

(1953) 12 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 1595 of 1945

Sohanlal Pachisia and Co.

APPELLANT

Vs

Bilasray Khemani and Others

RESPONDENT

Date of Decision : 11-12-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1
Contract Act, 1872 — Section 10, 38, 73
Evidence Act, 1872 — Section 114, 115, 21, 92
Partnership Act, 1932 — Section 32, 43, 64, 68, 69
Stamp Act, 1899 — Article 43
Stamp Rules — Rule 17

Citation : AIR 1954 Cal 179

Hon'ble Judges : Bose, J

Bench : Single Bench

Advocate : D.C. Sethi, for the Appellant; B. Agarwalla, for the Respondent

Judgement

Bose, J.—This is a suit for recovery of Rs. 14,437/12/3 for damages suffered by the plaintiffs in respect of certain dealings and transactions in shares they had with the defendants and in the alternative for enquiry into damages.

2. The case of the plaintiff firm is that on or about the 29th November 1944 (wrongly stated as 25th November) the defendants sold and the plaintiff firm purchased from the defendants 4,000 ordinary shares of Barakar Coal Co. Ltd. The said transaction was subject to the rules and usages of the Calcutta Stock Exchange Association Ltd. According to the rule and usage, the defendants were to deliver the shares and the plaintiff firm was to pay for the same within 3 days from the date of the contract. The contract relating to the transaction was numbered 499 and dated the 29th November 1944. The time for delivery was however extended from time to time by mutual agreement up to 20th December 1944. But although the plaintiff firm applied for delivery, the shares were not delivered by the defendants.

By reason of such failure to give delivery, the plaintiff firm, on 21st December

1944 purchased the said 4,000 shares in open market for and on account of and at the risk of the defendants and thereby suffered a loss of Rs. 13,862/8/- being the difference between the price at which the plaintiff firm purchased the shares from the defendants and the price at which the plaintiff firm was compelled to buy the said shares from the market on account of the defendants. The particulars of such damages are set out in paragraph 12 of the plaint. The defendants in their firm of "Bilasray Khe-mani" had drawn and made over to the plaintiff firm a post dated cheque for Rs. 7,237/87- bearing date 1st January 1945 by way of marginal security for the fulfilment of the said contract but the cheque was dishonoured by non-payment on presentation to the bank.

3. The defendants 1 and 2 have filed a joint written statement. The defendants 3 and 4 have together filed a separate written statement.

4. In the written statements several defences have been taken, it is denied that the plaintiff firm is registered under the Indian Partnership Act. It is also denied that the defendants carry on any joint family or co-partnership business under the name and style of Bilasray Khemani. It is stated that the defendants 1 and 2 are separate from the defendants Nos. 3 and 4. The business belongs solely to defendants 1 and 2. It is further stated that the transaction in suit was entered into by the plaintiff firm as agent of the firm of Bilasroy Khemani and it is not a case of purchase by the plaintiff firm as principal from the defendants as vendors. The post dated cheque was given in consideration for the time for delivery being extended up to 1st January 1945. There is general denial of several other allegations and the liability for damages is repudiated.

5. Prior to the filing of the written statements an order for particulars of the plaint was made by His Lordship Mr. Justice Khundkar and pursuant thereto certain particulars were furnished by the plaintiff's solicitors which are contained in letters dated the 16th January, 1946, 17th January 1946 and 24th January 1946.

6. The following Issues were raised at the hearing:

1. Did the plaintiff act as principal or as broker in the transactions in suit?
2. (a) Was the plaintiff firm entitled to require performance of the contract by Bilasroy Khemani?
(b) Is the plaintiff firm entitled to enforce any liability arising therefrom?
3. Up to what date was the delivery of the shares extended?
4. (a) Was the plaintiff ready and willing to carry out its part of the contract? (b) Was there any application for delivery by the plaintiff firm on the due date or the extended due date?
5. Are the defendants members of a joint family governed by the Mitakshara Law or partners or did they hold themselves out as partners as alleged in paragraph 1 of the plaint?

6. Was the plaintiff firm duly registered under the Indian Partnership Act at the date of the suit?

7. Is the suit maintainable by reason of the fact that the plaint has not been signed by all the partners?

8. To what relief, if any, is the plaintiff entitled?

ISSUE NO. 1.

