MANU/MH/0039/1942

Equivalent Citation: AIR1942Bom302, 1942(44)BOMLR703, ILR1942 Bom 670

IN THE HIGH COURT OF BOMBAY

O.C.J. Suit No. 1345 of 1941

Decided On: 01.04.1942

Appellants: **Gajanan Moreshwar Parelkar**
Vs.
Respondent: **Moreshwar Madan Mantri**

Hon'ble Judges/Coram:
M.C. Chagla, J.

JUDGMENT

M.C. Chagla, J.

1. This is a suit by the plaintiff to enforce an indemnity. It seems that in the year 1934 the plaintiff entered into an agreement with the Municipal Corporation for the City of Bombay for the lease of a plot of land bearing No. 226A of the Dadar Matunga Estate for a term of 999 years. In pursuance of the agreement the plaintiff was put in possession of that plot of land. At the request of the defendant the plaintiff agreed to transfer the benefit of the agreement for lease with the Municipal Corporation to the defendant. Thereupon the defendant entered into possession of the plot of land and commenced to erect a building thereon. The materials for the construction of the building were supplied by one Keshavdas Mohandas, and the amount therefore exceeded Rs. 5,000. Keshavdas Mohandas made pressing demands upon the defendant for the payment of that amount, and at the request of the defendant the plaintiff mortgaged the property to Keshavdas Mohandas by depositing the title deeds relating thereto to secure payment of a sum of Rs. 5,000 by a writing dated January 14, 1937. Under the terms of the writing the plaintiff covenanted to pay to Keshavdas Mohandas on January 14, 1938, the sum of Rs. 5,000 and interest thereon at the rate of ten annas per Rs. 100 per Gujarati month with monthly rests. In connection with the construction of the said building a further sum exceeding Rs. 5,000 became payable by the defendant to Keshavdas Mohandas. The plaintiff again at the request of the defendant effected a further charge on the property in favour of Keshavdas Mohandas to secure a further sum of Rs. 5,000 and interest by a writing dated March 23, 1937. The due date for the payment of this sum was also January 14, 1938. Under this writing the rate of interest was the same as under the previous writing. On July 30, 1939, the defendant gave a writing to the plaintiff stating that in connection with the building transferred by the plaintiff to the defendant's name, the defendant would be responsible for discharging the mortgages on the same and that the defendant would execute another mortgage deed in favour of the mortgagee in place of those executed by the plaintiff. On July 29, 1939, the plaintiff at the request of the defendant wrote a letter to the Bombay Municipality asking them to transfer the plot of land to the name of the defendant. The transfer was duly sanctioned by the Improvement Committee of the Bombay Municipality on August 26, 1939. No formal lease has up till now been executed by the Bombay Municipality in favour of the defendant. The plaintiff thereafter on several occasions called upon the defendant to procure from Keshavdas Mohandas a release of the plaintiff from his liability under the mortgage and the deed of further charge, but the defendant failed to do so. The plaintiff

alleges in the plaint that the defendant is in possession of the property and in enjoyment of the rents and profits thereof, and he has paid some interest to the mortgagee from time to time ; but a large amount of interest is in arrears and remains unpaid. The defendant has also failed to pay ground rent to the Bombay Municipality and to get the property duly insured. The plaintiff submits that he executed the mortgage and the deed of further charge at the request of the defendant because the agreement for lease stood in the name of the plaintiff and, therefore, the defendant is liable to indemnify the plaintiff in respect of all liability under the mortgage and the deed of further charge. He, therefore, prays that the defendant be ordered to procure from the mortgagee a release of the plaintiff from all liability under the deed of mortgage and further charge and also that the defendant may be ordered to pay into Court the sum required to pay off the whole amount due to the mortgagee under the mortgage and further charge and that the amount so brought into Court be utilised for the purpose of paying off the mortgage and further charge.

2. When the suit was called on, Mr. Tendolkar for the defendant admitted all the facts alleged by the plaintiff in the plaint and raised only two issues to the effect (1) whether the plaint discloses any cause of action and (2) whether the suit was premature. Mr. Tendolkar argues that unless and until the indemnified has suffered a loss he is not entitled to sue the indemnifier and, according to him, as in this case there is no averment in the plaint that he has suffered any actual loss, there is no cause of action on which the plaintiff can sue and in any event the suit is premature. Mr. Tendolkar relies for his arguments on Sections 124 and 125 of the Indian Contract Act, 1872. Section 124 defines the contract of indemnity as a contract by which one party promises to safeguard the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Mr. Tendolkar argues that what the promisor promises to save the promisee from is the loss caused to him and not loss which may be caused to him. Further, under Section 125 all that the promisee is entitled to recover from the promisor are damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies. Mr. Tendolkar contends that until the mortgagee files a suit against the plaintiff and obtains judgment which the plaintiff is compelled to satisfy the plaintiff is not entitled to sue the defendant.

