8 Ex. 299, the plaintiffs chartered a vessel of the defendant to carry a cargo from Liverpool to Calcutta; and the defendants promised, in the charter party to consign the vessel to Ewing and Co. at Calcutta on the usual terms, one of them being that the consignees might procure the homeward freight at 5 per cent, commission. The defendant consigned the vessel to Ewing and Co., but did not permit them to procure the

homeward freight, thereby depriving them of the commission and depriving the plaintiffs of a part of that commission, which by reason of an arrangement with Ewing and Co., the plaintiffs would have received, It was held that the plaintiffs could maintain an action for the full amount of the commission so lost by them and by Ewing and Co. The Court said that the contract was made for the benefit of Ewing and Co.; and Parke, B., remarked (p. 302): "I entertain no doubt whatever that the plaintiffs are entitled to recover the whole amount as trustees for Ewing and Co.

8. Clearly, the only reason for holding that the promisees were trustees for Ewing and Co. was, that the contract, if performed, would have resulted in a benefit to them. Plaintiffs' recovery of the full amount was directly dependent upon the right of Ewing and Co. to the expected commission. The word trustee was not used in the contract. If such a contract makes the promisee a trustee and creates a right to the commission in Ewing and Co. as cestui que trust, there is no reason why the same result should not follow where two parties make an ordinary commercial contract under which, if performed, third will benefit. The promisee, in these cases, was only a trustee to the extent that he must allow the use of his name. With respect to the money, if it came into his hands at all, his duty was to pay it over to the rightful owner, he was a mere conduit.

9. In Touche v. Metropolitan Ry. W. Co., (1871) 6 Ch. 671, the plaintiff rendered services to the promoters of the defendant company and they promised that he should receive 2,000 from the company. Later, when the company was formed, its articles of association provided that 2,000 should be paid to Walker, one of the promoters, for the benefit of the plaintiff. The plaintiff sued the company in his own name for the 2,000. It was held that the defendant company's promise to pay the 2.000 was made to the promotor as trustee for the plaintiff; and that the plaintiff had a right to come here and obtain the benefit of the arrangement entered into between Walker and the company" (p. 677). The Court cited Gregory and Parkar v. Williams, (1817) 3 Mer 582 as an authority to that effect. It seems clear that the plaintiff was not the promisee and that he gave no consideration for the defendant company's promise. The plaintiff was merely a beneficiary of the contract, and Walker, the promisee, was called a trustee merely to enable the plaintiff to enforce a contract made by others under which, if performed, he would benefit. In the ordinary sense of the term there was no trust in any of the cases now under discussion. The concept of trust was being used as a mere device for the recognition and enforcement of the right of a third party beneficiary created by a contract to which he was not a party.

10. In the case of Lloyd's v. Harper (1880) 16 Ch. D 290 in consideration of the admission of R. H. Harper as an underwriting member of Lloyd's Samuel Harper wrote to Lloyd's: I beg to tender may guarantee on his behalf, and to hereby hold myself responsible for all his engagements in

that capacity'. R. H. Harper defaulted on certain marine insurance policies, and Lloyd's sued Samuel Harper on the guarantee contract, for the benefit of the holders of such policies. It was argued that Lloyd's had suffered no injury, and were entitled only to nominal damages. It was held however that they could recover the amount that was due to the holders of the insurance policies. The cases of Tomlinson v. Gill, (1756) Ambler 330. Lamb v. Vice, (1840) 6 M and W 467 and Gregory and Parkar v. Williams, (1817) 3 Mer 582, were approved and followed. Lloyd's, the promisees were said to have received the guarantee promise as trustees for the benefit of many third parties, including the holders of insurance policies issued by R. H. Harper. Fry, J., said (p. 309):

In my opinion the action can be maintained for the whole amount covered by the guarantee. It apears to me from the cases which were cited in the course of the argument, especially Tomlinson v. Gill, (1756) Ambler 330 and Lamb v. Vice, (1840) 6 M and W 467 that were a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract; and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into.