7. The case of the plaintiff firm is that in respect of the transaction in suit the plaintiff and the defendants stood in the relation of principal to principal. The plaintiff was the buyer of 4,000 shares of Barakar Coal Co. Ltd. and the defendants were the sellers. In support of this case oral and documentary evidence have been adduced on behalf of the plaintiff firm. Raghunath Prosad Sharma has stated that the plaintiff firm acted as a principal and not as a broker in respect of the transaction in suit which was entered into on the 29th November 1944 (Qs. 50, 205, 206). The Daily Transaction Book (Ex. A) which records the transaction under date 29-11-44 shows that the plaintiff firm entered into the transaction with Bilasrai Khemani. The Share Ledger entry (Ex. B) under date 29-11-44 contains entries to the same effect at page 55 thereof. The party ledger book of the plaintiff (Ex. C) under date 29-11-44 records entries relating to the transaction in question with Bilasrai Khemani.

It appears from the Nakal book (Ex. P) that a sum of Rs. 13,862/8/- has been debited to Bilasrai Khemani under date 22nd December 1944 on account of purchase and sale of 4,000 Barakar Coal shares which took place between the plaintiff firm and Bilasrai Khemani. It further appears from that book (page 13) that 4,000 shares were brought by the plaintiff from Bilasrai Khemani on 29-11-44 and a lot of 4,000 shares was sold by the plaintiff to Bilasrai on 21-12-44. Further, in the ledger (Ex. B) at page 151 there is an entry under date 22-12-44 showing that the transaction was with Bilasrai Khemani.

8. The defendants, on the other hand have not produced a single book of account of their business to show that in the transaction the plaintiff firm acted as broker and not as principal. Bilasrai Khemani who has deposed before this Court in this case, has tried to explain away the non-production of his books of account by stating that his brother's son Tarakeswar Khemani has misappropriated large sums of money belonging to his firm and had taken away all the books and documents of the firm sometime in March or April 1946 and since then the books and documents cannot be traced. The manner in which he gave evidence as to this alleged loss convinced me that this story about the loss is a pure concoction. His story is that he came to learn about Tarakeswar taking away the books and documents from the durwan and the munib but when pressed hard in cross-examination to give the names of these pereons he comes forward with the convenient answer that he does not remember their names. Moreover, if as a matter of fact Tarakeswar had taken away the documents, no serious attempt or endeavour appears to have been made to recover or trace these documents.

It is clear that taking advantage of the fact that Tarakeswar is dead, imputation is being made that Tarakeswar had stolen the documents and so they are not available for the purpose of production in this Court. It is significant that the contract dated 29-11-44 (Ex. 9) has been produced by the defendants but all other relevant documents are missing. The explanation that the contract only was made over to the solicitor of the defendants before the alleged theft, is far from convincing. It appears to me that the circumstances are such that the court is entitled to presume u/s 114 of the Evidence Act (illustration (g)) that if the books had been produced they would have been unfavourable to the case of the defendants.

9. Some correspondence has been tendered in evidence. The letter dated 20th December 1944 written by the plaintiffs' solicitors Mr. B. M. Baga-ria, (Ex. I), which may be said to record contemporaneous facts, states that the plaintiff firm had purchased from Bilasrai Khemani 4,000 shares under contract No. 499 dated 29th November 1944. The letter also records the fact that the date of delivery of the shares was extended by mutual agreement upto 20th December 1941 and it also records the circumstances under which a post dated cheque for Rs. 7237/8/- was made over by Bilasrai Khemani to the plaintiff firm. Raghu-nath Sharma has proved by reference to the Peon Book of Mr. B. M. Bagaria that this letter was delivered to Bilasrai Khemani, the defendant No. 1 by a peon but Bilasrai refused to acknowledge receipt of that letter by signing on the Peon Book. It may be noted that the evidence of Sharma (Q. 109 to 119) on this point of delivery through a peon has not been challenged in cross-examination, though of course Bilasrai has in course of his evidence denied that he received any such letter.

It may be that as no reply was given to this letter, at the time, contradicting the statements contained in this letter the defendants have now taken up the attitude that no such letter was ever received by the defendants. It appears that another letter dated 21st of December 1944 (Ex. J) was sent by the plaintiffs' solicitors under Certificate of Posting and this letter records the fact that a letter dated 20th December 1944 had been delivered through a peon but Bilasrai Khemani refused to acknowledge receipt thereof. This letter (Ex. J) has also not been replied to by the defendants, although it is clear that the letter was delivered by peon.

10. The cheque (Ex. D) dated the 1st January 1945 for Rs. 7327/3/- was drawn by Bilasrai Khemani in favour of the plaintiff firm as payee thereof. So the plaintiff firm was treated as a party entitled to receive the money in relation to the transaction in suit.

11. The contract dated 29th November 1944 (Ex. 9) is not signed by the plaintiff firm as broker, nor is there any provision for brokerage in it.

