

(1931) 03 CAL CK 0018
In the Calcutta High Court

Pramatha Chandra Kar and Another

APPELLANT

Vs

Bhagwandas Madanlal and Others

RESPONDENT

Date of Decision : 13-03-1931

Acts Referred:

Contract Act, 1872 — Section 264

Citation : AIR 1932 Cal 236

Hon'ble Judges : Rankin, C.J.;Buckland, J

Bench : Full Bench

Judgement

Rankin, C.J.—This is an appeal from a decision of my learned brother Panckridge, J., upon an issue whether two persons, Mr. Pramatha Chandra Kar and Sir Hari Sankar Paul, are liable as partners of the defendant firm of Dawn & Co., on a money decree obtained against the firm by the plaintiffs Bhagwandas Mandal, dated 28th January 1927. The suit was for a sum of Rs. 4,592 in respect of two contracts which were made in 1923 and 1924 respectively and it was brought on 27th March 1925.

2. It appears that the case for the appellants Mr. Pramatha Chandra Kar and Sir Hari Sankar Paul is that, in April 1922, there was a dissolution of the partnership and Mr. Dawn, after that date, continued to carry on the business under the name of the old firm, Dawn and Co., the appellants having retired. It is clear that before April 1922 the plaintiff's had transactions with Dawn and Co. at a time-when admittedly the appellants were partners of the firm then trading under that name. The plaintiffs brought their suit, as I have said, against the partnership firm in the name of Dawn and Co. in March 1925 and very soon after that, namely, in April 1925, Mr. P.C. Kar brought a suit against Mr. Dawn, Sir Hari Sankar Paul and some other members of Sir Hari Sankar Paul's family for a declaration that the partnership had been dissolved as from April 1922. On 15th July 1926 he obtained a preliminary decree declaring that the partnership had been dissolved as from that date and pro-viding for the usual accounts. The plaintiffs having got their decree in January 1927 made no attack upon the

appellants as liable under the decree until February 1930, namely, for a period of some three years. Now, an issue having been directed as to whether the appellants are liable under the plaintiffs' decree as partners of the firm of Dawn and Co., the learned Judge has tried certain questions necessary for the solution of that matter. The plaintiffs maintain that not only did they do business with Dawn and Co., prior to April 1922, but that they made enquiries and came to know that the appellants were partners of the firm of Dawn and Co., that their dealings with Dawn and Co., were dealings upon which they gave credit to the appellant. It is quite clear that neither in April 1922 nor at any subsequent period was any public notice of the dissolution of the partnership given.

3. In the circumstances the learned Judge has tried the question whether it is true that the plaintiffs knew at any time prior to April 1922 that the appellants were members of this partnership and he has come (to the conclusion that ?) the plaintiffs' evidence on that question cannot be believed and he has, in my judgment, rightly refused to hold that it has been shown that the plaintiffs at the time they gave credit to the firm upon the contracts in suit knew of the status of the appellants as partners of this firm. That being settled, the learned Judge has addressed himself next to the question whether, in the absence of knowledge on the plaintiffs' part these individuals--Mr. P.C. Kar and Sir Hari Sankar Paul were partners--the plaintiffs would be entitled to succeed assuming that the partners as between themselves did dissolve the business in April 1922. This question in India turns upon the correct construction of Section 264, Contract Act. The learned Judge has come to the conclusion that the authorities to which I will refer in a moment require him to hold that, notwithstanding the provisions of Section 264, a person cannot hold a retiring partner liable unless he know that that individual person was a partner prior to the dissolution. Accordingly the learned Judge has addressed himself to the question of fact whether or not in April 1922 the appellants did retire from this firm as alleged. I will deal first with this question of fact.

