

(1939) 07 BOM CK 0012

In the Bombay High Court

Case No : First Appeal No. 38 of 1936 and Second Appeal No. 493 of 1935,
C.R.A. No. 376 of 1935 and C.A. No. 441 of 1938

Chhaganlal Kalyandas Shah

APPELLANT

Vs

Jagjiwandas Gulabdas

RESPONDENT

Date of Decision : 18-07-1939

Acts Referred:

Evidence Act, 1872 — Section 92(3)

Citation : AIR 1940 Bom 54 : (1939) 41 BOMLR 1263

Hon'ble Judges : N.J. Wadia, J;Indarnarayen, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Indarnarayen, J.—This is an appeal from the decision of the First Class Subordinate Judge at Broach in special civil suit No. 391 of 1932. The plaintiff herein sued the defendants on a promissory-note dated November 5, 1929, for a sum of Rs. 6,784-13-6. The promissory-note sued upon is signed individually by the three defendants and there is no mention therein of any partnership firm of Chhaganlal Kalyandas. The promissory note, as usual, contains a promise to pay the amount thereof on demand to the plaintiff. The plaintiff sent a notice of demand on October 20, 1932, and filed this suit on non-compliance thereof on November 4, 1932.

2. The defendants filed written statements inter alia pleading that they were agriculturists within the meaning of the term under the Dekkhan Agriculturists' Relief Act, and alleging that it was agreed at the time when the promissory-note in suit was passed that it was not to be enforced, but that the amount thereof was to be adjusted in the making up of the partnership accounts of the firm of Chhaganlal Kalyandas in which they alleged that the plaintiff himself and his third brother, Pasubhai, were also partners, and that the taking of such partnership accounts was a condition precedent to the attaching of any liability to them on this promissory-note. They further denied that the plaintiff being one of the

partners in the said firm could maintain the suit as he sought to do.

3. The plaintiff is described in paragraph 10 of the written statement as "a learned and clever pleader", and it is stated there that by reason of misrepresentation and fraud on his part in getting the promissory-note executed the suit is not maintainable. The learned trial Judge has rightly held that there is no fraud or misrepresentation proved on plaintiff's part. One of the defendants, defendant No. 2, is plaintiff's own brother and a partner in the firm of Chhaganlal Kalyandas.

4. I do not think we are concerned here with the allegation that the taking of this promissory-note by the plaintiff was a successful attempt to overreach the defendants.

5. In the written statement the defendants pleaded their status as agriculturists and the plaintiff evidently appears to have got scared at this plea, and in order to avoid it he presented an application to the trial Court on March 4, 1933, praying for an amendment of the plaint. Permission was accordingly granted by the Court and hence he added paragraph 1-A to the plaint, which reads as follows :

I-A. There was a firm of Shah Chhaganlal Kalyandas in Broach. The defendants Nos. 1, 2 and 3 mentioned above were the partners of the same. I the plaintiff had advanced money to the said firm. Accounts of the same were settled and an amount was found due with interest to me from the said firm. For the payment of the same, all the three partners the defendants Nos. 1, 2 and 3 mentioned above, executed the suit promissory-note in favour of me the plaintiff. At the top of the plaint, instead of mentioning in brief as the firm of Chhaganlal J Kalyandas, the names of the three partners of the said firm are mentioned for the sake of clarity and in order that no confusion might arise.

6. The title of the defendants in the plaint stated :

(1) Shah Chhaganlal Kalyandas.

(2) Jethalal Gulabdas Modi.

(3) Shah Chhotalal Kalyandas.

Partners of the firm of Chhaganlal Kalyandas.

7. The prayer clause, however, which is paragraph 7 of the plaint, reads as follows :

Therefore, I file this suit and pray that you will pass a decree for the principal Rs. 6,784-13-6 and Rs. 1,335-5-6 in all Rs. 8,120-3-0 which are due from the defendants with running interest and the costs of the suit against the property of the firm of Chhaganlal Kalyandas and against the person and property of the defendants and give such other relief as may seem proper, on considering the facts of the case.

8. It is to be noted here that the relief asked for is two-fold, viz. (a) against the

property of the firm of Chhaganlal Kalyandas and (b) against the person and property of the defendants. It is extremely lucky, I think, for the plaintiff that this part of the prayer was left unamended. That the firm Chhaganlal Kalyandas does not seem to have been intended to be sued is clear from the title of the suit, and the words "Partners of the firm of Chhaganlal Kalyandas" in the title are a mere description of the three partners named above who are sued individually as executants of the promissory-note, which also mentions them as individuals, and not as partners of the firm of Chhaganlal Kalyandas.

9. It is sought to be argued here with considerable stress by the learned Counsel for the defendant-appellant that this amendment can leave no manner of doubt that the suit, as it stands, is against the firm of Chhaganlal Kalyandas only and not against the individual partners mentioned) as (1), (2) and (3) in the title of the suit.