12. The receipt or the Memo of confirmation (Ex. O) which is signed by Bilasrai Khemani describes the transaction as "Their Bought Contract" that is, the Bought Contract of the plaintiff firm.

13. The only fact which really militates against the case of the plaintiff firm that it was a principal party in the transaction, is the wording of the body of the contract and the fact that the stamps which are affixed on the back of the contract (Ex. 9) are stamps which are usually affixed in the case of a Broker's Note. Raghunath Pro-sad Sharma has stated in course of his deposition that such stamps have been inadvertently affixed by a durwan who did not quite understand the real nature of the transaction. This is an explanation which is not at all convincing though, in fact, it may be true.

14. It has been held however that a Contract Note is not conclusive of the real relation of the parties to the contract and evidence can be given to prove whether a party contracted as agent or in the capacity of seller or buyer in the transaction. The cases of -- "Stock and Share Auction and Advance Co. v. Galmoye" (1886) 3 T L R 808 (A) and -- "Re Wreford Carmichael v. Rudkin" (1897) 13 T L R 153 (B) are authorities for the proposition that the contract is not conclusive. See also -- Nanda Lal Roy Vs. Gurupada Haldar, .

15. The evidence of Eilasrai Khemani is also to the effect that the transaction dated 29-11-44 was entered into by him as seller and the plaintiff firm was the buyer but it was put through by a broker of the name of Chaturbhuj Bajoria. Though in answer to some questions he has tried to make out, that the plaintiff firm acted as broker and Chaturbhuj Bajoria acted as under-broker in the transaction, yet he has not made any serious suggestion that there was any disclosed or undisclosed principal for whom the plaintiff firm acted as broker in respect of the contract dated 29th November 1944.

16. Mr. Agarwala has drawn my attention to the case of -- "Sewdud Roy Maskara v. Nahapiet" 34 Cal 623 (D), in which the words used in the Bought Note were "bought for you" and In the Sold Note the words were "sold for you" and in addition there was in the Sold Note a provision for brokerage at a certain rate. In the plaint also in that case it was alleged that the plaintiffs acted in their capacity of brokers. Harrington J. upon a consideration of the evidence in that case and upon construction of the language of the Bought and Sold Note made the following observations :

"I have come to the conclusion that the plaintiffs did in fact purport to act as brokers for the defendants. First, they say in the plaint that they took the defendants' order for the purchase and sale of jute in the capacity of brokers. Secondly, the language of the memoranda, "We have bought for you 1,000 bales" and "we have sold for you 500 bales" implies that the writers were not contracting as principals. These documents cannot be read as T have sold to you 1,000 bales" and "I have bought from you 500 bales" without entirely altering the language and lastly, the statement of the brokerage on the sale of 500 is only consistent with the sale being by brokers for a principal."

17. This case makes it clear that the grammatical or the natural and usual meaning is the meaning which has to be put upon these Bought and Sold Notes,

and adopting the same principle of construction in the case before me, there is no escape from the conclusion that in signing the Contract in suit the plaintiff firm conveyed the impression that it was acting as a broker. There is nothing whatever on the contract to indicate that the plaintiff firm intended to act otherwise than as a broker. The words are "We have this day I sold for you" and not "bought of you" or "bought from you". The plain meaning of this is that the plaintiff firm was selling the 4,000 shares on behalf of Bilasrai Khemani who was the seller. Further apart from the language of this contract, the fact of affixing of stamps on the back of the Contract according to the requirements of Article 43 of Schedule I of the Indian Stamp Act read with Rule 17(f) of the Indian Stamp Rules, makes it quite clear that the document was intended to have the appearance of a Broker's Note.

It also appears that when the 4,000 shares were purchased in the market on 21st December 1944, the plaintiff firm charged an extra two annas per share by way of "brokerage". This word "brokerage" was used by Raghunath Prosad Sharma himself when answering Q. 172 in his examination-in-chief. though later on, obviously being cautioned by his legal advisers, the witness preferred to use instead of "brokerage" the words "remuneration", an expression which was chosen carefully, to avoid any difficulty, when particulars were furnished by the plaintiff's solicitors in their letter dated the 16th January 1946. The affidavit affirmed on 8th December 1945 of Sewchand Rai Dabri-walla (paragraph 7) shows that Chaturbhu] Bajo-ria acted as plaintiff's under-broker in the transaction. Sewchandrai has not been called to explain this statement. Chaturbhu] Bajoria also has not been called by either party. It may be noted that Bajoria is in the position of a son-in-law to the defendant Bilasrai Khemani.

