
(1929) 01 BOM CK 0019
In the Bombay High Court
Case No : First Appeal No. 345 of 1925

Lakshman Kushaba Bakre

APPELLANT

Vs

Bhikchand Raichand Marwadi

RESPONDENT

Date of Decision : 07-01-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : AIR 1930 Bom 1 : (1929) 31 BOMLR 1179 : 122 Ind. Cas. 843

Hon'ble Judges : Patkar, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amberson Marten, Kt., C.J.—The appeal in this case is by defendants Nos. 2 to 4 against the original plaintiffs and defendant No. 1 from the preliminary decree passed by the trial Judge declaring that in the suit partnership the plaintiffs are entitled to a half share and defendants Nos. 1 to 4 to the other half, both being bound to hold one anna out of the profits for charity, and that the partnership shall be deemed to have been dissolved as from September 14, 1923. The decree also ordered accounts to be taken as follows :?

(a) An account of the debts and liabilities of the said partnership on the aforesaid date.

(b) An account of the credits, property and effects on the aforesaid date.

(c) An account of all dealings and transactions between plaintiffs and defendants not disturbing any subsequent settled accounts except the adhawa, Exhibit 184, and any further item or items that may hereafter be found necessary to be excepted.

2. Then the decree proceeded :

The claim for a specific sum alleged to have been fixed on settlement and promised to be paid is dismissed. Though this claim is dismissed the alternate

prayer subsists, and it is decreed as above. Just as plaintiff has falsely set up the claim for a fixed sum, as also the defendants have set up absolutely false points of defence to escape the liabilities as partners and coparceners. Both the parties are equally guilty. It is just the same whether costs are thrown on parties themselves or they are ordered be some out of the partnership property the shares being equal, I, therefore, order that all costs shall come out of the estate.

3. It is necessary to see in the first place what precisely was the suit that the plaintiffs brought, and in this respect it will be found that the pleadings and the first issue are incorrectly stated in the judgment under appeal. If one looks to paragraph 1 of the plaint, it is clear that what is alleged is that the partnership between the plaintiffs and defendant No. 1 was effected for the shop named Bhikchand Chhaganmal at Nasik. This partnership is alleged to have lasted from March 27, 1914, to July 15, 1923, when it is alleged to have been dissolved. And then in paragraphs 3 and 4 it is pleaded in effect that the accounts were settled and the balance of Rs. 26,397-7-6 was agreed to be recovered by the plaintiffs from the defendant. Accordingly, the plaintiffs claim that specific sum.

4. Then in paragraph 8" the case against defendants Nos. 2, 3 and 4 is stated :?

They all live together as members of a joint Hindu family and the amounts of the plaintiffs" claim have been taken by defendant No. 1 for the benefit of the joint Hindu family and all the defendants have been benefited by the game, And all the defendants promised to pay these amounts at the time when the account was settled between them. Hence all the defendants being liable to the plaintiffs" claim, they are made as defendants in this suit.

5. The plaintiff, therefore, claims Rs. 26,397-7-6.

6. It will, therefore, be seen that the claim was for a specific sum found due on a settled account, on a dissolution of the partnership between the plaintiffs and defendant No. 1, and that it was sought to make defendants Nos. 2 to 4 liable on the ground that they were members of a joint Hindu family with defendant No. 1, and alternatively that they expressly promised to pay this particular sum. Accordingly, it is important to observe that this alleged partnership was with defendant No. 1. Therefore, the statement in the judgment that the plaintiffs allege "that defendants had themselves carried on cloth business in partnership &c." is inaccurate. Similarly, the first issue as stated in the judgment is inaccurate, viz., "was the partnership between plaintiffs and defendant dissolved on July 15, 1923, as alleged in the plaint." We have looked at the original issue, and find that in the original it was defendant No. 1. That indeed is borne out by the 5th issue: "Are defendants Nos. 2 to 4 joint with defendant No. 1 and are they liable to plaintiffs?"

7. As regards certain parts of the case, the learned Judge decided in favour of the defendants. Shortly stated, he came to the conclusion that this story about an agreed account on dissolution was false, Then in paragraph 9 he says :?

My definite conclusion is...that plaintiffs became anxious to close the Shop and that they had eventually to close it by force in Bhadrapada and file suit on a coined story of dissolution agreed to and balance promised.

8. And as regards the adhawa, Exhibit 184, he held in paragraph 7 :?

I reject the plea that the adhawa was an accurate settlement for determination of rights and liabilities of the partners inter se or with the shop just as I reject defendant's plea that he signed the profit entry under an inducement or for income tax purposes. I hold that Exhibit 184 was a rough estimate for understanding the pecuniary position of the shop in general made with the consent of all but not understood or meant to be a final settlement of pecuniary liabilities as between the partners.

