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LOONKARAN SETHIYA

v.

STATE BANK OF JAIPUR & ORS.

April 25, 1968

[J. M. SHELAT, K. S. HEGDE AND A. N. GROVER, JJ.]

B

Indian Contract Act 9 of 1872, s. 202—Debtor giving power of attorney to creditor bank to execute a decree in his favour—It is power coupled with interest and irrevocable—Bank an equitable assignee—Can execute decree under Code of Civil Procedure, s. 146.

The appellant was indebted to the respondent Bank. He executed a power of attorney in favour of the bank giving it authority to execute a decree which he had obtained in his favour. The bank filed an application for the execution of the decree in the appellant's name, the application being signed by the manager of the Bank as holding power of attorney. The appellant objected to the execution. His objections were over-ruled by the executing court as well as the High Court. In appeal to this Court,

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HELD : (i) The power given by the appellant in favour of the Bank was a power coupled with interest and in view of s. 202 of the Indian Contract Act it was irrevocable. [126 D]

(ii) The interest of the appellant under the decree could not be said to have been transferred to the Bank either in writing or by operation of law. But the power of attorney was an engagement to pay out of the particular fund the debt due to the Bank and hence the same constituted an equitable assignment of the amount due under the decree or so much of that amount as was necessary for discharging the debts due to it. [127 A C]

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Watson v. *The Duke of Wellington*, [1830] 39 E.R. 231 and *Burn* v. *Carvalho*, [1839] 41 E.R. 265, applied.

Jagabhai Lallubhai v. *Rustamji Nasarwanji*, [1885] I.L.R. IX Bom. 311 and *Prahlad Pd. Modi* v. *Tikaitni Faldani Kumari*, *A.I.R.* [1956] Patna 233, approved.

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(iii) An equitable assignee of a decree who cannot have the benefit of O. XXI, r. 16 of the Code of Civil Procedure can still execute the decree under s. 146 of the Code. [128 F]

Jugulkishore Saraf v. *Raw Cotton Co. Ltd.* [1955] 1 S.C.R. 1369, affirmed.

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(iv) Although the application had been made by the bank as the appellant's agent, the bank was also entitled to file it and carry it on in its own right. It would serve no useful purpose to direct the present application to be closed merely because it was made in the name of the appellant. [129 A—B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 644 of 1965.

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Appeal by special leave from the judgment and order dated July 10, 1963 of the Allahabad High Court in Execution First Appeal No. 26 of 1961.

A *M. C. Chagla, B. Dutta,* and *O. C. Mathur,* for the appellant.

C. B. Agarwala and *V. D. Mahajan,* for respondent No. 8—the State Bank of Jaipur & Ors.

The Judgment of the Court was delivered by

B **Hegde, J.**—This appeal by special leave arises from the decision of the Allahabad High Court in execution first appeal No. 26 of 1961 on its file. The appellant is the decree-holder. The contesting respondent is the State Bank of Jaipur—to be hereinafter referred to as the Bank—; other respondents are not interested in the decision in this appeal.

C The material facts of the case are few. The appellant was indebted to the Bank. On March 27, 1959, he executed a power of attorney in favour of the Bank. That power of attorney *inter alia* recited :—

> "AND WHEREAS I am very heavily indebted to the Bank of Jaipur Limited, Agra branch and my liabi-
> D lity is partly secured by the pledge of my goods and partly by the equitable mortgage of my and my mother's immovable properties with the said Bank;
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> AND WHEREAS a major part of my said liability is unsecured;
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> AND WHEREAS I have agreed to appoint the
> E Bank of Jaipur Ltd. to be my true and lawful attorney to execute the said decree in suit Nos. 76 of 1949 (with which we are concerned in this appeal) which may ultimately be passed in my said appeal and to do the following acts, deeds, matters and things for me, on my behalf and in my name and to credit to my account the
> F sum or sums which may be realised in execution of or under the said decrees;
>
> NOW KNOW YE ALL men and these presents witness that I do hereby irrevocably constitute, nominate and appoint the said Bank of Jaipur Limited, and/or any principal officers and/or any other person or per-
> G sons that may be appointed by the said Bank of Jaipur Ltd. or its assigns from time to time in this behalf to be my true and lawful attorney for me and on my behalf and in my name to represent me therein and do all acts, deeds, matters and things in connection with the execution of the said decree in the Agra suit No. 76 of 1949 and the decree that may be passed in the
> H said appeal, that is to say :
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> 1. To proceed in execution of the said decree passed in the said Agra suit No. 76 of 1949 and to proceed in

execution of the decree which may be passed in the said appeal and to realise and recover the decretal amounts.

. . . . . .

8. To withdraw any amount that may be deposited in the courts at Agra and/or Allahabad or any court of justice in the said decree and/or in the decree in the said appeal and/or other proceedings in connection with the execution of the said decrees or any other order passed or made therein and/or in any Insolvency Court or from the Official Receiver concerning Insolvency of any of the defendants.

. . . . . .

