

A
MOHATTA BROTHERS

v.

B
BHARAT SURYODAYA MILLS CO. LTD., AHMEDABAD

April 5, 1976

[H. R. KHANNA AND P. K. GOSWAMI, JJ.]

Indian Partnership Act (9 of 1932), s. 69—Scope of—Partnership deed showing partners—Later deed showing change in partners—Proof, that it was not acted upon.

C The appellant, a registered partnership-firm, was the managing agent of the respondent. After submitting its resignation to the board of directors of the respondent-company, the appellant filed a suit claiming a sum of money in accordance with an agreed scheme. The appellant-firm consisted of 5 partners with effect from April 1, 1949, and in addition, a minor was entitled to a 4-anna share in the profits of the partnership but was not liable for the losses. The minor was represented by his mother as guardian. On October 24, 1949, another partnership deed was executed wherein the mother was shown as a partner of the appellant-firm with a 4-anna share and the minor's name was omitted. The respondent contended that the suit was not maintainable, because, the constitution of the old firm had been changed on October 24, 1949, and that the newly constituted firm consisting of 6 partners had not been registered.

D The trial court held that the new partnership deed was not acted upon and decreed the suit for a part of the amount claimed. There were appeals by both sides. The High Court disagreed with the finding of the trial court that the later partnership deed had not been acted upon and held that the mandatory condition of s. 69(2), Indian Partnership Act, was not fulfilled as the name of the mother, who was a partner in the reconstituted firm and in whose favour a cause of action had accrued, was not shown in the register of firms, and that this defect was fatal to the suit.

E Allowing the appellant's appeal to this Court and remanding the appeal to the High Court for disposal on merits,

HELD : The trial court took the correct view of the matter in so far as it held that the later partnership deed was not acted upon and that the mother did not become a partner of the appellant-firm. [1028B]

F (1) The question as to when it was decided not to act upon the later deed is not material. The evidence of one of the partners of the appellant-firm that it was not acted upon and that the mother was not a partner is admissible and is fully corroborated by the documentary evidence. It is a statement made by him against his own pecuniary interest, because, if the mother was a partner, the loss of the other partners would extend only to 12-anna share in the rupee; whereas, if she was not a partner then they would have to bear losses to the full extent of 16 annas in the rupee. [1029G-H; 1030H-1031D]

G (2) In the register relating to the registration of firms kept under the Indian Partnership Act, an entry relating to the registration of the appellant-firm dated May 5, 1952, reveals that even in the year 1952, the stand of the partners of the appellant-firm was that the mother was not a partner and that it was only her minor son who was entitled to a share in the profits of the partnership. [1028G-1029A]

(3) In the statement of accounts of the appellant-firm it is only the minor that is shown to have a 4-anna share and not his mother. [1030B-C]

H (4) Applications in connection with the registration of that firm were presented to the Income Tax Authorities under s. 26A, Indian Income Tax Act, 1922. All these applications were signed by the mother and they show that the mother never claimed to be a partner of the appellant-firm and that, on the contrary, she acknowledged that it was her minor son who was entitled to the 4-anna share in the profits. [1029E-G]

(5) The directors of the respondent-company had passed a resolution in 1950 referring to the two partnership deeds. But the entry which was made in the register of the respondent-company regarding the partners of its managing agents as required by s. 87, Indian Companies Act, 1913, shows that after April 1, 1949, there were only 5 partners, besides the minor under the guardianship of his mother of the appellant-firm. If the mother had become a partner since October 24, 1949, it is unlikely that an entry to that effect would not have been made in the register of the defendant-company, because, under s. 87, a return has to be sent to the Registrar of Firms regarding any change in the particulars required to be contained in the register and non-compliance with the requirement would entail imposition of fine. [1029A-E]

(6) The letter of resignation sent by the appellant-firm was signed by the mother also, but there was no indication whether she signed in her capacity as partner or as the guardian of her minor son. [1028F-G]

(7) Soon after the presentation of the suit, on an application under Order XXX, r.2, C.P.C., filed by the respondents, the appellant-firm declared the names of its partners and the declaration did not show the mother as one of the partners. The question as to who should share the profits of the appellant-firm and should be otherwise entitled to its assets is essentially a matter for the partners of that firm. Unlike the case of a defendant-firm from which money is claimed where each partner may be personally liable, in the case of the plaintiff (appellant) firm claiming money, it would be a wholly untenable plea for the defendants, from whom money is claimed, to urge that even though the mother as well as other partners claimed that it was not she but her minor son that was entitled to the 4-anna share in the partnership, the Court should hold that it was the mother who was entitled to that share. [1030C-G]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2075 & 2076 of 1968.

