
(1869) 06 CAL CK 0005

Calcutta High Court

Case No: Regular Appeals Nos. 260 and 262 of 1868

Ivan Herman Mollwo,
Edwin March and
Others

APPELLANT

Vs

Raja Pratap Chandra
Sing Bahadur

RESPONDENT

Date of Decision: June 18, 1869

Judgement

Markby, J.

This was a suit brought by certain persons carrying on business as merchants in London, against the late Raja Pratap Chandra Sing. The Raja died during the progress of the suit, and the present defendants are his minor sons represented by the Court of Wards. The suit was for the recovery of rupees 2,92,000, as balance due up to the 19th June 1865, upon an account current between the plaintiffs and a firm carrying on business under the style of W.N. Watson and Co., of which firm it was alleged that the Raja was a member. There were two partners residing in Calcutta, prior to 1865, Thomas Ogilvy Watson and his son William Noel Watson. The history of the business transactions of the Watsons prior to 1863 is not very clearly stated, but it seems that for some time they carried on business together without any agreement of partnership. The plaintiffs and the Raja represent them as carrying on business as early as 1860; whereas the elder Watson, who has been examined, says the firm commenced in the beginning of 1862. The style of the firm from that date, at any rate, was W.N. Watson and Co., and this is the firm of which the Raja is said to have been a partner.

2. The dealings between the firm of W.N. Watson and Co. and the plaintiffs appear to have commenced in the year 1862, and they consisted in the two firms consigning goods to each other in the usual course of business. On the 19th January 1863, an agreement was entered into between T.O. Watson, acting on behalf of himself and his son W.N. Watson, and the plaintiffs, stating the terms on which the plaintiffs agreed to transact business with the firm of W.N. Watson and Co. It regulates the commission which is to be charged by the plaintiffs and W.N. Watson and Co. on their respective consignments, and

authorizes the firm of W.N. Watson and Co. to draw on the plaintiffs in the usual way against consignments, leaving a specified margin. This agreement was used by W.N. Watson and Co. as a letter of credit in their transactions in Calcutta.

3. The history of the connection between the Raja and the Watsons during its earlier period is also extremely vague. It seems to have begun about the year 1862, and to have consisted in the Raja accepting their bills in order to enable them to raise money and carry on business as merchants, and in his occasionally advancing them money in cash. No account has been given on either side in the course of this case of the advances made by the Raja to the Watsons prior to August 1863; but it is clear that whatever capital was required in the business came from him, the elder Watson having nothing and the younger Watson a very vaguely stated sum of somewhere about rupees 10,000. It is also clear that from 1862, bills for a considerable amount were drawn by the Watsons upon the Raja, and though the business is said to have been at that time prosperous, these bills were for the most part not paid by the Watsons, and the Raja had either to pay or renew them. Thomas Ogilvy Watson states that, between January and August 1863, the Raja advanced cash and retired bills to the amount of rupees 90,000; and says, that during the year 1862, the Raja had assisted the firm largely by acceptances. It is therefore probable that in August 1863, from which time the history of the case becomes clearer, the firm of W.N. Watson and Co. was very largely indebted to the Raja.

4. Up to the last mentioned date there seems to have been no regular understanding between the Raja and the firm of W.N. Watson and Co., as to the terms on which he was to make advances, the Raja states that at that time he became uneasy at seeing what he considered the reckless mode in which the Watsons were conducting their business, and their extravagant mode of living; and he accordingly became desirous to obtain what he calls "an agreement to check it." The result of this was that an agreement was entered into, the terms of which we shall have to consider presently; but speaking generally it gave the Raja a very large control over all the affairs of the partnership. It also gave him 12 per cent. on his advances, a commission of 20 per cent. on the profits, and the title deeds of a tea garden as security.

5. On the 8th September 1863, a regular deed of partnership was drawn up between the two Watsons. Its terms have not been in any way referred to in the argument before us, but it is said to have been retrospective and to have been declared to operate from February 1862.

