

(1957) 07 BOM CK 0002

In the Bombay High Court

Case No : Civil Miscellaneous Appeal No. 6 of 1956

Dalichand V. Parekh

APPELLANT

Vs

Mathuradas Ravji

RESPONDENT

Date of Decision : 04-07-1957

Acts Referred:

Partnership Act, 1932 — Section 19

Citation : AIR 1958 Bom 428 : (1957) 59 BOMLR 1066 : (1958) ILR (Bom) 218

Hon'ble Judges : M.C. Shah, J

Bench : Single Bench

Advocate : A.R. Bakshi and J.R. Nanavaty, for the Appellant; H.C. Shah, for the Respondent

Judgement

1. The only question arising in this appeal is whether the payment made by the respondent company by way of a set-off to one Sevaram,, a partner of Roy and Co., against a debt due by the respondent firm to the said Roy and Co., is binding on Roy and Co. The suit out of which this appeal arises was brought by the receiver of the said Roy and Co., appointed by the Civil Court of Bantwa, for recovering the sum due from the defendant firm on taking accounts of the dealings between Roy and Co., and the defendant firm. Roy and Co., was a partnership firm constituted by a deed of partnership, Ex. 8/1 dated 5-10-48, having four partners Salamatrai, Balchand, Sevaram and Variyaldas, each partner having an equal share. The said firm purchased chillies and other goods at Veraval through the commission agency of the defendant firm. Shortly after the constitution of Roy and Co., the partners fell out and on 6-1-49, Sevaram gave a notice to the remaining partners for a dissolution of the firm and for settling the accounts, the notice stating, inter alia, that the said other partners should not do any act on behalf of the partnership without his consent. On receipt of this notice, Salamatrai sent the manager of Roy and Co., one Kanaiyalal, to the defendant at Veraval for a settlement of accounts of Roy and Co., with the defendant firm but the defendant refused to settle the accounts stating that they knew only Sevaram and they would not recognise the other

partners. Kanaiyalal returned to Bantwa and then Salamatrai himself went along with Kanaiyalal to Veraval and demanded a settlement of accounts but the defendant still refused to settle the accounts. So Salamatrai returned to Bantwa and sent a telegram to the defendant firm on 9-1-49, Ex. 7/7, asking the defendant not to pay or deal with Sevaram Nebhandas or else the defendant will remain responsible. Sevaram had his own business at Veraval and he had dealings with the defendant firm in that business. Sevaram was indebted to the defendant firm in a sum of Rs. 2013-1-6 and the defendant firm in its turn was indebted to Roy and Co. Sevaram and the managing partner of the defendant firm met at Veraval and as a result of that meeting, the defendant firm debited Roy and Co., with the abovesaid sum of Rs. 2013-1-6 and credited it to Sevaram, thereby setting off their liability to the extent of the abovesaid sum to Roy and Co., against their dues from Sevaram personally.

2. In reply to the telegram of Roy and Co., dated 9-1-49 the defendant company sent a letter dated 27-1-49 stating that they recognised Sevaram as Roy and Co., and that Roy and Co., was responsible for the dealings entered into by Sevaram, though curiously enough, they did not state that they had set off Rs. 2013-1-6 debiting the said sum to Roy and Co. The receiver of Roy and Co., Mr. Dalichand, a pleader of Bantwa, then gave a notice to the defendant company on" 23-3-50 demanding a sum of Rs. 4065-6-0 remaining due on accounts, but the defendant in reply stated that Rs. 1258-1-0 only were due from them. Thereafter the receiver filed a suit against the defendant company. The learned trial Judge held that the payment of Rs. 2013-1-6 by way of a set off was not binding on Roy and Co., and the defendant was liable to Roy and Co., for the same. The trial Court allowed interest to Roy and Co., on the footing of interest due on the amount of each particular dealing from the date of such dealing and awarded Rs. 4648-9-3, allowing the plaintiff to withdraw Rs. 1238-1-0 deposited by the defendant in Court and giving a decree for the balance which included interest as calculated above. The defendant went in appeal and the learned appellate Judge held that the payment of Rs. 2013-1-6 was not collusive and fraudulent, that the defendant firm was entitled in its own interest to realise its dues from Sevaram and for that purpose to set it off against the debt owed by them to Roy and Co., and that the payment was binding on Roy and Co. The learned Judge further held that the awarding of interest on various sums from the dates of those sums was wrong in principle. Accordingly, he held that Roy and Co. were not entitled to the Sum of Rs. 2013-1-6 nor the interest, but that interest should be calculated on the sum due to Roy and Co. from the date of the suit until the date of the preliminary decree at nine per cent, and at six per cent, from the date of the preliminary decree. In accordance with this finding, the learned Judge remanded the case to the trial Court for suitably amending the decree.

