

(1943) 11 BOM CK 0006

In the Bombay High Court

Case No : O.C.J. Appeal No. 9 of 1943 and Suit No. 499 of 1940

Bhagwanji Morarji Goculdas

APPELLANT

Vs

The Alembic Chemical Works Co. Ltd.

RESPONDENT

Date of Decision : 24-11-1943

Acts Referred:

Citation : AIR 1943 Bom 385 : (1944) 46 BOMLR 265

Hon'ble Judges : Leonard Stone, J;Coyajee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Leonard Stone, Kt., C.J.—This is an appeal from the judgment of Mr. Justice Chagla dated December 16, 1942. The appellant's claim is based on an agreement dated December 7, 1907, which in draft form was annexed to the memorandum and articles of association of the respondent company, which was incorporated on July 30, 1907. Mention of the agreement then in draft is to be found in Clause 6 of the memorandum of association of the respondent company, which commences as follows :

The members who at present constitute, or who may hereafter constitute the firm of Messrs. Kotibhasker, Amin & Co., are hereby appointed secretaries, treasurers and agents of the company upon the terms contained in the agreement annexed to the articles of association and it is hereby expressly provided that, in consideration of the services rendered by them in promoting the company after first establishing the practicability of the industry by actually starting tentative factories, the appointment of the said firm as secretaries, treasurers and agents of the company shall not be liable at any time hereafter to be revoked or cancelled on any ground or for any reason whatever, save and except their being found guilty of fraud in the management and discharge of their duties as such secretaries, treasurers and agents.

And the clause proceeds to lay down the rates of remuneration which the firm

are to receive.

2. By the said agreement four named persons, A S. Kotibhasker, B.D. Amin, K. T. Gajjar (then a minor) by his guardian T. K. Gajjar and M. B. Bhatavdekar, parties of the second part, described as all of Bombay, and carrying on business there under the name and firm of Messrs. Kotibhasker, Amin & Co., promise and agree on behalf of themselves and each of them and tht members or member of the said firm of Messrs. Kotibhasker, Amin & Co. for the time being, thereafter referred to as "the said firm," to and with the respondent company as follows :

(1) That the said Anant Shridhar Kotibhasker, Bhailal Dajibhai Amin, Krishnalal Tribhowandas Gujjar and Moreshwar Bhalchandra Bhatavdekar or the members or member of the said firm for the time being will faithfully and to the best of their and his ability perform the offices of secretaries, treasurers and agents of the said company, for the purposte of carrying on to the best advantage the (sic) of the said company, as long as the said company and the said firm shall continue to carry on their respective business at the remuneration, upon the terras, and subject to the conditions, hereinafter particularly mentioned and described.

(2) In consideration of the agreement hereinbefore contained on the part of the said firm, and in further consideration of the said firm, having promoted the said company, the said company hereby promise and agree with the said firm and its members or member for the time being, that the said firm shall be employed as, and shall be the secretaries, treasurers and agents of the said company as long as the said firm; and the said company shall exists and continue to carry on business either in the present or any other name, and that such appointment shall not be liable to be at any time revoked or cancelled on any ground or for any reason whatever, save and except their being found guilty of fraud in the management and discharge of their duties as Such secretaries, treasurers and agents; and the said company doth hereby for itself and its successors covenant with the. said Anant Shridhar Kotibhaskar, Bhailal Dajibhai Amin, Krishnalal Tribhowandas Gajjar and Moreshwar Bhalchandra Bhatavdekar and the said firm severally and jointly that the said company shall from time to time when the constitution of the said firm changes by death, retirement, admission of any new partner or otherwise enter into a fresh agreement, if necessary, with the said firm and the partner or partners therein in the terms in these presents contained. Provided that the appointment of the said firm as such secretaries, treasurers and agents shall forthwith cease and determine in the event of the company going into liquidation except for the purpose of reconstruction.

3. And by clause 8-

The said firm may at any time during the continuance of this agreement, subject to the approval of the board of directors¹, transfer to any fit and proper person or persons all the interest of the said firm under this agreement.

4. A.S. Kotibhasker died in 1910, and as the result of an assignment dated June

9, 1920, whereby the shares of K.T. Gajjar and M.B. Bhatavadekar were assigned to one Narayan Purshottam, B.D. Amin became the only original member of the firm, who was still a partner and carrying on business as Messrs. Kotibhasker, Amin & Co.