6. Subsequently to August 1863, very heavy losses were incurred by the firm. The younger Watson went to England, and attempted to get up a company and to sell to it the tea garden mentioned in the above agreement, but failed. In May 1864, the firm of W.N. Watson and Co. was dissolved, and the elder Watson continued to carry on business alone, but the style of the firm was apparently not changed. The advances made by the Raja and his liabilities on account of the firm had reached a very large amount, and there seemed little prospect of an improvement. Accordingly, on the 3rd of March 1865, a fresh

agreement was drawn up between the Raja and the two Watsons by which the amount which the Raja had paid and for which he was still liable on account of the firm of W.N. Watson and Co., was ascertained at rupees 3,88,218-14-3, of which he had actually paid rupees 3,25,218-14-3: and it was agreed that in consideration of the Watsons having executed a regular mortgage to the Raja of the Tea Gardens above-mentioned for rupees 2,52,149-11-3, the Raja should cancel his right to commission and all other rights which he might have under the agreement of 27th August 1863; and also give up all monies payable to him by the Watsons, except those secured by the mortgage. By this deed therefore the Raja appears to have agreed to an entire loss of rupees 1,36,069-3-0, and thus terminated the money transactions between the Watsons and the Raja.

7. The business of W.N. Watson and Co. was brought to a termination in May 1865, by the arrest of the elder Watson for debt.

8. An attempt was made to show that the Raja actually interfered in the business of the firm, but it entirely failed. The statement of Jagobandhu Chatterjee that the Raja sometimes looked at the samples of cotton may very possibly be true, but if so, it can only have been out of curiosity. Nothing can be more improbable than that the Raja would in any way concern himself with, or venture an opinion on, matters of business. The power which was given by the agreement to interfere in the management of the business was undoubtedly never exercised. Had the Raja wished to exercise it, he would have appointed an agent for that purpose. An attempt was made to show that Rasik Lal Bose was the Raja's agent so appointed, but though it is possible that Rasik Lal may have given information to the Raja as to how the business was going on, it is quite impossible that he can have acted in any way as the agent of the Raja; nor does Jagobandhu Chatterjee say so, and he certainly omitted nothing which was unfavourable to the Raja.

9. We should accept with much the same caution the evidence of Jagobandhu Chatterjee who declared the Raja to have been a partner, and the evidence of the elder Watson, who denies the Raja's partnership altogether. But we see no reason to distrust the evidence of the Raja himself. We can discover nothing in his conduct, or in the circumstances of this case, which would justify us in imputing to him the least desire to conceal or misrepresent any part of these transactions; on the contrary, his proceedings throughout appear to us to have been straightforward and honorable. We adopt entirely his version of the connection between himself and the Watsons, namely that he was actuated by motives of friendship, and not by any desire of gain. Even with the commission, we are not sure the adventure was at all an advantageous one to the Raja, when it is considered what rate of interest may be got with good security in this country. The elder Watson says that the Cachet Tea Estate mentioned in the agreement was valued at that time at three lacs of rupees, but it is perfectly clear that had the Watsons been able to raise that sum or any thing like that sum upon it, they would not have submitted to such terms as the Raja imposed upon them; we mean not as to commission on profits, and interest, but as to the management of their business, and even of their private affairs. Nor do we see any reason to doubt the truth of the Raja's assertion that

the suggestion for the payment of this commission came for the younger Watson. Indeed, there are one or two passages in the younger Watson's letters, which seem to us to render this view of the origin of that clause in the agreement highly probable; particularly the passage in the letter of the 13th May 1865, where he speaks of the happiness he felt in having (as we understand him) fixed the Raja as a partner by giving him a share of the profits.

10. The plaintiffs have attempted in the course of this case to represent the Raja as a cunning man anxious by this agreement to secure the profits of a business without incurring any of the risks; but there is more than one answer to this suggestion which seems to us quite conclusive. Is it in the least degree probable that if this had been so he would have surrendered the agreement, of August 1863, as he did, consenting to a dead loss of upwards of a lac of rupees, and making no attempt whatever to use the very extensive powers conferred upon him by the agreement, to recoup himself one single farthing of the advances he had made. The conduct of the Raja in this respect seems to us utterly inconsistent with the character which the plaintiffs would attribute to him. Moreover, had gain really been his object, he would not have left the Watsons the power which under the agreement, they clearly possessed of paying him off, should the business become profitable. He would, undoubtedly, have secured a share in the business for at least a certain number of years, and not have left the Watsons the power to get rid of him should the business turn out a profitable one--a power which, in such an event, they would be certain to exercise.