From the judgment and decree dated the 29th March & 1st April 1968 of the Gujarat High Court in First Appeals Nos. 769 and 1029 of 1960.

A. K. Sen, L. M. Singhvi, S. K. Bagga and Mrs. Bagga, for the appellant.

R. P. Bhatt, B. S. Trivedi H. S. Parihar and I. N. Shroff, for the respondent.

The Judgment of the Court was delivered by

KHANNA, J. These two appeals on certificate by Mohatta Brothers plaintiff-firm are directed against the judgment of Gujarat High Court whereby that court reversed on appeal the judgment of the trial court awarding a decree for recovery of Rs. 77,286/0 Anna/2 Pies in favour of the plaintiff-appellant against the respondent-company and dismissed the suit.

The plaintiff is a partnership firm doing business under the name and style of Mohatta Brothers. The plaintiff-firm carried on the business of managing agency of the defendant company up to September 4, 1950. Sometime before that date, it appears the plaintiff-firm expressed an intention of giving up the post of managing agents. On July 31, 1950 Chaturbhujdas on behalf of M/s. Chaturbhujdas, Kharawala Mohatta & Co. submitted scheme Ex. 168 in consultation with the plaintiff. Paras 5, 6 and 7 of the scheme were as under :

“(5) Before our this Scheme is approved by the Company the present Directors shall submit before the Company

A the Balance Sheets and the Profit and Loss Account upto
the end of the year 1949 and get the same passed, and they
shall get the Proforma Balance Sheet upto the date 31-7-50
prepared by the Auditors of the Company and shall hand
over the same to us, and this Scheme has been given while
understanding that at present everything is according to the
list of machinery given to us by the present Agents. And
B no one has any kind of charge or debt claimable from the
Company till this day excepting the approximate amount of
Rs. 4,77,850/- due to the Agents and their kith and kin till
this day and the list of which is given to us. We give this
Scheme believing the said fact true.

C (6) The amounts of the Agents of the Company and
their kith and kin which may have been deposited in the
Company on the day the date 31-7-50 and which come to
about Rs. 4,77,850/- as told by the present Agents are to
be kept credited in their accounts and interest thereon is
not to be given from the date 1-8-50. And when our Scheme
is approved they have not to take any interest on the said
amounts from the Company for five years from the date we
D start the work of the Mills and they have not to withdraw
the said amounts for a period of ten years thereafter but the
same are to be kept credited in the Company with interest
at six per cent. But the Company shall return the amounts
earlier if it so desires.

E (7) At present the amount of Rs. 3,46,466-11-8 is due
to the Punjab National Bank Ltd. by the Company and the
demand of giving bonus to the workers for the year 1949 is
outstanding from the Company. The present Agent states
that in both of the said matters payments can be made from
the amounts obtained by selling the goods of stores, etc.
which is lying with the Company at present, the list of which
is given to us by the present Agents, and from the amounts
F of E.P.T. deposit and advance payments of the income tax.
On making arrangement accordingly if the debt of the Bank
is not fully paid or the liability of bonus is not fully fulfilled
and if the Company is found responsible in any way, then the
same is to be fulfilled by the present Agent.

G But after fulfilling all liabilities accordingly if any amount
remains in balance the same shall be treated as assets of the
Company and half of the said amount shall be returned to-
wards the above mentioned amount deposited in the Com-
pany and which belongs to the present Agent and their kith
and kin. But on fulfilling completely the liability of the
Bank from the sale of goods of the Stores, etc. if there does
not remain sufficient surplus or before getting the amount of
H E.P.T. deposit and income tax advance payment if the
amount of bonus is required to be paid then the present
Managing Agents has to give that amount first."

