1964

April 1

DEVJI @ DEVIJI SHIVJI

v.

MAGANLAL R. ATHRANA & OTHERS

[A. K. SARKAR, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.]

Partnership—Sub-lease granted to partner of firm—No intention to bind to firm—Can other partners of firm be liable —Indian Partnership Act, 1932, *s.* 22.

The plaintiff appellant instituted a suit against the defendants respondents for the recovery of a sum of Rs. 57,000/-. The appellant was holding permanent lease hold rights over a certain colliery. On January 31, 1949 the appellant granted a sub-lease of the colliery to respondent No. 4 for a term of 5 years. He joined respondents 1, 2 and 5 as defendants to the suit on the ground that these three persons along with respondent No. 4 formed a partnership firm known as Saurashtra Coal Concern which was joined in the suit as defendant No. 5. The appellant's case was that respondent No. 4 was a *benamidar* for the partnership firm and, therefore, all the respondents were liable for the claim. Respondents 1 and 2 denied the appellant's claim totally. According to them, respondent No. 4 took the sub-lease in his personal capacity and not on behalf of the other respondents. Respondents 4 and 5 who are father and son, admitted the appellant's case that the lease was obtained by respondent No. 4 on behalf of the partnership firm. The trial court passed the decree against all the respondents. On appeal, the High Court set aside the decree as against respondents 1 to 3 but affirmed the same against respondents 4 and 5.

Held: that Section 22 of the Indian Partnership Act, clearly provides that in order to bind a firm by an Act or an instrument executed by a partner on behalf of the firm, the Act should be done or the instrument should be executed in the name of the firm, or in any other manner expressing or implying an intention to bind the firm. The sub-lease was not executed in the name of the firm. On the facts of this case it was held that in obtaining the sub-lease, the parties to it did not intend to bind the firm by that transaction, and therefore the decree should be limited only against respondents 4 and 5.

Karmali Abdullah Allarakia v. *Vora Karimji Jiwanji*, I.L.R 39 Bom. 261, *Gouthwaite* v. *Duckworth*, (1810) 12 East 421, *Mathura Nath Choudhury* v. *Sreejukta Bageswari Rani*, 46 C.L.J. 362, *Pandiri Veeranna* v. *Grandi Veerabhadraswami*, I.L.R. 41 Mad. 427, *Lakshmishankar Devshankar* v. *Motiram Vishnuram*, 6 B.L.R. 1106 and *Gordhandas Chhotalal Seth* v. *Mahant Shri Raghubirdasi Gangaramji*, 34 B.L.R. 1137, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 46 of 1961. Appeal from the judgment and decree dated July 17, 1958 of the Patna High Court in Appeal from Original Decree No. 162 of 1952.

Sarjoo Prasad and *D. N. Mukherjee*, for the appellant.

R. C. Prasad, for respondents Nos. 1—3.

1964

Devji @ Deviji Shivji
v.
Maganlal R. Athrana and Others

Mudholkar, J.

April 1, 1964. The Judgment of the Court was delivered by

MUDHOLKAR, J.—This is an appeal by a certificate granted by the High Court of Patna under Art. 133(1)(a) of the Constitution, and arises out of a suit instituted by the appellant against the respondents for the recovery of a sum of Rs. 57,000/-.

The appellant holds permanent lease-hold rights over a colliery called the Jealgora Govindpur Colliery and had worked the colliery himself for some time. On January 31, 1949, he granted a sub-lease of the colliery to respondent No. 4 for a term of five years. At that time, 2803 tons of slack and rubble coal was lying in the colliery, and under the terms of a separate agreement executed by respondent No. 4, he was liable to pay for this coal at the rate of Rs. 10/- per ton after selling it. According to the appellant, this coal was sold by respondent No. 4, but he was not paid its price amounting to Rs. 28,030/-. Further, according to him, royalty and commission were due to him from the respondents in respect of the coal extracted by them from the colliery, as also Rs. 1,355/8/3 on account of a loan taken by them from him on February 17, 1949. The total claim was tentatively valued by him at Rs. 57,000/-. He joined respondents 1, 2 and 5 as defendants to the suit on the ground that these three persons along with respondent No. 4 formed a partnership firm known as Saurashtra Coal Concern which was joined in the suit as defendant No. 5 and is now respondent No. 3 before us. The appellant's case was that respondent No. 4 was a *benamidar* for the partnership firm and, therefore, all the respondents were liable for the claim.

