

Bejoy Kumar Bhattacharjee and anr. Vs. (Firm) Satish Chandra Nandi, Jnanendra Nath Nandi, Dharendra Nath Nandi and ors.

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Court : Kolkata

Decided On : Feb-07-1936

Reported in : AIR1936Cal382,166Ind.Cas.900

Appellant : Bejoy Kumar Bhattacharjee and anr.

Respondent : (Firm) Satish Chandra Nandi, Jnanendra Nath Nandi, Dharendra Nath Nandi and ors.

Judgement :

D.N. Mitter, J.

1. This is an appeal by defendants 1, 5 and 6 from the decision of the Subordinate Judge, Hooghly, dated 4th August 1932, by which he decreed the suit of the plaintiff for recovery of a certain sum of money. Defendant 1 died during the pendency of the appeal and his five sons, who are defendants 2 to 6 to the suit, have been substituted in his place as the heirs and legal representatives under the law. The case stated in the plaint is that the defendants purchased from the plaintiff bricks and other materials for the construction of cooly lines of the Brahmanberia Jute Mills. It is alleged in the plaint that the defendant took material of the value of Rs. 12,674-7-0 from the plaintiff between 24th February 1925 and 27th October 1928. The defendants made payments from time to time of the sum

of Rs. 8,725-9-9 between 9th April 1925 and 27th February 1929. The plaintiff accordingly sued for the balance of Rs. 3,948-13-3 and to their claim they added the sum of Rs. 1,777-8-0 for interest at the rate of 18 per cent per annum. The total claim was laid at Rs. 5,726-5-3. On 17th August 1928 defendant 1 wrote a letter in favour of the plaintiff in which he agreed to be bound as a surety for the debt of the partnership.

2. The suit was contested by defendant 1 and his two sons, defendants 5 and 6 who by their written defence denied liability on the ground that they are not partners of the firm which took the materials and were not liable. They also pleaded limitation of a portion of the claim. They further contended in their written defence that the interest at the rate of 18 per cent per annum was excessive and unconscionable. Several issues were joined in the suit. The Subordinate Judge after taking evidence came to the conclusion that all the defendants were partners and were liable as such. On the question of limitation he reached the conclusion that as the suit which was instituted on 5th May 1931 was within three years of the last payment it was within time and he decreed the plaintiff's claim in full. Against this decision defendants 1, 5 and 6 have taken this appeal to this Court and defendant 1 having died during the pendency of the appeal the appeal is being continued by his heirs. Several points have been argued before us in support of the appeal. It is argued in the first place that in finding that defendants 1, 5 and 6 were partners the Subordinate Judge has gone against the pleadings as the case in the plaint is that defendant 1 was the sole partner and that all these defendants have been made liable because the articles were taken through them and there is absolutely no evidence on the record to show that defendants 5 and 6 were partners. As against defendant 1, it is next contended, the claim on the basis of suretyship cannot stand for the case of the suretyship was not pleaded and even assuming that the case of suretyship is made out, the plaintiff cannot get a decree against defendant 1 on that footing as the plaintiff did not get payment from the principal debtor and the suretyship was consequently discharged. It is argued by the appellant that the claim includes the price of the material after the letter of suretyship was given; and it is argued further that a good portion of the claim was barred by limitation; and lastly it is argued that the question of interest was not properly dealt with by the Subordinate Judge.

3. We will take the grounds in the order in which we have stated them. In so far as ground 1 is concerned which really rests on the argument that there is a variance between the pleadings and on the question as to who are really the partners, our attention has been drawn by Mr. Bose, who appears for the appellant, to para. 1 of the plaint, where it is stated that the defendants are a firm of contractors and their firm is known under the name and style of Pelley Brothers. It is also stated then that defendant 1 is the father of defendants 2 to 6 and they live jointly as members of a joint family and the real owner of the firm of Pelley Brothers is defendant 1, and the sons being capable manage the business. It is argued that the Subordinate Judge's finding that all the six defendants were partners of the firm of Pelley Brothers is clearly inconsistent with the statement made in para. 1 where the allegation is that the real owner of the firm is defendant 1. It appears, however, that when the matter came before the Subordinate Judge several issues were framed of which issue 4 was to the following effect :

Who are the proprietors of firm of Pelley Brothers? Have defendants 1, 5 and 6 any interest in it? If not, are they liable for debts due to the plaintiff?

4. Upon this issue evidence was directed and the issue was deliberately fought out in the Court below. In such circumstances it would not be right for us to hold that the Subordinate Judge was wrong in arriving at the conclusion that all the defendants were partners of the firm even in view of the case as laid in para. 1 of the plaint. In cases of this kind one has to bear in mind certain observations of their Lordships of the Judicial Committee of the Privy Council bearing on the question in *Sagarmal Nathany v. John Carapiet Galstaun* 1930 P C 205. In that case it was pointed out by their Lordships that pleadings should not be construed too narrowly and therefore in dealing with the question whether there has been a variance between a plaintiff's pleadings and the case alleged at the trial the Court must look not to the mere wording of the plaint, but to the issues which were settled for trial and to the manner in which the case was deliberately fought out by both the parties in the trial Court. Whatever the statement be in para. 1 of the plaint it appears clear that the parties understood that the real issue was whether all the defendants, including the appealing defendants, were partners or not. In the case before the Judicial Committee Lord Tomlin pointed out this:

Their Lordships so far as the first suit is concerned, see no reason to differ from the main findings of facts of the trial Judge and are of opinion that the High Court founded themselves upon too narrow a ground in dismissing the suit for variance. Their Lordships are satisfied that notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.