On the following day, *i.e.* August 1, 1950, the following letter was addressed by the plaintiff-firm to the Board of Directors of the defendant-company :

"We Messrs Mohatta Brothers, the Secretaries, Treasurers & Agents of the company hereby beg to tender our resignation as Secretaries, Treasurers and Agents of the Company on condition of the scheme of Sheth Chaturbhujdas Chimanlal dated 31-7-50 duly approved by the Board of Directors, being passed by the share-holders of the company in the Extraordinary General Meeting of the company to be held on 4th September, 1950.

FOR MOHATTA BROTHERS

Ahmedabad

Shivaratan G. Mohatta

Chandratan G. Moondhra

D. R. Moondhra

Brijratan S. Mohatta

S. R. Mohatta

Satyavati Mohatta"

A notice was then issued for convening a general meeting of the defendant-company on September 4, 1950 for sanctioning the said scheme. The said scheme was approved by the shareholders on September 4, 1950. Accordingly, as from that date Messrs Chaturbhujdas Kharawala Mohatta & Co. took over as the new managing agents of the defendant-company instead of the plaintiff-firm.

The plaintiff's case was that the liability of the Punjab National Bank was fully discharged by sale of the stores. No bonus was held to be payable by the Industrial Court to the employees of the company for the year 1949. It was stated that there was surplus left after discharging the liability of the Punjab National Bank from earmarked assets consisting of excess profit tax deposits, income tax advance amount and the amounts realised from the sale of the stores. The plaintiff-firm claimed half the surplus in terms of clause (7) of the scheme towards the deposit amounts of the plaintiff. Prayer was made for accounts of the surplus and decree for the amount due as per terms of the scheme with 9 per cent interest.

It may be stated that the plaintiff-firm with effect from April 1, 1949 consisted of five partners. In addition to those five partners, Shashi Kumar, who was a minor and whose mother Satyavati was his guardian, was entitled to four Anna share in a rupee in the profits of the partnership but was not liable for its losses. Partnership deed Ex. 115 was executed for this purpose on May 19, 1949 and was signed by the five partners and Satyavati. On October 24, 1949 another partnership deed Ex. 116 was executed wherein Satyavati was shown as a partner of the plaintiff-firm instead of her minor son Shashi Kumar.

A The suit was resisted by the defendant-company. Besides taking other pleas with which we are not concerned, the defendant contended that the plaintiff firm could not maintain the suit as the constitution of the old firm which acted as managing agents of the defendant-company had been changed on October 24, 1949. From that date, it was stated, the plaintiff-firm consisted of six partners, including Satyavati. B The newly constituted firm, according to the defendant-company, had not been registered and as such the suit was not maintainable.

The trial court held that the new partnership deed Ex. 116 by which Satyavati became a partner was not acted upon. As the original partnership mentioned in the partnership deed dated May 19, 1949 had been registered, the plaintiffs suit was held to be not barred by section C 69 of the Indian Partnership Act. It is not necessary to refer to the other issues and the findings of the trial court on those issues. Suffice it to say that the defendant was held entitled to deduct certain amounts from the amount claimed by the plaintiff. The trial court accordingly passed the following order :

D "The plaintiff has filed this suit for account as the account was to be taken of the realisation and expenses of the stores. But by pursis Exhibit 424 the parties have agreed about the net realisation of the stores and have therefore urged that no Commissioner be appointed and a final decree be passed. The real account was to be taken of the actual receipts and expenses of the sale of stores. But now nothing is required to be done and hence there is no necessity of passing any preliminary decree. E The plaintiffs as shown above are entitled to receive Rs. 77,286-0-2, from defendant towards their deposit amount being the net surplus which they are entitled. Hence defendants are liable to pay the said amount to plaintiff. The plaintiff should pay the remaining Court-fee stamp within a month. I, therefore, pass the following order.

F ORDER

Defendants do pay Rs. 77,286-0-2 and the cost of the suit to plaintiff with future interest at 6 per cent from 1st January, 1956. The plaintiff should pay the remaining Court fees within a month. Defendants to bear their own cost."

G Two cross-appeals were filed against the judgment and decree of the trial Court. One appeal was by the defendant-company praying for the dismissal of the plaintiff's suit. The other appeal was by the plaintiff-firm claiming for enhancement of the amount decreed by the trial court. One of the contentions advanced by the defendant-company was as under :

H "The plaintiff-firm was not entitled to file a suit as the plaintiff-firm was differently constituted from the firm of Mohatta Brothers as on 31st July 1950, and, in any event, as the minor Shashikumar had become major in 1953 and had

become a partner of the plaintiff-firm Mohatta Brothers, Ahmedabad, and as even the name of Satyavati Devi who was the partner suing did not appear in the entry in the register of firms the present suit was barred under section 69(2) of the Act.”

