Jahar Roy (Dead) Through L.rs. and Another

Vs

Premji Bhimji Mansata and Another

Civil Appeal No. 2035 of 1970

(N. L. Untwalia, P. N. Shinghal JJ)

03.11.1977

JUDGMENT

SHINGHAL, J. –

1. The first two defendants, who lost in the trial Court as well as on appeal, came to this Court on a certificate granted by the High Court under Article 133(1) of the Constitution as it stood before the Constitution (Thirtieth Amendment) Act, 1972. Jahar Roy, defendant 1, that date, when we were informed about his death by Mr. Mazumdar who was his advocate-on-record also, we gave him the option of continuing the arguments so that they may be concluded without any break and file a petition for substitution of the legal representatives of Jahar Roy before the delivery of the judgment, or to resume the hearing of the appeal after the substitution. Mr. Mazumdar was good enough to choose the former course as the substitution of the legal representatives of Jahar Roy was to be a formal affair and nothing special or new was likely to be argued in the appeal on their behalf. We accordingly heard the arguments at length. Later, alongwith an application for substitution, a prayer was made on behalf of the legal representatives of Jahar Roy for the re-hearing of the appeal. In all fairness, and to avoid any future objection, we acceded to the request and posted the appeal for further hearing.

2. We have heard Mr. Mazumdar on behalf of all the legal representatives also. He has however not argued any new point beyond inviting our attention to a suit filed by the plaintiff on February 25, 1970, during the pendency of the appeal in the High Court, claiming a declaration that the partnership between him and defendant Jitendra Nath Bose stood dissolved on and from February 24, 1970, and the order of appointment of Receivers in that suit. We shall refer to Mr. Mazumdar's argument in that behalf in due course.

3. Plaintiff Premji Bhimji Mansata and Jitendra Nath Bose defendant 3 carry on business in partnership in the name and style of "Rungmahal Theatre", in Calcutta, of which they are joint lessees. They pay a monthly rent of Rs. 2500 including the rent of fixtures and furniture. They also pay Municipal rates and taxes, electric charges and the cost of maintenance of machinery, fittings and furniture. Both of them have been described in the plaint as "the Management" of the Rungmahal Theatre. Jahar Roy, defendant 1 and Smt. Sarajubala Devi, defendant 2, hereinafter referred to as the defendants entered into an agreement with the plaintiff and defendant 3, on January 17, 1962. The agreement in which the defendants were described as "the Artistes" provided, inter alia, as follows :

> 1. The management agree to allow the Artistes the use of "Rungmahal Theatre" as the Licensees thereof including the stage, theatre-hall, the dressing rooms used in

connection therewith, the existing scenes and dresses for the purpose of public performances and shows thereat of Bengali dramas for a period of one year from the date thereof on the days and in the manner following :

(a) One evening show on each Thursday.

(b) One evening show on each Saturday.

(c) One matinee and one evening shows on each Sunday and other public holidays and also one whole night performance on the occasion of Sivaratri and Janmasthmi each. All the extra expenses including the Corporation charges and extra remuneration payable to staff for such whole night performances will be borne and paid by the Artistes. They would also obtain necessary permission from the authorities concerned :

Provided always and it is hereby expressly agreed that the Artistes would be entitled to continue with the shows of the drama that they would be actually staging during the week before the expiry of one year until the same is closed by the Artistes after a normal run.

It was further agreed that defendants would be entitled to all box office collections, but they would contribute a sum of Rs. 5275 every month towards the expenses mentioned in paragraph 5 of the agreement and would pay that sum to the Management within the seventh day of each month succeeding the month for which it became due.

4. The period of one year for which "the Artistes" were allowed the use of the Rungmahal Theatre and is equipment, as its licencees, expired on January 16, 1963, while "the Artistes" were, according to the plaintiff, exhibiting the Bengali drama called "Katha Kao", which continued its "normal run" upto October 10, 1963. On that date (according to the plaintiff) the agreement referred to above, came to an end, but the defendants staged the drama "Adarsh Hindu Hotel" on October 12 and 13, 1963 and "Nishkriti" on October 25 and 26, 1963. The plaintiff therefore sent a letter to the defendants on October 23, 1963, informing them that they had no right to stage any other play in terms of the agreement as their licence had already expired on October 10, 1963, after the "normal run" of "Katha Kao". The plaintiff however permitted the defendants to stage "Katha Kao" during the Puja holidays, up to October 27, 1963, without prejudice to the rights and contentions of the lessees. Even so the defendants issued advertisements in the newspapers on October 30, 1963, announcing the exhibition of "Katha Kao" on November 14, 1963 and of "Nishkriti" from November 15 to 17, 1963, and staged it. They also announced in a Bengali newspaper on December 18, 1963, that they would state "Swikriti" on December 21 and 22, 1963. The plaintiff therefore filed the suit in the Calcutta High Court on December 20, 1963, for a declaration, inter alia, that the defendants, their agents, servants or assigns had no right, title or interest to hold any theatrical performances or any performance in the Rungmahal Theatre in any manner whatsoever and that the plaintiff and defendant 3 were entitled to its exclusive use and enjoyment. He also prayed for a permanent injunction restraining the defendants from exhibiting any dramatic or other performance in that theatre or from using it. He claimed compensation or damages at the rate of Rs. 600 per day with effect from November 1, 1963. It was specifically stated in paragraph 15 of the plaint as follows :

