

(1959) 08 KL CK 0028
In the High Court Of Kerala
Case No : A.S. No. 586 of 1955-M

Tulsidas Mulji and Another

APPELLANT

Vs

Ebrahimjee and Others
 Ebrahimjee and Others Vs
Tulsidas Mulji and Another

RESPONDENT

Date of Decision : 07-08-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 30 Rule 10
Limitation Act, 1908 — Section 22(1)

Citation : AIR 1960 Ker 75

Hon'ble Judges : Velu Pillai, J; M.S. Menon, J

Bench : Division Bench

Advocate : V.C. Gopalaratnam, A. Madhava Prabhu, D.R. Kamath, L.V. Krishnaswami Iyer and V.C. Renga Dorai, for the Appellant; K.V. Surianarayana Iyer, C.M. Devan and N.N. Venkitachalam, for the Respondent

Final Decision : Partly Allowed

Judgement

M.S. Menon, J.—This is an appeal from the decision of the Subordinate Judge of South Malabar at Kozhikode in O. S. No, 41 of 1948. The suit was for damages for the breach of a contract of affreightment and the return of the advance freight paid by the plaintiffs.

2. The total claim was for a sum of Rs. 10,736-10-6. The lower Court said :

"The suit is decreed with costs against defendants 1 to 3 jointly and severally for the sum of Rs. 10,736-10-6 with interest thereon at 6 per cent. from the date of plaint and full costs of suit with interest thereon at 6 per cent, from this date till realisation."

3. The 2nd defendant was the tindal of the country craft Itehrnania, the vessel concerned in this case. He had not chosen to appeal and the decree as far as he is concerned does not arise for consideration.

4. In the plaint as originally filed there were only two defendants :

"Tulsidas Mulji ,1011 of Mulji Vishram trading under the name and style of Vishram Khimjee"

and Hasan Ayoooh, the tindal mentioned in paragraph 3 above. The plaint was subsequently amended as per the order in I. A. No. 1738 of (1953 dated 18-2-1954 and the 3rd defendant, described as follows, was brought on record :

"Moolji Vishram son of Vishram Khimjee trading under the name and style of Vishram Khimjee".

5. The bill of lading is Ext. A-I dated 26-11-1947. It shows that the undertaking was to carry 55,000 tiles and 600 ridges from Calicut to Colombo by the country craft Rehmania, that the total freight payable was Rs. 3,948-0-9 and that out of the said amount, Rs. 1,974-0-0 was paid as advance freight by tile plaintiffs.

6. The goods were not delivered at Colombo. The suit and the decree followed.

7. According to the 1st defendant (1st appellant) he never had any connection with the trade "Vishram Khimjee", the vessel Rehmania or the transaction concerned. According to the 3rd defendant (2nd appellant) he is the sole owner of the said trade and vessel, and as he was brought on record only after the period of limitation no decree should have been passed as against him.

8. The contentions of the plaintiffs (respondents) are :

(1) the suit all along has been against "Vishram Khimjee";

(2) "Vishram Khimjee" is the name of a joint family trade conducted by the 3rd defendant and his sons, inclusive of the 1st defendant; and

(3) the amendment effected was the correction of a misdescription - not the addition of a new defendant - and so no question of limitation affects the claim made in the suit.

(9) We propose to assume, without deciding, that the plaintiffs are right when they say that "Vishram Khimjee" represents a trade of the joint family.

(10) Order 30, R. 10 of the CPC 1908, provides :

"Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply."

In *M. Ar. Ram. P.M. Chidambaram Chettiar Vs. The National City Bank of New York*, the Court took the view that Rule 10 applies only to an individual carrying on business under an assumed name. The Court said :

"Rule 10, O. 30, is modelled on O. 48(a), R. 11, the corresponding English provision. That rule applies, it has been held in England, to a single individual who carries on business under an assumed or trading name. Rule 10, O. 30 stands in marked contrast with R. L. The latter rule applies to "any two or more

persons", whereas R. 10 refers to "any person carrying on business. There is no reason to depart from the view taken in the English cases and we must hold that R. 10 is applicable only to the case of a single individual."

11. The view of the Madras High Court has come up for criticism and dissent in other Courts. In *Alekh Chandra and Others Vs. Krishna Chandra Gajapat Narayan Deo, Fazl Ali, J.*, referred to the view expressed in *M. Ar. Ram. P.M. Chidambaram Chettiar Vs. The National City Bank of New York*, and said :

"With that view I agree subject to this qualification only that there is nothing to prevent this rule being applicable to those cases where more persons than one carry on business in an assumed name, though strictly speaking they are not partners. Such a case cannot arise in England, but in India the members of a joint family who do not form a contractual partnership in the strict sense of the term do often carry on business in an assumed name."

