(1947) 09 PAT CK 0025

In the Patna High Court

K. Balakrishna Patro and Others APPELLANT

Vs

C. Balu Subudhi and Others RESPONDENT

Date of Decision : 09-09-1947

Acts Referred:
Contract Act, 1872 — Section 43

Citation : AIR 1949 Patna 184

Hon'ble Judges : Das, J;Ayyar, J

Bench : Full Bench

Judgement

Das, J.—These are three appeals, which arise out of three suits, heard together in the Courts below and governed by one judgment. The defendants in the Court of first instance are the appellants before us. The appeals are from the judgment and decree of the learned District Judge of Ganjam-Puri, dated 21st September 1940, by which the learned District Judge has reversed the decision of the learned Subordinate Judge of Berhampore, dated 23rd December 1939. The facts are simple enough, but a very interesting question of the liability of the members of a ''Sabha'' (a caste organisation or meeting) was raised in the Courts below, and has been pressed before us in the appeals. In order to appreciate the question raised, it is necessary to state some of the facts. The three plaintiffs in the three suits were Ramamurthy Subudhi, Balu Subudhi and Lingaraju Subudhi. They alleged that in order to effect a partition amongst the co-parceners of the families which they represented, they executed what has been called a "muchilika of reference" on 1st April 1925 in favour of defendants 1 to 3, whereby the latter were requested to divide the properties and pass an award in accordance with the terms of the reference. It was alleged that this muchilika was executed at the suggestion of the defendants who were the responsible members of the Vysya caste or community to which the parties belonged. Defendants 1 to 3 accepted the reference and proceeded with the arbitration. In October, 1926 the arbitrators divided the houses in a particular manner. The father of Ramamurthy Subudhi died in January 1927 and in March 1927 Ramamurthy sent a registered notice to defendants 1 to 3 alleging that the division of houses was not based on the principle of equality. The arbitrators (defendants 1 to 3) took umbrage at the allegations made by Ramamurthy Subudhi and at a meeting held of the caste organisation the three plaintiffs and their families were ordered to be boycotted or ex-communicated. Balu Subudhi, one of the plaintiffs, then called for a meeting of the whole caste community consisting of 14 Pentos. It has been stated before us that a Pento is a group or village of the community and the 14 Pentos constituted one caste or community Sabha. The meeting called for by Balu Subudhi was held at a place called Russelkonda from 4th July 1927 to 6th July 1927 and all the defendants were present at the meeting. As the marriage of a niece of Balu Subudhi had been arranged, Balu Subudhi wanted the ban of ex-communication to be lifted. At the meeting of the community held at the instance of Balu Subudhi, the defendants passed & resolution that each of the three plaintiffe Langaraju, Ramamurthy and Balu should deposit RS. 1500, Rs. 1000 and Rs. 1000 respectively before the ban could be lifted and the arbitration proceedings in the partition matter could continue. Accordingly, the three plaintiffs deposited the amounts, mentioned above, on 5th or 6th July 1927. The case of the plaintiffs was that the defendants had further promised that the amounts deposited by the plaintiffs would be repaid to them with interest at 12 per cent, per annum after the final award had been given by the arbitrators. Certain fines were also imposed on the plaintiffs which were paid by them. After the aforesaid payments, a fresh division of the houses was made and the parties took possession of their Bhare of the houses in January 1928. The plaintiffs were then directed to have their lands measured and other details worked out so that the arbitrators might make lots and pass a final award. The working out of these details took some time and it was stated that this was completed by about June 1936. The arbitrators were informed of the completion of the details, but they refused to make lots and pass a final award. In the meantime, one of the co-parceners brought a suit for partition. The plaintiffs then demanded their deposits back with interest and when that was refused, they brought the suits out of which the three appeals have arisen. The plaintiffs alleged that the defendants and other members of the caste community were jointly and severally liable to repay the amounts deposited by the plaintiffs. The suits were not brought against the ''Sabha'' as such but against; the defendants personally. The main defence, as disclosed by the various written statements filed, was a denial that the defendants had asked the plaintiffs to deposit certain sums of money before the ban of excommunication could be lifted and a further denial that any such sums were deposited by the plaintiffs or that the defendants had agreed to repay the sums deposited with interest at 12 per cent per annum. The calling of a Sabha at the place and about the time alleged by the plaintiffs was admitted, but it was alleged that the ''Sabha'' was called in respect of a personal matter of Balu Subudhi and not in connection with the partition matter. In some written statements filed at a later stage it was alleged'' that some subscription was raised at the ''Sabha'' held in Russelkonda on 5th or 3rd July 1927, for the purpose of building a hostel for the students of the community and for helping the students of the community in the matter of higher education etc. In, the written statements filed by the appellants, no plea was definitely raised as to if the defendants (that is, the appellants) were or were not personally liable for the sums alleged to have been deposited by the plaintiffs.

