

## I.L.R., 15 BOMBAY.

15 B. 1 = Chitty's S.C.C.R. 246.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MULJI GOVINDJI (*Plaintiff*) v. NATHUBAI HIRACHAND  
(*Defendant*).\* [4th July, 1890.]

*Contract—Assignment of contract—Suit by assignee of contract for damages for non-delivery—Plea that assignment of contract was a sham—Sham assignment—Fraud—Right of third party to question bona fides of assignment—Demand for delivery—Contract Act IX of 1872, s. 93.*

On the 25th December, 1886, the defendant contracted to deliver to the plaintiff on the 26th May, 1887, one hundred bales of cotton at Rs. 196 per candy. On the 28th February, 1887, the plaintiff assigned this contract to one Khorsi Khetsi, and a few days afterwards, *viz.*, 7th March, 1887, he became insolvent. In his schedule there was no mention of this contract, or its assignment, or of the receipt of any consideration for the assignment. Khorsi Khetsi, as the beneficial assignee of the contract, subsequently called on the defendant to give delivery of the goods, and offered payment of the price; but the defendant, who was then aware of the plaintiff's insolvency, refused, on the ground that Khorsi Khetsi was not a *bona fide* assignee of the contract for value; that the assignment was a sham, and was not intended to pass the beneficial interest in the contract. A suit was then brought against the defendant by Khorsi Khetsi claiming damages for breach of the contract. This suit was dismissed, on the ground that the assignment of the contract was fraudulent. The plaintiff knew of the dismissal of Khorsi Khetsi's suit in 1887, but had never himself made any demand on the defendant for the performance of the contract. On the 6th November, 1889, the plaintiff's petition in insolvency was dismissed for non-prosecution, and on the 18th November, 1889, Khorsi Khetsi re-assigned the contract to the plaintiff. The plaintiff now sued the defendant to recover damages for breach of the contract. He contended that his assignment to Khorsi Khetsi, though in fraud of the Official Assignee and the creditors of the insolvency, was not in fraud of [2] the defendant, and that by the dismissal of his petition the parties, as to their rights and liabilities under the contract, had been relegated to the position which they occupied prior to the plaintiff's insolvency.

*Held*, that the plaintiff was not entitled to recover damages from the defendant. There had been no demand for delivery by the plaintiff, or on his account,

\* Small Cause Suit No. 8924 of 1890.

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as required by s. 93 of the Contract Act IX of 1872. Khorsi Khetsi had asked for delivery as beneficial owner, but the property had not passed to him by the assignment; and although the defendant would be bound to recognize an assignee who could establish his title of full ownership in the contract, he was under no obligation to recognize Khorsi Khetsi when, as a fact, the beneficial interest in the contract still remained in the plaintiff, with whom the defendant had originally contracted.

In England, where there has been an assignment by deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors, on the ground of its not being a real transaction; but where the assignment is not by deed, the true nature of it as a sham may be proved. In India it is in all cases open to third parties to show that such was the case.

[F., 27 M.L.J. 445=(1914) M.W.N. 717; Appl., 9, Bom.L.R. 462 (464); R., 12 Bom.L.R. 822 (824)=7 Ind. Cas. 957; 16 C.P.L.R. 164 (167); 4 Ind. Cas. 233=5 N.L.R. 146 (149); 17 Ind. Cas. 39=6 S.L.R. 107.]

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge of the Court of Small Causes, Bombay.

" 1. This suit was instituted on 1st April, 1890, to recover from the defendant the sum of Rs. 756 as damages for the breach of a contract dated 25th December, 1886, to deliver one hundred bales of good Bhavnagar cotton at the price of Rs. 196 per candy on 26th May, 1887.

" 2. When the case was called on for hearing before me on the 9th, May, 1890, the plaintiff's pleader, after stating the effect of the contract as given above, stated the following additional facts in connection therewith. The contract in question was assigned by the plaintiff to one Khorsi Khetsi on the 28th February, 1887. Almost immediately thereafter the plaintiff became insolvent, and on 7th March filed his petition and schedule in the Insolvent Court. On 6th November, 1889, the petition was dismissed for non-prosecution by the plaintiff, and on 18th November, 1889, Khorsi Khetsi re-assigned the contract to the plaintiff.

" 3. The defendant's attorneys then raised the following defences:—

" (a) The assignment to Khorsi Khetsi was fraudulent;

[3] " (b) The insolvency and subsequent conduct of the plaintiff amounted to an abandonment of the contract, which was acquiesced in by the defendant;

" (c) Denial of breach by the defendant;

" (d) The plaintiff was not ready and willing to perform his contract by paying for and taking delivery of the cotton on due date;

" (e) Denial of damages.