12. In *Jamunadhar Poddar Firm Vs. Jamunaram Bhakat and Others*, the Court discussed the case law on the subject, and said :

"A business can be carried out either by one person, either in his own name or in an assumed name, or by a number of persons in association. In the last-mentioned case the association of those persons would ordinarily in England be a partnership concern. There is no such conception in England, the like of which we have here in the case of a joint Hindu trading family, of a group of persons trading together but not constituting a firm. In view of that fact it would, in our judgment, be not right to follow blindly the dicta of Judges of the English Courts where they say that R. 11 of O. 48A relates to the case of a single individual. On this point we fully endorse the view expressed by the Patna High Court in *Alekh Chandra and Others Vs. Krishna Chandra Gajapat Narayan Deo*, . Differing from the decisions of the Madras High Court in *M. Ar. Ram. P.M. Chidambaram Chettiar Vs. The National City Bank of New York*, we agree with that decision of the Patna High Court. No convincing reasons have been given in the judgment of the Madras High Court. The contrast between the language of Rr. 1 and 10 of O. 30 made therein does not carry the matter far, and we do not agree with the observations that here in India "there is no reason to depart from the view taken in the English Cases" on the scope of that rule; and :

"Order 30, R. 10 uses the words "any person". The singular number is there but the word "person" must be given the meaning assigned to it by section 3(39) of the General Clauses Act. Unless there is something repugnant in the context or in the subject, the term "person" will include any association or body of individuals whether incorporated or not. We do not find either anything in the context or subject which would lead to us to hold that R. 10 contemplates the case of a single individual only, and not of many individuals. Of course where more than one individual trade under a firm name or under any other assumed name and form a partnership resting on contract, the case would come under R. 1 of O. 30, but where they do not form a partnership, we do not see any

convincing reason why they should not come within R. 10."

13. We are in agreement with the view expressed in *Alekh Chandra and Others Vs. Krishna Chandra Gajapat Narayan Deo, and Jamunadhar Poddar Firm Vs. Jamunaram Bhakat and Others*, On the assumption we have made in paragraph 9 above - that "Vishram represents a trade of the joint family of the 3rd defendant and his son - it must follow that a suit against "Vishram Khimjee" would have been in order. The difficulty in the way of the plaintiffs, however, is not that such a suit would not have been competent; but that such a suit has not been instituted.

14. We find it impossible to say that the suit either before or after the amendment was a suit against the trade carried on in the name and style of "Vishram Khimjee". The cause-title makes it clear that the suit before the amendment was against *Tulsidas Mulji* and his tinal and that the suit after the amendment was against him, the tinal of the vessel and his father *Moolji Vishram* who was brought on record as the 3rd defendant,

15. The references to "Vishram Khimjee" appear to have been no more than part of the descriptions of the 1st and 3rd defendants, The matter before and after the amendment was not for a decree against "Vishram Khimjee"; but for a decree "directing the defendants jointly and severally to pay the plaintiffs the sum of Rupees 30,738-10-6".

16. Section 22(1) of the Indian Limitation Act, 1908, provides:

"Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

The sub-section as is clear from its wording has no application to the correction of a misdescription. As already indicated our view is that what the amendment effected was not the correction of a misdescription but the addition of a new defendant. It is not disputed that if such is the case the provision will apply and that the suit has to be considered as barred by limitation as far as the 3rd defendant is concerned.

17. Whether a particular description amounts only to a misdescription will depend on the wording of the plaint concerned, and no useful purpose will be served by discussing the decisions on the subject. A useful summary of the cases is available in *Rustomji's Commentary to Section 22 of the Indian Limitation Act, 1908* (6th Edition 1955).

