

Privy Council Appeal No. 29 of 1934.

The Bharat Spinning and Weaving Company, Limited - - - *Appellants*

v.

Manilal Lallubhai and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1935.

Present at the Hearing:

LORD BLANESBURGH.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the Bharat Spinning & Weaving Company, Limited (hereinafter called the Company) against a final order of the High Court of Judicature at Bombay in its appellate jurisdiction dated the 24th of March, 1933, which reversed an order made by a learned Judge of that Court in the exercise of its ordinary original civil jurisdiction dated the 8th of September, 1932.

In the Courts in India two of the points relied upon by the respondents to this appeal were, viz. : (1) whether an award under the Indian Arbitration Act (IX of 1899) against a firm in the name of the firm is valid; and (2) whether it is competent for the High Court under the provisions of Order 21, rule 50 (2), of the Code of Civil Procedure, to determine whether persons who dispute that they are partners in a firm against which an award has been made in the name of the firm are so liable.

Both the Courts in India decided these questions against the respondents and their learned counsel has not relied upon either of the two points in this appeal.

The only other questions were whether in fact the respondents were partners or held themselves out as partners in the firm of Mulchand Pranjivandas. This firm is hereafter referred to, for the sake of brevity, as the firm of M.P. The matter came before the learned Judge, Kania J., upon what is called a "Chamber Summons," which was taken out on behalf of the Company in the matter of the Indian Arbitration Act and in the matter of an arbitration between the Company and the firm of M.P. and an award dated the 12th of February, 1931.

The summons asked for leave to the Company to execute the said award, which was made against the firm of M.P., against four individuals, viz.: (1) Harakchand Tarachand (hereinafter called Harakchand); (2) Amersi Harjinandas (hereinafter called Amersi); (3) Manilal Lallubhai; and (4) Madhavlal Lallubhai. The two last mentioned persons are the respondents to this appeal.

The summons was adjourned into Court for the determination of the liability of the respondents; Harakchand and Amersi did not dispute their liability as partners in the firm of M.P.

At the hearing two issues were framed on the merits, viz.: (1) whether Manilal Lallubhai and Madhavlal Lallubhai, or either of them, were at all material times partners in the firm of M.P.; (2) whether they or either of them held themselves out as partners in the said firm and are liable as such.

Documentary and oral evidence was produced before the learned Judge, who decided both the above-mentioned issues in favour of the Company and by his order of the 8th September, 1932, granted leave to the Company to execute the said award against the respondents as partners in the said firm of M.P. as well as against the other two above-mentioned persons who did not dispute their liability.

The respondents appealed against the above-mentioned final order.

The appeal was heard by Beaumont C.J. and Rangnekar J., who, on the 24th March, 1933, delivered concurring judgments, and decided, as already stated, the preliminary points in favour of the Company and the two above-mentioned issues of fact in favour of the respondents.

The result was that the said order of the 8th of September, 1932, was set aside, the said chamber summons was dismissed as against the respondents and a declaration was made that the respondents were not partners and that they did not hold themselves out as partners in the said firm of M.P. It is against this order of the 24th March, 1933, that the Company have appealed to His Majesty in Council.

The material facts are as follows:—

The Company are manufacturers of various kinds of piece goods at Bombay—Messrs. Purshottam Govindji & Company are the managing agents of the Company. By eight contracts, the first contract being dated 18th July, 1929, and the last the 24th of April, 1930, the Company sold certain goods to the firm of M.P. The said firm failed to perform their part of the contracts and the Company's claim in respect thereof was referred to arbitration in pursuance of one of the clauses which was common to all the said contracts.

By the above-mentioned award, dated the 12th of February, 1931, it was directed that the said firm of M.P. should pay to the Company the sum of Rs. 45,259.13.6 with interest on the said sum at the rate of six per cent. per annum from the 1st of February, 1931, until payment. On

the 2nd March, 1931, the attorneys for the Company demanded payment of the said amount from Amersi, Harakhchand and the respondents as partners in the said firm of M.P. On the 5th March, 1931, both the respondents, through their attorney, disputed their liability for the said sum and asserted that they were not partners in the said firm.

