

Grihi Nath Chowdhury Vs Baij Nath Ram Marwari and Another

Court: Calcutta High Court

Date of Decision: April 28, 1910

Citation: 6 Ind. Cas. 412

Hon'ble Judges: Lawrence Jenkins, C.J; Doss, J

Bench: Division Bench

Judgement

Lawrence Jenkins, C.J.

This appeal arises out of an ordinary suit to recover a money-claim, and that money-claim had its origin in the

price of goods sold and a loan taken, The indebtedness was evidenced by a rukka executed in favour of the plaintiffs by defendants Nos. 1 and 2.

There is no doubt as to the liability of these defendants, and the only question now is as to the liability of defendant No. 3. All these three

defendants were at one time members of a joint family, but in April 1877, there was a separation. The indebtedness in respect of which the suit is

brought arose in 1904, and the rukka was executed on the 2nd April in "that year. The ground on which the plaintiffs by their plaint sought to bring

liability home to defendant No. 3 is expressed in these terms: Though defendant No, 3 is not the executant of the rukka, yet because he too has

been benefited by the said loan, therefore, he is bound to pay the debt due to the plaintiffs". By way of defence it was alleged by defendant No. 3

in his written statement that the rukka on the basis of which the suit was brought was executed by defendants Nos. 1 and 2, and not by him, and

so, he submitted, he was not bound by it : and he went on to aver that the cloths etc., for which the rukka was alleged by the plaintiffs to have been

executed, were not taken for his use, and, therefore, he could not be liable for it, and that the rukka was not joint as alleged by the plaintiffs.

2. The first and second defendants, however, sought to bring in. their relative, defendant No. 3, as a sharer of their responsibility, and they set up in

their written statement a family arrangement evidenced by a memorandum executed on the 31st July 1905. The occasion of this memorandum was

family quarrels which led to Criminal proceedings, which were composed by the intervention of a pleader of Bhagalpur. The case of the first and

second defendants in their written statement was that by reason of this memorandum defendant No. 3 was responsible with them for the claim that

was being vindicated in this suit. Though it was not so pleaded by the plaintiffs, they have also adopted this theory in the course of the litigation.

There can be no doubt that this memorandum provides as between the three defendants that this liability and many others should be treated as joint

liabilities. But the plaintiffs were not parties to the memorandum or to the transaction, so that the very obvious question that suggests itself at the

outset is, how are the plaintiffs entitled to sue defendant No. 3 in their circumstances? I have indicated what the plaintiffs' own case was on the

plaint, that is to say, that the third defendant had been benefited", that is a theory that has been negated by the findings of the lower Courts, but

notwithstanding that, the lower appellate Court reversing the decision of the Munsif has granted a decree against defendant No. 3, and this decree

has been confirmed on appeal by the learned Judge of this Court. In my opinion, this decision is erroneous. Having regard to the nature of the claim

and all the circumstances, it is to my mind manifest that there was no contractual relation established between the plaintiffs and defendant No. 3

and there was nothing on which to base a liability arising out of contract. Mr. Chuekerbutty has argued the case on behalf of the plaintiffs and

defendants Nos. 1 and 2, the respondents before us, with his usual ability and has in effect asked us to hold, first, that the memorandum itself

operated as a declaration that the three defendants were members of a joint family, and that it had so potent effect as to create that status at any

rate for the purposes of this suit, Mr. Chuekerbutty had to concede that it amounted to an estoppel. But at once the difficulty arises whether it

would be possible in the circumstances to contend that three defendants could not, if so minded, have altered that arrangement. It had to be

conceded that this could not be contended. Then it was suggested, that this point was raised now in this Court for the first time. As I have read the

pleadings and the judgment of the Munsif, that is not so; for, I think, the point was distinctly raised in the pleadings; and, the issues formulated in the

Munsif's Court point to this as being a matter on which defendant No. 3 relied as an answer to the claim advanced against him by the plaintiffs. I,

therefore, think that we cannot take seriously the suggestion that had this point been raised, evidence "Would have been, forthcoming which could

have enabled the plaintiffs to formulate some equitable grounds on which they could claim for themselves the right to sue on the basis of this

arrangement. Had the plaintiffs attempted to do so, then it seems to me they would have been met by the objection that they were travelling

beyond the scope of their plaint. I, therefore, think that not only is the point that has been raised on behalf of defendant No. 3 a sound point, but is

a point to which effect can legitimately be given even at this stage. " Though this leads to "" the result that defendant No. 3 is not liable to the

plaintiffs in this suit, that can have no effect on any question that may arise as between the defendants themselves; on that we say nothing.

3. The result is that we must set aside the decrees of Mr. Justice Brett and of the lower appellate Court and restore that of the Subordinate Judge.

4. The appellant before us is entitled to his costs of the lower appellate Court and of the hearing before Mr. Justice Brett as well as of this appeal.

5. This judgment will govern the analogous Appeal No. 40 of 1909.

Doss, J.

6. I agree.