11. In the Court of Appeal, James, L. J., said (p. 315):

I am of opinion that Fry, J., was well warranted in the conclusion at which he arrived that the engagement was made with the Committee as trustees for and on behalf of the person beneficially interested,

12. Speaking on the argument that Lloyd's could recover no more than nominal damages, Lush, L. J., said (p. 321):

That, to my mind, is a startling and alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with A for the benefit of B.A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

13. In this case the contract was merely an ordinary contract of guarantee, made partly for the protection of Lloyd's, partly for the protection of its members, and partly for the protection and security of third persons who might do business with E. H. Harper. If in such a contract the promisee is a trustee for the benefit of third persons the same is true of the promisee in any contract that is made for the benefit of a third person. If the promisee can recover in an action on such a contract the full amount that is due to the third person he does so because the Court recognizes a legally enforceable right in that third person, and not because the promisee himself has a right to such an amount. The amount so recovered belongs to the third person and not to the

promisee. With respect to this money the promisee has no other duties as trustee except to pay the amount so collected immediately to the third person. Where this is so it is a barren formality to require the suit to be brought in the name of the promisee and the beneficiary should be allowed to maintain suit directly in his own name. In some cases, the beneficiary of the contract might beheld to be a cestui que trust on either of two grounds. Two partners have agreed that on the death of one, the survivor shall pay to his widow a sum of money out of the business income, or that the widow shall have an interest in the business. Such contracts have been enforced in favour of the widow as against the creditors of the deceased partner: see Page v. Cox (1851) 10 Hare 163, Re Flavell (1883) 25 Ch. D 89 and Drimmie v. Dayies (1899) 1 Ir. Ch. 176. This could be justified either on the ground that the promisee, the deceased partner, was a trustee for his wife on the principle of Tomlinson v. Gill, (1756) Ambler 330 or on the ground that the promisor, the surviving, partner, promised to take over the business assets in trust for the benefit of the widow.

14.There are a few cases in which the plaintiff was denied a remedy, although the facts cannot be distinguished from those in Tomlinson v. Gill, (1756) Ambler 330. Apparently this was because the Court considered that some trust fund in the possession of one of the contracting parties was necessary. The possibility of regarding the promisee as a trustee of the contract right did not occur to the Court. In Les Affreteurs etc. v. Walford (1919) AC 801 Walford was a broker for the charterers of a ship and negotiated a charterparty with the defendants as owners. In that contract the defendants promised the charterers to pay a commission to the broker. The broker sued the owners on this promise and got judgment. Lord Birkenhead, L.C., said (1919) A. C. pp. 805-806:

A charterparty is, of course, a contract between owners and charterers, and it is elementary that so far as the brokers are concerned, it is res inter alios acta; but the parties in the present case, by an interlocutory and very sensible arrangement, have agreed that the matter shall be dealt with as if the charterers were co-plaintifls.

15. Thereupon he discussed and followed the case of Robertson v. Wait, (1853) 8 Ex. 299 and the Court held that the contract created in Walford a right to his commission against the shipowners. The learned Lords regarded the charterers as having contracted as trustees for the broker Walford in face of the fact that Walford himself negotiated the contract as agent for the charterers. Lord Wrenbury said (p. 813):

We have here to do with a contract between two parties reserving a benefit of a third. . . a contract to which he himself, I agree, was not a party.

16. Lord Finlay said (p. 811):

We must regard the charterer as having entered into that bargain in the interests of the broker and

as a trustee for the broker.

17. Lord Birkenhead said (pp. 806-807):

The broker, in effect, nominates the charterer to contract on his behalf, influenced probably by the circumstances that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted.

18. In Walford v. Les Affreteur etc, (1918) 2 KB 498, at p. 506, Sorutton, L. J., said:

That objection, which has existed so long as I have been at the bar has always been avoided on the authority of Robertson v. Wait, (1853) 8 Ex. 299, by the charterers suing as trustees for the broker, or by the shipowners not taking the objection that the brokers were not parties to the charterparty.