Thereupon the Company took out the chamber summons which gave rise to the subsequent proceedings to which reference has already been made.

It appears that in 1925 there was a firm in Bombay called Vallabhdas Hiralal doing business in piece goods. The said firm is hereinafter referred to as the firm of V.H. The partners in that firm were another firm called Ramniklal Manilal (hereinafter referred to as the firm of R.M.), a man called Hiralal Mayachand (hereinafter called Hiralal) and the above-mentioned Amersi.

By the partnership agreement, dated 25th February, 1925, it was provided that the firm of R.M. and Hiralal should provide certain capital, and that the said firm should have a share of six annas, Hiralal eight annas and Amersi three annas out of one rupee of seventeen annas.

The firm of R.M. dealt mainly in yarn in Bombay and the partners were the respondents to this appeal and Harakhchand.

The books of the firm V.H. were not before the Court; it was, however, admitted that in the books of that firm the account in respect of money advanced by the firm of R.M. was kept in the name of that firm, but for some reason or other the account of the share of the firm of R.M.—in respect of the profit and loss in the business of the firm of V.H.—was kept in the name of Vallabhdas Harakhchand: that was the name of a son of Harakhchand, who was a partner in the firm of R.M. This was relied upon by the Company as an instance, to say the least, of a benami transaction by the firm of R.M., and it was said that anyone looking at the books of V.H. would find that the firm of R.M. were creditors of, but not partners in, the firm of V.H.

In their Lordships' opinion too much importance should not be attached to this method of keeping the account, unexplained though it be, for there is no doubt that the above-mentioned partnership agreement of the 25th February, 1925, clearly disclosed the fact that the firm of R.M. were partners in the firm of V.H., and as appears from the evidence of Dhanjibai, a member of the firm who acted as managing agents of the Company, the fact that the firm of R.M. was a partner in the firm of V.H. was well known.

It appears that the business of the firm of V.H. was not profitable and on the 11th of October, 1928, notice of dissolution was sent to Hiralal and Amersi by H. K. Mehta, a vakil, who purported to act on behalf of his client, a "Mr. Vallabhdas Harakhchand," who was stated in the notice to be a partner in the firm of V.H.

Mr. Vallabhdas Harakhchand was not a partner in the firm of V.H., but apparently the notice was accepted by Hiralal and Amersi as having been sent on behalf of the

firm of R.M.—and as constituting a dissolution of the firm of V.H.

A new firm then came into existence. It was called Mulchand Pranjivandas, to which reference has already been made. It began to carry on business about the 2nd of November, 1928. The business was in piece goods and was carried on in the same shop as had been used by the firm of V.H.

This firm of M.P. is the firm in which it is alleged by the Company that the respondents were partners.

No deed of partnership was executed either before or at the time when the firm of M.P. began to do business, and it was not until the 17th of May, 1929, that the partnership agreement in respect of this firm was executed. The terms of that deed show that the partners in the firm of M.P. were Harakhchand and Amersi, the former having a nine annas and the latter a seven annas interest in the partnership business.

Harakhchand apparently was a man of some means, and provided a sum of Rs. 25,000 for the business of the firm.

It is to be noted that Harakhchand was one of the partners in the firm of R.M., and Amersi was one of the partners in the dissolved firm of V.H.

Apparently the new firm of M.P. did in fact take over the business of the firm of V.H., with its assets and liabilities, but no agreement to that effect, either written or verbal, was proved.

The evidence of the respondent Manilal with respect to this matter was as follows :—“ The firm of M.P. disposed of the goods, recovered the outstandings and paid the debts of the firm of V.H. ; they took charge of the goods and outstandings with my permission.”

This is one of the features in the case on which the Company relied as showing that in this transaction there was really no change made except that the name of the firm was changed from V.H. to M.P. and that Harilal was got rid of; Harakhchand being the representative of the firm of R.M. in the new firm of M.P.