" Neither party asked to have any specific issue raised and determined on these defences.

" 4. The plaintiff's pleader in opening his case then read certain correspondence that had passed between Khorsi Khetsi and the defendant after the date of the plaintiff's insolvency and before the due date of the contract, from which it appeared that the former, as the beneficial assignee of the contract, had called on the latter to give him delivery under it, and offered payment of the price, but the defendant had refused, on the ground that Khorsi Khetsi was not a *bona fide* assignee of the contract for value. The plaintiff's pleader then admitted that the assignment to Khorsi Khetsi was fraudulent, and had been so held by the late Second Judge of the Court while acting as Chief Judge in dismissing the suit No. 13043 of 1887 brought by Khorsi Khetsi, as assignee of the contract, against the defendant for damages by reason of its breach shortly after its due date.

He also admitted that the defendant was aware of the plaintiff's insolvency when he received notice from Khorsi Khetsi to give delivery to him under the contract as the assignee; that there was no mention, in the plaintiff's schedule, of the contract or its assignment, or the receipt of any consideration by the plaintiff from Khorsi Khetsi for the assignment; that the plaintiff had at no time subsequently sought to amend his schedule, or himself made any demand on the defendant to perform the contract, and that he knew, at the time, of the dismissal of Khorsi Khetsi's suit in 1887. But he contended that the assignment, though in fraud of the Official Assignee and the creditors of the insolvency, was not in fraud of the defendant, and that the parties by the dismissal of the plaintiff's petition had been relegated to the former position [4] in regard to their rights and liabilities under the contract as obtaining prior to the date of the plaintiff's insolvency.

"5. In disposing of the case so put before me on the facts above stated, I said there could be no doubt that the assignment by the plaintiff to Khorsi Khetsi was fraudulent, and if so, it seemed to me that the re-assignment by Khorsi Khetsi to the plaintiff was tainted with the same fraud, and, therefore, the plaintiff's right to maintain this suit, which was based on that re-assignment, seemed to me to be founded on fraud. But, apart from this, I held that the plaintiff by reason of his insolvency was not ready and willing to perform his part of the contract on its due date by himself, nor by his agent, inasmuch as Khorsi Khetsi's offer to perform it was not made as the agent of the plaintiff, but in his own right as the beneficial assignee of the contract. I also held that the conduct of the plaintiff had been such as justified the defendant in the belief that the plaintiff had abandoned his contract, and that in such belief he had likewise abandoned it—*Morgan v. Bain* (1). I, therefore, dismissed the suit, and certified the defendant's professional costs, Rs. 151.

"6. The plaintiff's pleader then required me to state a case for the opinion of the High Court, under s. 69 of the Presidency Small Cause Court's Act XV of 1882, and, on my desiring to be informed of the points on which the opinion was to be asked, stated he would formulate the questions and submit them on the 14th instant. On that day, accordingly, he submitted the ten following questions, of which the fourth, fifth, sixth, and seventh seem to me to be rather questions of fact than of law, and the ninth, moreover, to proceed on a misunderstanding of what my decision, in fact, was in regard to the third point mentioned in para. 5 above, while the tenth formed no part of his contention at the hearing, was not dealt with in my judgment, and was never indicated as one on which either my decision or the opinion of the High Court would be required. As, however, their Lordships in the recent case of *Sulleman Hassan v. The New Oriental Bank Corporation* seemed inclined to put a somewhat wide construction on the section under which this reference is required by [5] the plaintiff's pleader, I have thought it better, until the construction of that section is finally settled, to submit, for their consideration, all the questions desired by him exactly as they are proposed:—

"1. Whether the Judge was correct in allowing the defendant to raise an issue as to whether the assignment by the plaintiff to Khorsi Khetsi of (*inter alia*) the contract sued on was fraudulent?

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“2. Whether the Judge ought not to have ruled that it was not open to the defendant, as a stranger to the transaction, to plead the fraudulent nature of such assignment?

“3. Whether the Judge ought not to have held that whether such assignment was or was not tainted with fraud did not affect the plaintiff's right to recover against the defendant?

“4. Whether the Judge was correct in holding that upon such facts as were admitted the said assignment was fraudulent?

“5. Whether the Judge ought not to have held that the *onus* lay upon the defendant of proving that such assignment was fraudulent, and that he had not discharged such *onus*?

“6. Whether the Judge was correct in holding that the plaintiff was not ready and willing to pay and take delivery on due date?