Dealing with the above contention, the High Court disagreed with the finding of the trial court that partnership deed Ex. 116 dated October 24, 1949 had not been acted upon. The learned Judges of the High Court held so far as the first part of the above contention is concerned that when a firm is reconstituted by introduction of a new partner, it would remain the same registered firm, and there would be no necessity of fresh registration if the continuing firm was registered with the Registrar of the Firms under section 59 of the Indian Partnership Act. Dealing with the contention that Shashi Kumar had become major, the High Court found that there was no evidence to show the age of Shashi Kumar and the whole argument in this respect was based on mere conjecture. On the latter part of the submission, the High Court held that the mandatory condition under section 69(2) of the Indian Partnership Act was not fulfilled in the present case as the name of Satyavati who was a partner of the reconstituted firm and in whose favour a cause of action had accrued was not shown in the register of the firms. This defect was held to be fatal. The High Court in this context observed :

“In view of this legal position which we have discussed the second mandatory condition under section 69(2) is not fulfilled in the present case as the name of Satyavati who was partner of the reconstituted firm and in whose favour the cause of action had accrued is not shown in the register of firms. This defect would be fatal as the first defect of want of registration of the firm itself and in both the cases we would have no option but to dismiss the suit. In that view of the matter it would be wholly unnecessary to go into any of the other contentions which have been raised in these two appeals and to record any finding on the issues relating to the merits of the case or as regards the other appeal of the plaintiff as well. Howsoever much we may regret to dismiss the plaintiff's suit which apparently is well founded by upholding this technical objection of the defendant company, we are bound to dismiss this suit as in law a non-compliance of this second mandatory condition is also equally fatal as the non-compliance of first condition. At the same time, however, in the circumstances of the cases while dismissing the plaintiff's suit we would order both the parties shall bear their own costs all throughout.”

In appeal before us Mr. Sen on behalf of the appellants has assailed the judgment of the High Court in so far as it has disagreed with the finding of the trial court that Satyavati was not a partner of the plaintiff-firm and the deed of partnership dated October 24, 1949 had not been acted upon. Mr. Sen has also questioned the correctness of the view taken by the High Court regarding the construction of section

A 69(2) of the Indian Partnership Act. As against that, Mr. Bhatt on behalf of the respondents has canvassed for the correctness of the view taken by the High Court, both on the question of fact as well as on the question of law.

B After hearing the learned counsel for the parties and after having been taken through the relevant material on the record, we are of the opinion that the trial court took a correct view of the matter in so far as it has held that Satyavati did not become a partner of the plaintiff-firm and that the deed of partnership dated October 24, 1949 was not acted upon.

C The main consideration which prevailed with the High Court in holding that Satyavati became a partner of the plaintiff-firm was the execution of deed of partnership dated October 24, 1949. According to this deed, Satyavati became a partner to the extent of 4 Annas share out of 16 Annas, which had been previously held by her minor son Shashi Kumar. Shashi Kumar under the deed of partnership of May 19, 1949 was entitled to the share of profits to the extent of four Annas in a rupee and was not liable for the losses which were to be borne by the other five partners. Satyavati became entitled under the deed of October 24, 1949 not only to the share of profit to the extent of 4 Annas in a rupee but also became liable to share losses to that extent. The other circumstance relied upon by the High Court was resolution dated January 21, 1950 passed by the Board of Directors of the defendant-company. That meeting was presided over by Shivratn G. Mohatta, partner of the plaintiff-firm. In that resolution there was reference to partnership deeds dated May 19, 1949 and October 24, 1949 which had been received along with letter dated December 1, 1949 from Mohatta Brothers. The Board of Directors took note of the changes mentioned in the above two partnership deeds and agreed to accept the partners therein mentioned. The third circumstance relied upon by the High Court is letter dated August 1, 1950 Ex. 118 which was sent on behalf of the plaintiff-firm, Mohatta Brothers, for the purpose of tendering resignation as Secretaries, Treasurers and Agents of the defendant-company. This letter was signed, besides the other partners, by Satyavati. There was, however, no indication in the letter as to whether Satyavati signed it in her capacity as a partner or as the guardian of her minor son Shashi Kumar.