Respondents 4 & 5, who are father and son, admitted the appellant's contention that the lease was obtained by respondent No. 4 on behalf of the partnership firm, but their contention was that they surrendered their lease-hold interest to the appellant on November 1, 1950, which was accepted by him, and that he was, therefore, not entitled to the claim in respect of royalty and commission from them for the period subsequent to November 1, 1950. Further, according to them, the coal which was lying in the colliery was not actually weighed at the time of the agreement and the figure of 2803 tons was put down only as a rough estimate. According to them, on the date of the surrender of the lease by them, there was a stock of more than 2803 tons of slack and rubble, etc., as well as soft coke, including the stock left by the appellant at the time of granting the sub-lease, because that could not be sold, and the appellant took possession of the entire stock lying in the colliery in November, 1950, after promising to adjust it towards the dues. They, therefore,

1964

Devji @ Deviji Shirji
v.
Maganlal R. Athrana and Others

Mudholkar, J.

disclaimed all liability to pay the price of 2803 tons of coal. They also denied having taken a loan from the appellant as alleged by him.

No separate written statement was filed on behalf of respondent No. 3, but respondents 1 & 2, who were defendants 2 & 4 in the trial court, denied the appellant's claim totally. According to them, respondent No. 4 took the sub-lease in his personal capacity and not on behalf of the other respondents. They averred that there was no privity of contract between them and the appellant and that, therefore, he was not entitled to a decree against them. The real facts, according to them, are that the respondent No. 4 took a sub-lease of the property from the appellant and gave a managing agency of the same to the Saurashtra Coal Concern of which the first respondent is the financing partner and the second respondent is the working partner. This concern was, they say, never a sub-lessee of the appellant. They also denied having anything to do with the stock of coal which the appellant is alleged to have sold to the 4th respondent.

The trial court negatived the claim of the appellant in respect of the loan but decreed the claim for Rs. 28,030/- as the price of coal and commission thereon against all the respondents. It further passed a preliminary decree for ascertaining the precise amount of royalty and commission which would be due to the appellant on account of the sub-lease. The trial court further said that the minimum amount under this head would be Rs. 26,000/-. Respondents 1 to 3 preferred an appeal to the High Court and the High Court accepted it. Thus, the position now is that the decree of the trial court stands only against respondents 4 & 5, but has been set aside as against respondents 1 to 3.

In view of the fact that both the courts below have found concurrently that the sub-lease in question was taken by respondent No. 4 alone, the only point urged by Mr. Sarjoo Prasad in support of the appeal is that respondent No. 4 being a partner in the Saurashtra Coal Concern, all the partners of the firm are liable under the lease inasmuch as the firm admittedly came into possession of the demised colliery. He points out that even according to respondents 1 to 3, they came into possession of the demised colliery immediately after the execution of the sub-lease, and wants this Court to infer from this that the partnership had already come into existence before the lease was obtained. This, however, has never been the case of the appellant in the courts below. The only case which he put forward was that the lease was taken by respondent No. 4 on behalf of all the respondents. In other words, his case was that respondent No. 4 was a *benamidar* for the partnership firm. It is only

this case which the respondents had to meet, and in our judgment, it would not be proper to permit the appellant to make out an entirely new case at this stage. Apart from that, s. 22 of the Indian Partnership Act, 1932, clearly provides that in order to bind a firm by an act or an instrument executed by a partner on behalf of the firm, the act should be done or the instrument should be executed in the name of the firm, or in any other manner expressing or implying an intention to bind the firm. The sub-lease was not executed in the name of the firm, and it has been found by the courts below that respondent No. 4 in obtaining the lease, did not act on behalf of the firm. This in substance means that in obtaining the sub-lease, the parties to it did not intend to bind the firm by that transaction.