11. We entirely agree with the Judge of the lower Court that nothing was done by the Raja which can be construed as "holding himself out as a partner." There is no evidence of a single act done, whether brought to the knowledge of the plaintiffs or not, which could suggest any inference that the Raja was a partner. The dealings of the Raja, which would be best known by commercial men in Calcutta, would be his acceptance of bills drawn upon him by the Watsons, which they afterwards discounted. It is agreed that this was the mode in which the Raja always gave his assistance, except on the few occasions when he made advances in cash; and this so far from leading persons to suppose that the Raja was a partner is *prima facie* inconsistent with his being so. An attempt was made by the plaintiff to establish, not that the two Watsons had ever stated to them that the Raja was a partner, but that they had (as Mr. March puts it in his evidence) held out to them the Raja as a partner. No correspondence of the Watsons earlier than the year 1864 has been referred to, and no definite conversations have been detailed, and we are not therefore in a position to judge what exactly the Watsons did say; but we do not understand that this witness undertakes to say that the Watsons ever asserted in direct terms that the Raja was a partner; if so, he contradicts his letter of the 27th March 1865. If Mr. March means to say that his firm were induced by such statements as are referred to in this letter to give credit to W.N. Watson and Co., we must say that we do not quite understand a man of business when he is ascertaining to whom he is giving credit, being satisfied with a statement that the only wealthy person of all the three persons with whom he supposed

he was dealing, was "to all intents and purposes a partner." We do not believe that a man of business really anxious to ascertain the truth upon so important a matter would be satisfied with a vague statement of that sort.

12. Moreover, we have no hesitation in saying that if the Watsons ever represented in direct terms that the Raja was a partner, or held him out as a partner, they committed a fraud upon the Raja. If, as they themselves say, they merely stated that he was legally a partner, that seems to me to involve a statement that he was not a partner in fact, and would be fatal to their claim.

13. But apart from all this, we do not see how any statement made by the Watsons, without his authority, would affect the Raja. The Watsons were, no doubt, at liberty to represent the facts as they stood, but no representation by them, based on any inference which they drew from those facts, could affect the liability of the Raja.

14. The question which remains--and it is the question which has been mainly argued on this appeal--is whether by reason of the agreement of 27th August 1863, the Raja put himself into such a position that the Watsons had a right to pledge his credit and did pledge his credit in all the transactions of the firm; or, in other words, were the Watsons the agents of the Raja in all the transactions of the firm.

15. It would be very easy upon this, as indeed upon all the other points of law in this case, to raise a preliminary discussion as to the general law which was to be applied to disputes of this nature between British subjects resident in England and Hindus; but it has very sensibly been conceded in the argument that in the decision of this case we ought to adopt generally the principles of English law as established by the recent decisions. The Advocate-General who appeared for the appellants admitted the applicability of those decisions not exactly as authority, for that they could hardly be, but as conclusions of persons whose opinions are in this Court entitled to the greatest possible respect upon questions bearing a very close analogy to that which we have to consider in this case. This basis of argument has been accepted by the respondents' counsel, and we entirely adopt it.

16. Before considering the law, it seems to us that the most convenient course will be to consider what the position of the parties was under the agreement of the 27th August 1863. By it the Raja was not bound to make any further advances to the firm, but the agreement evidently contemplated that he would do so; and in consideration of the past and future advances W.N. Watson and Co. agreed, so long as the liabilities of the firm to the Raja remained unextinguished, not to make any shipments without the Raja's consent; and when such shipments were made, to hold the shipping documents at the disposal of the Raja. They also agreed not to order any goods from home, either as remittances, or consignments, without the consent of the Raja; and whenever any remittances arrived either in goods or money, they were to be made over to the Raja and dealt with under his directions, and he was to be at liberty to apply the proceeds towards