10. Before I consider the merits of this argument, I consider it necessary to point out that in the trial Court the defendants themselves seem to have contended and they conducted their defence on the basis that the suit was against the defendants in their individual capacity, and not as against the firm. If the suit were against the firm only, there could have been no question of their going into the status of the defendants as to whether they were agriculturists or not. Evidence was led on this disputed question of status, and the learned Judge after trial has found against the contention of the defendants. It is, however, clear from this that the defendants were under no doubt that they were being sued in their individual capacity as executants of the promissory-note and not merely "qua" partners in the firm of Chhaganlal Kalyandas. I do not think, therefore, that they are entitled in appeal here to contend that the suit is not against them individually but only against the firm. There is no doubt that the very unfortunate and ill-advised application for amendment which aimed at avoiding the plea of "agriculturists" has necessarily resulted in a hornet's nest for the plaintiff. But considering the two-fold prayer (in the prayer clause of the plaint) which are distinct and separate, I am not prepared to hold that the suit is against the firm only. While the learned advocate for the defendants was entitled to emphasize the frame of the pleadings and the amendment application filed, it cannot be overlooked that the suit is substantially one based on the promissory-note, and against the individuals signing it. Too much stress cannot be laid upon the language of pleadings which appear to have been entirely ill-drafted in Gujarati. After all the function of pleadings is to focus the attention of the parties and of the Court to the points in dispute and not to defeat justice. In connection with this it may be stated that Mr. Desai, the learned advocate for the plaintiff, has frankly stated that he cannot support the latter part of the decree passed by the learned First Class Subordinate Judge, wherein it is stated :

Decree for plaintiff Rs. 8,120-3-0 costs and future interest at 6 per cent, on Rs. 6,784-13-6 from date of suit against defendants and the firm of Chhaganlal Kulymidas.

11. Mr. Desai states that he has no objection to these italicised words being deleted from the decree. Though most of this trouble has been caused by the ill-considered amendment, I do not think we can well refuse this request, considering the two separate reliefs asked for in the prayer clause as it yet stands in the plaint.

12. The next point which might be considered is the contention of the defendants that the plaintiff himself was a partner in the firm of Chhaganlal Kalyandas and hence cannot maintain this suit as final accounts have not been taken, and as it was agreed that the amount of this promissory-note was to be adjusted in making up the final accounts. The cause of action on the promissory-note is entirely independent of the partnership accounts; nor are the parties to this promissory-note described anywhere therein as partners of the said firm.

13. A promissory-note is a document which confers special and valuable rights on the holder, e.g. by way of presumptions mentioned in the Negotiable Instruments Act, and if the defendants' contention were to be upheld, all these valuable rights arising from the promissory-note would have to be entirely brushed aside and destroyed. I am, therefore, of opinion that the learned advocate for the plaintiff has rightly contended that this cannot be done. Assuming for the purposes of argument that the allegation of the defendants that the plaintiff was their partner in the firm of Chhaganlal Kalyandas is in fact correct, there is ample authority to show that even without a final settlement of partnership accounts a partner may, in certain circumstances, such as those in the present case, well sustain an action against his partners and be entitled to a decree.

14. In *Karri Venkata Reddi v. Kollu Narasayya* ILR (1908) Mad. 76 it was held by Sir Arnold White C. J. and Mr. Justice Abdur Rahim :

In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in respect of a matter, which, though arising out of partnership business, or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for.

15. It may here be noticed in passing that the promissory note sued upon in this case mentioned the amount in annas and pies, and even if this was the result of the adjustment of a part of the partnership account, or even assuming that the plaintiff was a partner, yet the suit on this independent cause of action could well be maintained.

16. Lindley in his treatise on Partnership, 10th ed., at p. 653, states :

Again, if one partner gave to his co-partner a bill or note which was in such a form as to bind, not the firm, but the partner who gave it, he might be sued by his co-partner thereon, whatever the state of the accounts between the two might be, and although the bill or note in question had reference to some

partnership transaction ; for by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership account.

17. In *Ramnath Gagoi v. Pitambm Deb Goswami* ILR (1915) Cal. 733 it was held by Mookerjee and Roe JJ. that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties, and at p. 741 in the judgment therein occurs the following passage:

In this situation, the principle formulated by Lord Cottenham in *Rawson v. Samuel* (1839) Cr. & Ph. 161 applies, viz., that an action for the balance of a settled account would not be restrained merely because there were other unsettled" accounts between the parties. In the present case, there are not even cross-demands ; the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts, and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Preston v. Strutton* (1792) 1 Anst. 50 where the pendency of an unsettled partnership account, upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note, given for a balance upon a former settlement.

18. If the contentions of the defendants (in which plaintiff's brother defendant No. 2 joins) to the effect that plaintiff is on the whole a debtor and not a creditor are correct, it was certainly open to them to have filed a suit against the plaintiff for rendition of partnership accounts immediately the plaintiff filed this suit on this promissory-note against them. The plaintiff's suit was filed as far back as 1932, and it appears that no suit for partnership accounts has yet been filed by the defendants against him.

