BOMBAY HIGH COURT

Chimanram Motilal

Vs.

Jayantilal Chhaganlal

O.C.J. Appeal No. 42 of 1938 and Suit No. 1253 of 1937

(John Beaumont, Kt., C.J. and Kania, J.)

31.03.1939

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal by the plaintiffs against a judgment of Mr. Justice Somjee. There are two plaintiffs, both of which are firms, which have been registered under the Indian Partnership Act, 1932. They financed defendants Nos. 1 and 2 in relation to the purchase of large quantities of corrugated iron sheets, and they sue for a sum of over nine lakhs of rupees alleged to be due from defendants Nos. 1 and 2 in respect of these transactions. Various defenses were set up on the merits, all of which failed, but by an amendment the defendants alleged that in respect of these transactions for financing them the two plaintiff firms became partners ad hoc, and that that partnership was not registered under the Partnership Act, and, therefore, the plaintiffs' suit did not lie under Section 69(2) of the Act. That defense prevailed with the learned Judge, who accordingly dismissed the plaintiffs' suit. The question, which we have to determine on this appeal, is whether the two plaintiff firms were partners in relation to their financial arrangements with defendants Nos. 1 and 2, or whether they were mere co-lenders.

2. The agreement between the plaintiffs and the defendants with regard to the finance is exhibit Q, and there was also a later agreement in much the same terms providing for further finance, which is exhibit Rule In exhibit Q the two plaintiff firms are described as pledgees, which expression was to include, unless repugnant to the context, the partners for the time being in the two plaintiff firms, and the agreement provides that the pledgees will lend to the pledgors, that is the defendants, the sums therein mentioned against a pledge of corrugated iron sheets, and there were the usual provisions for securing due cover, and, if there was default by the pledgors, the pledgees were entitled in their discretion to sell the pledged goods. Exhibit Q is dated June 2, 1937, and on the same date the two plaintiff firms entered into an arrangement, which is exhibit A 5, specifying the terms on which as between themselves the finance to the defendants was to

be provided, and that document is obviously of great importance in determining whether the relationship between the plaintiffs was that of partners. The agreement is in the form of a letter written by plaintiffs No. 2 to plaintiffs No. 1, and it says that with reference to the agreement for pledge made in favour of yourselves and ourselves by the defendants, it has been agreed that in respect of the transactions or adventures mentioned in the agreement for pledge our shares are equal, and we are to share equally in the receipts from the defendants, the receipts being substantially interest on moneys advanced and commission which was to be paid under exhibit Q. Then it is provided that if there are any losses, the same will be shared equally. The losses would of course arise from failure of the debtors to pay the amounts due. So that what it really comes to is this, that the two plaintiffs were to share equally in the interest and commission, and were to bear equally the losses, and it seems to me that that agreement is entirely consistent with the two plaintiff firms being mere joint lenders.

3. The question whether a transaction amounts to a partnership or not is often a difficult one. Under Section 4 of the Partnership Act, ' partnership' is defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. I think the words "acting for all" were inserted to emphasize that partners are agents, and not merely principals. Then Section 6 provides that in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. It is quite clear that you may have a partnership in a single transaction, and it is also clear that sharing profits and contributing to losses are indications of a partnership, but by themselves they are not enough to constitute a partnership. One essential element of partnership, as is shown in the definition, is that there should be agency. One partner can always bind another partner in any matter which falls within the scope of the partnership business, subject to any limitation under Section 20 of the Act, and if the relationship constituted between parties in respect of a particular matter does not expressly or by necessary implication involve the right of one party to pledge the other as an agent, then there is no partnership. To my mind the defendants have failed here to prove that the two plaintiff firms were in any respect agents one for the other. All the expressions in exhibit Q and exhibit R confer rights or impose obligations on the pledgees. There is nothing to show that one pledgee could act on behalf of the other. For example, I see no reason to suppose that one of these two pledgees could have sold the pledged goods without consulting the other pledgee.

4. The oral evidence carries the matter no further. A partner in the second plaintiff firm, Ramkumar Morarka, gave evidence, and said that he generally managed the matter on behalf of the two plaintiff firms, but there is nothing to show that he claimed a right, or ever exercised a right, of acting without consulting his co-lenders. Part of the moneys advanced was borrowed by the lenders from a bank, and an account was opened with the bank in their joint names, but the evidence is that cheques drawn on that account had to be signed by one partner in both plaintiff firms. There is, as far as I can see, nothing either in the oral evidence or in the written documents to show that one of these plaintiff firms had any authority to act for the other, and that being so, I

think that one of the essential elements necessary to constitute a partnership is absent, and that these parties were nothing but co-lenders.