the extinguishment of his debt. With regard to the consignments other than remittances, the proceeds of these when sold, were to be made over to the Raja, and remitted to the consignors with his sanction. It was also agreed with regard to the conducting of the office business in detail, that the Raja should be consulted, and that he might direct a reduction of the establishment, if he thought proper; and it was provided that no money should be drawn for the private expenses of the members of the firm, or for conducting the business of the firm, without the consent of the Raja; and that the Raja should have free access to all the books, documents, and correspondence of the firm. Then follows the clause which gives the Raja a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May 1662, until the Raja's debt was paid off and his liabilities extinguished. The title-deeds of the tea gardens were handed over to the Raja as a security for his advances; and the moveable and immovable property of the firm, present and future, was declared generally liable for the debts due to him by the firm. As far as it appears not one of these very sweeping powers was ever put in force by the Raja. A single sum of rupees 27,000 was credited to him as his commission on the profits of the business up to April 1863; but that sum was subsequently re-credited to the firm on account of subsequent losses, or losses subsequently discovered. It is, however, contended that we must look not to what actually occurred, but to the position in which the Raja was placed, and the powers which he might have exercised had he been so minded under the agreement.

17. Now had this question come before an English Court prior to the final decision in *Cox v. Hickman* 8 H.L.C. 268, there can be little doubt which way it would have been decided. We may test it by the judgment of Mr. Justice Blackburn in that case, upon the question referred to the Judges by the House of Lords. We select the judgment of that learned Judge not only because of his eminent ability and great commercial experience, but because he was evidently not satisfied with the rule which he felt compelled to apply; and he undoubtedly therefore, before he applied it, tested it with the utmost severity. But the learned Judge found himself bound by previous cases to say that whatever the parties may have contemplated, a participation in profits (otherwise than by a person in the service of the firm, as a remuneration for services performed) in itself, by operation of law, rendered the participator liable for the acts of the firm in the same manner as a principal is liable for the acts of his agent. Applying that principle to this case, we should also be compelled to hold that the Raja was liable.

18. But the decision of the House of Lords who felt themselves emancipated from the fetters of previous authority, produced a most important change in the law of partnership. It was there held that the argument, which had hitherto prevailed, that because a man was interested in the profits of a partnership therefore he was a partner, was fallacious; that participation in profits did not of itself constitute a partnership; that it was indeed right, in deciding whether or no a man was a partner, to consider whether or no he was interested in the profits, and their Lordships evidently attribute very great weight to that circumstance; but they emphatically put the question upon a wider ground. Henceforth,

according to that decision, the true question is not--Did the person sought to be made liable participate in the profits; but--has the trade been carried on by persons acting on his behalf?

19. The Judge of the lower Court has referred to this case, and professes to be guided by it; and notwithstanding the criticisms that have been made on the language of the judgment we think he has considered the question which has to be determined from the right point of view. It is objected in the first place that in stating the question to be considered, for "behalf" which is the term used by Lords Wensleydale and Cranworth, in their judgment in the House of Lords, he has substituted "benefit." This we think arose from the way in which the case was put before him. It was probably contended there, as it has been contended here, that in reality this was the Raja's business, carried on, as the saying here is, benami; and if that had been established, we should have said that being carried on for his benefit was the same thing as being carried on his behalf. As to what follows in the judgment, there is no doubt some slight confusion in the use of the words "principal" and "agent;" but we think it is clear that finally the Zilla Judge places the case in the proper light.

20. Considering therefore that this is a question more of fact than of law, and considering that the Judge of the Court below has in our opinion, considered the question which the House of Lords declared in *Cox v. Hickman* 8 H.L.C. 268 to be the right question, we should feel much hesitation in coming to a different conclusion; but it seems to us that the Zilla Judge, though he took up the right position with regard to the question he had to decide, attributed too much weight to the participation in profits. Of course, once having settled the question that participation in profits does not constitute partnership, but is only a fact which may be relied on as evidence of partnership, the cases in which the effect of a participation in profits has been considered are no longer precedents, upon which analogous cases can be decided, but only illustrations. Yet this is one of those questions in which it is highly useful to see what weight men of judgment and experience have attributed to that circumstance. From this point of view we refer to the case of *Bullen v. Sharp* 1 L.R.C.P. 86, and there it is clear that the majority of the Court attributed far less weight to the participation in profits than the Zilla Judge did in this case; and we may also add that Lord Wensleydale and Lord Cranworth seem to intimate that they would do, if you construe literally the expression they used in *Cox v. Hickman* 8 H.L.C. 268. It seems to us from that case, and also from the case of *Kilshaw v. Jukes* 3 B. & S., 847, that the Judges in England are inclined to use freely the power which the decision in *Cox v. Hickman* 8 H.L.C. 268, conferred upon them of looking at this question according to the real circumstances and the intention of the parties. For our own part, we gladly avail ourselves of that power, and doing so we can only come to one conclusion, namely that the Raja is not liable for the debts of the firm of W.N. Watson and Co. We are asked to find in this case that the plaintiffs sold and delivered goods to the Raja; that they paid money for the use of the Raja; that they lent money to the Raja; and that they started accounts with the Raja. These are not mere words; they must be proved, for they are the