“7. Whether the Judge was correct in holding that the plaintiff has acquiesced in defendant's not delivering under the contract?

“8. Whether the Judge ought not to have held that a sufficient demand for delivery of the goods and tender of cash, therefore, were respectively duly made, and that the defendant thereupon was bound to deliver the goods under the contract and answerable in damage for not so doing?

“9. Whether the Judge ought not to have held that any further demand or tender was excused by the defendant's refusal to recognize Khorsi Khetsi?

“10. Whether the Judge ought not to have held that by the terms of the contract providing that it should not be cancelled the defendant was not, in any event, whether or not the said [6] assignment was fraudulent or any demand or tender was made, bound to pay to the plaintiff the difference between the contract rate and the market rate on the 25th of August, 1887?”

*Lang*, for plaintiff.

*Macpherson* (Acting Advocate-General), for defendant.

#### JUDGMENT.

SARGENT, C.J. — We understand, from the fourth paragraph of the case stated by the Judge of the Small Cause Court and on examination of the proceedings in the Small Cause Court suit No. 13043 of 1887, that he found the assignment to Khorsi Khetsi to have been fraudulent in the sense of being a sham, and not intended to pass the beneficial interest; as explained in *Bowes v. Foster* (1), *Rajan Harji v. Ardeshir Hormusji Wadia* (2) and the cases mentioned in the foot note. The case of *Bessey v. Windham* (3) and *Phillpotts v. Phillpotts* (4) are doubtless, English authorities that where there has been an assignment by deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors, on the ground of its not being a real transaction. But *Bowes v. Foster* (1) shows that even in England, where the assignment is not by deed, the true nature of it as a sham transaction may be proved; and a long list of authorities in this Presidency, of which it is sufficient to cite *Rajan Harji v. Ardeshir Hormusji Wadia* (2) and the

(1) 2 H. & N. 779.

(3) 6 Q. B. 166.

(2) 4 B. 70 (76, 77).

(4) 10 C. B. 85.

cases referred to in the foot note, establish that in this country it is in all cases open to third parties to show that such was the case.

Here the beneficial property in the contract had not passed to Khorsi Khetsi; and although the defendant would be probably bound to recognize an assignee who could establish his title of full ownership in the contract, no authority was cited to show that he was under an obligation to do so, if, as a fact, the property in the contract still remained in the person with whom the defendant had originally contracted. Further, as Khorsi Khetsi asked for delivery as beneficial owner, and not on behalf of the plaintiff, there has been, in fact, no demand for delivery by the [7] plaintiff or on his account, as required by s. 93 of the Contract Act IX of 1872, which the defendant was bound to recognize.

We must, therefore, answer the eighth question in the negative. The first question must be answered in the affirmative, the term fraudulent being understood as above explained. The second and third questions, on a similar understanding, in the negative. The fourth, fifth and sixth questions require no answer, as the fourth and sixth raise a question of fact; and as to the fifth, the *onus* was not, as far as appears from the case, thrown on the plaintiff. The ninth must be answered in the negative. The seventh and tenth require no answer.

Costs of reference on the plaintiff.

Attorneys for the plaintiff: Messrs. *Conroy and Brown*.

Attorneys for the defendant: Messrs. *Chalk, Walker and Smetham*.

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*Before Mr. Justice Farran.*

W. D. RYRIE AND OTHERS (*Plaintiffs*) v. SHIVSHANKAR GOPALJI  
(*Defendant*).\* [2nd August, 1890.]

*Practice—Discovery—Affidavit of documents when there are several plaintiffs some of whom are in England—Inspection—Privilege—Grounds of privilege.*

Where there are several plaintiffs, all of them must join in making the affidavit of documents, unless some specific reasons to the contrary are shown. The fact that some of the plaintiffs reside in England, is no reason why they should be excused from making such affidavit.

Documents which contain the purport of interviews with, and of advice received from the plaintiffs' solicitors and counsel as to the plaintiffs' position in regard to their said claim and as to the steps to be taken thereto, are privileged.

Documents which record the steps taken by the plaintiffs from time to time in prosecuting their claim against the defendant, are not privileged.

Opinions upon, or steps taken in reference to a suit in which plaintiffs and defendant are putting forward opposing contentions, cannot be said to relate solely to the case of the plaintiff, and are not privileged.

SUMMONS in Chambers. The concise statement stated the plaintiffs' claim to be "for Rs. 57,397-10 and such further sum [8] with interest as might be the deficiency upon the consignment '*Ex Hispania*' and the

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\* Suit No. 234 of 1890.