9. The specific claim in the suit having thus been disposed of, the learned Judge treated the suit, as I understand his judgment, as a partnership suit, and accordingly directed that there must be a dissolution and an account taken subject to the questions (a) and (b) which he mentioned in paragraph 10. Let that be so. Then on that basis we must treat this suit as a partnership suit, and we also take it that the story of the plaintiffs that the defendants expressly promised to pay the settled amount is unfounded. We are, therefore, left with this that a partnership is pleaded as between the plaintiffs and defendant No. 1, and we are asked to bring in defendants Nos. 2, 8 and 4 on the ground that they are members of the joint Hindu family with defendant No. 1. Then at the end the learned Judge finds as follows in paragraph 26:?

The dissolution maybe as between plaintiffs and defendant No. 1 on deduction of profits from the balance the liability will have to be made good by all jointly as co-debtors; for dissolution and settlement it may be a suit as between plaintiffs and defendant No. 1; for enforcement of the liability for the balance it is a debt due to plaintiffs from all the defendants under a khata opened in defendant No. 1's name for them all, with the consent of them all, not an implied consent of coparceners to the manager's act but an express consent by actual conduct to their being treated as co-debtors with defendant No. 1.

And then in the preliminary decree, which I have already stated, the learned Judge makes a declaration that defendants Nos. 1 to 4 are entitled to a half share of the profits of the partnership.

10. The question then arises as to whether a partnership suit in that form will lie. In *Gangayya v. Venkataramiah* I.L.R.(1917) Mad, 454 the Madras Full Bench decided that a contract of partnership entered into by the manager of a joint Hindu family with strangers does not ipso facto make the other members of the family partners; and not being partners, the other members, whether divided or undivided, cannot institute any suit in respect of partnership, (e. g.) a suit for dissolution of partnership. In *Kharidar Kapra Co., Ltd. v. Daya Kishan* I.L.R.(1920) All. 116 the was disposed to be in favour of the law laid down in the Madras case. And a similar view of the law will be found in Mayne's Hindu Law, 9th Edition, at

pages 398 and 399. In our own Court, in *Vadilal v. Shah Khushlal* I.L.R.(1902). 27 Bom. 157 it was held that though a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities.

11. Then in AIR 1922 237 (Privy Council) it is stated (p. 114):?

The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent, In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a karta to impose on a minor coparcener the risks and liabilities of a new business started by himself, is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on the point, do not deem it necessary to enter on a further discussion of this aspect of the case.

12. Then further on it is stated (p. 115):?

Thus in the grounds of appeal it is contended that the defendant and his four brothers having all along lived as members of an undivided Hindu family, and properties having been acquired with the joint funds and the defendant having got some of those properties in his share on partition with the receiver, the learned Subordinate Judge ought to have passed a decree against the defendant at any rate so far as the assets of the firms allotted to his share are concerned.

The answer to the case thus made is given by the Subordinate Judge towards the dose of his careful and well-reasoned judgment, and their Lordships are in complete agreement with what is there said.

And then as to the allegation that the minor had been admitted to the benefit of the partnership, their Lordships say (p. 116):?

This is a fact to be established by evidence, and though it was neither pleaded nor made an issue at the trial, the High Court, without inviting evidence specifically directed to this point, held the admission proved, and thus set up a new case in appeal. The defendant has just ground of complaint as to this, and the procedure is not one to be commended.

13. Now in the present case I would hold that there is no adequate evidence to show that there was an ancestral business. The defendants may be descended from an ancestor who bought and sold cloth, but it is not shown to us that there was an ancestral business on the material dates in this case. The defendants were left orphans at an early age, and consequently it appears to be a case where really a new business was in fact started by the elder brother in this family. Moreover, it is to be observed that one of the parties, at any rate, was a minor and, therefore, there was no question as to his having agreed to open a

new business or to enter into any partnership with the plaintiffs.

14. The question, therefore, comes to this whether it was open to the learned Judge to convert this suit or its pleadings and issues into a totally different suit, namely, one founded on an alleged partnership between the plaintiffs and defendants Nos. 1 to 4. In this respect I should point out that in various parts of the evidence plaintiff No. 2 admitted that there was no partner except defendant No. 1. He had already stated that in a previous suit of 1920 and when the statement was put to him he had to admit in effect that it was correct. The other plaintiff No. 1 Bhikchand deposed in paragraph 1 of his evidence that defendant No. 1 was their partner, but in paragraph 11 he said that the shop was to admit the defendant's family as a partner, and in paragraph 17 he said that all the defendants came to be partners. I do not think that that evidence can really be of value. It seems to me evidence given to meet difficulties which the witness himself created during his examination. On the other hand, Vasudev Hari, another plaintiffs' witness admits that defendant No. 2 was not a direct partner. He was a sub-partner. He also admitted that defendant No. 3 was paid a salary.