causes of action. The argument is that all this was done between the plaintiffs and the two Watsons; and that the Watsons were agents of the Raja in these transactions. If that is true, the Raja is liable; but is it true? We find not the smallest evidence of fraud on the part of the Raja, and we are perfectly clear it was never his intention to make the Watsons in any way his agents. And we agree with Bramwell, B., that to say that a man is liable on a contract, though there has been no fraud, and though no one concerned intended that he should be liable, is a proposition which carries its own refutation.

21. It was a good deal pressed upon us in the course of the argument, that to decide this case in favour of the Raja, would favour the practice of persons carrying on business under fictitious names; and that in this country on account of the inveterate habit which prevails of keeping back the names of the real parties even in the most trivial transactions, it was especially necessary to be on one's guard against encouraging such a practice. So far as any danger of persona carrying on their own business in the names of other persons is concerned, it is perhaps sufficient to say that the present, as already pointed out, is not such a case; and we should feel no difficulty, where such a case is established, in dealing with it. And as to another somewhat similar suggestion, that parties will set up in business men of straw without incurring any liability themselves, we must say that this danger has always appeared to us somewhat exaggerated. The simple fact is that it cannot be done. Take the present case for an illustration. Suppose the Watsons, being without money, and without credit sufficient to enable them to carry on business, to be what are usually called men of straw; could the Raja have started them in business without incurring liability; could he, without doing so, have increased their credit? Not by a single rupee. Only by advancing money in hard cash, or which comes to the same thing, by accepting their bills, and so adding his credit to theirs, could he enable them to carry on business. And at every step the same process would be repeated. Every new advance, it is true, procured them fresh credit, but the Raja's liability increased exactly in the same proportion, until at length it reached nearly four lacs of rupees, which the Raja has had to pay; so that the question really in cases of this kind is, not whether it shall be lawful to carry on business through men of straw without incurring liability, for that is impossible; but whether a man, when he advances money to others to enable them to carry on business, shall be allowed to measure his responsibility; whether, provided he commits no fraud and misleads no one, he may give to another, without risking everything he has in the world, as much credit as the command of a certain sum of money will give and no more, securing to himself a share of the profits which may arise from the employment in business of the money so advanced if the business turns out well, and losing the money advanced if it turns out ill. We think the evils which are likely to arise from such an arrangement have been overstated. It might be proper that the claim of a person who thus advanced capital to repayment, should be postponed to the claims of the general creditors. It might also be desirable that there should be some system of registration which would distinguish firms which carried on business with borrowed capital from those which carried it on with their own. But we can see nothing in such transactions which would justify a sweeping law prohibiting them, nor, since *Cox v. Hickman* 8 H.L.C.

268, do we consider that any such rule of law exists.

22. We have not hitherto referred to the provisions of Act XV of 1866, because it was not in force when these transactions took place; but it appears to us that those provisions at least show that the legislature do not foresee the dangers which have been predicted from allowing persons to share in the profits of a trading concern without incurring unlimited liability. The result is that, in our opinion, the decision of the Court below ought to be reversed, the decree in favour of the plaintiffs ought to be set aside, the suit dismissed, and the plaintiffs must pay the costs both here and in the Court below.

⁽¹⁾ The Memorandum of Agreement is set out in full in the text, see 3 B.L.R. post p. 339.