It may be noted that on the day the power of attorney was executed the decree passed in favour of the appellant in suit No. 76 of 1949 was under appeal. Subsequently in appeal the same was affirmed. Thereafter the bank levied execution of the decree in question on May 8, 1959. The execution application was filed in the name of the appellant but it was signed by the manager of the Bank as his power of attorney holder. The appellant objected to the execution. He contended that the power in question had been obtained "by false representation and assurance held out to the deponent (appellant) that they (the Bank) would advance large sum of money including for the purpose of John's Mill and improvement of the same, and for conducting of the appeals and other business." He further averred in his counter statement "that no sum whatsoever at any time was advanced by the Bank against the security of the aforesaid decree and no sum whatsoever is payable to the Bank against the same. There is no lien of the Bank of any nature whatsoever in the aforesaid decree."

The objection of the appellant was over-ruled by the executing court and the execution was directed to proceed. Against that order the appellant unsuccessfully went up in appeal to the High Court. The only question considered by the High Court was whether the power executed in favour of the bank was a power coupled with interest and hence the same could not be revoked in view of s. 202 of the Indian Contract Act, 1872 (9 of 1872). The High Court answered that question in favour of the Bank. It held that it was a power coupled with interest and therefore the same could not be revoked by the appellant. In the last paragraph of the High Court judgment it is observed :

"Mr. Kirti then tried to argue that the entire execution proceedings are *ultra vires* but we cannot allow him to argue an entirely new point. Sethiya's application was founded on specific grounds which have been

A rejected by the court below and he cannot be permitted to travel outside them in this appeal."

We are unable to spell out the meaning of these observations. It is seen from the grounds of appeal filed before the High Court that the appellant had contended that "because there being no B transfer or assignment of the decree in its (Bank's) favour, the Bank of Jaipur Limited, had no legal right or *locus standi* to execute the decree and the executing court had no jurisdiction to entertain the execution application and to continue the execution proceedings." He had also contended that the execution court cannot go behind the decree, and the execution case must proceed according to the provisions in the Code of Civil Procedure. C Obviously the contention of the appellant was that as the decree stood in his name, his agent cannot proceed with its execution as he desired to take into his own hands the execution proceedings. The above contentions of the appellant were purely legal contentions; if they are valid, they go to the root of the matter and therefore the High Court was not right in brushing aside D those contentions on the ground that those contentions had not been taken in the pleadings or urged before the executing court.

In this appeal we had the benefit of hearing the elaborate arguments of Shri M. C. Chagla for the appellant and of Shri C. B. Agarwala for the respondent. From the arguments E advanced the following questions arise for consideration :

(1) Whether the power of attorney in question is a power coupled with interest; if it is so, whether the same is revocable ?

(2) Whether in view of the said power the Bank can be F held to be an assignee of the interest in the decree; if so, whether that assignment is a legal assignment or an equitable assignment ?

(3) Whether the dispute between the appellant and the Bank could have been enquired under s. 47 of the Code of Civil Procedure ?

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(4) If it is held that the Bank is an assignee of the amount due under the decree or any portion thereof, can it because of that interest execute the decree, despite the objection of the appellant, either under O. XXI r. 16 or under s. 146 of the Code of Civil Procedure ? and

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(5) The execution application having been filed in the name of the appellant, can the Bank now be permitted to continue the execution in its own right ?

Some of the questions presented for decision are not free from difficulty. But it is not necessary for us to pronounce on those questions as we are of the opinion that the power of attorney in question is a power coupled with interest, and hence the same is not revocable. Further, the transaction entered into under that document amounts to an equitable assignment of the decree in favour of the Bank to the extent necessary to discharge appellant's debts to the Bank and on the basis of the rule laid down by this Court in *Jugulkishore Saraf* v. *Raw Cotton Co. Limited*,(1) it is open to the Bank to execute the decree in its own right. Lastly, we attach no importance to the form of the execution, which form was necessitated because of the terms of the power of attorney; looking to the substance of the matter and not being unduly weighed down by the form, we are of opinion that the Bank has been executing the decree in its own right. We shall elaborate our reasons in support of these conclusions presently. In view of our above conclusion we have not thought it necessary to go into the other questions of law raised at the hearing.

There is hardly any doubt that the power given by the appellant in favour of the Bank is a power coupled with interest. That is clear both from the tenor of the document as well as from its terms. Section 202 of the Contract Act provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked. The document itself says that the power given to the Bank is irrevocable. It must be said in fairness to Shri Chagla that he did not contest the finding of the High Court that the power in question was irrevocable.

The next question for decision is whether from the terms of the power of attorney we can conclude that the appellant had transferred or assigned his rights in the decree or any portion thereof in favour of the Bank. From those terms it is not possible to come to the conclusion that there was any transfer of the interest of the appellant in the decree to the Bank. In that document there are no words of transfer. The document specifically says that the Bank should execute the decree on behalf of the appellant. As per the terms of the document the appellant continues to be the owner of the amount due under the decree; the Bank was merely authorised to act as his agent; and therefore it is not possible to hold that in law the Bank was an assignee of the decree. The interest of the appellant under the decree

(1) [1955] 1 S.C.R. 1369.

A cannot be said to have been transferred to the Bank either in writing or by operation of law.