In support of his contention, Mr. Sarjoo Prasad has strongly relied upon the decision in *Karmali Abdulla Allarakia* v. *Vora Karimji Jiwanji and others*(1). That was a case in which the question for consideration was whether one of the two partners is liable upon a *hundi* drawn by one of the partners though the *hundi* was not drawn in the name of the firm. The Privy Council following the decision in *Gouthwaite* v. *Duckworth*(2) held that the other partner would be liable though on the face of it the *hundi* did not purport to be on behalf of the firm. That decision, however, does not help the appellant, because while the transaction in connection with which the *hundi* was drawn, was admittedly a partnership transaction, in the case before us, it has been found that the transaction, that is, the taking of the sub-lease, was not on behalf of the partnership. The next case relied upon was *Mathura Nath Choudhury* v. *Sreejukta Bageswari Rani and others*(3). In that case, the question was whether the firm is liable for the money borrowed by one of its partners. The High Court pointed out that this is a question of fact and depends upon the facts and circumstances of each particular case. In that case also, it was found that the liability arose upon a contract entered into by one of the partners in connection with the partnership business. This case is, therefore, similar to the one just referred to above. The third case relied upon is *Pandiri Veeranna* v. *Grandi Veerabhadraswami*(4). In that case, the question was whether the fact that one of the several partners had authority to acknowledge liability to save limitation as against his partners, had to be established only by direct evidence or whether it could be inferred from the surrounding circumstances. The High Court held that it was

(1) ILR 39 Bom. 261 at 274, etc. (2) (1810) 12 East 421.
(3) 46 CLJ 362. (4) ILR 41 Mad. 427 (Full Bench).

1964

Devji @ Deviji Shivji v. Maganlal R. Athrana and Others

Mudholkar, J.

permissible to establish the existence of authority from the surrounding circumstances. The case is thus of no assistance to the appellant. The next case relied upon was *Lakshmishankar Devshankar* v. *Motiram Vishnuram, etc.*(1). There, it was held that where money borrowed by one partner in the name of the firm but without the authority of the co-partners has been applied to paying off the debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied and the same rule extends to money *bona fide* borrowed and applied for any legitimate purposes of the firm. It is difficult to appreciate how this case advances the present matter further, because here, the sub-lease has not been obtained in the name of the firm. The last case relied upon was *Gordhandas Chhotalal Seth* v. *Mahant Shri, Raghuvirdasji Gangaramji*(2) That again is a case in which the firm was held to be bound by the debts contracted by the managing partner for the purposes of the factory run by the firm. All the partners were held liable, because the transaction was entered into by the managing partner for the purpose of the partnership business. This case is similar to the one just referred to above and is, therefore, of no assistance to the appellant.

Mr. Sarjoo Prasad also referred to two other decisions in *Ram Kinkar Banerjee and others* v. *Satya Charan Srimani and others*(3) and *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur* v. *Samuel Henry Seddon*(4). In these cases, the defendants sought to be made liable were assignees of a lease, but that is not the case here. Indeed, Mr. Sarjoo Prasad quite rightly conceded that respondents 1 to 3 cannot be made liable upon the ground that there was a privity of estate between them and the appellant.

We, therefore, agree with the High Court that the decree should be limited only against respondents 4 and 5, and dismiss the appeal with costs.

Appeal dismissed.

(1) 6 BLR 1106.
(2) 34 BLR 1137.
(3) AIR 1939 P.C. 14.
(4) ILR 19 Pat. 433 at 459.