3. in this appeal, Mr. Baxi for the appellant has not disputed the lower appellate Courts finding regarding interest and the only point in issue now is whether the payment of Rs. 2013-1-6 by way of set off is binding on Roy and Co. u/s 19 of

the Indian Partnership Act, an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm, and the authority of a partner to bind the firm conferred by this section is called implied authority. Therefore, a payment made to a partner falls within his implied authority and is valid payment to the firm and it is competent to a partner to give a discharge in respect thereof so as to bind the firm, and this legal position is no longer in dispute. But the question is whether it is within the implied authority of a partner to set off his own separate debt against the debt due to the firm. On this subject Lindley on Partnership says :

""Although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment. As a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way, and a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set off against a debt due to his firm."

This question of a partner's authority to discharge a debt of his own by setting it off against a debt due to his firm has been considered at some length in *Baikunta Nath v. Hara Lal Pal*. 9 Ind Cas 116. The English decisions on the subject have there been considered and ultimately the ruling in *Piercy v. Fyney* (1871) 12 Eq. 69 to the effect that a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set off against a debt due to his firm, has been approved. The proposition in *Piercy's* case (B) has also been approved in *Veerasawamy v. Ibrahim Rowther* 19 M LJ 221: 1 Ind Cas 200 and it has been defended on broad grounds of justice, equity and good conscience. The test applied is whether the discharge of his personal liability by setting it off against a debt due to his firm is an act falling within the ambit of his implied authority. The learned Judges. of the Calcutta High Court in *Baikunta Nath's* case (A) observed:

"Now a partner has no implied authority to discharge his private debts by set off against a debt due to the partnership; consequently, such a set off by one partner cannot prejudice his co-partners. To put the matter in another way, whenever a party received from any partner in payment for a debt due from that partner only, the indebtedness or obligation of the firm in any form, the presumption of the law is that the partner gives this and the creditor receives it in fraud of the partnership; in other words, if a partner releases a debt due to his firm in consideration of a release to him of a debt due. by him solely, the presumption will be that the transaction was fraudulent."

As the learned Judges have pointed out, this rule has also been accepted by American Court. Then follow observations which are material and they are:

"The true principle is that as a partnership is formed for the common benefit of all the partners, every transaction ought legally to be a joint account and not for the exclusive benefit of one member of the Company so that one partner cannot

bind the firm to pay his own private debts. We must, therefore, adopt the view that an agreement by one partner to discharge a debt due to the firm by setting off his individual liability against it, is not binding on the firm, unless made with the consent of the other partners or subsequently ratified by them."

This principle has been followed in *Motilal Chimanram Vs. Sarupchand Prithiraj*, and although it is true that the transaction in that case had taken place in the course of winding up proceedings of a dissolved firm, the principle there stated namely that it is not a necessary act in the winding up of a dissolved firm of a partner to create a "novatio" in respect of a debt owing to the firm, equally applies to a running linn. In that case too, payment was made by way of set-off by which credit was given of the debt due from one of the partners and the sum was debited to the firm and Mr. Justice B. J. Wadia held that this is not recovering a debt but really continuing it to somebody else as a debtor, and unless the other partners have given previous consent or have subsequently ratified or acquiesced in it, the transaction was not binding upon them.