5. We do not think therefore that there is any substance in the ground which is raised as to the variance of the pleadings and proof having regard to the course which the trial took after the issues were framed. We do not think that there has been any prejudice in so far as defendants 1 to 6 are concerned. The next point taken is that there is absolutely no evidence to show that defendants 5 and 6 are partners. We do not think that this ground is sustainable seeing that there are a few outstanding facts which leave no doubt in our mind that the partnership consists of the father defendant 1 and his five sons. One of such outstanding facts is that it is admitted by defendant 1, the father, when he deposed before the Commissioner that he gave a sum of about 2 lacs of rupees in order to enable the sons including the appealing defendants to start this business. We are asked having regard to the evidence given before the Commissioner that he was giving the sum to the other defendants, namely defendants 2, 3 and 4 for starting this business. But as has been pointed out by the Subordinate Judge that the right construction to be put upon the evidence of defendant 1 given before the Commissioner is to hold that he was giving it to all his sons, for it is not likely that he should invest a sum of 2 lacs of rupees depriving his two younger sons from the benefit of the partnerships. This also appears to be the case from certain correspondence which has been referred to by the Subordinate Judge-certain letters and postcards Ex. 5 and 5 (a). There defendant 1 was writing to the other plaintiff Satis Nundy for taking time to adjust the accounts.

6. This is only consistent with the circumstance that defendant 1 was a partner. An attempt was made therefore both in this Court as also in the Court below, to show that neither Ex. 5 nor Ex. 5 (a) contains the genuine signature of defendant 1 and this attempt failed before the Subordinate Judge who had no hesitation in rejecting this contention. He held that the signatures on these two letters were genuine. The

two letters Ex. 5 and Ex. 5 (a) are to be found printed at pp. 32 and 33 of the second part of the paper book. It is true that defendant 1 has given a denial to these signatures but the Subordinate Judge is of opinion that the evidence of defendant 1 is of a shifting and prevaricating kind, and that he was unable to place any reliance on it after a careful perusal of it, and it seems to us that the whole object of defendant 1 was to shield defendants 2, 3 and 4 and to make it difficult for the plaintiff to realize his money. We are in entire agreement with the Subordinate Judge after having gone into the entire evidence on this point. With regard to the ground about the liability on the basis of suretyship it is not necessary to come to any conclusion in view of our finding that defendant 1's liability as partner has been established to our satisfaction. The real question on which we have heard the respondent and thought that the case calls for a reply was the plea of limitation. It appears from the finding of the Subordinate Judge on this question of limitation that the issue of limitation was not urged or made out by evidence.

7. It appears that the Subordinate Judge negatived the plea of limitation on the ground, as he puts it, that the suit was instituted on the 22nd Baishakh 1338 B.S. corresponding to 5th May 1931 and that the claim was within time because the date of the last transaction was Kartick 1335 B.S. This finding of the Subordinate Judge would undoubtedly be justified if the case was treated as one of mutual open and running accounts within the meaning of Article 85 of the Schedules to the Limitation Act. Having regard to the evidence which has been given in this case it cannot be said that the transaction in this case disclosed the case of mutual open and current account where there has been reciprocal demands. The present case appears to be one in which goods were purchased and payments made in discharge of the price of the said goods. The true test in cases of open and mutual accounts has been discussed in a very elaborate judgment of Sir George Rankin C. J., (as he then was) in the case of *The Tea Financing Syndicate Ltd. v. Chandra Kamal Bez Barua* 1931 Cal 359. After an exhaustive review of the authorities Sir George Rankin summarizes his conclusion as follows:

There can I think be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following *Holloway, Ag. C. J.* transactions on

each side creating independent obligations on the other and not merely transactions which create obligations on one side. Those on the other being merely complete or partial discharges of such obligations.

8. The present case is really a case where there are obligations on one side, those on the other side being merely partial discharges of the obligation. The goods were purchased and were paid for. In this view it appears that Mr. Sarat Chandra Roy Choudhury who appears for the respondent does not contest the argument of the appellants that Article 85 does not apply to this case but concedes that the real article applicable to the present case is Article 52 for the price of the goods, and that the suit is to be instituted within three years from when the goods were delivered. It appears from the evidence that some of the goods the prices for which were sued for were delivered beyond three years of the date of the institution of the present suit, that is beyond three years of 5th May 1931, and we are told that it will be possible from an examination of the accounts to arrive at a figure which will show the amount that is barred by limitation. But it was not possible, having regard to the state of account books the only material available to the Court, for the learned Advocates on either side to arrive at a very definite figure. In these circumstances we have no other alternative but to hold that this ground cannot be sustained and this contention cannot be given effect to, having regard to the paucity of material on the record of this case. The defendants-appellants are to blame in this matter and to some extent. It is true that the plea of limitation can be urged at any stage having regard to Section 3, Limitation Act, but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence it becomes difficult for the Court sitting in appeal to give effect to the defence contention. Before the Sub-Judge the point of limitation was faintly urged, for the learned Judge remarks: 'Issues 2 and 3 were not urged or made out by evidence.' It seems to us that the trial Judge must have felt the same difficulty which we have felt, viz., paucity of materials to sustain the defence. On these grounds we must regret the contention of the appellant on the question of limitation. In this view the ground which is based on the plea of limitation must also fail.

9. Having regard to the circumstance that the Subordinate Judge seems from his very brief finding on limitation to have applied a wrong article of the schedules to the Indian Limitation Act to the present case we are of opinion that that circumstance really bears on the question of costs. The defendants had fair reasons for preferring this appeal. In these circumstances we dismiss this appeal, but we do not allow any costs to the plaintiffsrespondents either in this Court or in the Court below. We affirm the decree of the Subordinate Judge except with regard to costs.

Patterson, J.

10. I agree.

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