19. Bankes, L. J., said (p. 504):

The plaintiffs were not parties to the contract alleged to be contained in the charterparty, but it was arranged, in order to avoid any amendment, and in order to bring the plaintiff within the decision of Robertson v. Wait, (1853) 8 Ex. 299, that an action should be treated as brought by the charterers for the benefit of the plaintiffs. That is possible, and that the contract inserted in the charterparty between the charterers and the shipowners can be treated as a contract made by the charterers in the interests of the brokers and on which they, the charterers, can sue as trustees for the brokers, must be taken to be established law since the decision in Robertson v. Wait, (1853) 8 Ex. 299, a decision which has never been questioned.

20. The absence of the promisee (the charterer) as plaintiff was held to be made immaterial by the agreement of the plaintiff and defendant to try the case as if the promisee were a co-plaintiff. If he had been the plaintiff, he could have recovered Walford's agreed commission as trustee, and Walford could have compelled its payment over. If Walford had had no right to it by virtue of the contract, assuredly the charterer would not; and the subsequent stipulation between Walford and the owner would not itself create one. Nor would the issues be res judicata as against the charterer, for he was a party neither to the suit nor to the stipulation. And if the beneficiary Walford had no legally recognized right prior to the stipulation, the House of Lords would not have recognized and enforced such a right merely because the defendant stipulated with him that the issues should be determined just as if a third person were in fact a party plaintiff. In giving judgment that the defendant must pay Walford in accordance with the contract with the charterer, the House of Lords clearly recognized that that contract had itself created an enforceable right in Walford to the promised commission, and it enforced that right by a direct judgment in his favour

against the promisor. This was in spite of the fact that Walford did not give the consideration for the defendant's promise and that he was not the promisee in the contract. Walford had rendered services to the charterer; but the defendant's contract was in consideration for the payments made by the charterer of the vessel not in consideration for those services.

21. In 1 Ir. Drimmie v. Dayies (1899) 1 Ir. Ch. 176, the defendant promised his partner by a deed to pay annuities to' the promisee's children. The Court held that the children and the promisee's executors could maintain suit on the sealed contract. The Vice Chancellor said (pp. 181-182):

The defendant's contention is based on the Common Law rule that in the case of contracts Under seal no one can sue who is not a party to the deed. That rule is fully stated in the case of Twaddle v. Atkinson (1861) 1 B and S 393., namely, that a stranger to the contract, that is to say, a person who is not a party to the contract, and from whom no consideration moved, cannot sue upon it. The test seems to be whether such a person could be sued upon the contract. Now here the daughters and sons were not parties to the contract, nor did any consideration move from them, nor could they be sued upon the contract. But this rule did not prevail in equity, and since the Judicature Act the rules in equity are to prevail in cases where such a conflict exists. The equitable rule was that the party to whose use or for whose benefit the contract had been entered into has a remedy in equity against the person with whom it was expressed to be made.

22. What is the nature of the trust that was created by the Courts in Les Affreteurs etc. v. Walford (1919) AC 801 and Tomlinson v. Gill, (1756) Ambler 330? Nothing was held in trust by the promisor; and no property or money was to be paid to the promisee or was to be held by him as a trust fund. The performance that was agreed upon in these two cases was a payment by the promisor direct to Tomlinson and to Walford; in Lamb v. Vice, (1840) 6 M and W 467; it was merely the exercise of sufficient care in the taking of bail bonds; in Lloyd's v. Harper (1880) 16 Ch. D 290, it was the causing of R.H. Harper to pay his debts to his creditors. All that the promisee could be said to hold in trust therefore was the contract 'right;' and in none of the foregoing cases was this a right that money should be paid to the promisee, which he was to hold as a trustee for the third person. When it is said that the promisee is a trustee of the contract right that the promised performance shall be rendered, we are merely saying that the facts create a right in the third party. The facts that create the resulting legal relations among the three parties are nothing but a promise by A for a consideration moving from B to render a performance to C. There is no more reason for holding B to be a trustee, than for holding C to have an enforceable right. The result aimed at is the same in either case, and the procedure should be the same in attaining it. In Walford's case the House of Lords recognized that the participation of the trustee is a mere encumbering formality except for the purpose of making the judgment conclusive against him, and that the right to the money is actually in the beneficiary. It is indeed cumbrous