The above-mentioned procedure certainly was an unusual way of transferring the business liabilities and goodwill of a firm to an entirely different firm, and it has undoubtedly to be taken into careful consideration before a conclusion on the main issue in the case is arrived at.

It appears that on the 23rd January, 1929, the firm of M.P. opened a current deposit account with the Central Bank of India, Limited, at Bombay: the account was to be kept in the name of the firm M.P. and the names of the partners were given to the Bank as Harakhchand and Amersi.

The business of the firm of M.P. for the first year 1928-29 resulted in a small profit of Rs. 2,885-2-3: entries were made in the books of the firm of M.P. under date 1st November, 1929, whereby a nine annas share of this sum was credited to Harakhchand and a seven annas share was credited to Amersi, which was in accordance with the terms of the partnership agreement.

It appears to their Lordships that the above-mentioned three matters, viz. : the opening of the account at the Bank with the declaration that the partners in the firm of M.P. were Harakhchand and Amersi, the partnership deed of 17th May, 1929, and the entries in the books of the firm of the shares of the profit of Harakhchand and Amersi, which appear to have been made in due course, are of much importance, because they are events which took place while the business was at all events holding its own, and before any trouble between the firm of M.P. and the Company occurred.

The havala entries of the firm of V.H. in the books of the firm of M.P. also are in accordance with the case of the respondents, viz., that they were creditors of the firm of M.P. in respect of advances but were not partners.

In the opinion of their Lordships, however, these last-mentioned entries do not carry so much weight as those to which reference has previously been made; the evidence shows that the said havala entries were made some considerable time after January, 1930. The firm of R.M. made advances to the firm of M.P., which, however, got into difficulties about October or November, 1930, and it appears that the firm of R.M. on the 6th of October, 1930, were pressing the firm of M.P. for payment of the sum of Rs. 24,966. The result of the M.P. firm's trading for the second year of its existence was a loss of Rs. 58,810.

It is not necessary to enter into further detail of the other entries and accounts in the books of the firm of M.P. It is sufficient to say generally that they are consistent with the case of the respondents, viz., that they were creditors of, but not partners in, the firm of M.P.

It is obvious that this is not conclusive, because if the Company's case is correct and that one or other of the partners in the firm of M.P. was benami of the respondents, the books would be kept in such a way as would preserve that benami character.

The case of the Company, however, was based mainly upon the verbal evidence and the inferences to be drawn from the proved facts of the case. The learned Judge who tried the case, speaking generally, believed the evidence of the Company's witnesses and disbelieved the evidence of the witnesses called for the respondents.

The learned Judges who heard the appeal in India were of opinion that though there was ground for suspicion, the oral evidence was not of such a nature as to justify the Court in holding that the respondents were partners in the firm of M.P., especially in view of the absence of any documentary evidence to support the case of the Company.

The learned counsel therefore on both sides drew their Lordships' attention to the oral evidence with great care, and their Lordships are indebted to them for their assistance in this respect.

Dhanjibhai and Chogmal were very important witnesses for the Company, as they testified to conversations and interviews with Manilal and Madhavlal with relation to the business and constitution of the firm of M.P. Dhanjibhai, as

already stated, was a member of the agency firm, which acted on behalf of the Company. This witness was regarded as a witness of truth by the learned Judge, who saw him and heard him give his evidence, and their Lordships are prepared to believe that he was speaking the truth to the best of his recollection. Chogmal was a broker and commission agent, who was alleged to be indebted to Dhanjibhai; their Lordships are not prepared to reject his evidence on that ground which apparently appealed to the learned Judges who heard the appeal.

But the evidence of both Dhanjibhai and Chogmal was given in August 1932 nearly four years after the alleged conversations and it is impossible to rely implicitly upon the recollection of witnesses as to conversations alleged to have taken place so long ago, when there is no documentary evidence of any kind to corroborate such recollection and especially when the documentary evidence is in direct contradiction thereof.