15. It seems to me, therefore, that if we were to go in any detail into the evidence which the learned Judge has relied on as establishing this joint liability of defendants Nos. 2 to 4 on the ground that they were co-partners, we should really be making to a large degree a new case for the plaintiffs. Partnership is a particular relationship, and it seems to me *prima facie* that a partnership suit should be kept to accounts between the partners that are concerned. This, of course, is without prejudice to the question whether, if on taking the partnership accounts a sum was found payable by defendant No. 1, then whether in some other proceeding if defendant No. 1 was unable to pay, the plaintiffs might not recover the amount as being a debt due from members of a joint family. It seems to me then that the matter cannot be gone into in this partnership suit, and that to frame, as the learned Judge has done, a declaration which *prima facie* makes all the defendants co-partners of the plaintiffs is an incorrect method and one which would create difficulties. After all, I take it that one individual A is entitled to enter into a partnership with another individual B, although B may happen to be a member of a joint Hindu family, and that it does not necessarily follow that because he enters into a partnership with one coparcener B, he thereby becomes a partner with the other members of B's joint family of whose existence he may not even 1929 be aware.

16. When then in the present case we find that the plaint itself only alleged a partnership between A and B, and not between any body else, and when even the issues are framed on the same basis, then I think the suit is primarily based on an ordinary partnership and dissolution and that accounts should be confined to the relations between the parties in that suit, without prejudice, as I have already stated, to any claim that the plaintiff may subsequently have against the other coparceners.

17. That being so, it seems to me that this order of the learned Judge cannot

stand and that it will have to be modified by confining it to a declaration as between the plaintiffs and defendant No. 1, and by confining the accounts in a similar way to the partnership as between the plaintiffs and defendant No. 1, This will be without prejudice to any other claim that the plaintiffs may be advised to make against defendants Nos. 2 to 4 in the event of the accounts when taken resulting in any liability by defendant No. 1 to the plaintiffs. On the other hand, the suit, under these circumstances, will have to be dismissed as against defendants Nos. 2 to 4 with costs throughout.

18. I come next to the cross-objections which have been filed by the plaintiffs. They claim that it was an error to hold that the partnership was not dissolved on July 15, 1923; that it was an error to hold that the accounts were not made and adjusted as alleged by the plaintiffs; that the lower Court's view with regard to the adhawa, Exhibit 184, is not correct; and that the order as to costs is wrong. In the first place, these cross-objections are only headed as between the appellants (viz., defendants Nos. 2 to 4) and respondents Nos. 1 and 2, who are the plaintiffs. Further they have not been served on defendant No. 1. It is clear that these cross-objections cannot be heard in the absence of defendant No. 1, because if they were held good, they would involve, amongst other things, an immediate judgment against defendant No. 1 for the amount claimed in the suit, and he would thereby be deprived of the benefit of having the accounts taken as directed by the preliminary decree. That is conceded by the learned pleader for the plaintiffs, and he requests that we should give an adjournment in order to enable the first defendant to be served. But it is to be observed that this is an appeal of 1925 and we are now in 1929. The plaintiffs, therefore, have had ample time to put this case in order.

19. A further objection, which has been taken by the defendants, is that according to the practice of this Court, cross-objections ought not to be filed by one co-respondent against another co-respondent except (at any rate, in very special circumstances. For instance, in *Nursey Virji v. Alfred H. Harrison* (I.L.R.1913) . 37 Bom. 511 Basil Scott C.J. and Mr. Justice Chandavarkar decided that the ordinary rule is that the cross-objections provided for by Order XLI, Rule 22, of the CPC are cross-objections which are aimed against an appellant from a decree of a lower Court and are not cross-objections against a co-respondent. In any case such cross-objections will not be allowed as against a co-respondent, where the respondent could have preferred them by way of appeal. Clearly this is a case where the plaintiffs could have preferred these cross-objections by way of an appeal. No doubt, that judgment also says (p. 512):? There are, no doubt, exceptional cases in which the rule might be relaxed so as to allow a cross-objection by a respondent against a co respondent; but we do not think that this is much a case." So too here we see no exceptional ground why cross-objection against a co-respondent should be allowed. And still less do we think that a special indulgence should be granted in a case where the appellants did not take the trouble to make a necessary person, viz., defendant No. 1. a party to the cross-objections. We think, therefore, that in the present case the procedure by

way of cross-objections is erroneous, and that even if we could look upon it as an exceptional case, we are not prepared to exercise our powers having regard to the fact that the plaintiff's have not made the necessary persons parties to the proceeding, notwithstanding the great lapse of time that has taken place since the original appeal was filed.

20. In these circumstances, we think that the cross-objection must be dismissed with costs.

Patkar, J.

21. I agree.

22. Appeal allowed. Declaration to be varied by declaring the partnership to be as between the plaintiffs and defendant No. 1 only. Similar variation in the rest of the decree regarding accounts etc. Suit dismissed as against defendants Nos. 2 to 4 with costs throughout, but without prejudice to any other proceeding the plaintiffs may be advised to bring to render defendants Nos. 2 to 4 liable as members of a joint Hindu family for any sum eventually found due from defendant No. 1 in this suit, Cross-objections dismissed with costs.

23. Having regard to the regrettable length of time this appeal has taken in the appellate Court, we will ask the learned Judge to proceed as early as practicable with the taking of the accounts directed by the order dated June 13, 1925.