procedure that might require, first, a suit by the trustee, and then secondly a suit by the beneficiary, when the net result required by the law is that the money shall be paid to the beneficiary.

23. If it be possible and desirable to declare that a promisee may be a trustee of a contract right by virtue of a mere promise to him to pay money to a third person, it is equally possible and desirable to declare him to be a trustee of a right created by any other kind of promise made for a third person's benefit. In neither case is there recognition of a trust for the purpose of conserving property or affording protection for an incompetent beneficiary; in both cases alike it is for the purpose of compelling performance by a promisor who has received a consideration for his promise. The expansion of the trust concept to include cases such as these is an instance of the growth of law by fiction. In England it has often been by fiction that old rules have been avoided, discredited, and finally broken down. The result is the same whether reached by fiction or not, and there is no reason in India why we should not openly recogniza the fact that fiction has been employed, that a change has been worked in the law by its use, and that the time has come to state the result in terms that will no longer mislead.

24. Whatever may have been the necessity in England whether historical, procedural or otherwise, of making use of such fictions in order to give to a third party the right to enforce a contract made between others, there seems to be no similar necessity for importing these anomalies into Indiaexcept possibly so far as suits on the Original Side of the Chartered High Courts are concerned. There the English Common Law is enforced, but on the appellate side and in the mofussil Courts the English Common Law' is not and has not ever been followed. The first report of the Commissioners, appointed in 1853, to consider the reform of the Judicial, establishments of India stated inter alia:

The Mofussil Courts, on the other hand, had nothing to do with English law but were amenable in all respects to the Regulations of Government, and when Hindu or Mahomedan Law did not apply, or when no Regulations were applicable, were directed to proceed according to justice, equity and good conscience. That is to say, in cases for which no law was provided, the Judges were authorized to use the bast discretion they possessed. (See Rules and Orders, Calcutta High Court (O. S.) Preface, p. 15).

25. The Act of 1861 for establishing High Courts of Judicature in India, provided for the abolition of Supreme Courts and Sadder Courts and the establishments of High Courts which should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts (Section 9.)

26. The Letters Patent of 1865 provided in Clause 21 that the law of equity and rule of good conscience to be applied by the said High Court of Judicature at Port William in Bengal, to each ease coming before it in the exercise of its appellate jurisdiction, shall be the law of equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such ease.

27. Nor is there anything in the Indian Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit. In the United States of America this is frankly recognized. Section 136, American Law of Contract, as stated by the American Law Institute, provides that a promise to discharge the promisee's duty creates a duty of the promisor, the creditor beneficiary, to perform the promise.

28. According to Scots Law:

When parties contract, if there be any article in favour of a third party, at any time, estjus quaesitum tertio, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform; 1 Stair's Inst. Law of Scotland, 95.

29. In Khwaja Muhammad Khan v. Husaini Bagum (1910) 32 All 410 where the appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time he would pay to the respondents Rs. 500 a month in perpetuity for her betelleaf expenses, and c., from the date of her reception, and charged certain properties with the payment, with power to the respondent to enforce it, it was held that the respondent, although no party to the agreement, was clearly entitled to proceed in equity to enforce her claim. Their Lordships of the Privy Council said that the case of Twaddle v. Atkinson (1861) 1 B and S 393. was inapplicable, that this case was an action of assumpsit, and that the rule of Common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common law doctrine was applied to agreement or arrangements entered into in connexion with such contracts.