2. The parties proceeded to trial on the pleadings mentioned above and the learned Subordinate Judge framed several issues. The first and foremost issue raised a question which was essentially a question of fact, namely, if the plaintiffs had deposited the sums of money as alleged in the plaints and if so, what the conditions of the deposits were. On a very elaborate consideration of the evidence, the learned Subordinate Judge found in favour of the plaintiffs on this issue. In other words, he found that the plaintiffs had deposited the sums of money in the circumstances alleged by them on the promise that the sums would be returned to them with interest after the final award had been given. He disbelieved the appellants'' case that no money had been deposited or that the meeting had been called for a different purpose, where subscription was raised for helping the students of the community etc. Though the plea that the defendants were not personally liable does not appear to have been specifically raised in the pleadings, there was an issue namely, issue 2, which was as follows: "Whether the defendants are liable for the suit amounts?" Dealing with this issue the learned Subordinate Judge expressed himself as follows:

According to the plaintiffs'' own showing they did act ask for vouchers through fear as they had been under the ban of excommunication, but who excommunicated them, not any individual members of the community but on the authority of the 14 Pentos themselves. This being the state of things, the plaintiffs should have sued the 14 Pentos as also all the members of the 14 Pentos individually. In case of doubt that ought to have been their procedure when the society is an unregistered one. No doubt, there would be great difficulties in their way, but that could not be helped: vide Bhagwandas Singh and Others Vs. Pinjra Pole Pashu Anathalaya and Ram Sarup Vs. The Arya Samaj and Others, . There can be no doubt in this case that the defendants in their individual capacities never pledged their credit, but it was the 14 Pentos that pledged their credit. Evidently the plaintiffs looked to the 14 Pentos people for repayment of their deposits. There is no evidence to show that the defendants who have been actually brought on the record represented the entire body of members constituting or representing the 14 Pentos. On the other hand, the plaints themselves clearly indicate that other persons besides the defendants constitute the Sabha.

In this view of the matter, the learned Subordinate Judge held that the suits were not maintainable against the defendants personally, inasmuch as they had no personal liability in the matter. The learned Subordinate Judge dismissed the three suits on this finding.

3. There were three appeals to the learned District Judge who affirmed the finding of the learned Subordinate Judge on the main question of fact, namely that the deposits had been made by the plaintiffs in the circumstances alleged by

them. On the question of personal liability the learned District Judge expressed himself as follows:

...I find that the plaintiffs made the deposits in the Sabha that was held at Russelkonda on 6th July 1927 and the members of the Sabha including the defendants receive the deposits promising to pay interest at the rate of 12 per cent. per annum after the final settlement ol the partition dispute.

He further found that the members of the Sabha including the defendants had contracted to repay the sums with interest aforesaid. The learned District Judge applied Section 43, Contract Act, and held that the defendants were joint promisors and the promisee was entitled to compel any one or more of such joint promisors to perform the whole of the promise. In that view of the matter, he held that the defendants along with others of the Sabha, who had contracted to repay the deposits with interest, were jointly and severally liable to refund the deposits with interest. Thereupon he decreed the suits with costs and future interest at 6 per cent, per annum.