5. is obvious that in the ordinary popular acceptation of the term, the plaintiffs were not partners, and that no useful purpose would be served by their registering this alleged special partnership under the Partnership Act, because all the requisite particulars had already been registered by the two plaintiff firms, and some of the particulars required to be registered, for instance, the name of the firm and the place of business of the firm, could not be registered, because the alleged partnership had no firm name and no place of business. But, in spite of such considerations, the plaintiffs might well have constituted themselves partners in law, and, I think, this case illustrates a danger which financiers run. It must be very common, in a commercial city like Bombay, for two or more banks or two or more financial houses to undertake jointly to finance some undertaking, which requires more extensive help than one lender is prepared to give, and it is very unlikely that people, acting together to finance an undertaking, consider that they are becoming partners, and, therefore, liable to register themselves for the special purpose of that transaction under the Indian Partnership Act. But it may very well be, if they are not careful in the expression of the contract between them, or in their actions in relation to the transaction, that they have in fact constituted themselves partners as matter of law, and they may find that, when they sue to enforce their rights, they are met with the objection that their special partnership has not been registered, and that their suit does not lie. It may well happen also that by the time the defect in their title is brought to their notice, limitation has run against them. This seems to me a danger which Section 69 of the, Indian Partnership Act may place in the way of perfectly honest and bona fide lenders. However, in this case, in my opinion, it is clear on the evidence that these two plaintiffs were not partners, but were no more than joint lenders.

6. We, therefore, allow the appeal with costs throughout, declare the plaintiffs entitled to recover the amount due from defendants Nos. 1 and 2, and refer the matter to the Commissioner to ascertain the amount.

Kania, J.

7. The two plaintiff firms filed this suit against the two defendants (who are now respondents) and some others to recover the amount lent by the plaintiffs under two agreements dated June 2, 1937, and June 7, 1937. It is not disputed that each of the plaintiff firms, who are carrying on business as dealers in cotton, linseed and shares, and also as moneylenders, has been duly registered under the Indian Partnership Act. It is not suggested that there was any general partnership between them. The two agreements under which money was agreed to be lent by the plaintiffs to the defendants were in the nature of a pledge in respect of bundles of corrugated iron sheets which the defendants had agreed to purchase but were unable to pay for. The evidence shows that the defendants approached plaintiffs No. 2 first and persuaded them to advance money to fulfill their outstanding contracts. Plaintiffs No. 2 then negotiated with plaintiffs No. 1,

and they agreed to give together the necessary loan. As there was a fall in the market on June 24, 1937, a letter was written on behalf of both the plaintiffs, and stated to be under instructions of both of them, and sent by their attorneys to the defendants calling upon them to provide the necessary margin and in default threatening to take steps as provided under the agreements. The defendants failed to comply with the requisitions, and the suit is filed to recover the amount due.

8. In the written statements originally filed various contentions were raised. When the matter reached hearing an amendment was applied for, and the sole contention raised in this appeal was included in the written statement. The contention was that in this transaction the two plaintiffs formed a partnership within the Indian Partnership Act and not having been registered the suit must fail. The question whether there is a partnership is a mixed question of law and fact. According to Section 4 of the Indian Partnership Act, a partnership is defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. It is further provided by Section 6 that to determine whether a group of, persons is or is not a firm regard shall be had to the real relations between the parties as shown by all relevant facts taken together. In the present case the learned Judge came to the conclusion that, taking into consideration all the facts, there existed a partnership between the two plaintiffs within the meaning of the Partnership Act.