30. In Debnarayan Dutt v. Chunilal Ghose, 1914 Cal 129 Jenkins, G. J., and Mookerjee, J., held

that where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immovable properties of the original debtor, and the acknowledgment was communicated to the creditor and accepted by him, the arrangement between the creditor and the transferee did not amount to a novation within the meaning of Section 62, Contract Act; that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and that the creditor is entitled to sue the transferee on the registered instrument. They relied upon Gregory and Parkar v. Williams, (1817) 3 Mer 582; Touche v. Metropolitan Ry. W. Co., (1871) 6 Ch 671; Gandy v. Gandy, (1884) 30 Ch D 57 and other English cases. Jenkins, C. J., remarked at p. 144:

We have here then a position in which it would be, in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant 5. If we were governed by Twaddle v. Atkinson (1861) 1 B and S 393. 393 (1) there might possibly be a difficulty in our way, but it has to be borne in mind that, Twaddle v. Atkinson (1861) 1 B and S 393. was a decision on a form of action peculiar to the Common Law Courts in England and that the case was influenced by the rule that no action in assumpsit could be maintained upon a promise unless consideration moved from the party to whom it was made. Here we have a definition of consideration which is wider than the requirement of the English law, Section 2(d), Contract Act. And it has beep laid down by Sir Barnes Peacock in a Full Bench decision of this Court in relation to the Courts in the mofussil, Rambux Chittangeo's case, (1867) BLR Sup Vol. 675 that in those Courts the rights of parties are to be determined according to the general principles of equity and justice without any distinction, as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of equity. The rules and the fictions which have been in many cases adopted by the common law Courts in England for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable only by the Courts of equity, are not necessary to be followed in this country where the aim is to do complete justice in one suit. More than that we now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in Twaddle v. Atkinson (1861) 1 B and S 393 (1). That I take to be the result of the decision of the Privy Council in Khwaja Muhammad Khan v. Husaini Bagum (1910) 32 All 410. In the report of that case, in 14 C.W.N. 868 there is an interlocutory remark of Lord Macnaughten which indicates the limits imposed on a Court of Common law. He there says supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division buts could she not bring a suit in equity'?. The answer of the learned counsel was 'yes.' It is possible that this distinction can be

explained by the history of the action of assumpsit which was a development of the writ of trespass. In the old writ in indebtitatus assumpsit it was alleged that the defendant 'not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtly to deceive and defraud' had not paid and so forth. The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience. The case with which we are now dealing finds a close parallel in Gregory and Parkar v. Williams, (1817) 3 Mer 582 and also in the more recent cases of Touche v. Metropolitan Ry. W. Co., (1871) 6 Ch 671 and Gandy v. Gandy, (1884) 30 Ch D 57. There is a valuable exposition of the law by Lord Hatherley In the first of these last two cases which was adopted by Cotton, L. J in the second. The Lord Chancellor said, 'The case comes within the authority that where a sum is payable by A.R. for the benefit of C.D. C.D, can claim under the, contract as if it had been made with himself.' That appears to me to be a principle which is of distinct use in the consideration of this case. It appears to me that we have therefore in the circumstances of this case, a condition of affairs in which it would be right to hold that the plaintiff is entitled to enforce his claim in this suit.

31. This case was followed in Dwarika Nath v. Priyanath, 1918 Cal 941, and other cases. It is true that there are other cases both in the Calcutta High Court and in other Courts in India in which a contrary view has been taken, such for example, as Subbu Chetti v. Arunachalam Chettiar, 1930 Mad 382, a Pull Bench decision in which all the cases were discussed: Jiban Krishna v. Nirupama Gupta, 1926 Cal 1009; Krishna Lal Sadhu v. Pramila Bala Dasi, 1928 Cal 518 and Jagadamba Debya v. Bibhuti Bhusan, 1933 Cal 407. These cases seem to be in conflict with Debnarayan's case (supra) which I propose to follow. If that case can be explained, and it is felt desirable to explain it, by pretending that there was something in it in the nature of a trust or agency, then, in my opinion, in the present case the facts constituted a trust or agency just as much as in that case, or in the English cases to which I have referred. However, I prefer to base my decision, on a frank recognition that these are fictions and that in India no necessity arises for resorting to them.