4. In the appeals before us, the main argument of learned Counsel for the appellants centres round the question of the liability of the appellants for the deposits found to have been made by the plaintiffs respondents. It is contended before us that the appellants had no liability in the matter, and the suits as framed were not maintainable. It is also pointed out that there is a difference between pleading and proof in this case, the plaintiffs-respondents though pleading in the plaint that the appellants were jointly and severally liable for the deposits made had given evidence to the effect that the deposits were made at the instance of the ''Sabha'' as such and the promise of repayment, if any such promise was made, was made by the Sabha of the 14 Pentos. Learned Counsel for the appellants has for this purpose taken us through the evidence of three of the witnesses (witnesses numbered 5, 7 and 10 of the plaintiffs) on whom the learned District Judge had relied for his finding that the appellants had made a joint promise. It has been urged before us that in view of the evidence given for the plaintiffs the suit was not maintainable against the defendants personally.

5. Before I consider in detail these contentions raised on behalf of the appellants, I should mention one other matter. One of the appellants, namely, appellant 3, J.B. Prusti, died on 3rd November 1945. His heirs were not brought on the record within the time allowed by law. A petition has been filed on behalf of the other appellants to bring the heirs of appellant 3 on the record either under the provisions of Order 41, Rule 20, Civil P.C., or under the inherent jurisdiction of this Court. Certain facts have been alleged in support of this petition and a large number of affidavits and counter-affidavits have been filed. One of the sons of the deceased appellant 3 has also filed a petition to the effect that he does not wish to be substituted in place of his father. All these petitions have also to be disposed of by us. On behalf of the surviving appellants, it has been contended that though the heirs of deceased appellant 3 were not brought on the record within the time allowed by law, this Court has inherent jurisdiction to bring the

heirs on the record in order to do complete justice between the parties. It is conceded by learned Counsel for the appellants that Order 41, Rule 20, Civil P.C., does not in terms apply. As to Order 41, Rule 4, Civil P.C., to which also a reference was made, the decision of the Pull Bench in Ramphal Sahu v. Satdeo Jha AIR 1940 Pat. 346 is conclusive of the matter, so far as this Court is concerned, though a view different from the view expressed in the Full Bench decision aforesaid has been taken in some other High Courts. It was observed there that by reason of the provisions of Rules 3 and 11 of Order 22, the appeal in so far as it concerned the deceased appellant had abated and as the abatement, if not set aside, had the force of a decree, the matter became final as against the deceased appellant and there was nothing in Order 41, Rule 4 which permitted the Court to disturb that finality of the decree as against the deceased appellant. It was further pointed out that the wording of Order 41, Rule 4, Civil P.C. was not appropriate to a case where one of the plaintiffs or defendants appellants had died during the pendency of the appeal, and hence the appellate Court had no power to proceed with the hearing of ah appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and the application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants. We are satisfied on the facts alleged in the affidavits and counter-affidavits filed that no sufficient cause has been shown for setting aside the abatement so far as the deceased appellant 3 is concerned.

6. Then remains the question if the heira should be brought on the record in the exercise of the inherent jurisdiction of this Court. The circumstances in which the inherent jurisdiction of the Court may be invoked have been dealt with at great length in an unreported decision of the Division Beach in First Appeal No. 232 of 1936 decided on 15th April 1940 in the very same case which gave rise to the Pull Bench decision in Ramphal Sahu v. Satdeo Jha A.I.R.1940 pat. 346. We have gone through that decision where a large number of authorities have been considered and it has been held that in a fit and proper case the Court may exercise its inherent powers or its powers under Order 41, Rule 33, Civil P.C. to bring into the record the heirs of a deceased appellant. We now address ourselves to the question if this is a fit and proper case for exercising our inherent powers. In First Appeal No. 232 of 1936 decided on 15th April 1936, (1940?) it was pointed out that no prejudice was likely to be caused to the plaintiffs who were the respondents, if the heirs of the deceased appellant were brought on the record, because in that case the plaintiffs were being granted the very rights which they had asked for. As observed there, inherent powers were being exercised so that "a proper decree might be passed by granting to the plaintiffs the very rights which they had asked for." The case before us is not of that nature. As far as the plaintiffs-respondents are concerned, they had