5. On March 31, 1922, Narayan Purshottam assigned his two shares to the plaintiff, so that from that time until the next assignment, which took place on October 5, 1939, the plaintiff and Amin carried on as partners the business of the old firm. In fact it appears that Amin was the active partner who managed the affairs of the respondent-company, whereas the plaintiff does not appear to have taken any active part in the business of the firm and consequently in the management of the respondent-company's affairs.

6. By an assignment dated October 5, 1939, Amin retired and assigned his share in the partnership to his son. So that as from the date of such assignment none of the original partners were concerned with the business. On November 20, 1939, the respondent-company by its attorneys wrote to the plaintiff asserting the view that as all the original partners had left the business of the firm of Messrs. Kotibhasker, Amin & Co., the firm had ceased to exist and to function as; secretaries, treasurers and agents to the respondent-company, and in effect there was for the first time a refusal to employ Messrs. Kotibhasker, Amin & Co. any further. But it should be mentioned that between October 5 and November 20 nobody as a representative of Kotibhasker, Amin & Co. had managed or taken any part in the respondent-company's affairs, and the respondent-company in fact made its own arrangements, though these were unknown to the plaintiff until after the notice of November 20 had been received. The relevance of this is because the respondent-company has raised the issue that in any event Messrs. Kotibhasker, Amin & Co. were not after October 5, 1939, ready and willing to perform the services as secretaries, treasurers and agents of the respondent-company.

7. The only other fact, which it is necessary to mention, is that it appears that when an original partner or the successor of an original partner retired and assigned his share, it was the practice to notify the respondent-company by letter. It does not appear whether these letters were ever replied to ; but the respondent-company recorded the fact of their receipt in the minute book of the meetings of the directors of the respondent-company.

8. When Narayan Purshottam purchased two shares in the firm, the letter which is dated June 9, 1920, took the following form :

We are instructed by our client Mr. Narandas Purshottam to state that by an assignment dated to-day Mr. Krishnalal Tribhowandas Gajjar one of the partners in the firm of Messrs. Kotibhasker, Amin & Co. has assigned to our client his right title and interest in the said firm and in all the stock in trade, book and other debts credits contracts assets" effects profits business and goodwill of the said firm from January 1, 1920. We therefore request you to make a note of the Said

assignment.

The entry in the minute book; of the respondent-company being under date July 28, 1920, was as follows :

(6) Letter from Messrs Bhaishankar Kanga & Girdharlal, solicitors of Mr. Narandas Purshottam be noted.

9. Again, when Narayan Purshottam assigned his two shares to the plaintiff, the letter which is dated April 1, 1922, took the following form :

We are instructed by our client Mr. Bhagwanji Morarji to inform you that by an assignment dated March 31, 1922, Mr. Narandas Purshottam a partner in the agents firm of Kotibhasker, Amin and Co. has this day assigned his share or interest in the said firm of Kotibhasker, Amin & CO. to him. Copy of the said assignment is sent to the agents for registration in the office of the company which please note.

The assignment, copy of which was enclosed, recites that by an agreement of December 7, 1907, made between the respondent-company and Messrs. Kotibhasker, Amin & Co. the firm were upon the terms and conditions contained therein employed as the secretaries, treasurers and agents of the. respondent-company, and in the operative part of the assignment the plaintiff as purchaser covenanted with Narayan Purshottam that he would in due course observe and perform all the covenants and conditions contained in the agreement of December 7, 1907. The letter enclosing copy of the assignment from Narayan Purshottam is noted in the respondent-company's minute book in the following terms :

Noted contents of the letter dated April 1, 1922, from Messrs. Motichand and Devidas, solicitors of Mr. Bhagvanji Morarji Goculdas Devji, regarding the purchase and assignment of the share of Mr. Narandas Purshottamdas in the firm of Messrs. Kotibhasker Amin & Co. by the said Bhagwanji Morarji.

10. At no time does any one seem to have considered that it might be necessary, as was contemplated by the agreement of December 7, 1907, that the respondent company should enter into some new or further agreement with a new partner or with the firm as reconstituted.