Although the plaintiff called upon the defendant 3 to join the plaintiff in instituting

> this suit, the defendant 3 is not willing to join the plaintiff. In the circumstances, the defendant 3 has been made a defendant in this suit. The plaintiff states that no relief is claimed the defendant 3.

5. The defendants filed a joint written statement in which they denied that they were mere licensees and the licence had expired. They claimed that they were entitled to stage any other drama along with "Katha Kao" which, according to them, did not come to an end after its "normal run" on or about October 10, 1963. They pleaded that "Katha Kao" was being run lawfully every Thursday, while another new drama "Swikriti" was being run on other days. They claimed further that they were entitled to stage any other drama along with "Katha Kao" and denied that they had committed any breach of the agreement. As regards Jitendra Nath Bose who was arrayed as defendant 3 in the suit, the defendants contended that he had not only refrained from joining the plaintiff in the suit but was opposing it and was supporting the defendants so that the suit was not maintainable by one partner and it was also barred under Section 42 of the Specific Relief Act.

6. A number of issues were framed by the trial Judge, including a specific issue as to the maintainability of the suit because of the non-joinder of defendant 3 as plaintiff, and also on the question whether the two defendants were entitled to stage any other play after "Katha Kao" one week before the expiry of period of one year from the date of the agreement.

7. Defendant Jahar Roy examined himself as the sole witness on behalf of the defendants. In his judgment dated July 14/15, 1964, the trial Judge found all the issues in favour of the plaintiff and passed a decree granting a declaration that the defendants, their agents, servants or assigns had no right, title or interest to hold any theatrical or other performance in the Rungmahal Theatre in any manner whatsoever or to use it in any manner whatsoever and that the plaintiff and defendant Jitendra Nath Bose were entitled to its exclusive use and enjoyment. The trial Judge granted a permanent injunction restraining the defendants from exhibiting and dramatic performances or any performance in the theatre, or from using it. He allowed the plaintiff compensation and damages at the rate of Rs. 5275 per month also with effect from November 1, 1963, along with the costs of the suit.

8. The defendants filed an appeal, but it was dismissed with costs by the Calcutta High Court on May 21, 1970, except for the correction of a "slight mistake" in the judgment and the decree.

9. As has been stated, the defendants have filed the present appeal on a certificate granted by the High Court. They have however been staging their dramas in the theatre in question for a period of some 14 years since the institution of the suit on account of the stay orders obtained by them from time to time.

10. It has been argued by Mr. Mazumdar on behalf of the appellants that as the licence was given by the plaintiff and Jitendra Nath Bose as joint promisees of the property, the suit was not maintainable under Section 45 of the Contract Act, hereinafter referred to as the Act, by one of the joint promisees without joining Jitendra Nath Bose as a co-plaintiff.

11. Section 45 and the illustration thereunder read as follows :

> 45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during the joint lives, and, after the death of any

one of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representative of all jointly.

Illustration

A, in consideration of 5000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life and after the death of C, with the representatives of B and C jointly.

The section thus deals with devolution of joint rights in the case of joint promisees, but it does not deal with a case where, a joint promisee does not want to join as a co-plaintiff and is arrayed as a proforma-defendant with the specific plea that no relief is claimed against him. The judgment and the decree in this case have in fact enured to his benefit also.

12. It is Order 1, Rule 1 of the Code of Civil Procedure, which deals with the procedure in civil actions of this nature and it provides as follows :

1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, be cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promisee and the other promisee refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from Biri Singh v. Nawal Singh [(1898) ILR 24 All 226 : 1902 AWN 31] and Pyari Mohun Bose v. Kedarnath Roy [(1899) ILR 27 Cal 409], it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promisees, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promisee has refused to join him as a co-plaintiff. Reference in this connection may also be made to Monghibai v. Cooverji Umersey [66 IA 210, 219 : AIR 1939 PC 170], where it has been observed as follows :

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property, and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not.