4. Mr. Shah for the respondent has relied on *Diwan Chand Parma Nand v. Ram Das Uttam Chand*. AIR 1931 Lah 136, where a contrary view was taken. The principle laid down in the rulings there referred to is no doubt true, namely that a partner had authority to receive payment on behalf of the firm and to realise the debt and the payment will bind the firm unless fraud or collusion is proved but with respect that will not hold good where payment is made by setting it off against the debt due by a partner of the firm. The learned Judges have no doubt referred to *Baikunta Nath's case (A)*, but, with all respect, they have not touched the real point of the decision in that case. But apart from it, I prefer to follow the principle accepted in *Baikunta Nath's case (A)*. Therefore, *Sevaram* had here no implied authority so as to bind *Roy and Co.* by getting a credit of Rs. 2013-1-0 in his own account and having the sum debited to *Roy & Co.*, and since, such payment by way of set off falls outside the scope of his implied authority, it must follow that it is not binding on *Roy & Co.*, and on this narrow ground, the plaintiff-appellant is entitled to succeed,

5. Mr. Baxi for the appellant has disputed the fact of the payment itself, namely the debit entry in the defendant's books of account, but this has been found proved by both the Courts and the fact cannot now be disputed in second appeal. Mr. Baxi next urged that the payment by means of set off was in fraud of *Roy & Co.*, and was collusive. On the principle laid down in *Baikunta Nath's case (A)* such payment would be deemed to be fraudulent and actual loss or damage to *Roy & Co.*, need not be proved. Mr. Shah for the respondent-defendant has urged that the only plea made by the plaintiff before the Commissioner was that *Sevaram* and the defendant company had joined hands, and learned counsel contended that no fraud was alleged. It is true fraud was not alleged in terms but the plea did definitely mean that the payment was collusive and the suggestion made was that it was in fraud of *Roy & Co.* But even if it was not stated specifically the payment not being within the implied authority of one partner

would be deemed to be fraudulent. It is no longer contended by Mr. Shah that the defendant recognised only Sevaram and that he did not know whether Salamatrai was a partner of Roy & Co., and it is now conceded that the defendant company did know that Salamatrai was a partner. The defendant was warned not to make payment to Sevaram and although that cannot affect the implied authority of a partner to receive payment, the fact here is that no cash payment was made to Sevaram, and on the other hand, his liability was set off against the debt due to Roy & Co. It is true that in spite of the telegram, if cash payment had been made to Sevaram, then whether Sevaram paid the sum to Roy & Co., or not the payment would have bound Roy & Co. But here the payment was by way of set off and the transaction becomes fraudulent, not so much on account of the warning by the telegram, but because it fell outside the ambit of Sevaram's implied authority. Therefore, the payment in the present case must be deemed to be collusive and fraudulent. The learned appellate Judge's order in this respect must therefore be set aside.

6. The appeal before the learned appellate Judge was against the final decree and if the learned judge disallowed a certain sum or sums, the proper course for him was to calculate the amount ultimately due to Roy & Co., with the assistance of the parties if necessary, and not to remand the case to the trial Court for modifying its decree after a proper calculation. An order of remand on such a ground is not justified and ought not to have been made. Regarding the accounts, on the footing that the defendant firm is held liable to Roy & Co., for the sum of Rs. 2013-1-6 the Commissioner has found in paragraph 10 of his report that Rs. 3395-6-9 are due to the plaintiff from the defendant. The calculations made by the Commissioner have been accepted by the Courts below and are not in dispute. The Commissioner has next found that Rs. 1253-2-6 are due to the plaintiff by way of interest prior to the suit and this sum was awarded by the trial Court. The lower appellate Court has however found against the plaintiff on this point, and that finding is not now disputed. The lower appellate Court has awarded interest from the date of the suit at varying rates and this part of the order is also not disputed by the plaintiff with the result that interest will be allowed in those terms.

7. In the result, therefore, I allow the appeal in part and pass a decree in favour of the plaintiff- appellant firm for Rs. 3395-6-9. The plaintiff- appellant will be at liberty to withdraw from the Court Rs. 1238-1-0 deposited by the defendant-respondent in part payment of the above said decree and shall be entitled to recover the balance, viz. Rs. 2157-5-9 from the defendant-respondent firm together with interest thereon at nine per cent from the date of the suit until the date of the preliminary decree and at six per cent from the date of the preliminary decree until payment. The defendant respondent to pay the plaintiff-appellant's costs in the trial Court and half the costs of the plaintiff-appellant in the lower appellate Court and in this Court, and to bear their own costs throughout.

8. Appeal allowed.