18. *Madhosingh v. Union of India*, (S) AIR 1955 Raj 57, had to deal with a plaint somewhat similar to the one before us. In that case the suit as originally brought was against "Mr. Rawlins, General Manager, Jodhpur Railway, Jodhpur". The judgment of *Wane-boo, C. I.*, (with whom *Dave, J.*, agreed) summarised the amendments effected as follows :

"The name of Mr. Rawlins was removed on 8-11-1945, and the suit continued against the General Manager, Jodhpur Railway. There was another amendment later on, and the name of the General Manager, Jodhpur Railway, was also struck off, and "Marwar Durbar" was substituted for it on 15-7-1946. Later, the Marwar Durbar has been replaced by the Union of India."

and said:

"We are of the view that if the suit is filed against the manager or agent of the railway, and if it appears that the intention was to sue the railway, and to get a relief against the railway, it may be possible in an appropriate case to hold that the name of the defendant originally put down was merely a misdescription. But the present case is of a different nature altogether. Here the suit was not against the Manager of the Jodhpur Railway. The suit was against Mr. Rawlins, who was described as the Manager Jodhpur Railway."

The suit before us as already pointed out was before the amendment only a suit against "Tulsidas Mulji, son of Mulji Vishram trading under the name and style of Vishram Khimjee" and his tinal, the 2nd defendant.

19. Counsel for the plaintiffs contended before us that a decree against the 1st defendant will itself bind the joint family on the assumption we have made in paragraph 9 above, The contention is unsustainable. As pointed out in P.A.R. Ramaswami Chettiar Vs. Srinivasa Iyer and Others,

"A partner of an ordinary firm may, in the absence of special restriction, bind by his acts the other members of the partnership; but in the case of a trading family it is the manager alone, unless a special arrangement exists, that can take part in the business and bind by his acts his co-parceners. The true legal position therefore is, that as between the co-parceners, the fact that the family is engaged in trade does not convert it in relation to that trade, into a partnership."

20. In K.M. Ramakrishna Mudaliar Vs. V.S.V. Manikka Mudaliar (deceased) and Others, the Court referred to Sheo Prasad Singh v. Saheba Lal ILR 20 Cal 453, and said :

"The language employed by the learned Judges of the Calcutta High Court in ILR 20 Cal 453, is in favour of the view that even a junior member, if he is in charge of the family business, will have all the powers of a managing member to the extent necessary for the proper conduct of the business of which he is in charge."

AIR 1942 311 (Oudh) is a case in which the liability related to a joint family business under the management of a junior member. The Court said :

"It has been argued that Shyam Lal is the senior member of the family and Pearey Lal is the junior but in a joint family in which several businesses are earned on, the karta or the eldest member of the family cannot manage all. He must entrust his powers in respect of some of the business to the junior members of the family also. Pearey Lal in this case appears to be managing the

sugar manufacturing business on behalf of the whole family and therefore his acts bind the whole family including Shyam Lal."

21. In this case there is no evidence to show that Tulsidas Mulji or any business of the family of which he was in charge had anything to do with the transaction with which we are concerned, and it must follow that the decree of the lower court has to be modified by exonerating both the 1st and 3rd defendants from all liability in respect of the plaint claim. We decide accordingly.

22. There is a contention that the advance freight paid, namely Rs. 1,974-0-9 cannot in any event be recovered by the plaintiffs. The contention is apparently based on the peculiar rule of English mercantile law by which advance freight is not recoverable "if the delivery of the goods is prevented by the act of God, perils of the seas Or other excepted cause which excludes an action of damages". The words quoted are of Lord Weight in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbonr Ltd* (1943) AC 32. In the same case Lord Porter dealt with the rule as follows:

"It is the that advance freight by long custom cannot be recovered though the goods shipped are never delivered. *Byrne v. Schiller* (1871) 6 Ex 319; and *Allison v. Bristol Marine Insurance Co.* (1876) 1 AC 209, so declare. The decision was reached with regret. In the former case Cock-burn, C. J., says he thinks the rule "founded on an erroneous principle and anything but satisfactory", and Montague Smith J. regards it as the result of an implied term. In the latter Lord Hatherley says "We have to remember that from a very early period, as long ago, it was said during the argument, as the time of Charles II - at all events for a very long time - it has been settled in our maritime law that prepaid freight cannot be recovered back", and all their Lordships seem to have been influenced by the fact that it was the practice for the merchant to insure prepaid freight, and, indeed, of the shipowner to make an allowance for that purpose."

In view of the conclusion we have reached it is unnecessary to consider the applicability of the rule to the present case and it is not considered in this judgment.

25. The appeal is allowed in the manner and to the extent indicated above. The respondents will pay the costs of the appellants in this Court and, in the circumstances of the case, both the appellants and the respondents will as against each other bear their respective costs in the court below.

24. We make it clear that nothing in this judgment will affect the decree of the trial court as far as the 2nd defendant is concerned.