

CALCUTTA HIGH COURT

Mathura Nath Choudhury

Vs.

Sreejukta Bageswari Rani

(Suhrawardy and Mallik ,JJ.)

26.05.1927

JUDGMENT

Suhrawardy, J.

1. The facts which have given rise to the suit and this appeal are that the plaintiff was the owner of an elephant by the name of Lal Bahadur. Defendants 1 and 3 carried on the business of catching wild elephants and the plaintiff's case is that defendant 1 and his servant defendant 2 hired from her the elephant for the purpose of employing him in their business. There was an agreement between the plaintiff and defendants 1 and 2 of which the materia portion was to the following effect:

I remain liable to pay to you ₹ 5,000 as the price of the elephant and Bs. 00 as the balance of the hire (money); if during the period the elephant remains in my possession, it be broken in health or becomes unfit for work or dies and I cannot return it to you at the stipulated time.

2. Under this agreement defendant 1 took possession of the elephant and used it for shikar or catching wild elephants in the Garo Hills up till the 29th December 1923 when it was found that the animal was ill and it died soon after. The plaintiff thereupon on the basis of the agreement brought the present suit for recovery of ₹ 5,000 from defendants 1 and 2. Defendant 1 in his written statement alleged that defendant 3 (the appellant before us) was a partner in the business and should have been made a party and that the suit should not proceed in his absence. Thereafter the plaintiff made an application in which she applied to make defendant 3 a party defendant and said that she was making the application on the objection taken by defendant 1 and as defendant 3 was an undisclosed partner in the business. The Sub-Judge before whom the application was made passed the following order:

The plaintiff makes an application to add Muthuranath Choudhury as a party. It occurs

thus : He is a necessary party. Add him as a party. Issue summons.

3. On the body of the plaint the name of Mathuranath Choudhury, the appellant, was inserted at the heading under the names of the other defendants but no further alteration was made in the plaint either in the body of the plaint or in the prayers alleging facts against-defendant 3 and seeking particular relief against him. The order adding defendant 3 as a party was passed after the settlement of issues in the case. The plaintiff, therefore, applied again to frame fresh issues with reference to defendant 3 and the following issues were added:

(a) Was defendant 2 an agent of defendant 3 Mathuranath Ohoudhury and was he authorized by defendant 3 to enter into the agreement with plaintiff? If not, is defendant 3 liable?

(b) Was defendant 8 partner of defendant 1 in the elephant catching business and as such liable to the plaintiff?

4. Defendant 3 in his written statement denied any knowledge of the agreement with the plaintiff and otherwise supported defendant 1 in his contention that no decree could be passed in the suit. The parties went to trial and evidence was adduced on both sides and it appears that it was admitted by defendant 3 that he was a partner of defendant 1 in the business. The trial Court decreed the suit against all the defendants jointly. On appeal by defendant 3 the learned District Judge of the Assam Valley District maintained all the findings of the trial Court and dismissed the appeal. Defendant 3 appeals before us and-it has been contended on his-behalf, firstly, that the suit should not have been decreed as against him as the plaint was not properly amended -and no relief was asked against him by the plaintiff in the plaint. The objection was not specifically raised in any of the Courts below nor in the grounds of appeal in this Court. Moreover we do not think that there is any substance in it. The objection is a highly technical one and is fully covered by Section 99, Civil Procedure Code There has been no failure of justice on account of the omission in asking for a particular relief against defendant 3. By the addition of defendant 3 as a defendant to the suit the plaintiff intended to claim a decree against him as well, being a partner in the business, for the conduct of which the defendant was let out. This objection must, therefore, be overruled.

5. It is next argued that defendant 1 exceeded his authority in entering into an agreement like the present. This objection should also be overruled on the ground that it was not taken in any of the Courts below; and it is an objection which must be decided on the evidence and on the facts of the case. The learned Subordinate Judge in dealing with the liability of the appellant under Section 251, Indian Contract Act, observed that not a word was said in the written statement to suggest that he was not liable for or was not bound by the act of defendant 1 and that the said act was not necessary for the business. The ground upon which this portion of the appellant's case has been placed before us is that the condition to pay the sum of ₹ 5,000 in the event of the elephant being lost was an unusual condition into which defendant 1 entered without obtaining a

valid authority from his partners; and he is, therefore, personally liable and not the other partners of the business. There is nothing on the record to support this contention except the fact that in some agreements by which elephants were hired for the business defendant 1 made different stipulations. There does not seem to be anything unusual in the agreement before us. It has been found upon the evidence that the plaintiff was not willing to let out the elephant, but on the insistence of the defendants she agreed to do so on condition that she must be paid ₹ 5,000 if the elephant died or disappeared. It is also found that the elephant was a trained elephant for the purpose of catching wild elephants.