11. It is also necessary to say something with regard to the remaining defendants. Besides defendant No. 1, who is the respondent-company, and defendant No. 2, who is Amin's son, there are twelve other defendants, none of whom appear on this appeal. Some of them are the legal personal representatives of A.S. Kotibhasker, and the rest of them appear to be persons who have purchased or acquired a sort of dormant share in the firm of Messrs. Kotibhasker, Amin & Co., from which they draw profits but in which they do not work or have any liability for losses. The action is framed as a claim for damages against the respondent-company for breach of the agreement of December 7, 1907. No other relief than the sum of Rs. 9,00,000 damages and interest thereon

is claimed. The plaintiff is not an original partner, and the respondent-company has entered into no covenant or agreement with him. I think that at the outset the Advocate General was attempting to contend simpliciter that if A contracts with B to pay C a sum of money, C can sue A. But the way the matter developed is as follows:

First, it is said that there is an express agreement in favour of the plaintiff on which he can sue, because the agreement of December 7, 1907, has endowed the firm of Messrs. Kotibhasker, Amin & Co. with perpetual succession as secretaries, treasurers and agents of the respondent-company.

Secondly, it is said that if this be not so, then there is a constructive or implied agreement on which the plaintiff can sue, because in the events which happened in 1922 the respondent-company recognised the assignment to the plaintiff by Narayan Purshottam and that such recognition created a new agreement between the respondent-company and the plaintiff and B.D. Amin which incorporated all the provisions and terms of the agreement of December 7, 1907. No estoppel has been pleaded nor is any relied on.

12. This second contention was not relied upon in the Court below, and objection was taken by Mr. Coltman to its being relied upon in this Court; because it is not pleaded in the plaint. Some controversy took place as to whether paragraph 17 of the plaint was sufficient to ground a claim for a constructive or implied agreement : but even if it is sufficient it is clear that the only relief claimed in the prayer to the plaint is damages for breach of the agreement of December 7, 1907. An application was accordingly made in this Court by the Advocate General on behalf of the plaintiff to amend the plaint by adding at the end of paragraph 17 the words " for the period and on the terms and conditions contained in the agreement of December 7, 1907 " and by adding a new paragraph 17-A so as to raise a new agreement between the respondent-company and the firm as constituted with the plaintiff and B.D. Amin as partners and by adding to the prayer of the plaint a claim in respect of the breach of such new agreement. Mr. Coltman strenuously opposed any leave to amend being granted, and amongst other reasons he pointed out, that any claim for breach of any such new agreement would be statute barred as the time under the Indian Limitation Act is three years only. Further that even if such difficulty could be overcome, B.D. Amin would be a necessary party to this suit. We upheld these objections and refused leave to amend. The plaintiff, therefore, can only rely on his contention that by the conjoint effect of the agreement of December 7, 1907, and the fact that he has become a member of a firm carrying on business as Messrs." Kotibhasker, Amin & Co. he has a right to sue for damages for breach of that agreement. As already stated, no estoppel is pleaded or relied upon.

13. In the first place, it is necessary to consider the nature and terms of the agreement of December 7, 1907. It is an agreement, of a type common in this country, and usually known as a managing agency agreement : indeed so common have these agreements become that the Legislature has intervened by

a group of sections in the Indian Companies Act, 1936, in order to set a limit to the authority of such agencies; but the Act is not retrospective except that by Section 87A managing agencies existing when the Act came into force can only survive for twenty years from that date.

14. The agreement of 1907 is an agreement for services to be rendered by the partnership to the company, and for employment by the company of the partnership. Mr. Coltman has submitted that as a matter of construction the definition of " the said firm ", therein contained, as being the four named persons "and the members or member of the said firm of Messrs. Kotibhasker, Amin & Co. for the time being : " is really only a compendious method of saying the four persons and the survivors or survivor of them. I cannot accept this construction, because, in my opinion, the clause, which provides that

the said company shall from time to time when the constitution of the said firm changes by death, retirement, admission of any new partner or otherwise enter into a fresh agreement, if necessary, with the. said firm and the partner or partners therein in the terms of these presents contained.

clearly contemplates the introduction of new partners into the firm. This clause is only consistent with an attempt to endow the partnership with what Sir John Beaumont has described in the case to which I will presently refer as : " the attributes of a corporation having perpetual succession : " so that from generation to generation its constituents for the time being shall serve the company as secretaries, treasurers and agents, and the company shall be bound to employ them as such upon the remuneration originally fixed. That this employment was a valuable asset is demonstrated by the fact that the plaintiff paid Narayan Purshottam Rs. 1,05,000 for his two shares in the firm; it being common ground that Messrs. Kotibhasker, Amin & Co. carry on no other business than that of acting as secretaries, treasurers and agents to the respondent-company.