obtained a decree against the deceased appellant 3 on the footing that the liability was joint and several. So far as the deceased appellant 3 is concerned, the appeals have abated and the rights of the parties have been finally determined. To bring the heirs of the deceased appellant 3 after the period of limitation would cause grave and serious prejudice to the plaintiffs respondents. I am unable, therefore, to hold that this is a fit and proper case where the inherent jurisdiction of the Court should be exercised. Then there is another aspect of the matter. If the appeals of the surviving appellants are allowed and it is

Clubs are associations of a peculiar nature; they are societies the members of which are perpetually changing and the feature whioh distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member.

Lindley L.J. has further pointed out that it is upon this fundamental condition, not usually expressed but understood by every one that clubs are formed, and this distinguishing feature has been often judicially recognised. As to the caste organisation in question, the learned Subordinate Judge has pointed out that it is in existence aince 1910 or 1911, it holds its annual sittings at different places, the 14 Pentos at their annual sittings elect members of their managing committee for the year, the managing committee has got a President, a Secretary and consists of other n embers, the Secretary of the managing committee is also the Secretary of the 14 Pentos annual meetings, but the persons who preside at the annual meetings or Sabhas of the 14 Pentos are the Rajus who are the head-men of the caste. These facts are not sufficient to show that the organisation in question has the same fundamental condition or distinguishing feature of a club. The learned Advocate-General has referred to certain observations in a book entitled: 4,The Law relating to Unincorporated Associations" being the Yorke Prize Essay for the year 1937, by Mr. Dennis Lloyd. The observations are to the following effect:

The rule that members will not generally be held personally liable in respect of obligations incurred on behalf of the club seems never to have been expressly extended to other unincorporated societies.

Reference has then been made to the observations which fell from Lindley L.J. in Wise''s case 1903 A.C. 139 and it has been pointed out that in the case of any society in the nature of a partnership or an association for gain the members cannot lawfully exempt themselves from personal liability by merely inserting a provision to that effect in the rules. As I have stated above, we have no sufficient data from which we can conclude that the ''Sabha'' in question ialike a members'' club with its fundamental condition or distinguishing feature. Assuming, however, for the sake of argument, that the Sabha in the present case is like a members'' club, it seems to me that the defendants are still liable on the finding arrived at by the learned District Judge, namely, that they had joined in milking the plaintiffs pay the deposits and in the promise that the deposits would be paid back with interest after the conclusion of the partition proceedings. In the case of Jones v. Hope (1880) 8 T.L.R. 247 which was a case in which Colonel Durnford, a member of the corps, had obtained the services of Mr. Jones for an association called the Volunteer Corps, Thesiger L.J. had pointed out that there might be a liability on the part of the defendants if they had as members of the corps obtained the services of Mr. Jones,. The following observations of Thesiger L.J. are relevant for this purpose:

The first question that was put to the jury was this Was the plaintiff retained by, and did he give credit to Colonel Durnford, on his (Colonel Durnford''s) own account, or as representing the corps? That question was answered by the jury in this way. He was retained by, and gave credit to, Colonal Durnford as representing the corps Now for a time it appeared to me that the word ''corps'' contained and involved ambiguity, and that there was a possible way in which it might have been used in respect of which there might be a liability on the part of the defendants, that is to say, it might be used either as meaning an abstract entity, although not a legal entity, known as a Volunteer corps, or it might be used as meaning persons individually composing the corps, of whom Colonel Durnford would be one; and if that were the meaning, Colonel Durnford himself would be liable.

The decision, however, went against Mr. Jones because it was found that Mr. Jones himself knew that Colonel Durnford had no personal liability whatever in the matter. The same point has been adverted to Overton v. Hewett Ors. (1886) 3 TLR 246, in the following words of Wills J:

It was possible that a man might make a contract with a club in the sense that he made it with the individual members. Thesiger L.J. pointed out that if that were so, the fact that the members were numerous, and that only one or two of them were sued, would be no answer to the action.

