

(1959) 09 CAL CK 0007

In the Calcutta High Court

Case No : A.F.A.D. No's. 1003 and 1004 of 1954

Nalin Behari Roy and Another

APPELLANT

Vs

Bisweswar Bhattacharjya

RESPONDENT

Date of Decision : 04-09-1959

Acts Referred:

Contract Act, 1872 — Section 43

Citation : AIR 1961 Cal 393

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

Advocate : Lala Hemanta Kumar, Rabindra Nath Mitra, for Satchidananda Sen Gupta, for the Appellant; Sudhindra Kumar Palit, for the Respondent

Final Decision : Dismissed

Judgement

Renupada Mukherjee, J.—These two connected appeals have arisen out of one judgment and two decrees passed by the Lower Appellate Court. Nalin Behari Roy, appellant in Second Appeal No. 1003 of 1954 of this Court, was the sole plaintiff in Money Suit No. 13/4 of 1951 in the Third Court of the Munsif at Bankura. Kanial Ratan Kavivaj, appellant in Second Appeal No. 1004 of 1954 of this Court was the sole plaintiff in Money Suit No. 5 of 1951 of the same Munsif's Court. The claim in the first mentioned Money Suit was Rs. 1758/12 as, and the claim in the other Money Suit was Rs. 806/-. The simple case of the two plaintiffs of the two suits was that Bisweswar Bhattacharjya, who is the common defendant in both the suits, took loans of money from the two plaintiffs for the purpose of his personal business, agreeing to pay interest at twelve per cent. per annum and the amounts mentioned above were still outstanding on account of principal and interest.

2. Both the suits were contested by the defendant. His defence was that the loans in question had not been incurred by him on his own personal account, but he contracted the loans as Secretary of a Society known as Tiluri Samabay (Co-operative) Samity (Society) and for the purpose of that Society. The defendant

also pleaded. some payments.

3. Some common questions of law and fact being involved in both the suits, the suits were made analogous in the Trial Court and tried together. Upon the evidence adduced by the parties, the Trial Court decreed Money Suit No. 13/4 of 1951 in part for Rs. 1515/- and Money Suit No. 5 of 1951 in part for Rs. 448/2/9pies, with corresponding costs. The contention of the defendant that he had no personal liability was negatived by the Trial Court.

4. Two appeals were preferred by the defendant from the judgment and decrees passed by the Trial Court. The Lower Appellate Court allowed the appeals and dismissed the suits of the two plaintiffs on the finding that the loans were contracted by the defendant as Secretary of Tiluri Samabay Samity, and for the purpose of the Samity to the knowledge of the two plaintiffs, and the defendant had no personal liability to repay the loans.

5. These two Second Appeals: have been preferred by the two plaintiffs of the two suits. The appeals were heard together in this Court. Mr. Lala who argued the appeals on behalf of the two appellants raised several contentions before me. I shall deal with those contentions one after another,

6. Mr. Lala contended, in the first place, that the Society known as Tiluri Samabay Samity admittedly came into existence after the enactment of the Bengal Co-operative Societies Act, 1940, and admittedly this Society was not registered. Mr. Lala, therefore, submitted that because Section 7 of the said Act prohibits the use of the word "co-operative" or "samavaya" by a person or group of persons other than a co-operative society duly registered under the Act, it should be held that this Society, which was not a registered one, had no legal existence; and so even assuming that the loans were incurred by the defendant respondent as secretary of the said society, it should be held that the defendant was personally liable to repay the loans. I am unable to accept this contention of Mr. Lala. Section 7 of the Bengal Co-operative Societies Act, no doubt, prohibits the use of the word "co-operative" or "samavaya" by an unregistered society, but the penalty for the unauthorised user of the above expression is prescribed in the Fifth Schedule of the Act. Such unauthorised user of the word "co-operative" or "Samavaya" does not obliterate the factual existence of the Society. The two appellants were themselves members of the above mentioned society. Both the Courts below have concurrently held that the respondent incurred the loans from the appellants by executing two promissory notes as secretary of the society. That being the case, the mere fact that the society was not a registered one, will not entitle the appellants to recover the loans from the defendant personally. The first contention urged on behalf of the appellants, therefore, fails,