The contract made on the occasion of the inauguration of the business of the firm of M.P. was for 171 bales, the price of which was about Rs.60,000. That contract was signed by Amersi in the name of the firm M.P., as indeed were all the subsequent contracts with the Company.

It is true that Dhanjibhai said he would not have entered into these contracts unless he had been given to understand that the firm of R.M. were partners in the firm of M.P. If that be so, it is difficult to understand why he did not get the names of the respondents to the contracts, which were for considerable amounts but rested content with a mere verbal assurance that the respondents were partners. It has to be remembered that the respondents had been making advances to the firm of V.P. and continued to make advances to the firm of M.P. and this fact may explain the presence of the respondents at the material interview at the beginning of the Company's transactions with the firm of M.P.

Amersi was called as a witness for the Company and in his evidence said that the respondents were not partners in the firm of M.P. The advocate for the Company thereupon tendered a document which Amersi had signed in the presence of the Company's attorney on the 30th April 1931. This document contained statements to the effect that Harakchand's name in the partnership agreement of the firm of M.P. really stood for the firm of R.M. and that the respondents had taken part in the management of the business of M.P. Although objection was raised as to the admissibility of this document, it was admitted and apparently treated as substantive evidence.

In their Lordships' opinion this was clearly wrong. The only use that could be made of the document was for the purpose of impeaching the credit of the witness Amersi after the Court had given leave to the advocate for the Company to treat Amersi as a hostile witness and to cross-examine him. The Court gave such leave and the document was so used.

Their Lordships agree with the learned Judge who tried the suit, that in view of the statements contained in that document, Amersi was a man upon whose evidence no

reliance could be placed. But in more than one place in his judgment the learned Judge has relied upon statements made by Amersi, both verbally and in writing, which were not admissible as evidence against the respondents. As for instance the learned Judge relied largely upon four letters written by Amersi to Dhanjibhai in November 1930. It is clear that these letters were not admissible in evidence against the respondents and yet the learned Judge drew therefrom an inference, which was very damaging to the respondents, viz., that the letters correctly represented the facts stated therein and that Manilal must have stated to Amersi that he would go and see Dhanjibhai and that matters had been cleared up between the parties. This is only one instance of the wrong admission of evidence with regard to statements alleged to have been made by Amersi in the absence of the respondents and without any proof of their authority.

Their Lordships realise to the full the importance of the fact that the learned trial Judge saw the witnesses and heard them give their evidence, but that importance is greatly diminished if it is found that the learned Judge's decision in material respects is based on inadmissible evidence.

Much of the evidence of the other witnesses for the Company is consistent with the position alleged by the respondents that they were interested in the firm of M.P., but as creditors for money advanced to the firm and not as partners. This would entail frequent communications between the respondents and the firm of M.P. and in all probability the presence of one or other of the respondents at the shop of the firm of M.P.

There remains to be considered the evidence of the respondents. It is clear to their Lordships that in some respects they did not adhere to the truth, and their Lordships appreciate the grounds on which the learned trial Judge did not accept their evidence. But the fact that the respondents did not give true evidence in material respects, though most material for consideration, is not sufficient to furnish the Company with the evidence which was necessary to discharge the onus which lay upon them.

By section 109 of the Indian Evidence Act it is provided that when the question is whether persons are partners, landlord and tenant or principal and agent and it has been shown that they have been acting as such the burden of proving that they do not stand or have ceased to stand to each other in these relationships respectively is on the person who affirms it. There is no doubt that in the first instance it was for the Company to prove either (1) that the respondents were partners in the said firm or (2) that the respondents had been acting as such. Their Lordships after full consideration of the evidence are in agreement with the decision of the Appellate Court in India, without adopting all the reasons of the said court, that the Company did not discharge the onus which lay upon them in respect of either of the said issues.

The result is that, in their Lordships' opinion, the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE BHARAT SPINNING AND
WEAVING COMPANY, LIMITED

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MANILAL LALLUBHAI AND ANOTHER

DELIVERED BY SIR LANCELOT SANDERSON.

Printed by His Majesty's Stationery Office Press,
Rococo Street, S.E.1.

1935.