6. It has been strenuously argued that on the agreement defendant 3 cannot be made liable, firstly on the ground that the agreement was with defendant 1; and, secondly, because it has not been proved that it was in the course of the partnership business that this contract was entered into. It is said that the agreement was with defendant 1 (We may leave out of consideration defendant 2 as he was merely a servant of defendant 1, though an ex-parte decree was passed against him) and for this construction of the agreement reliance has been placed upon the case of *Kush Kanta v. Chandra Kanta*¹, In that case the law which is so well known was thus laid down:

The bailee is responsible to the bailor for loss, destruction, or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of business; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract.

7. On the particular facts of that case it was held that a partner who was not a party to the agreement should not be made liable though the contracting defendant took the elephant and employed it for the purpose of the business of the company and which contract the company refused to execute to the knowledge of the plaintiff. On these circumstances it was held that no other partner of the business besides the contracting defendant might be made liable under the agreement though the hire was for the benefit of the partnership business. That case, therefore, does not support the defendant's contention and if it is carefully scrutinized it goes a great way to help the plaintiff's case. Reliance has also been placed upon the decision in the case of *Ram Chandra Sahu v. Rasim Khan*², the head-note of which is to the following effect:

The liability of the dormant partner extends only to sums borrowed by the active partner in his capacity as a member of the firm. The ultimate use by the firm of money borrowed by one of its members individually on his own credit does not render the firm liable for the loan.

8. In that case, it appears that the borrowing defendant was a partner of the firm and had also other business in which he was interested. He borrowed some money on his own account and in his own name. He found subsequently that the defendant firm was in need of pecuniary help and the money he had borrowed he employed for the business of the firm. In these circumstances the

learned Judge held that the firm or all the members constituting the firm could not be made liable for the money thus borrowed, as it was not borrowed originally for the purposes of the firm by the borrowing defendant as a partner of it and was not also so borrowed with the knowledge of the plaintiff. The learned Judges also observed that where one member of a partnership borrowed money upon his own credit by giving his own promissory-note for the sum so borrowed and subsequently used the proceeds of the notes in the partnership business, of his own free will, without being under any obligation to or to contract with the lender so to do, the partnership was not liable for the loan. The substance of the matter is whether the firm is liable for the money borrowed by one of its partners is pre-eminently a question of fact and depends upon the circumstances of each particular case.

¹ AIR 1924 Cal 1056 : 83 Ind. Cas. 151

² AIR 1925 Cal 29

9. With regard to the liability of defendant 3, if it be conceded that the money was borrowed and spent for the purpose of the business, there can be no question on the law as embodied in the Indian Contract Act and laid down by innumerable cases. Under Section 251, Contract Act, the appellant is liable if the act of defendant 1 was necessary for or usually done in carrying on the business of the partnership of which he was a member. It is not the appellant's case that defendant 1 did not act as a partner or his act was one which could be brought under the exemption to Section 251. As to undisclosed or dormant partner the law is clear. The leading case upon this point is the case of *Paterson v. Gandasequi*³ where the law is thus laid down:

If the principal be not known at the time of the purchase made by the agent, it seems that, when discovered the principal or the agent may be sued at the election of the seller; and it was observed in that case that a dormant agent might be assimilated to a dormant partner where though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he might afterwards pursue his remedy against the dormant partner, when discovered. Section 251, Contract Act, which contains the law of partnership controls the relation between partners which is similar to the relation between principal and agent : and under Section 231, Contract Act, the principal is as much liable for the act of the agent himself. It cannot therefore be said that on the contract as it stands and on the findings of fact arrived at by the Court below defendant 3 is not liable under the agreement made between the plaintiff and defendant 1.

10. The last point taken by the appellant is that the sum of ₹ 5,000 stipulated to be payable to the plaintiff on the loss of the animal was in the nature of a penalty and the Court should have enquired as to the real value of the elephant and passed a decree accordingly. This point also was not raised in any of the Courts below and consequently there has been no enquiry as to the value of the animal. In the agreement the value of the elephant was given as ₹ 5,000 and it was stipulated that if the defendant failed to return the animal to the plaintiff he would pay ₹ 5,000 as the value of the animal. To the agreement as it stands Section 74, Contract Act, has no

application. It is a simple agreement. The plaintiff said that she would part with her thing if the defendant guaranteed to pay a certain amount if the thing was lost. It was not a case of a breach of contract or the non-performance of any particular agreement by the defendant. It was a sort of contract on hire with the reservation that if the article is not returned the value stipulated in the agreement should be paid to the owner. In our opinion this contention fails.

11. The result is that all the points urged on behalf of the appellant fail and this appeal is dismissed with costs. The appellant will pay full costs to the plaintiff respondent Bageswari Rani and half costs to defendant 1, respondent Bhagyamal Bama. We make no order as regards costs in favor of defendant 2, respondent.

Rule 860 (S) of 1926.

12. This Rule was obtained from this Court by defendant 1 respondent for the purpose of

³[1812] 15 East 62

transporting that defendant-respondent to the category of appellant on the ground that he apprehended that the plaintiff and the appellant might collude and did not place the case properly before the Court. Such contingency has not arisen and the learned advocate for the defendant does not press the application. The Rule is accordingly discharged.

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