15. The difficulty in the plaintiff's way is that neither he nor any of his predecessors in title did compel the company to enter into a fresh agreement with them. It is said on the plaintiff's behalf that this only had to be done : " if necessary." But, in my judgment, these words are amply explained by the fact that changes in the firm contemplated, are by death, by retirement and by admission of a new partner or otherwise. In the first two cases, it might not be necessary to require the company to enter into a new agreement; since the remaining or continuing partners would be persons to whom the company was already bound ; but except on the doctrine of perpetual succession I cannot see how the respondent-company is bound to employ the plaintiff with whom it has never entered into any contract.

16. Three cases have been relied upon by the plaintiff. The first of these is Nusserwanji Merwanji Panday v. Gordon ILR (1881) 6 Bom. 266. That case was also in respect of a managing agency agreement which the plaintiffs sought to

enforce by injunction, and although this relief was refused, the plaintiff relies on the following passage in the judgment of Sir Charles Sargent (p. 277) :-

As to the first of the defendants' objections, I think that, having regard to the memorandum and articles of association, the contract, however informally and clumsily worded, was that the firm, for the time being, should be the agents of the company for twenty-five years. The right, therefore, to sue on the contract would, by its nature, survive to the three plaintiffs after the death of Merwanji." But be it observed that when the facts of that case are examined, it appears that the three plaintiffs were original members of the firm and not as in the case before us claiming as the successor of a successor.

17. The second case is Ramkumar Potdar Vs. The Sholapur Spinning and Weaving Co. Ltd., That case was one in which the managing agents sought to assert a continuity of employment, notwithstanding a complete change in the constituents of their firm, and the learned Chief Justice, Sir John Beaumont, says (p. 926) :-

There is an alternative ground which, I think, is equally fatal to the plaintiff's case, and that is, that even assuming that Clause 6 of the memorandum has the effect for which the appellant contends, the present members of the firm of Morarjee Goculdas & Co. do not come within the terms of that clause. The clause provides, as I have said, that the " firm of Morarjee Goculdas & Co.," or " whatever member or members that firm, may for the time consist of" shall be the agents, etc. Strictly speaking, as soon as new members are introduced into the firm, a new firm is constituted. The plaintiff relies on the words, " whatever member or members that firm may for the time consist of", but the facts are that at the date of the incorporation of the company the firm consisted of two individuals, one of whom died in 1880, and the other of whom died in 1908, and none of the present members of the agency firm were ever partners with either of those two individuals. Whatever meaning may be given to the words, " whatever member or members that firm may for the time consist of, it seems to me quite impassible to say that the present members of the firm of Morarjee Goculdas & Co., who were never members of the firm at a time when either of the persons who constituted the firm at the date of the incorporation of the company were alive, can be said to be members of the firm named in the memorandum. The argument of the appellant really seeks to endow this firm with the attributes of a corporation having perpetual succession so far as concerns its relations with the company. It is further suggested by Sir Chimanlal Setalvad that if the clause has the extended meaning contended for by the appellant, it would be void in law, but it is not necessary, in my opinion, to consider that argument.

18. The third and last case is the unreported case of Morarji Goculdas & Co. v. The Sholapur Spinning & Weaving Co., Ltd. (1938) O. C.J. Appeal No. 20 of 1938, decided by Beaumont C.J. and Rangnekar J., on October 12, 1938 (Unrep.) which was heard in this Court. That was also the case of a managing agency

agreement: the two new partners in that case were two Calcutta firms who were seeking to sue, as they had advanced to the company twelve lacs of rupees. The learned Chief Justice, Sir John Beaumont, said as follows :-

Then there was a second agreement, an hypothecation agreement, between the company and the two Calcutta firms, by which the Calcutta firms agreed to advance twelve lacs of rupees to the company on certain Security; and then there was further an agreement between the company and the Calcutta firms, by which the firms were appointed selling agents. There was no actual agreement between the company and Morarjee Goculdas & Co. appointing the new firm of Morarjee Goculdas & Co. as managing agents of the company and the learned Advocate General on behalf of the plaintiffs has invited us to hold that there was an implied agreement by the company to employ Morarjee Goculdas & Co. as its agents in the terms of Clause 6 of the memorandum of association.

And later on the learned Chief Justice says this :-

The draft of that agreement (i.e. the agreement between the old partners and the new) was sent to the company, and the agreement was recited in the hypothecation agreement of even date to which the company was a party, so that it is plain that the company had notice of the agreement, and of course the arrangement under which this managing agency was to continue was part of the scheme by which the company was to get the twelve lacs of rupees. It seems to me that the company, having not only notice but knowledge that the new partners were advancing their twelve lacs of rupees on the supposition that the moment they were admitted as" partners in Morarjee Goculdas & Co. they would automatically become members of the firm which were managing agents without any fresh agreement, cannot, after taking twelve lacs, turn round and deny that agreement. The case might perhaps be based on estoppel by conduct, but I prefer to put it on implied agreement, though not the implied agreement set up in the plaint.