18. If the matter had rested solely on the contract dated 29-11-44 and no other evidence would be forthcoming, then I would have very little hesitation in dismissing the suit, following the principles enunciated in -- "34 Cal 628 (D); -- Nanda Lal Roy Vs. Gurupada Halder, .

19. But the half hearted manner in which the defendant tried in the witness box to support the case, that the plaintiff firm acted merely as broker in the transaction, convinces me that the defendant Bilasrai knew that although the plaintiff firm was making some profit by charging some commission or brokerage in the transactions the plaintiff firm was really acting as principal and on their own account and not on behalf of any disclosed or undisclosed principal and I am further convinced that Bilasrai had consented to the plaintiff firm so acting in the transaction. In his examination in chief all that Bilasrai could be induced to state, after repeated endeavour of his counsel, Mr. Agarwalla, is that he had share transactions with Sohanlal Pachisia through Chatur-bhu] Bajoria who acted as a broker. He knew that Sohanlal Pachisia was a broker in the share market -- a fact which is not disputed by the plaintiff firm, who used to act both as broker and dealer in the Stock Exchange. (Bilasrai -- "Q. 34-43; Q. 58, 67, 101).

In answer to Q. 201 he says that he was in-formed that Sohanlal Pachisia had

broken the terms of the contract, thereby implying that Sohonal was the real party to the contract and not merely broker. His answers to Q. 207-211 are very definite and there is clear admission that the plaintiff firm was the buyer and he the defendant Bilasrai Khemani was the seller. To the same effect are the answers to Q. 225-238 -- though attempt has been made to qualify the statement to a certain extent, in some of the answers given. The answers to Q. 252, Q. 253 show that Bilasrai knew that Sohonal Pachisia was the party entitled to get delivery and to get the payment of difference. The defendant had 17 or 18 previous transactions with Sohonal Pachisia since 12th October 1944 (Q. 304-307).

20. In this state of the evidence of Bilasrai Khemani I feel constrained to hold that the defendant all along knew that the principal party in the transactions in suit, was the plaintiff firm, and he had dealt with the plaintiff firm as the contracting party. The correspondence, the books of account and other documents upon which reliance has been placed by the plaintiff, and to which I have already referred in the earlier part of this judgment also support this case.

21. The case of -- "Sewdut Roy Maskara v. Nahapiet (D)" recognises the principle that if it was found in that case that the defendant knew that the plaintiffs were really principals and agreed to their so acting, the decision would have been otherwise. "34 Cal 628 (D). But Harrington J. found that the question whether the defendant knew of and assented to this mode of dealing was not easy to determine upon the facts and circumstances of that case.

22. In the case before me, it is clear on the facts that although for the purpose of earning some commission or remuneration out of the transaction the plaintiff firm, gave the contract dated 29-11-44, the appearance of Broker's note, the firm really acted as principal party to the contract with the knowledge and consent of the defendant.

23. The plaintiff firm is therefore entitled to maintain the suit as framed.

ISSUES NOS. 6 AND 7:

24. It has been contended by Mr. Ehuramull Agarwala the learned counsel for the defendant that as the plaintiff firm was not properly registered in the Register of Firms maintained by the Registrar of Firms under the provisions of the Indian Partnership Act, the suit as framed is not maintainable. It is pointed out that the Statement which was filed by the partners before the Registrar of Firms (Ex. I) contained a declaration that out of the four partners who carried on business under the name and style of Sohanlal Pachisia & Co., the partners Duttalal Mohenderia and Jagadish Kumar Gupta retired from the partnership on 1st January 1945 and the other two partners, Sohanlal Pachisia and Sewchandrai Dabrl-walla continued to carry on the business of the plaintiff firm in co-partnership on terms & conditions contained in a Deed of partnership dated the 23rd August 1945, but in the Register of Firms all the four persons are shown as partners of the firms on 5th September 1945, the date on which the partnership

was registered with the Registrar of Firms and consequently the registration is defective and the suit also has not been properly instituted. I do not think that there is any substance in this contention.

It may be that the officer responsible for effecting the registration did not apply his mind to the "Remarks column" in the Statement (Ex. 1) and as a result thereof entered the names of all the four persons as being partners of the plaintiff firm on the 5th of September 1945. But the fact remains that the plaintiff firm was registered on the 5th September 1945, that is one day prior to the institution of the suit and the four persons are shown (it may be wrongly) on the Register as partners of the firm. Under Order 30 Rule 1 of the CPC persons who are partners can sue in the name of the firm, of which such persons were partners, at the time of accruing of the cause of action. The cause of action in the present case was in respect of a contract dated 29th November 1944, and the breach thereof took place, and the damage was suffered in respect thereof, in December 1944, when all these four persons were partners of the plaintiff firm and therefore all the four partners are entitled to sue in the firm name in respect of the transactions in suit.