3. If the whole law of indemnity was embodied in Sections 124 and 125 of the Indian Contract Act, there would be considerable force in the contention of Mr. Tendolkar ; but that is obviously not so. The Indian Contract Act is both an amending and a consolidating Act, and it is not exhaustive of the law of contract to be applied by the Courts in India. Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from. loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier.

4. In the present suit the indemnity arises because the plaintiff has become liable owing to something which he has done at the request of the defendant and therefore, in my opinion, Section 124 does not apply at all to the facts of this case. Further, Section 125, as the marginal note indicates, only deals with the rights of the indemnity-holder in the event of his being sued. Section 125 is by no means exhaustive of the rights of the indemnity-holder as I shall presently point out. The indemnity-holder has other rights besides those mentioned in Section 125.

5. Mr. Tendolkar has further relied on two decisions, one of our Court and the other of the High Court of Calcutta. In Shankar Nimbaji v. Laxman Supdu(1939) 42 Bom. L.R. 175 an appellate bench of this Court held that under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered, and a suit brought before actual loss accrues is premature. The proposition of law stated in these wide terms undoubtedly supports the arguments of Mr. Tendolkar. But if one examines the facts of that case, the decision there did not require the enunciation of the law in these very extensive terms, and I am not prepared to extend the principle of that case beyond the facts proved there and for the decision of which it was necessary. The facts of that case were that one Supdu used to deposit monies with defendant No. 2. After the death of Supdu, defendant No. 2 withdrew Rs. 5,000 from Supdu's khata and lent them to defendant No. 1 on a mortgage bond in his own favour. The plaintiffs, who were the sons of Supdu, protested against this and after some correspondence, defendant No. 2 passed a promissory note for Rs. 5,000 in favour of the plaintiffs. The plaintiffs then filed a suit to recover Rs. 5,000 and interest from defendant No. 1 by sale of the mortgaged property and in case of deficit prayed for a decree against the estate of defendant No. 2 which was in the hands of his sons, defendant No. 2 having died during the pendency of the suit. On these facts the Court held that the plaintiffs could not sue the defendants in anticipation that the proceeds realised by the sale of the mortgaged property would be insufficient and there would be some deficit left. The Court construed the promissory note as an indemnity given by defendant No. 2 to the plaintiffs in case any loss was caused to them by his unauthorised meddling with their money. As pointed out in the judgment, it was open to the plaintiffs to repudiate the mortgage transaction altogether and claim the whole of the amount] from defendant No. 2, leaving him to file a suit against defendant No. 1 to recover the mortgage amount; but the plaintiffs chose to accept that mortgage transaction and to treat defendant No. 2 as their benamidar and, therefore, all that they claimed to recover from defendant No, 2 was the loss, if any, that they might suffer in consequence of the mortgage transaction. It is, therefore, clear that if the plaintiffs recovered their full claim from the mortgaged property, defendant No. 2 would not be liable at all and, therefore, till the mortgaged property was sold and the deficit, if any, ascertained it was impossible to say whether the plaintiffs had suffered any loss which defendant No. 2 could be called upon to indemnify. Therefore, on the peculiar facts of that case it was necessary that the plaintiffs should suffer actual loss before they could maintain their action on the indemnity. But I am not prepared to read this judgment to mean that in no case can an indemnity-holder maintain an action against an indemnifier unless he has suffered actual loss.

6. In Chand Bibi v. Santoshkumar Pal I.L.R. (1933) 60 Cal. 761 the father of the defendant purchased from the plaintiffs their eleven annas share in certain property. This property including some other property was mortgaged by the plaintiffs to secure a sum of Rs. 2,700. The purchaser, the defendant's father, covenanted to pay off the mortgage debt and release the property which he had purchased and the other property from the mortgage. He also agreed to indemnify the plaintiffs if they were made liable for the mortgage debt. The defendant's father failed to pay off the mortgage debt, and the plaintiffs filed the action to enforce the covenant. In his judgment at page 765 Mr. Justice Lort-Williams observed that as the plaintiffs had not yet had to pay anything in respect of the mortgage although they were called upon to do so, and as the mortgagee had not yet taken any proceedings on the mortgage, the plaintiffs had not yet suffered any damage, and, therefore, the suit was premature so far as the cause of action on the indemnity was concerned. With great respect to the learned Judge who decided this case it was not at all a considered judgment on this particular point--no authorities having been cited before him. He also apparently overlooked the fact that he himself