4. Now, the defendants called, first of all in importance, Sir Hari Sankar Paul to prove the dissolution. Sir Hari Sankar Paul turned out to be an almost useless witness because, while he had been a partner of the firm, it appears that he took little interest in the matter, and never even drew any money from the firm. When he was called to prove that there was a dissolution of the partnership, he was found to be under the impression that in 1922 the firm had been dissolved by a letter being written. The letter was not in his hand at the time and it turned out that the letter he was thinking of was a letter written on 3rd April 1925 by himself to Mr. Dawn in the course of which he begged Mr. Dawn to come to a settlement of the accounts of the firm with Mr. Kar, and in that connexion he said that the partnership had been dissolved by mutual consent on 30th April 1922. He gave no tangible evidence of anything that happened in 1922 amounting to dissolution of the partnership. It is not really contended that upon this evidence the learned Judge could reasonably be asked to hold that there was a proof of dissolution. So far as the letter is concerned, it is to be observed that the letter

of 3rd April 1925 which was after the plaintiff's had brought their suit against Dawn and Co., and shortly before Mr. P.C. Kar had brought his suit for dissolution of partnership, is not in itself at all convincing evidence.

5. The next evidence of importance produced before the learned Judge is the evidence of a brother of Mr. P.C. Kar, who appears to have been employed as an assistant or clerk in the firm of Dawn and Co. This brother of Mr. P.C. Kar gives no evidence of any conversation and produces no letter between the partners which would amount to clear and direct evidence of dissolution, but he says that he was authorized to sign the firm's name per pro and he says, though curiously enough not in his original examination but in further examination-in-chief, that there was the old firm and then there was the new firm in April 1922. He produces a book in which he says entries were made with reference to the business of the old firm and that book on examination turns out to be of this character: that, while the entries in it may well have reference to a dissolution of partnership about that time, there is nothing in themselves from which the Court can make certain that there was a dissolution in April 1922. There was also produced the last book of accounts, the large book of accounts, and the entries are found to come to an end after the first two or three pages. Mr. Dawn has not produced as a witness, and none of the books after April 1922 were produced, to show what was happening in the firm after April 1922. In addition to that a letter was produced, dated 27th June 1922, written by Mr. P.C. Kar to the Agent of the Chartered Bank of India, Australia and China. In that letter, Mr. Kar said that he was writing at the request of Babu Rajendra Lal Dawn of Messrs. Dawn and Co. and was writing to confirm that he had severed his connexion with the said firm of Dawn and Co. as from 1st May 1922 and had not therefore signed the letter of guarantee which Babu Rajendra Lal Dawn had signed in favour of the bank on behalf of Messrs. Dawn and Co. In my opinion that letter is evidence for the appellants. If I am asked to say under what section of the Evidence Act it is evidence, I think it is evidence u/s 8. If a person is proving that he has retired from a firm, he is quite entitled to show that immediately after the date of retirement he wrote to the bank and informed them that he had severed his connexion with the firm and could not continue to guarantee its account. If he does that, I think any statement by him made at the time as the reason for his refusing to continue to guarantee is admissible to explain his conduct.

6. The evidence of the witness Naresh Chunder Kar is not very satisfactory in some respects. He does not appear to have given very complete or intelligent answers to certain questions; and when he is asked about the books it turns out that he knows rather less about them than one would suppose from some of his answers at the beginning of his examination. As regards the small book, at the end, questions were put to him as to the meaning of the entries and he says:

I cannot say anything about that. It was Rajen Babu who kept these books. All that I can say is that this particular book was kept to ascertain in fact if there was any sale of any goods relating to the old partnership business and on such

occasions I used to refer to that book."

Question,--"The last two entries in the opening page show" received from Rajendra Lal Dawn as loan Rs. 1,395 and that is shown as expenditure on the other side; you find another entry like that of Rs. 1,350?"

Answer,--"I cannot say anything about it.

7. The evidence of Sir Hari Sankar Paul having proved to be of little or no service, the learned Counsel for the appellants before us applied to the learned Judge to stop the trial and direct that the evidence of Mr. P.C. Kar should be taken on commission. It is quite clear that these appellants elected to go to trial without the evidence of Mr. P.C. Kar just as they deliberately went to trial without the evidence of Mr. Dawn and without the books of the firm of Dawn & Co. after the alleged dissolution. Mr. P.C. Kar, I am satisfied, was at the time lying seriously ill and when it appeared that the evidence of Sir Hari Sankar Paul manifestly came to nothing the Court was asked to issue a commission to examine Mr. P.C. Kar himself. No previous application of this sort had been made and it is quite clear that with their eyes open the appellants were prepared to go to trial without his evidence. It seems that the learned Judge concluded the hearing of the suit and re-served his judgment and then notice was] given of a formal application for the issue of a commission to examine Mr. P.C. Kar. The learned Judge seems to have some doubt as to his power to entertain it. I cannot say that I have any doubt for myself. But the learned Judge did consider the application on its merits and refused it. He thought that to issue a commission at that stage would be a very exceptional order and that as the appellants elected to go to trial without taking any steps at all to have Mr. P.C. Kar examined it would not be fair at the end of the trial to make such an order such as was asked for.