Section 69 of the Indian Partnership Act requires that in order that a suit can be properly instituted to enforce a right arising from a contract by or on behalf of a firm against any third party, the firm must be registered and the persons suing must be shown in the Register of Firms as partners in the firm. The registration in the present case fully satisfies the requirements of section 69. If Duttalal Mohensaria and Jagadish Kumar Gupta are wrongly on the register, steps may be taken for the rectification of the mistake u/s 64 of the Indian Partnership Act but the incorrectness of the registration cannot be a valid ground for defeating the suit as has been filed in the present case.

25. It has been submitted by Mr. Sethia the learned counsel for the plaintiff that the deed of partnership dated 23rd August 1945 was never acted upon and the two partners, Duttalal Mohensaria and Jagadish Kumar Gupta did not retire from the partnership on the 1st January 1945 but on the 4th November 1945 and he has relied on an entry made in the Register of Firms under date 19th May 1952. But as u/s 68(1) of the Indian Partnership Act any statement filed for the purpose of registration is conclusive proof of any facts stated therein and it is clearly recited in the "Remarks column" of Ex. I that the deed of partnership dated 23rd August 1945 is an operative document, it is not open to the learned counsel for the plaintiff to contend that the deed dated 23rd August was not intended to be given effect to.

26. Mr. Agarwala also contended with reference to certain documents produced by Lalit Mohan Banerji, the representative of the Calcutta Stock Exchange, which have been marked as Ex. II, that one Gouri Sankar Mantri became a partner of the plaintiff firm on or about 15th August 1945 but he has not been registered as a partner in the Register of Firms and so the suit is not maintainable. It is clear, however, from the evidence of Raghunath Prosad Sharma that this person was

brought in as a partner only for the limited purpose of doing business on behalf of the plaintiff firm in the Stock Exchange but he was not really a partner in the strict sense of the term nor had he any right to participate in the profits of the firm and he was also not liable for any loss of the firm. Moreover, this individual was not a partner at the time of the accruing of the cause of action and further he had nothing to do with the transaction in suit. There is thus no force in this contention of Mr. Agarwala and it cannot be given effect to.

27. Mr. Agarwala has drawn my attention to an unreported judgment of Panckridge J. in the case of -- "Radhakissen Santhalia v. Kanhy Lal Ramchandra", being Suit No. 1739 of 1938, D/- 10-4-1940 (Cal) (P). In this case the name of one Kanhyalal who died in 1935, was continued to be shown on the Register of firms even after his death, as a partner of the firm of Radhakissen Santhalia and a suit was brought in the firm name in 1938 for recovery of a sum of money due in respect of certain Hessian transactions. It was argued that as the registration of the firm was defective by reason of a dead person being shown as a partner the suit must fail. Panckridge J. did not finally decide the point but expressed the view that he was not inclined to accept the contention. The learned Judge, however, found on facts which were much stronger than in the case before me that two individuals, Murlidhur and Keshardeo who had become partners of the firm before the date of institution of the suit had not been registered as partners of the firm and as their names did not appear on the register, the registration was defective and the suit was not therefore maintainable.

28. In the case before me, the evidence adduced to show that Gouri Sankar Mantri was a partner of the firm before the date of the institution of the suit is not enough to justify me in holding that Mantri was a full-fledged partner of the firm and not a partner for the limited purpose of transacting business in the Stock Exchange. It is true that Raghunath Prosad Sharma has merely suggested in course of his deposition that Mantri was a partner for a limited purpose and has not produced any document to show that Mantri was taken in as a partner only for a limited purpose. But the deeds of partnership dated 23rd August 1945 and 28th March 1948 show that only Sohanlal Pachisia and Sewchandrai Dabriwalla have continued to carry on business in co-partnership and they are the only partners of the firm since 1st January 1945 or 4th November 1945 and there is no other partner having any interest or share in the partnership. If Mantri had been a partner in the strict sense, he would have been described as a partner in the deed of partnership dated the 23rd August 1945 and the deed dated 28th March 1948, if he continued to be a partner till the last mentioned date, and further he would have been made a party to the deeds in his capacity of a partner.

29. In the case before Panckridge J. there was ample evidence of dealings as partners as far as Murlidhar and Keshardeo were concerned, but in the case before me, there is no evidence, besides the fact that Mantri has been recognised as a partner by the Stock Exchange, that Mantri ever had dealings as

a full fledged partner of the plaintiff firm. Further as I have pointed out before, Mantri had no relation to the cause of action for the suit. He became a partner, if at all, after the accruing of the cause of action.