32. In the present case all the parties were before the Courts below and are before us, and neither common sense nor convenience, nor equity nor good concience require me to force the parties into further and unnecessary litigation. In my opinion, the plaintiff is entitled to enforce the contract in suit. Therefore, the appeal is allowed with costs here and below and the judgment of the District Judge of Bankura modified. There will be a decree in favour of the plaintiff for his claim and costs against defendants 8 to 17, and against defendants 1 to 6 for any balance which

may remain outstanding after executing the decree against defendants 8 to 17. Defendants 8 to 17 will in addition pay the costs of defendants 1 to 6 and defendant 7.

M.C. Ghose, J.

33. (After stating facts, the judgment proceeds.) In this case there were two contracts. The first contract was between the plaintiff's predecessor and Dutts defendants whereby Dutts agreed to pay plaintiff Rs. 220 a year as rent of the tenure. The second contract was between Dutts and Pandas whereby Pandas agreed to pay Rs. 520 a year as rent of the sub-tenure; they further agreed with Dutts to pay the sum in two lots, viz. Rs. 300 to Dutts and Rs. 220 to plaintiff. I do not see how the contract between Dutts and Pandas can have the effect of releasing Dutts from the effect of the former contract between the landlord and Dutts. In my opinion, Dutts are bound to pay the rent, Rs. 220 a year, to the plaintiff; they cannot escape the liability by reason of their contract with Pandas that Pandas would pay the amount for them. This appears clear from the terms of the contract between Dutts and Pandas. In para. 6 of Panda's kabuliat it was stated:

If on account of my neglect in paying the rents the Raja institutes a suit against you I shall pay you the litigation expenses. If any harm is done to your mourashi interest on account of the said rent, I or my heirs and successors shall make good the loss or damage that may result therefrom to you or your heirs and successors.

34. It is clear from the terms of the kabuliat that Dutts reserved the rights to demand and obtain from Pandas the whole of the rent, Rs. 520. If Pandas failed to pay the rent to the superior landlord and produce the rent receipt to Dutts within the time Dutts were entitled to sue Pandas for the same, in my opinion the decree made against Dutts must stand. The next question is whether the decree should also be made against Pandas. My learned brother has discussed all the leading cases. I agree to the proposition of law that though ordinarily only a person who is a party to the contract can sue on it, where a contract is made for the benefit of a third person, there may be an equity in the third person to sue upon the contract. The question is whether the contract between Dutts and Pandas was a contract made for the benefit of the plaintiff. It is clear that the contract was made primarily for the benefit of Dutts. They wanted to enjoy an income of Rs. 300 a year without doing any work for it, without either collecting the rent from the raiyats or paying the rent due to the superior landlord. It is urged that the contract was also for the benefit of plaintiff. On the other side it is urged that the benefit to the plaintiff, if any, was very slight ; rent is the first charge upon the tenure ; if Dutts do not pay the rent the plaintiff' may get a rent decree against them and put up the tenure to sale free of incumbrances, but against Pandas the plaintiff can only have a money decree.

35. My learned brother holds that the plaintiff benefited by the contract between Dutts and Pandas and he is entitled on the strength of it to get a decree against Pandas. I was inclined to hold that the plaintiff should be given a decree against Dutts alone, and Dutts should be left to sue Pandas in a separate rent suit. It was urged that it was now too late for Dutts to sue Pandas, the claim for the period being barred by limitation. In these particular circumstances I accept my learned brother's view that a decree may be made both against Dutts and Pandas in the form proposed by him.