8. In these circumstances, the first matter which is pressed upon us is that it is unfortunate and unjust that this matter should be disposed of without taking the evidence of Mr. P.C. Kar and that this Court ought now to give a direction which would enable that gentleman to be called and to give his evidence. I find it very difficult to hold that the learned Judge erroneously exercised his discretion when he refused an application of this character made at the time and in the circumstances in which that application was made to him. It has to be remembered that the position now is considerably worse. If we were to make an order which would have the effect of letting in the evidence of Mr. P.C. Kar, then this Court would have to decide upon the reliability and the value of the evidence of the witnesses whom the learned Judge saw and whom we have not seen. The whole case would have to be canvassed afresh and it would be very difficult to conduct the evidence of Mr. P.C. Kar in such a way as to make the taking of his evidence at this stage fair to the plaintiffs without something in the nature of a retrial. Upon the whole, as the learned Judge has not thought fit to exercise his discretion in favour of the appellants, it would not be right, in my opinion, for the Court of appeal to say that the learned Judge was wrong.

9. The difficulty I find upon this matter arises chiefly in connexion with the second question, namely whether the learned Judge is right in refusing to be satisfied with the evidence as a whole caned for the appellants. The case from that point of view is very much on the border line. There is the hazy evidence of Sir Hari Sankar Paul and there is the letter to the Bank dated 27th June 1922.

10. The books while they do not prove a dissolution suggest that something of that sort was happening at the time and, although Mr. Dawn has not been called, it does appear to be true that in the partnership suit he was professing to be the sole proprietor of Dawn & Co. On the other hand, one has to admit the force of what the learned Judge says that, in the absence of some direct evidence by one or other of these partners as to the dissolution of the partnership, it is difficult to say that the Court is bound to be satisfied with scraps and suggestions of the kind to which I have referred. If this matter rested there, I should find it a difficult matter indeed to be quite certain that, in the absence of any evidence to the contrary given by the plaintiff's, the learned Judge in a case of this sort has given full value to the cumulative evidence, such as it was, produced by the appellants. On the whole, I am however bound to say that it was the duty of the appellants on whom the onus rested to satisfy the learned Judge in a reasonable sense. I find it difficult to divest my mind of the idea that the evidence points to a dissolution in 1922 but at the same time I cannot say that, as a matter of right judgment the learned Judge was obliged to be satisfied with the evidence.

11. In these circumstances, it seems to me to be necessary to come to a decision upon the contention that was raised as regards Section 264, Contract Act. Now, the cases on the point in favour of the appellants are cases in the High Court of Bombay and the learned Judge has referred to them shortly and very clearly in his judgment. It comes to this that there is a decision in favour of the appellants by Tyabji, J. in the case of Greaves Cotton & Co. v. Purshottam Dharmasi & Co. [1903] 5 Bom. L.R. 366 and there is an opposite decision of Beaman, J. in the case of Gisvani Gorio & Co. v. Kalyanji Vallabhdas 30 Ind.Cas. 864. Then there is a case which went to a Division Bench on appeal the case of Jwaladutt R. Pillani Vs. Bansilal Motilal, . In that case, it was conceded before the Bombay High Court that, unless the plaintiff knew that a particular person was a partner prior to the dissolution, he could not get the benefit of Section 264. That was conceded before the appeal Court in Bombay and the case went to the Privy Council upon another point, namely upon the point whether an old customer, as it is said, requires to have an express notice of the dissolution--a point which has been decided in this Court in the case of Chundee Churn v. Eduljee [1882] 8 Cal. 678. The Privy Council in their judgment upheld the decision in that Calcutta case but in no way dealt with the question whether a person who did not know that a certain man was a partner of the firm prior to the dissolution could u/s 264, in the absence of any notice of any kind, claim to hold him liable upon transactions entered into after the dissolution. There was thereafter a case Bhaishankar Motiram Vs. Lakshmi Dyeing Works, where the appeal Court in Bombay again took the view that a person who was not known to be a partner was not within

