

(1939) 04 CAL CK 0015
In the Calcutta High Court

Ali Mohamed Ebrahim Shakoor

APPELLANT

Vs

Adam Hajee Peer Md. Essack and Others

RESPONDENT

Date of Decision : 06-04-1939

Acts Referred:

Partnership Act, 1932 — Section 68

Citation : AIR 1940 Cal 134

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—This is an application by, defendant 6, Hajee Adam Abdul Bhakoor, for an order that the leave granted under Clause 12 of the Letters Patent of this Court to the plaintiff to institute this suit in this Court be revoked, in the alternative for an order staying the suit. There was a prayer for security for costs; that was abandoned by learned Counsel for the petitioner. This motion arises out of a suit instituted by the plaintiff Ali Mohamed Ebrahim Shakoor against six defendants. They are (1) Adam Hajee Peer Mohamed Essack, for self, (2) Adam Hajee Peer Mohamed Essack, as manager of Peer Mohamedi Fund, (3) Ahmed Hajee Peer Mohamed, (4) Abdul Karim Adam, (5) Taiyub AH Mohamed, and (6) Hajee Adam Abdul Shakoor. It will be more convenient, I think, to refer to the defendants by their respective numbers and not by their names which are confusing by reason of the fact that the names of the different defendants are very similar and seem to be a permutation and combination of one another's names. Defendant 1 is the same person as defendant 2. Defendant 3 is the brother of defendant 1 and defendant 4 is the son of defendant 1. Defendant 5 is the plaintiff's son, and defendant 6 is the manager of defendant 1. It is clear from this statement that defendants 1, 3 and 4 are closely related as brothers and son, and defendant 6 is the manager of defendant 1. The plaintiff's suit is one for the dissolution of a partnership alleged to be existing between him and the five defendants and for accounts. There is a farther prayer for a declaration that the document executed by the plaintiff on 3rd February 1936, in favour of defendant 1 is void on the ground of fraud, undue influence and similar grounds.

It is alleged that the partnership business was carried on at Calcutta.

2. The suit was instituted on 27th June 1938. The written statement of defendant 1 was filed on 10th August 1938, and the written statements of the other defendants were filed on 7th November 1938. On 22nd August 1938, defendant 1 applied to this Court for a stay of the suit and for security for costs. In fact that application was similar to the present one in all respects except that there was no prayer for an order to revoke the leave granted under Clause 12 of the Letters Patent. The other defendants did not join in that application, nor were they served with notice of that application. On 6th December 1938, by consent an order was passed. The plaintiff consented to furnish security. While that application was pending the other defendants were written to by the solicitors of the plaintiff asking them to state their attitude with respect to the application, but no reply was given to this letter. Thirteen days after that consent order, that is on 19th December 1938, the present application has been made by defendant 6, who, as I have said, is the servant of defendant 1. In this application it is worthy of notice that defendant 3, who is the brother of defendant 1, has not been served with notice.

3. On behalf of the petitioner the allegations are briefly as follows : He says that there was no partnership between defendant 1 and the other defendants. He claims that the business belonged to defendant 1 alone and that the plaintiff and the others were servants, who had a share in the profits of the business. His contention is that under the peculiar law prevailing in the Bantva State where the agreement between the parties was entered into and where all the parties reside, the agreement did not constitute a partnership. This agreement is dated 15th December 1934. It is stated that the head office of the business is at Bantva and not at Calcutta and it is pointed out that there is a term in the agreement whereby the plaintiff agreed that all, disputes would be settled at Bantva or Rajkot and that he would not be permitted institute legal proceedings elsewhere. The next important allegation of the petitioner is that all accounts between the plaintiff and defendant I have already been settled and that on 3rd February 1936, the plaintiff executed a document evidencing this settlement of account and terminating the agreement. This document it was alleged was executed at Bantva. This is the document which was challenged on the ground of fraud and undue influence. The petitioner alleges that no fraud or undue influence was exercised, and that the circumstances all indicate that the plaintiff willingly and with full knowledge of all the facts executed this document. It is said that pursuant to this document the plaintiff was given a sum of over Rs. 3,00,000 which he accepted. The contentions of the petitioner are : firstly, that the entire cause of action in this suit arises outside the jurisdiction of this Court; secondly, that the plaintiff contracted that he would not be entitled to bring any suit except in the Bantva and Rajkot Courts. On these grounds it is contended that this Court has no jurisdiction to entertain this suit. Thirdly, it is said that, even if this Court has jurisdiction to entertain this suit on the footing that part of the cause of action has arisen here, the leave granted should be revoked or the suit should be