7. Mr. Lala contended, in the second place, that the respondent cannot avoid personal responsibility, simply because he executed the pro-notes as secretary of the society. In the submission of Mr. Lala, the description of the respondent as secretary of Tiluri Sainabay Samity in the two hand notes was a mere description

of his position, and the description, by itself, does not show that the liability was the liability of the Samabay Samity and not of the defendant respondent. In this connection, I may mention that both the Courts below concurrently held that the loans were incurred by the respondent on two hand-notes in his capacity as secretary of Tiluri Samabay Samity, The two appellants completely suppressed the fact of execution of two hand notes by the respondent, and the two plaints were drafted on the footing that the respondent had Incurred the loans by withdrawing some amounts of money from the Postal Savings Bank as messenger of the two plaintiffs. Mr. Lala submitted that the evidence of the respondent at the utmost shows that he signed the pro-notes as secretary of the Samity. He however, contended that this evidence is not sufficient to show that the Samity was really liable for the money. In support of this contention Mr. Lala cited a Privy Council decision reported in *Firm of Sadasuk Janki Das v. Kishan Pershad Bahadur* 23 CWN 937: (AIR 1918 PC 146) Mr. Lala cited some other cases of this Court and of other High Courts for the purpose of supporting his contention that the description of the respondent was a mere description of his office and nothing more. I need not refer to the other cases cited by Mr. Lala on this point, because they do not add any tiling to the Privy Council decision referred to by me. That decision has got no application to the facts of the present case, because the appellants have suppressed the pro-notes. I am, therefore, left absolutely in the dark as to what were the contents of the two pro-notes. It has, however, been established in evidence that the loans taken by the respondent were utilised by the Samity and they had been duly credited in the account books of the Samity. The two appellants themselves were two members of the Samity. In these circumstances, it is impossible to say that the description of the respondent as secretary of the Samity in the two hand-notes was a mere description of his position and nothing more. The appellants were aware of this position, and no false representation was made to them. I, therefore,, agree with the finding of the Lower Appellate Court that the loans in question were incurred for the Samity by the respondent on being duly authorised by the Samity. That being the case, the contention of Mr. Lala that the description of the respondent in the two hand notes was a mere description of his office, and that he had personal liability with regard to the loans must be negated. The second contention urged on behalf of the appellants, therefore, fails.

8. Mr. Lala argued, in the next place, that! assuming that the respondent took the loans as an agent of the Samity, the appellants are entitled to sue him personally, because no action can be brought against the Samity under the law which does not recognise the existence of the Samity. This argument is not tenable, because although no action may lie against the Samity as Samity for want of registration, certainly the appellants were entitled to bring their suits against all the members of the Samity collectively. The third contention urged on behalf of the appellant, therefore, fails,

9. Mr. Lala contented in the last resort that the suits are maintainable against the respondent personally u/s 43 of the Indian Contract Act. Ho relied on the first

part of Section 43 which run in the following terms:--

"Where two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any or more of such joint promisors to perform the whole of the promise....."

Mr. Lala contended that it being admitted that the suits did not lie against the Samity as Samity, and it being not disputed that the suits could have been brought against all the members of the Samity, it should be held that the respondent was one of the joint promisors as contemplated in Section 43 of the Indian Contract Act, and being one of joint promisors, he was bound to perform the whole of the promise because of the absence of any express agreement to the contrary. In my opinion, this contention of Mr. Lala is not well founded, because it does not take stock of the pleadings of the appellants themselves,

10. The cases made out in the two complaints of the two suits were that the respondent alone had incurred the loans for his own business purposes. There is not a whisper in the two complaints that the debts were contracted by the respondent for the purpose of the Samity. The appellants are now attempting to take advantage of the case made by the respondent. In my opinion, this is not permissible.

11. As the loans were taken for the Samity which was an unregistered one, the suits should have been brought against all the members of the Samity. Two cases of the Allahabad High Court, one of which is reported in *Ganesha Singh v. Mundi Forest Co.* ILR 21 All 346 and the other in *Bhagwandas Singh and Others Vs. Pinjra Pole Pashu Anathalaya* will support the view that where a suit is brought against an unregistered society, all the members constituting the society must be impleaded. In my opinion, no one particular member of the society can be singled out for recovering the claims of the plaintiffs.

12. In the above connection Mr. Lala drew my attention to a case reported in *Jai Kishen Das v. Arya Priti Nidhi Sabha* AIR 1921 Lah 357. It has, no doubt, been held in that case that the option given by Section 43 of the Indian Contract Act to a plaintiff to proceed against any one of two or more joint promisors can be exercised even after the institution of the suit. This, however, does not help the present appellants, because their suits were initially and fundamentally defective. By a suppression of the real facts of the cases, they came to Court with a false story that the respondent took the loans in question alone and for his own personal necessity. After having taken up that position, the appellants cannot be allowed to say that the defendant is personally liable for the loans, as he is also one of the members of Tiluri Samabay Samity. If the plaintiffs had come to Court with the true story, then the respondent might very well have proved to the satisfaction of the Court that the promise to pay in these cases was only a joint promise to pay, and the respondent had no individual liability to repay the loans. In my opinion, Section 43 of the Indian Contract Act has got no application to the facts of the present cases, and so the last contention urged on behalf of the

appellants fails.

13. All the contentions urged on behalf of the appellants having failed, these two appeals are dismissed with costs to the respondent. One set of hearing fee will be divided equally in the two appeals.

14. Leave is asked for on behalf of the appellants to file appeals under Clause 15 of the Letters Patent, but is refused.