decided an earlier case of the same Court (Osmal Jamal & Sons, Ltd. v. Gopal Purshattam (1928) I.L.R. 56 Cal. 262. Further, although the facts of the case are not very clearly stated, it seems from the arguments of counsel that the covenant in the conveyance in favour of the defendant's father was that the plaintiffs could not recover any amount from the purchaser until they paid the money to the mortgagee. If that was so, then the decision turns on the construction of the actual language of the covenant. Further, it does not appear whether the plaintiffs were personally liable to the mortgagees because it would be open to the mortgagees to enforce their mortgage claim against the property conveyed to the defendant's father, and if they could recover the full amount from the sale of that property, the plaintiffs might not be liable at all. In any case I prefer to follow the judgment of the same learned Judge in Osman Jamal & Sons, Ltd. v. Gopal Purshattam, when he considered all the English authorities and delivered a considered judgment. In that case the plaintiff company agreed to act as commission agents for the defendant firm for the purchase and sale of hessian and gunnies and charge commission on all such purchases, and the defendant firm agreed to indemnify the plaintiff company against all losses in respect of such transactions. Pursuant to the agreement the plaintiff company purchased certain hessian from one Maliram Ramjidas. The defendant firm failed to pay for or take delivery of the hessian purchases. Maliram Ramjidas re-sold the hessian goods at less than the contract price and claimed the difference as damages from; the plaintiff company. The plaintiff company went into liquidation, and the Official Liquidator filed a suit to recover the amount claimed by Maliram Ramjidas from the defendant firm under the indemnity. It was urged by the defendants that inasmuch as the plaintiffs had not yet paid any amount to Maliram Ramjidas in respect of their liability they were not at present entitled to maintain their suit under the indemnity. Mr. Justice Lort-Williams negatived the contention and passed a decree in favour of the plaintiff company with a direction that the amount when recovered from the defendant firm should be paid to Maliram Ramjidas.

7. It is true that under the English common law no action could be maintained until actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him, he had actually to wait till a judgment was pronounced, and it was only after he had satisfied the judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. Therefore the Court of equity stepped in and mitigated the rigour of the common law. The Court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into Court sufficient money which would constitute a fund for paying off the claim whenever it was made. As a matter of fact, it has been conceded at the bar by Mr. Tendolkar that in England the plaintiff could have maintained a suit of the nature which he has filed here; but, as I have pointed out, Mr. Tendolkar contends that the law in this country is different. I have already held that Sections 124 and 125 of the Indian Contract Act are not exhaustive of the law of indemnity and that the Courts here would apply the same equitable principles that the Courts in England do. Therefore, if the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off.

8. It is further argued by Mr. Tendolkar that in this case the liability of the plaintiff is not absolute but contingent. Mr. Tendolkar says that there is nothing to show that if the mortgagee was to sue to enforce his mortgage and the property was sold, there would

be any deficit for which the plaintiff would be liable. Mr. Tendolkar overlooks the fact that under both the mortgage and the further charge there is a personal covenant by the plaintiff to pay the amount due, and it would be open to the mortgagee to sue the plaintiff on the personal covenant reserving his rights under the security. Therefore, the liability of the plaintiff under the personal covenant is absolute and unconditional, and he would have no answer to a suit filed by the mortgagee under that covenant. Mr. Tendolkar suggests that if such a suit were filed the Court would, under Section 68, Sub-section (2), of the Transfer of Property Act, exercise its discretion and stay the suit until the mortgagee had exhausted all his available remedies against the mortgaged property or the mortgagee had abandoned his security. I do not propose to speculate as to what the Court might do in the event of this suit being filed. If the plaintiff is sufficiently substantial--and I am told he is--the mortgagee may content himself with obtaining a personal decree against him and give up his security, I, therefore, hold that the plaintiff is entitled to be indemnified by the defendant against all liability under the mortgage and the deed of further charge.

9. Turning to the prayers of the plaint, the plaintiff wants a declaration that he is entitled to be indemnified by the defendant. I do not think he is so entitled as the defendant has never denied the indemnity nor challenged his right to be indemnified.

10. The order that I will make will, therefore, be that the defendant be ordered to procure from the mortgagee a release of the plaintiff from all liability under the deed of mortgage and further charge. I give him three months' time to do so. In default of his doing so, the defendant to pay into Court the amount required to pay off the whole amount due to the mortgagee under the mortgage and further charge and that the amount so brought into Court to be utilised for the purpose of paying off the said mortgage and further charge.

11. There will also be a decree for the plaintiff for the costs of the suit.

12. It is not possible to ascertain today what would be the amount which the defendant would have to pay into Court in the event of his not procuring from the mortgagee a release of the plaintiff from all liability under the deed of mortgage and further charge. I have, therefore, not indicated the amount in the order I have made about payment by the defendant into Court of the money due under the mortgage. In case there is any difficulty as to working out this part of my order, I will give the parties liberty to apply under the decree.