19. Another allegation made by the defendants in their written statement was that a third brother of the plaintiff by name Pasubhai was also a partner in the firm like defendant No. 2, and that he was a necessary party to this suit. It is, I think, the plaintiff's choice which partners of the firm he chooses to proceed against for his claim. This, of course, presupposes that Pasubhai: was a partner (though the plaintiff does not admit it), and I hence fail to see how it can be said that Pasubhai was a necessary party to the suit.

20. u/s 92, prov. 3, of the Indian Evidence Act, it is contended by the learned advocate for defendant No. 1 that his client was entitled to show by evidence that there was a condition agreed to at the time the promissory-note was passed, which was a sine qua non for the! attaching of liability on this promissory-note. Section 92, prov. 3, speaks of the existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property which may be allowed to be proved. This clearly presupposes to my mind that in a case to which it could be applied the contract, grant or disposition of property itself remains

intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition it self and as agreed must come into existence before the obligation attaches there-under. Applying that to the facts of the present case, it seems to me that what is pleaded in the written statement to resist the liability on the promissory-note is a virtual negation of the promissory-note as such, for in effect the written statement states that the promissory-note was never to be paid in cash, nor demanded payment of, nor was it to be sued upon, but that the amount thereof was only to be adjusted in the final making up of accounts. It is obvious that, whether this promissory-note existed or not, in the taking of accounts the amounts dubitable and creditable in the partnership accounts would have to be set down, and the result found out as to what was due by each partner to! the other. It is difficult to see how in this process this promissory-note could come in as an instrument which was being enforced or given effect to according to its contents.

21. I am of opinion that the facts pleaded do not aim at proving a condition precedent to the attaching of the legal liability to this document, but lay the axe at the very foundation of it nullifying entirely the effect of the promissory-note and its existence. I do not think that the language of Section 92, prov. 3, can bear such strain, and I, therefore, agree with the opinion of the trial Judge when he decided issue No. 6 (c) in favour of the plaintiff.

22. The plaintiff is not suing in his capacity as partner, nor does he admit that he was a partner. His suit is entirely based on the promissory-note which he holds and in which there is no mention of partnership. I am, therefore, of opinion that the principle embodied in Order XXX, Rule 9, of the Civil Procedure Code, does not apply to the facts of this case.

23. In *Maung Kyun Nga v. M.A.R.T.A.R. Arunachalam Pittay* ILR (1927) Rang. 520 it was held by Mr. Justice Brown that :

Where the defendant pleaded that he had given the on-demand promissory-note in suit to the plaintiff not for a loan, but for an advance on account of a partnership to be accounted for when the partnership account was gone into, that such a defence cannot be allowed, and that was not a defence of no consideration or a condition precedent to the attaching of an obligation, but an attempt to set-off an unliquidated claim against a claim on a promissory-note, which is not permissible.

24. In *Vishnu Ramchandra Joshi Vs. Ganesh Krishna Sathe*, it was held by Macleodl C.J. who stated (pp. 489-91) :

the question before us is whether the defendant having passed a promissory note payable on demand in favour of the plaintiff, cart be allowed to lead evidence to prove a contemporaneous oral agreement whereby the plaintiff is said to have agreed that he would not present the note, although it was payable on demand, until he had discharged certain incumbrances on the property he had sold to the defendant's brother-in-law?.

This question came before the High Court of Calcutta in *Ramjibum Serowgy v. Oghore Nath Chatterjee* ILR (1897) Cal. 401 There the defendant gave the plaintiff a promissory-note for Rs. 7,000 in full discharge of his debts and all other claims of the plaintiff against him up to that time. It was further agreed, according to the defendant's case, that the plaintiff should not bring any suit on the promissory-note until the defendant's share in certain compensation money had been received by him, Mr. Justice Sale in giving judgment said (403, 404) :

Under the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement. The case of *Moseley v. Hanjord*² is clear authority to the effect that in England the evidence of such an oral agreement would be inadmissible.... There are numerous other English authorities to the same effect to which I need not refer, inasmuch as the argument for the defendant is not so much that under the English law the evidence is admissible, but that proviso 3 to Section 92 of the [Indian] Evidence Act has the effect of altering the English law?.

Those remarks apply equally well to the case before us.

25. The facts of the present case are by no means dissimilar, and I am, therefore, unable to hold that the learned trial Judge was wrong in coming to the conclusion that it was not open to the defendants to lead evidence to prove the arrangement alleged. Besides it is obvious, even if such an arrangement as alleged ever existed, it must have been some time before the execution of the promissory-note for it is said that it was passed in pursuance of it. The subsequent written promissory-note cannot be altered by any such prior arrangement.

26. The appeal will therefore be dismissed and the words "and the firm of Chhaganlal Kalyandas" will be deleted from the decree of the lower Court. In view of the fact that most of the trouble has been caused by the ill-considered amendment made by the plaintiff in his plaint, we think he is entitled only to half his costs in this appeal.

N.J. Wadia, J.

27. I agree.