This takes us to the question whether the power given to the Bank amounts in equity to an assignment of the decree or any portion thereof, to the Bank. From the power of attorney it is B clear that the amount under the decree was specifically ear-marked for discharge of the debts due to the Bank. It was constituted as a special fund for the said purpose. The power to realise that fund was made over to the Bank with the further authority to set off the amount realised towards the debts due to it. In other words, the power of attorney is an engagement to pay out of the C particular fund the debt due to the Bank and hence the same constitutes an equitable assignment of the amount due under the decree or so much of that amount as is necessary for discharging the debts due to it. That rule is recognised in *Watson* v. *The Duke of Wellington*(1). Therein the plaintiffs, executors of Mr. Sims, had advanced a large sum of money to Marquis of Hastings on the joint bond of the Marquis and a surety. The sum due on D the bond exceeded £9000. Towards the end of 1825, the Marquis having returned from India to England, the plaintiffs made repeated applications to him for payment of the debt. The Marquis represented that he was about to receive a large share of the Deccan prize-money; promised that their demand should be paid out of that fund; and begged that, in the meantime, no E proceedings might be taken against him or the assets of his surety. On February 6, 1826, Mr. Allen, the solicitor of the plaintiffs. again waited on the Marquis, who then stated that he had directed Col. Francis Doyle, whom he had empowered to receive his share of the prize-money, to pay the debt and costs due to the executors of Mr. Sims; and at the same time the Marquis wrote F and delivered to Mr. Allen a letter addressed to Col. Doyle directing him that the executors of Mr. Sims were claimants on that fund for a bond debt with interest. From these facts the Court of Chancery came to the conclusion that there was an equitable assignment in favour of the executors of Mr. Sims of a portion of the prize-money sufficient to meet the debts due to the estate of Mr. Sims by the Duke of Wellington. To the same effect is G the decision in *Burn* v. *Carvalho*(2). Therein the Court of Chancery held that in equity, an order given by a debtor to his creditor upon a third person, having the assets of the debtor to pay the creditor out of such fund is a binding equitable assignment of so much of the fund.

H The courts in India, which administer both law as well as equity, have followed the rule laid down in the above decisions. In this connection reference may be made to the decision of the

(1) [1830] 39 E.R. 231.

(2) [1839] 41 E.R. 265.

Bombay High Court in *Jagabhai Lallubhai* v. *Rustamji Nasarwanji*(1) and of the Patna High Court in *Prahlad Pd. Modi* v. *Tikaitni Faldani Kumari*(2). In the latter case, the Patna High Court held that a transaction similar to the one we are concerned in this case, in substance amounted to allocation of fund to be appropriated towards the debt and therefore it is an equitable assignment. No decision taking a contrary view has been brought to our notice. We think that the rule laid down in the above decisions is a sound rule as it advances the interest of justice. We accordingly adopt that rule.

There was great deal of controversy as to whether on the strength of the equitable assignment in its favour, the Bank could execute the decree, even when the decree-holder (appellant) does not want that it should be executed. Shri Chagla argued that an executing court cannot go behind the decree; it has to execute the decree as it stands; so far as that court is concerned, the only person who can execute the decree is he whose name is shown in the decree as the judgment-creditor; unless the decree has been transferred, and the transfer in question recognised under O.XXI, r. 16 of the Code of Civil Procedure, the court has no power to execute the decree when the judgment creditor does not want it to be executed. He urged that as the decree was not transferred to the Bank either in writing or by operation of law, nor was there any recognition by court of such a transfer, the Bank was incompetent to execute the decree in its own right. He was emphatic that the only method by which an assignee of a decree can execute the decrees is by having recourse to O.XXI, r. 16. As the Bank cannot avail of that provision the execution cannot be proceeded with. In support of those contentions Shri Chagla invited our attention to various decisions. It is not necessary for us to go into those controversies in view of the decision of this Court in *Jugulkishore Saraf*(3). Therein this Court held that an equitable assignee of a decree who cannot have the benefit of O.XXI, r. 16 can still execute the decree under s. 146 of the Code of Civil Procedure. Shri Chagla contested the correctness of that decision and desired that the question of law should be reconsidered by a larger Bench. We are bound by that decision and no compelling circumstances were made out for its reconsideration.

It is true that the execution application shows that the applicant is the appellant and the Bank is merely acting as his agent. In other words, the Bank did not purport to execute the decree in its own name or in exercise of its own right. When the execution application was filed, there was no dispute between the appellant and the Bank. Hence the Bank levied execution of the decree in

(1) (1885) I.L.R. IX Bom. 311. (2) A.I.R. 1956 Patna 233.
(3) [1955] 1 S.C.R. 1369.

A the name of the appellant as provided in the power of attorney. The controversy between the parties arose during the pendency of the execution. It is only thereafter that it became necessary for the Bank to assert its own right. It serves no useful purpose to direct the present application to be closed merely because it was made in the name of the appellant. In view of our earlier B conclusions it will be still open to the Bank to levy fresh execution of the decree. It will be in the interest of the appellant as well as the Bank to allow the present application to go on.

For the reasons mentioned above, this appeal is dismissed with costs.

G.C. *Appeal dismissed.*