30. Mr. Sethia submitted that the documents produced by the Stock Exchange are inadmissible in evidence. He relies on a decision of Sarkar J. in -- "Suit no. 1736 of 1940, D/- 1-3-1951 (Cal) (G)". In that case a Register showing the constitution of a certain firm of members of the Stock Exchange was held as inadmissible. In the case before me a Partnership Form and Declaration signed by the plaintiff firm and Mr. Mantri which were filed in the Stock Exchange have been sought to be tendered. In my view they are admissible as admissions against the plaintiff u/s 21 of the Evidence Act.

31. It was contended by Mr. Agarwala that by the retirement of the two partners Duttalal Mo-henseria and Jagadish Kumar Gupta, the old firm consisting of four partners (Sohanlal, Sewchand-rai, Duttalal and Jagadish) stood dissolved and the new partnership should have been registered as such. But it is clear from section 32 of the Partnership Act read with the relevant sections in Chapter VI of the said Act that by mere retirement of a partner, a firm is not dissolved but the retiring partner must give notice of his intention to dissolve the firm in order to bring about a dissolution. The old firm continues, with the continuing partners as its members. So the firm as registered on 5th September 1945 was properly registered. So the suit cannot fail see -- Tapendra Chunder Goopta Vs. Jogendra Chunder Goopta and Others, (H).

32. Even assuming that the old firm became dissolved by the retirement of the two partners, then the dissolved firm can maintain this suit, without being properly registered, for realising the money due to the dissolved firm, by virtue of the provisions of Section 69(3)(a) of the Partnership Act. The provisions of Sub-sections (1) and (2) of section 69 do not affect the right or power to realise the property of a dissolved firm. It is immaterial, in such a case, that the firm is unregistered or defectively registered. So in any view of the matter the suit cannot fail.

33. Mr. Agarwala further contended that as the plaint is not signed by all the partners, the suit is defective and it should therefore be dismissed. It appears to me that this contention is also without substance. It has been held by the Rangoon High Court in -- "Subramanian Chettyar v. T. R. M. T. S. T. Firm of Ela" AIR 1935 Rang 209 (I) that the correct way of bringing a suit under Rule 1 of Order 30 of the Code of Civil Procedure, is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit: see also --" AIR 1932 137 (Nagpur) (J) and -- Bhadreswar Coal Supply Co. Vs. Satis Chandra Nandi and Co. and Others, .

34. The Issues Nos. 6 and 7 are therefore decided in favour of the plaintiff.

ISSUES 2(a) and 2(b):

35. The point argued by Mr. Agarwala on these Issues is that Section 45 of the Indian Contract Act, requires that promises made to joint promisees are to be enforced by all such promisees jointly and as two partners Duttal Mohenseria and Jagadish Kumar Gupta are not properly on the Register of Firms, the suit must be treated as by two partners only, namely Sohanlal Pachisia and Sewchandrai Dabriwalla and so the suit claiming performance of the promise is not maintainable. Raghunath Prosad Sharma in answer to Q. 224 has stated that the suit has been instituted on behalf of the partners of the plaintiff firm who on 6th September 1945 were partners of the firm, and his evidence further is that all the four persons were partners (Q. 219 and other questions).

The entry in the Register of Firms under date 5th September 1945, as I have pointed out already, shows that four persons are shown as partners of the firm on that date and the firm was registered on that date. Thus all the persons who were partners of the firm, at the time when the promise was made by Bilasrai Khemani and at the time of the accruing of the cause of action (Order 30, Rule 1, Civil P. C.) have joined as plaintiffs. There is therefore no force in this contention of Mr. Agarwala. ISSUE NO. 3:

36. The plaintiff's case is that the original date of delivery was 1st December 1944. But it was extended in the first instance up to the 3rd December 1944 but on the last mentioned date it was further extended till the 5th December 1944 but on this date (5th December 1944) the date was extended up to 20th December 1944. The letter of the 20th December 1944 (Ex. I) which records contemporaneous facts and which was written before any real dispute arose between the parties, sets out the case of the plaintiff and it is unlikely that the plaintiff firm had started concocting stories at that stage. So the facts stated in this letter can be safely presumed to be correct. The letter states that on 5th December 1944 a Bill had been made out and pursuant to that the defendant Bilasrai Khemani gave a cheque for Rs. 7237/8/-.