stayed inasmuch as the suit has been brought here with intent to make it impossible for the defendants to defend the suit. It is pointed out that all the books are at Bantva, all the witnesses reside there, and that the suit could be most conveniently tried at Bantva or Rajkot. The contention is that this suit has been brought here deliberately with the object of making it impossible for the defendants to carry on their defence.

4. On behalf of the plaintiff-respondent the contention is that there was a partnership and that the partnership was registered at Calcutta. It was further pointed out that Calcutta was the principal place of business, of the partnership. On this ground it is argued that this Court has jurisdiction to try this suit. It is contended further that the deed of partnership does not contain any clause which precludes the plaintiff from suing in this Court. Lastly, it is said that this suit can be conveniently tried here and that this application is a mala fide one made for the purpose of harassing, the plaintiff. The first thing to remember in an interlocutory application like this is that matters of difficulty and importance which require a meticulous consideration of facts and law and which are best determined upon the evidence of witnesses who have been subjected to cross-examination should be decided at the trial of the suit and not in the application. I do not consider that it is necessary to go into the facts in detail or to decide finally whether the plaintiff's allegations of fraud are justified or whether they are themselves fraudulent. What has to be decided on this application is whether any part of the cause of action has arisen within the jurisdiction of this Court and if so whether the leave granted under Clause 12 of the Letters Patent, should remain. Upon the materials before me and as at present advised, I have no hesitation in coming to the conclusion that the plaintiff has shown that a part of the cause of action has arisen within the jurisdiction of this Court. There is a register which is kept in accordance with the terms of the Partnership Act. In that register it is stated that all the parties are partners and that the principal place of business of the partnership firm is at No. 1, Amratolla Lane, Calcutta. u/s 68, Partnership Act, it is laid down that the statements contained in the register of firms shall as against any person by whom or on whose behalf such statements have been made be conclusive proof of any fact therein stated. The defendants say that this entry was made merely to enable the plaintiff to file suits in the Small Cause Court at Calcutta and to deal with certain income tax matters and that it does not represent the real state of things. I am extremely doubtful whether the defendants can be allowed to say this in view of the provisions of Section 68, Partnership Act. In any case for the purposes of this application the register of firms is sufficient evidence to establish that there was a partnership business, that the plaintiff and the defendants were all partners in this business and that the principal place of business of the firm was at Calcutta. This suit is for a dissolution of this partnership, therefore this Court has jurisdiction to try this Suit.

5. On behalf of the petitioner it is said that the plaintiff has already, by a document of 3rd February 1936, given up his rights. The plaintiff says that this