the scope of Section 264. In that case, the learned Judges of the Bombay High Court appear to have been under a misapprehension to the effect that, in the Privy Council in *Jwaladutt R. Pillani Vs. Bansilal Motilal*, it was admitted that the view taken by the Bombay High Court on this matter was correct. Now, the learned Judge probably acted very judiciously and rightly in preferring to follow these decisions sitting as a Court of first instance.

12. The matter is however now in this Court and, in the circumstances of this particular case, it is unfortunately necessary, in my judgment, that we should deal with the point. It is quite clear that, in *Eduljee's* case, the view ultimately accepted was that the section does not profess necessarily to deal exhaustively with the question of notice arising upon a dissolution. It was held that even if public notice had been given, the section did not govern the case so as to decide that express notice was unnecessary in the case of old customers. The case before us however is directly within the section. It is not a question of arguing from one proposition to the converse of that proposition. The section does purport to deal with cases where no public notice has been given and the plaintiff has no notice of the dissolution; and the proposition enunciated by the section is that a person dealing with a firm will not be affected by the dissolution in these circumstances. Are we then to say that the section only applies to oases where particular individuals who are sought to be made responsible as partners were known to have been partners to the parties seeking to make them so responsible ? I will not enlarge upon the principle that a section of an Act is *prima facie* to be interpreted according to the plain meaning of the words, nor will I trouble here with the cases now somewhat numerous in which the Judicial Committee has affirmed and applied this doctrine notwithstanding that the result is to make the law in India somewhat different from the law that would obtain according to the English principles. If it were in any way clear to me that to take the language of the section at its face value was to make the section say something paradoxical or plainly inconvenient or disastrous to commerce I might not be prepared even yet to forgo the claim that in such a case the statute ought to be interpreted if possible to leave room for an implication that would render the provisions reasonable. I do not agree with all that was said by Beaman, J., but I am entirely unable to say that there is any sufficient reason to cut down the *prima facie* and direct meaning of the words of this section so as to exclude from its operation persons who were not known to be partners.

13. It is quite true that the principles of agency to be found in the Contract Act and in Section 115, Evidence Act, would not by themselves take one so far as Section 264 on this footing takes us. That is very likely why Section 264 were specially enacted with reference to the particular case of partnership. It may well be that a person in India is dealing with a firm; it may well be that the firm has a good reputation; it may also be that a person dealing with the firm made considerable enquiry as to its position; still it may well be that he may not know exactly who are the individuals who compose the partnership. Again, so many people in India and elsewhere trade under names which give no indication of the

individuals who compose the partnership that the legislature may have been minded to cut down to the minimum any kind of enquiry as to the composition of the firm by a person who has to deal with it. Again, I think it may be that the draftsman of the section gave effect to a desire on the part of the legislature to encourage in every way giving public notice when a change in the constitution of the firm takes place. It is to my mind not paradoxical or in any way impossible to suppose that the legislature meant to say that if a firm is dissolved and no notice is given and people continue to trade with the firm under the old firm's name they are not to be affected by a secret dissolution. After considering this matter somewhat carefully, while I quite appreciate that the section so construed is from the point of view of accepted English principles an anomaly, I am not prepared to hold that the question u/s 264, Contract Act, can be dealt with on the footing that there is any implied exception saving the liability of some persons. That being so, it would be entirely unnecessary, on any view taken of these facts, to think of issuing a commission and it is entirely unnecessary to examine further the state of the evidence on the question whether there was in fact a dissolution of partnership in April 1922.

14. For these reasons, I think the appeal fails and must be dismissed with costs.

Buckland, J.

15. I agree.