G As against the circumstances relied upon by the High Court, we find that in the register relating to the registration of firms kept under the Indian Partnership Act, an entry was made on May 5, 1952 relating to the registration of the plaintiff-firm. The above entry was plainly in pursuance of application filed on behalf of the plaintiff-firm shortly before the making of that entry. The above entry shows that the position taken up on behalf of the plaintiff-firm even in the year 1952 was that there were only five partners of the plaintiff-firm and that in addition to that, Shashi Kumar minor was admitted to the benefit of partnership. The entry thus reveals that even in the year 1952 the stand of the partners of the plaintiff-firm was that Satyavati was not a partner of the plaintiff-firm and that it was her minor son

Shashi Kumar who was entitled to share in the profits of the partnership. This entry would be inexplicable if Satyavati had become a partner of the plaintiff firm with effect from October 24, 1949.

Another circumstance which goes to show that Satyavati did not become a partner of the plaintiff-firm is the entry in the registers of the defendant-company. According to section 87 of the Indian Companies Act 1913, which was the Act in force at the relevant time, every company shall keep *inter alia* at its registered office a register of managing agents containing with respect to each of them the following particulars, that is to say, in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner. The entry which was made in the register of the defendant-company regarding the partners of its managing agents showed that after April 1, 1949 there were five partners besides Shashi Kumar minor under the guardianship of his mother Satyavati, of the firm of the managing agents Mohatta Brothers. Although the above entry was made on October 6, 1949, no subsequent entry was made thereafter showing Satyavati as partner of the firm of Mohatta Brothers. Had Satyavati in fact become a partner since October 24, 1949 of Mohatta Brothers, it seems unlikely that an entry to that effect would not be made in the register of the defendant-company. It may also be mentioned in the above context that return has to be sent to the Registrar of Firms under section 87 regarding any change in the particulars required to be contained in the register. Failure to comply with the above directions entailed imposition of fine.

The third significant circumstance which tends to show that Satyavati despite the execution of the deed of partnership dated October 24, 1949 did not become a partner of the plaintiff-firm is evidenced by applications in connection with the registration of that firm which were presented to the income-tax authorities under section 26A of the Indian Income-tax Act, 1922. Ex. 280 to 286 are the applications which were filed on behalf of the plaintiff-firm for the years 1949-50 to 1956-57. In all these applications, Shashi Kumar minor under the guardianship of Satyavati was shown entitled to 4 Annas share in a rupee in the plaintiff-firm. Satyavati was not shown in any of these applications as partner of the plaintiff-firm. All these applications which were signed by Satyavati clearly go to show that during these years she did not claim herself to be partner of the plaintiff firm. On the contrary, she acknowledged that it was her minor son Shashi Kumar who was entitled to 4 Annas share in the profits of the partnership.

Documentary evidence which has been brought on the record, in our opinion, clearly lends support to the statement of Shivratn (PW 1) that partnership deed dated October 24, 1949 was not acted upon and that Satyavati did not become a partner of the plaintiff-firm. Jivan Das PW, who was an employee of the defendant-company, has likewise deposed that Satyavati was never a partner of Mohatta Brothers.

During the hearing of the appeal, affidavit of Satyavati has been filed stating that she was never a partner of Mohatta Brothers and it

A was her son Shashi Kumar who was at all material times admitted to the benefit of the partnership. Mr. Bhatt has objected to this Court taking notice of the contents of the affidavit of Satyavati including her disclaimer of any interest in the plaintiff-firm. In this respect we are of the view that even without the above affidavit, the material on the record clearly goes to show that Satyavati was not a partner of the plaintiff-firm.

B In addition to what has been pointed out, we find that in the statement of accounts of the plaintiff-firm it is Shashi Kumar and not Satyavati who is shown to have 4 Annas share in the plaintiff-firm. Entries show that Shashi Kumar shared the profits as well as the losses in that proportion. The significant thing which emerges from the account books is that Satyavati was not shown as the person entitled to 4 Annas share in the partnership firm.