Later on the learned Chief Justice says this :-

But I think that any such agreement, whether it is to be implied or founded on estoppel, would be limited to the life of the new firm of managing agents,....

So that, that case, when it is analysed, is really the case of a novation.

19. The judgment of the learned Judge in the Court below contains this observation (p. 268 ante):

In giving such a construction to the agreement I would be undoubtedly conferring upon this partnership an attribute which is peculiar to a corporation for in effect this partnership would have perpetual succession. There is another and a more serious difficulty in the way of Mr. Taraporewala. The personal covenant entered into by the then members of Kotibhasker, Amin & Company to perform faithfully and to the best of their ability the office of Secretaries, treasurers and agents of the company must, if Mr. Taraporewala's contention

were correct, also bind all the future members of the firm. It is difficult for me to understand how the then partners of Kotibhasker, Amin & Company could possibly bind by a personal covenant their successors in office, or how the company could enforce such a covenant against those who were not a party to it. In this case so long as Bhailal Amin was a partner of the firm, there was at least one member of the firm who had entered into this covenant with the company. When Bhailal Amin retired in October, 1939, and the firm consisted of the plaintiff and defendant No. 2, neither the one nor the other was a party to this covenant. The simple test would be whether if this firm consisting of these partners refused to act as the agents of the company, the company could have filed a suit to enforce this covenant against them. In my opinion the company could not have done so. Therefore I cannot hold that while the plaintiff and defendant No. 2 can enforce their rights) against the company, the company would be without any rights whatsoever under the same agreement. Such a finding would make the agreement lack the important and necessary element of mutuality.

I agree with these observations of the learned Judge, and the conclusion which he has arrived at. In my judgment, without setting up a novation or an estoppel the plaintiff cannot sue for damages for breach of the agreement of December 7, 1907, to which he was no party.

20. Considerable discussion has taken place as to whether a managing agency agreement such as the one in this case is void for uncertainty or for remoteness, and out of deference to the very able arguments which have been addressed to us by both sides I desire to add this. In my judgment no question of perpetuity arises ; because on the view I take of the matter it is not possible to frame a managing agency agreement to which a partnership is a party so as to create a continuity in the right to serve and the obligation to employ unless the company is bound on each occasion on which the partnership changes by the admission of a new partner to enter into a new agreement, and unless such obligation is punctiliously enforced. The machinery existed in this case, but it was never made use of. Properly framed there is no reason why a managing agency agreement should be void for uncertainty, although an agreement such as the one in this case, which seeks to bestow immortality by a definition clause, may well break down from the uncertainty of such ambitious devices.

21. There is a further point. The respondent-company says that even if this contract was enforceable, the plaintiff and defendant No. 2 were not ready and willing to perform it after October 5, 1939. But, in my judgment, the respondent-company has never asserted any right to terminate any contract on any such ground, The only attitude taken up by the respondent-company was that the contract of December 7, 1907, had come to an end, and, in my judgment, it is not open to the respondent-company to rely on this additional ground ; nor, having regard to the view we take on the main issue, does it become material.

22. Lastly, there is one further matter to be disposed of, namely, the costs of defendant No. 2. The question arises in this way : so far as the issue of the right

to sue under the agreement of December 7, 1907, is concerned, the interests of the plaintiff and defendant No. 2 are identical, and there would be no reason why defendant No. 2 should not join the plaintiff in initiating this suit; but, as the plaintiff saw fit to charge defendant No. 2 with collusion with the respondent-company, and made him a defendant to the suit, clearly, in my opinion, defendant No. 2 was entitled to appear therein. The allegations of collusion were in fact withdrawn in the Court below, but the withdrawal was not accompanied by any offer to pay costs to date or any part thereof, and defendant No. 2 remained in the suit at any rate to ask for his costs. I cannot see why in these circumstances he should not have his costs. It is suggested that he only ought to have some part of them, i.e. the costs relevant to the issue of collusion; but, in my judgment, this is not so. I am not prepared to disturb the decision of the learned Judge in the Court below on this point.

23. In the result, this appeal must be dismissed with costs in favour of all the respondents who have appeared in this Court.

24. Cross-objections of the respondent-company dismissed with costs.

Coyajee, J.

25. I entirely agree and have nothing to add.