The defendant Bilasrai Khemani has admitted, in his evidence that on the 5th December 1944. he drew the cheque and made it over to the plaintiff firm. In the Written Statement, the case made was, that on 9th December 1944 the cheque was handed over and the time for delivery was extended till 1st January 1945. But in the witness box Bilasrai Khemani has been forced to admit that the cheque was given on 5th December 1944, though he has maintained that the delivery date was extended on that date up to 1st January 1945. But not a scrap of paper has been produced by the defendants to show that extension was up-to 1st January 1945. The defendants did not reply to the letter of the 20th December 1944 and controvert the allegations in that letter. That this letter was delivered by peon appears from another letter written the very next day i.e. 21st December 1944, which was sent under certificate of posting. Sharma has also stated that the letter of 20th December 1944 was delivered by a peon but Bilasrai did not sign the peon book though he took the letter and read it.

Sharma has also related the circumstances under which and the conditions on which the post dated cheque of the 1st January 1945 was given on the 5th December 1944. The circumstances do not appear to be improbable. The books of account and the letter of 21/22nd December 1944 show that on 21st December 1944 the plaintiff firm had purchased 4,000 shares on account of and at the risk of the defendants. The cheque of 1st January 1945 was attempted to be cashed after the due date but it was dishonoured (See letter of 4th January 1945). It appears to me that the case of the plaintiff firm is true and the date of delivery was extended till the 20th December, 1944.

ISSUES 4 (a) and 4 (b):

37. Bilasrai Khemani has admitted in course of his evidence that he had given instructions to persons looking after his business at Calcutta not to accept any registered letter coming from an attorney. He has also admitted that the addresses on the envelopes containing the letters dated 21/22nd December 1944 and 4th January 1945 are correct. So the letters must have reached the destination but as nobody accepted the letters on behalf of the addressee, the endorsements of refusal were made on them and they came back to the sender.

The oral evidence of Sharma and the correspondence of the plaintiff's solicitors show that attempt was made to get delivery of the shares on the 1st December, 3rd December, 5th December 1944 but the date was finally extended up to 20th December 1944. On the 5th December 1944 the plaintiff firm made out a bill for the difference and managed to get the cheque for Rs. 7327/8/-. Their anxiety and willingness to get the shares is further evidenced by the fact that on the very next day after the extended date (i.e. 20th December 1944) they purchased 4,000 shares in the market. The cross-examination of Sharma on this point by Mr. Agarwala makes it clear that the plaintiff firm was at all material times in a position to pay the price of the shares. The letter of the 20th December 1944 contains an offer to pay the price against delivery of the shares.

38. The case in -- Ismail Bhai Rahim and Others Vs. Adam Osman and Others, referred to by Mr. Agarwala that offer of payment through solicitors is not good tender within the meaning of Section 38 of the Contract Act, is distinguishable. If a party is in a position to perform his part of the contract and expresses his readiness to perform it either personally or through his agent or representative, that is sufficient evidence of readiness and willingness, though the offer of performance may not amount to tender. It is true that the plaintiff firm has not disclosed the Pass Book, or any other book or document to show their financial position but Mr. Agarwala refrained from calling for the production of the Books and documents although Sharma offered to produce the documents if called upon to do so. In fact Bank Pass Book was offered to be disclosed by Mr. Sethia during the hearing but Mr. Agarwala objected to it, and so I did not allow it to be produced.

39. I have no hesitation in deciding these Issues in favour of the plaintiff. I hold

that the plaintiff firm was all along ready and willing to carry out its part of the contract and that there were applications for delivery by the plaintiff on the due date as also on the extended due dates. The market was hi favour of the plaintiff firm and it is inconceivable that the plaintiff firm would not be eager to take delivery or perform their part of the contract.

ISSUE NO. 5:

40. The defendant Shankarlal has died during the pendency of the suit, and I am not satisfied on the evidence that the defendants Nos. 3 and 4 are members of any joint family consisting of themselves and the defendant No. 1. I am in- clined to accept the evidence of Bilasrai Khemani that he is separate from the defendants Nos. 3 and 4. The evidence of Raghunath Sharma that he had talks with the defendants and it was represented to him that they were members of a joint family or carried on a joint business, is unreliable. I hold that the defendants were not members of a joint family nor did thsy carry on any joint business at the material time. There can be no doubt however that a decree against the defendant Bilasrai Khemani alone, can be passed in the facts and circumstances of this case.