document was brought about by fraud. This question must be decided in the suit and cannot be decided upon affidavits on an application of this nature. Next the petitioner relies upon the clause in the partnership agreement of 15th December 1934, which he says debars the plaintiff from suing in any other Court except the Courts at Bantva and Rajkot. The translation of this document furnished by the petitioner is not on affidavit. On behalf of the plaintiff there is a translation which is supported by an affidavit. After perusing this translation I cannot say that, by this document the plaintiff has divested himself of his right to bring a suit of the nature of the present one in this Court. I shall now deal with the next contention-urged on behalf of the petitioner, namely, that even if this Court has jurisdiction to try this suit leave should be refused on the ground of balance of inconvenience or on the ground that the plaintiff has brought this suit mala fide in this Court merely to harass the defendant. Certain cases were cited in support of this contention. They are *Radha Bibee v. Mucksoodum Doss* (1874) 21 W.R. 2004, *Kalooram Agarwalla Vs. Jonistha Lal Chakrabarty and Another*, and *Daulatram Rawatmull Vs. Maharajlal and Others*, . In my opinion these decisions can be distinguished from the circumstances of the present application. In the case reported in *Radha Bibee v. Mucksoodum Doss* (1874) 21 W.R. 2004 a widow was suing for maintenance. The entire-cause of action arose outside the jurisdiction of this Court. The widow sought to invoke the jurisdiction of this Court by praying for an order that a charge may be declared upon certain Calcutta property for her maintenance. In the cases reported in *Kalooram Agarwalla Vs. Jonistha Lal Chakrabarty and Another*, and *Daulatram Rawatmull Vs. Maharajlal and Others*, the suits were on promissory notes. The entire cause of action was outside Calcutta. The plaintiff brought the suits in this Court-depending upon assignments of the promissory notes made within the jurisdiction of this Court obviously for the purpose of creating jurisdiction. In all these cases it will be seen that the jurisdiction of this Court was sought to be attracted by a device and it was held that when the subject-matter of a suit is outside the jurisdiction of this Court the plaintiff should not be allowed to bring a suit in this Court by the adoption of such devices. The decisions reported in *Kalooram Agarwalla Vs. Jonistha Lal Chakrabarty and Another*, and *Daulatram Rawatmull Vs. Maharajlal and Others*, were not followed in another case reported in *Rai Radhika Mohan Roy Br. V. Bhobani Prosanna Lahiri* (1936) 63 Cal. 908 on the ground that if the view of the earlier cases were adopted it would strike at the root of negotiability. I am not concerned with the question of negotiability in this case. It is quite clear however that in all these cases jurisdiction did not exist until jurisdiction was attracted by the adoption of a device for the express purpose of conferring jurisdiction on this Court.

6. In this case the position is quite different. The plaintiff relies not upon any device; he relies upon facts which were in existence long before this suit was ever contemplated. He relies upon the entry in the register kept under the Partnership Act. It cannot be said that this entry was made with the object of giving the plaintiff an opportunity of bringing the suit in this Court. I am of

opinion therefore that the cases cited by learned Counsel on behalf of the petitioner do not help him. Learned Counsel for the petitioner then relied upon a case reported in *Jethabhai Versey & Co. v. Amarchan Madhavji & Co.* AIR (1942) Bom. 9. In that case certain principles were laid down upon which the Court would be justified in ordering a stay of the suit. In my opinion, the facts of the present case do not fall within the scope of those principles. It was said there:

If the Court taking all the facts into consideration comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then apart from any question as to expense or inconvenience, in my opinion, not only has the Court jurisdiction, but it is its duty to stay the proceedings.

7. Again there is the following passage:

As I have already pointed out in order to justify a stay it is as a rule necessary that something more should exist than a mere balance of convenience in favour of proceeding in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done in this sense, that it will be very difficult or practically impossible for the litigant who is applying for stay to get justice in this country.

8. It may be that in this case many of the witnesses are residents of Bantva. It may also be true that some documents are at Bantva. But I do not think that it can be said that if the suit were tried here it would be so inconvenient for the defendant as to result in injustice being done. I shall next take up the contention of the respondent that this application is mala fide. In my opinion this contention is not groundless. As I have said before, there was an application by defendant 1 a very few days before the present one which was almost in identical terms. The only substantial difference between that application and the present one is that there was no prayer for revoking the leave granted under Clause 12 of the Letters Patent. It is curious that the other defendants did not join in that application. It is also curious that this prayer for revocation of leave was not made then although all the facts which are now relied upon were well known to defendant 1 at that time. It is also curious that the other defendants, although they were written to by the plaintiff did not care to disclose what their attitude was in respect to that application. A further fact which raises a suspicion in my mind is that defendant 3, who is a brother of defendant 1, has not been given notice of this application, nor has he joined in this application. The suggestion made by the petitioner that this has been done deliberately so that defendant 3 may come up with another application is not without foundation. In these circumstances I consider that this application should be refused. I accordingly dismiss it with costs. The costs will be as of a defended action. There will be only one set of costs.