13. In Pramada Nath Roy v. Ramani Kanta Roy [ILR 35 Cal (PC) 331 : 35 IA 73 : 10 Bom LR 66],

it was held by the Privy Council that, in the event of rent being unpaid, the owners of the zamindari interest were entitled, by a suit, to bring a "putni" to sale, with the consequences prescribed by the Bengal Tenancy Act. Their Lordships specifically observed in that case as follows :

> And it is a general rule - a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure - that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure.

We see no reason for taking a different view and find no merit in the argument of Mr. Mazumdar to the contrary. He no doubt invited our attention to Vyankatesh Oil Mill Co. v. N.V. Velmahomed [AIR 1928 Bom 191 : 109 IC 99 : 30 BLJR 117], Vagha Jesing v. Manilal Bhogilal Desai [AIR 1935 Bom 262 : 156 IC 898 : 37 BLJR 249], Hari Singh v. Firm Karam Chand-Kanshi Ram [AIR 1927 Lah 115 : 100 IC 721 : 8 Lah 1], Sobhanadri Appa Rao Bahadur v. Parthasarathi Appa Rao Savai Aswa Rao Bahadur [AIR 1932 Mad : 137 IC 274 : 62 MLJ 154] and Nathaniel Uraon v. Mahadeo Uraon [AIR 1957 Pat 511 : ILR 36 Pat 273], but they were cases in which one or the other joint promisee was left out altogether from the frame of the suit, or the case was by way of an action in tort. Learned Counsel was in fact unable to refer to any case where it has been held that one joint promisee cannot maintain a suit by making the co-promisee a proforma-defendant.

14. Mr. Mazumdar tried to place reliance on the following observations in Lindley on the Law of Partnership, thirteenth edition, page 303 :

> With respect to other simple contracts, whether written or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it.

This passage occurs under the rubric "Actions by and against partners where no change in the firm has occurred", and is subject to the general observations stated by Lindley under the earlier rubric "Actions by and against partners". While making those general observations, it has been stated as follows at serial 5 (at pages 290-291) :

> 5. Where a plaintiff claims any relief to which any other person is entitled jointly with him, every such other person must, except with the leave of the court, be made a co-plaintiff or (if he refuses) a defendant.

It cannot therefore be urged with any justification that a contrary view has been stated by Lindley.

15. Before leaving this aspect of the matter we may as well refer to an ancillary argument of Mr. Mazumdar that even if it were held to be permissible for one joint promisee to make the other a co-defendant, that would not be permissible without the tender of indemnity against costs, which was not done in this case. That rule finds a mention in Halsbury's Laws of England, third edition, at page 61 and appears to be based on Cullen v. Knowles and Birks [(1898) 2 QB 380] and Johnson v. Stephens and Carter Limited and Golding [(1923) 2 QB 857]. But the rule does not in fact enure to the benefit of the contesting defendant. When the matter came up for specific consideration in Burnside v. Harrison Marks Productions Ltd. [(1968) 2 All ER 286] the position obtaining in England was set out by Lord Denning, M.R. in the following words :

> I think that the Judge's decision proceeds on a misunderstanding of Johnson v. Stephens and Carter Ltd. [1923 All ER 701]. That case shows that, when a promise is made to two persons jointly, then one of them cannot ordinarily require the other to

> join as plaintiff, and cannot add him as a defendant, unless he offers him an indemnity against costs. This, however, is a rule made for the protection of the joint contractor whom it is sought to add as plaintiff or defendant. It is not made for the benefit of the other contracting party who is the defendant to the action. He cannot insist on the indemnity or the offer of it : for it is no concern of his. All that he can require is that both the persons, with whom he made his contract, are before the court. So long as they are both there, even if one is a defendant, he cannot complain.

It would thus appear that there is no force in the argument of Mr. Mazumdar to the contrary.

16. It may be mentioned here that Mr. Ghosh tried to raise the argument that Section 45 of the Act deals with a case relating to "the right to claim performance" of a contract and not a case like the present. The argument could not, however, be examined as it was not based on any such plea in the written statement and was not urged for consideration in the High Court.

17. Moreover, as has rightly been held in the impugned judgment of the Calcutta High Court, the two contesting defendants in this case became tenants on sufferance or trespassers on the termination of their licence. A co-owner could in the case of indivisible property, well have maintained a suit for the recovery of the whole from persons holding unlawful possession thereof. Reference in this connection may be made to the decisions in Mahabala Bhatta v. Kunhanna Bhatta [ILR 21 Mad 373 : 8 MLJ 598], Chandri v. Daji Bhau [ILR 24 Bom 504; 2 Bom Lr 491], Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh [ILR 35 Cal 807 : 7 CLJ 483], Syed Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd. [ILR 39 Mad 501 : 29 IC 60 : 28 MLJ 598] and Maganlal Dulabhdas v. Bhadar Purshottam [AIR 1927 Bom 192 : 29 Bom LR 222 : 101 IC 35].