C Soon after the present suit had been filed, on application filed on behalf of the defendants under Order XXX, Rule 2 of the Code of Civil Procedure, names of the partners of the plaintiff-firm were declared on behalf of the plaintiff-firm. In the declaration the name of Satyavati was not mentioned as one of the partners of the plaintiff-firm. The question as to who should share the profits of the plaintiff-firm and should be otherwise entitled to its assets is essentially a matter for the partners of the plaintiff-firm. The facts of the case disclose that the partners of the plaintiff-firm have agreed between themselves that so far as the 4 Annas share in the profits and assets of the plaintiff-firm are concerned, it would be Shashi Kumar who would be entitled to the same. That position is also accepted by Satyavati in the applications in connection with the registration of the firm to the income-tax authorities. It would, in our opinion, be a wholly untenable plea for the defendant from whom money is claimed, to urge that even though Satyavati as well as the other partners claim that it is not she but her son Shashi Kumar who is entitled to 4 Annas share in the partnership, the court should hold that it is Satyavati who is entitled to that share. The distinction between a plaintiff-firm and a defendant-firm in the above context should not be lost sight of. So far as a defendant-firm against whom a suit for recovery of money has been filed is concerned, it would be open to the plaintiff to prove that a person is a partner of the defendant firm despite the denial of that fact by that person as well as the other partners of the defendant-firm. The reason for that is that a creditor of a defendant-firm can, except in some cases to which it is not necessary to refer, also proceed against the personal assets of each and every partner. Such a consideration does not hold good when the dispute relates to the question as to who are the partners of the plaintiff-firm.

H It has been mentioned above that Shivratan stated in the course of his deposition that partnership deed dated October 24, 1949 had not been acted upon. This statement is against the pecuniary interest of Shivratan. It is plain that if Satyavati were a partner of the plaintiff-firm, Shivratan and other partners would have to bear losses to the extent of 12 Annas in a rupee. As against that, if Shashi Kumar be entitled to share profits to the extent of 4 Annas in a rupee and be not

liable for the losses, in such an event Shivratan and other partners would have to bear the losses to the full extent of 16 Annas in a rupee. If despite that fact, Shivratan has deposed that Satayvati did not become a partner of the plaintiff-firm and the deed of partnership dated October 24, 1949 was not acted upon, his statement in this respect should not, in our view, be rejected, especially when there is overwhelming documentary evidence which lends support to the above statement.

The entire course of dealings shows that despite the execution of the deed of partnership dated October 24, 1949, the said partnership deed was not acted upon and the relations between the partners of the plaintiff-firm continued to be governed by the deed of partnership dated May 19, 1949 according to which it was not Satyavati but her son Shashi Kumar who was entitled to four Annas share in the partnership. The question, to which a reference has been made in the course of arguments, as to when it was decided not to act upon the deed of partnership dated October 24, 1949 is hardly of much importance, the material thing is that the said deed was not given effect to or acted upon by the parties concerned. The firm which came into existence as per deed of partnership dated May 19, 1949 was admittedly registered under the Indian Partnership Act and its partners were shown in the Register of Firms.

Looking to all the facts we are of the opinion that the trial court took a correct view of the matter in so far as it held that Satyavati had not become a partner of the plaintiff-firm and that the deed of partnership dated October 24, 1949 had not been acted upon. The High Court, in our opinion, was in error in reversing that finding of the trial court. In view of this conclusion of ours, it is not necessary to go into the legal question as to what should be the proper construction of section 69(2) of the Indian Partnership Act. Learned counsel for the parties are agreed that such question would arise only in case we had affirmed the finding of the High Court that Satyavati had become a partner of the plaintiff-firm and that the deed of partnership dated October 24, 1949 had been acted upon.

The High Court did not deal with the merits of the cross-appeals filed by the parties in view of its finding on the point as to whether Satyavati had become partner of the plaintiff-firm and the construction it placed upon section 69(2) of the Indian Partnership Act. In the light of the conclusion we have arrived at, it becomes essential to remand the matter to the High Court so that the cross-appeals filed by the parties may be disposed of on merits. We accordingly accept the appeals, set aside the judgment of the High Court and remand the case to it for disposal of the appeals filed by the parties on merits. Looking to all the circumstances, we leave the parties to bear their own costs of these appeals.

As the matter has been pending for a long time, the High Court may dispose of the appeals at an early date.