There again the decision went against the person who had supplied goods to the club, because it was found on the evidence in the case that there was no such notion in the mind of the plaintiff that he was making a contract with the individual members of the club. The position is different in the case before us. The clear finding of the Court of Appeal below is that the defend-ants passed a resolution that the ban of excommunication would not be lifted unless the plain-tiffs made the deposits and paid fines. The further finding is that the defendants themselves made the promise that the deposits would be returned with interest at 12 per cent, per annum after the conclusion of the partition matter. If the defendants themselves had made the promise, may be as members of the ''Sabha'', they would undoubtedly be liable in law. We allowed learned Counsel for the appellants to place the relevant oral evidence on this point, particularly in view of the observation of the learned Subordinate Judge that there was no evidence to show that the defendants had accepted liability for the re-payment of the deposits. If the learned District Judge had come to a finding on this question in the absence of any evidence to that effect, it would be an error which would require to be corrected by us in second appeal. Having had the advantage of seeing the evidence of the three witnesses on whom the learned District Judge has relied, we are satisfied that there was evidence on the record which, if accepted, would support the finding of the learned District Judge that the defendants themselves had compelled the plaintiffs to make the deposits and had further promised that the deposits would be repaid with interest at 12 per cent, per annum after the conclusion of the partition matter. On this finding of the learned District Judge, Section 43, Contract Act, clearly applies. The promise was a joint promise and the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

8. It was argued before us that the Contract Act was not a complete Code and reliance was placed on certain observations made in The Irrawaddy Flotilla Co. v. Bugwandas 18 Cal. 620 . That was however, a case in which the question for decision was if the Carriers Act of 1865 had been superseded by the Contract Act of 1872. It was pointed out in that connection that the Act of 1872 did not profess to be a complete Code dealing with the law relating to contracts, and it purported to do no more than to define and amend certain parts of that law. The observations made in that case have no application to the facts of the present case where, on the finding of the learned District Judge, Section 43, Contract Act, clearly applies. That the promisee may sue one or more of the promisors to enforce the whole of the promise is clear from the terms of the section itself and has been so held in several decisions of this Court Bishunath Sahay Vs. Nanku Prasad Singh, and Raghunath Das Vs. Baleshwar Prasad Chaudhuri, . It is unnecessary to consider in this case the further question if a fresh suit would lie against other promisors when a suit has already been brought and decreed against some of them, and if the English common law rule as laid down in King v. Hoare (1844) 13 M. & W. 494 and Kendall v. Hamilton (1879) 4 A.C. 504, will or will not apply in India. There has been some divergence of judicial opinion on that question. That question does not, however, arise in the present case.

9. For the reasons given above, I am of the opinion that even on merits the appellants are not entitled to succeed. I need refer to only two other points raised on behalf of the appellants. It has been contended that the suit was not maintainable because the plaintiffs were also members of the ''Sabha''. This is the same argument as the one which I have already dealt with. The suit was not brought against the ''Sabha'' as such but against the defendants themselves who had" made the promise. Moreover, it is doubtful if the plaintiffs were members of the ''Sabha'' at the relevant date, having been excommunicated by the ''Sabha'' before that date. The plea of limitation was also raised before us. This plea has been dealt with satisfactorily by the learned'' Subordinate Judge who found against the defendants. It does not appear that this plea was pressed before the learned District Judge. As pointed out by the learned Subordinate Judge the partition proceeding was continuing in 1931, and even in 1936 the arbitrators

were asked to apportion lots and make the award. In that state'' of affairs the suits which were brought in 1988-89 were not barred by time. The result, there, fore is that the appeals fail and must be dismissed with costs in favour of the plaintiff- respondents, and I order accordingly.

Ayyar J.

10. I agree. It is clear from the evidence that the 14 Pentos ''Sabba'' was nothing more than a loosely knit caste organisation exercising certain ill-defined powers of discipline over its members and did not partake of the nature of a club which essentially signifies a centre of social intercourse.