18. The remaining argument of Mr. Mazumdar relates to the question whether the defendants were entitled to stage any play other than "Katha Kao" which was actually staged during the week before the expiry of one year from January 17, 1962 as that was the date of the agreement. The trial Judge found on evidence of defendant Jahar Roy that the play was actually staged one week before the expiry of the period of one year stipulated in the agreement. Jahar Roy has also admitted that the same play is being run only once a week thereafter, and that other plays are being staged on other dates. On this basis Mr. Mazumdar has argued that the defendants are entitled to the benefit of the proviso to paragraph 1 of the agreement between the parties which has been extracted in an earlier part of the judgement.

19. A reading of paragraph 1 shows that the defendants, as the licensees, were allowed to use the theatre and the equipment for a period of one year, for one evening show on each Thursday and each Saturday, and one matinee show, one evening show on each Sunday and other holidays, and also one whole night performance on the occasion of Sivaratri and Janmasthmi. The controversy in this case does not relate to the performances on public holidays other than Sundays or on the occasion of Sivaratri and Janmasthmi. So for all practical purposes the defendants were entitled to four shows in a week, including two shoes on Sundays. It is not in dispute before us that they were only staging "Katha Kao" during the week before the expiry of the period of one year from the date of the agreement, so that that was it "normal run". It follows therefore that as no other drama was being staged in the week preceding the expiry of the period of the licence, the benefit of the proviso could enure only for "Katha Kao" and not for "Swikriti" or any other drama. As the defendants staged "Adarsh Hindu Hotel", "Nishkriti" and "Swikriti" along with "Katha Kao" after the expiry of period of the licence, there is nothing wrong with the concurrent finding that the "normal run" of "Katha Kao" came to an end when the defendants started staging the other dramas three times a

week and relegated "Katha Kao" to one show in the week. This is the plain and simple meaning of the paragraph bearing on this aspect of the controversy, and we are unable to agree with Mr. Mazumdar that it was permissible for the defendants to continue with the licence merely because they continued to play "Katha Kao" once a week and the other plays another days, at their option. Such a course could not be said to be the "normal run" of "Katha Kao", and was clearly abnormal. Learned Counsel has not been able to point out how the finding of fact of the High Court that the "normal run" of "Katha Kao" came to an end when the defendants started performing another drama along with it after the expiry of one year's period of the licence could be said to have been vitiated by any error of law or procedure.

20. Mr. Mazumdar tried to a argue that the agreement dated January 17, 1962 could not be said to have been validly terminated by the plaintiff as "the Management" did not refund the sum of Rs. 10,000 or any part thereof in accordance with the requirement of paragraph 16 of the agreement. The argument was however found to be untenable as no such plea was taken in the written statement and it was not the subject-matter of any issue during the course of the trial.

21. This leaves for consideration the argument which Mr. Mazumdar has advanced on behalf of the legal representatives of Jahar Roy (defendant 1). As has been stated, he has invited our attention to the suit which is said to have been filed by the plaintiff as far back as February 25, 1970 for a declaration that the partnership between him and defendant Jitendra Nath Bose stood dissolved on and from February 24, 1970 and for some other reliefs. Out attention has also been invited to the trial Court's order for the appointment of joint Receivers in that case. It has been argued on that basis that as the joint Receivers took possession on April 16, 1970, the plaintiff was not entitled to claim any relief in the suit which is the subject matter of the controversy before us, that the Receivers were necessary parties and that the plaintiff no longer had any right to claim any of the reliefs in this suit because of the total failure of his cause of action. It would be sufficient for us to say that none of these arguments was advanced in the appeal before the High Court and we do not find it possible to allow them to be raised in this second appeal for the first time. Even otherwise, the arguments have no bearing on the appeal before us.

22. There is thus no merit in this appeal and it deserves to be dismissed. It may however be mentioned that the High Court, perhaps by inadvertence, confined the decree for compensation at the rate of Rs. 5275 per month to the plaintiff who was, however, not the sole licensor. The plaintiff and defendant 3 being joint promisees are equally entitled to the said compensation. Expect for this modification in the impugned judgment and the decree of the High Court, the appeal fails and is dismissed. There will however be no order as to the costs of this Court in the circumstances of the case.

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