9. I concede that the case is not free from doubt, but, having heard all the arguments, I am unable to agree with the conclusion reached by the learned Judge. In the first place, the effect of the documents which came into existence between the parties and between the plaintiffs themselves has to be looked at. The two documents made between the two plaintiffs on the one side and the defendants on the other have described the two plaintiffs as joint pledgees. Throughout the documents there appears to be no suggestion to support the contention that one of the plaintiffs alone would be entitled to act in the name of both, or on behalf of both, to enforce the rights of the joint pledgees against the borrowers. Although two documents have been executed, the effect of the second document of June 7, 1937, is merely to increase the amount of the loan in proportion to the further bundles which might be pledged to the plaintiffs. Apart from that, there is no other transaction between the plaintiffs on the one hand and the defendants on the other. On behalf of the defendants it was urged that the plaintiffs subsequently purchased corrugated iron sheets on their own account, and the entries in respect of those purchases have been made in the same books in which there are entries in respect of the dealings between the plaintiffs and the defendants. The evidence of Mr. Ramkumar clearly shows that he made the purchases on June 10, after all the loans which were to be given by the plaintiffs to the defendants were completely advanced. He alone went into the market and purchased certain bundles. It is obvious that this has nothing to do with the transaction of lending money which was covered by the two agreements between the plaintiffs and the defendants. After making the purchases he informed his a plaintiffs, and they agreed to share the profits and losses in accordance with the agreement, exhibit A5. Again the arrangement was that in respect of these purchases the profits and losses only were to be divided, but it is not stated that all rights and obligations between the parties were

to be in accordance with exhibit A 5. If this transaction of purchase had been made after two or six months, I do not think anyone would have ventured to urge that because the plaintiffs may have been partners in that joint purchase they should be considered partners in the transaction in suit. The mere fact that there was proximity between the two transactions, without establishing that they had any other connection whatsoever, does not help the defendants to establish that the relation between the two plaintiffs in respect of the loans given by them to the defendants was that of partners.

10. It was next urged that the plaintiffs went to the bank and borrowed money together. They lent money to the defendants together, and, therefore, there was a business of money lending. The profits and losses were to be divided half and half and there was thus a partnership. In this connection it should be borne in mind that the initial arrangement between the parties was that the two plaintiffs were to advance their own money. Under the agreement between them it is further provided that if money was required to be borrowed from outsiders, both of them should jointly do so. The evidence does not show that the whole amount in fact advanced by the plaintiffs to the defendants was borrowed by them from the bank, or that the agreement was arrived at on the footing that the whole amount was to be borrowed from the bank in the first instance. The fact that loans were taken by them from the bank and entered in the ledger is in accordance with the arrangement between the parties, viz. that if more money was required they should borrow jointly from financiers. It is significant that in the agreement the term "Profits" is not used anywhere.

11. It was next urged that separate books of account were kept. That is not at all surprising because the two plaintiffs had no other common bond at all. The only agreement between them was to give joint advances to the defendants and in respect of that it was essential that they should open books of account. If the fact of these purchases is not relevant to determine whether there was a partnership between the plaintiffs in respect of the transaction in suit, the fact that entries in respect of the purchases were made in the same book could not carry the case any further.

12. Strong reliance was placed on behalf of the defendants on the following statement made in the evidence of Ramkumar:

> The dealings with the defendants 1 and 2 were a joint venture of the first plaintiff firm and my firm for earning interest and as I alone was attending to that business I kept separate books of account in respect of it.
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> This statement was strongly relied upon to establish the essential test, viz. one of them was the agent of the other. If a partnership is established under Section 18 of the Partnership Act, a partner is the agent of the firm for the purposes of the business of the firm. In my opinion that statement does not carry the case sufficiently far for the defendants. Attending to the business may mean merely keeping the keys of the godown,

keeping a watchman, or arranging to give delivery or receiving bundles of corrugated iron sheets. These are not the acts which necessarily constitute one the agent of the other. To prove that one of them was the agent of the other it should be shown that something was done on behalf of both, without consulting the other, and which was accepted or found binding on both. In the present case no such incident or incidents have been referred to. As I have pointed out, in the notice of demand it is expressly stated to be sent under the joint instructions of the two plaintiffs and in the names of the two plaintiffs. The opening of the account with the Bank of India Ltd. is also shown to be by the two plaintiffs, and a representative of each of them had to sign the cheques. No individual act is pointed out to lead to the inference that one of them was the agent of the other in the matter of the transactions between the parties. In the absence of that test being fulfilled, the agreement between the two financing firms appears to be one to lend money and recover a stated rate of interest and commission varying according to the number of bundles of corrugated iron sheets pledged with them, coupled with the chance of losing some money in the event of the market going down. In my opinion a correct reading of exhibit A5 does not lead to any other conclusion.

13. I, therefore, agree that the appeal must be allowed with costs throughout, and a decree passed in favor of the plaintiffs in accordance with the terms mentioned by the learned Chief Justice.
Appeal allowed.