41. Mr. Agarwalla pointed out that the plaintiff firm has made one kind of case about the defendants being held out as joint proprietors of the business in the letter supplying particulars dated 16th January 1946 and a different kind of case in the witness box. I do not think so. Raghunath has made the same case in answers to Q. 33 and Q. 607-645, though no doubt he has been forced to modify it to a certain extent in course of his cross-examination. Though the evidence on this issue of both parties is insufficient and the defendants could have produced more satisfactory evidence, I am inclined to accept the evidence of Bilasrai Khemani on the point in preference to the oral testimony of Raghunath. The plaintiff firm has made several alternative cases about jointness of the business in the plaint as it was not sure which case would succeed. The whole object was to somehow rope in, the defendants Nos. 3 and 4 but I think it has failed in its attempt. ISSUE NO. 8:

42. It has been contended by Mr. Agarwalla that there is no evidence of the market rate, as prevailing en the extended due date for delivery, and hence no decree for damages can be passed in the suit. It has been argued that if the due date was 20th December 1944, the plaintiff can at the most claim the difference between the market rate on that day and the rate at which the shares were purchased on 29th November 1944 and the plaintiff had no right to purchase the shares in the market on the 21st December 1944 and claim the difference on the basis of "the market rate prevailing on the 21st December 1944.

43. I am unable to accept the contention of Mr. Agarwalla that the plaintiff firm was under an obligation to purchase the shares on the very same day on which delivery was to be given. The defendants had the right to give delivery within any time till the last moment of the 20th December 1944. So until the day had

elapsed, it could not be said that the defendants had committed breach of the contract. It was therefore physically impossible for the plaintiff firm to make the purchase, in the market, on that very day. It is true that the date of the breach of the contract was the date of delivery: -- "A. K. A. S. Jamal v. Moolla Dawood Sons and Co." AIR 1915 PC 48 (M) but as pointed out in Halsbury Laws of England, Vol. 10, page 122, footnote (u) where -- "Shaw v. Holland" (1846) 15 M & W 136 (N) is quoted:

"the difference is more properly that between the contract price and the market price "on the day after the breach", where the defendant has the whole of the day fixed for delivery on which to deliver; but the express or implied terms of the contract must be given effect to."

44. In the case of -- Pannalal Sagore Mull Vs. Mukhram Radhakissen, (O), the time for delivery was up to 31st October but damage awarded at the rate prevailing on the 1st November (i.e. next day) was held to be proper. (page 637, per Sanderson C. J.).

45. It is well settled that in giving damages for breach of contract the party complaining should so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed: -- ("Wertheim v. Chincoutimi Pulp Co." 1911 AC 301 (P) at p. 307 and -- "Williams Brothers v. Ed. T. Agius Ltd." 1914 AC 510 (Q); see also Section 73, Contract Act and illustration (a) to the section). In the present case the plaintiff firm could not get the shares till the next day. So the market rate on that date can be taken into consideration and damages awarded on the basis of such rate.

46. I am unable to accept the further argument of Mr. Agarwalla that there is no evidence of the prevailing market rate of the 21st December 1944, and so no damages can be awarded. It is true that no independent evidence of any broker or dealer has been produced nor the official quotations of the Stock Exchange have been tendered in evidence. But this is, because, no specific issue was raised on the point and it was not suggested at the time of the settlement of issues that the defendants were specifically disputing the rate on the basis of which the claim was laid in the plaint. It is only at the stage of argument that the learned counsel argued that the rate had not been proved. Raghunath Prosad has however stated in answers to questions 156-157, 163, 585 and 672 what the market rate was. There has been no serious cross-examination on the point. No evidence has been adduced by the defendants to show that the rate was otherwise. In the circumstances the Court is justified in acting upon the evidence of Raghunath Prosad, supported by the books of account of the plaintiff which show at what rate the damages have been calculated and the debit has been made.

In my view however the plaintiff is not entitled to charge the extra two annas per share and make any profit out of the transaction. It also appears to me that the plaintiff is not entitled to inflate the damages (i.e. the amount of difference

between Contract price and Market price) by charging interest at 6 per cent. thereon. The plaintiff firm had purchased the shares in the market and they must have dealt with those shares in the stock exchange in course of their business. It is not a case of the plaintiff's money being locked up by reason of the purchase made on the 21st December 1944. The claim for interest should therefore be disallowed. Now deducting at the rate of two annas per share and disallowing the claim for interest, the total claim comes to Rs. 13,362/8/-.

47. There will therefore be a decree for Rs. 13,362/8/- in favour of the plaintiff firm with interest on decree at 6 per cent. as against the defendant No. 1 Eilasrai Khemani. The suit is dismissed as against the defendants Nos. 3 and 4. The defendant No. 1 will pay to the plaintiff the costs of the suit on scale No. 2 including reserved costs, if any. Certified for two counsel. The plaintiff will pay to the defendants Nos. 3 and 4 one day's costs of hearing. Certified for two Counsel.