Privy Council Appeal No. 21 *of* 1937

Sir Hukumchand Sarupchand, Kt. - - - - *Appellant*

v.

Hansraj Harji 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 7TH APRIL, 1938.

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD WRIGHT.]

The question in this appeal is whether a firm called Hukmichand Rambhagat and Company (hereafter for convenience described as H.R. & Co.) consisted at the material times of two partners, namely, Hansraj Harji the first respondent and a firm of Hukmichand Rambaghat (hereinafter described as H.R.) or of three partners, namely, the first respondent and two other persons, the appellant and the second respondent Mamraj Rambaghat, who were the partners in H.R. In other words were there three separate partners, or only two? The importance of the question is that H.R. & Co. sustained heavy losses and has been wound up, and the second respondent is also insolvent. Hence if H.R. were as a firm partners in H.R. & Co., H.R., in which the appellant is now the solvent partner, will have to make good the loss in respect of H.R. & Co. in the proportion of 12 annas in the rupee to 4 annas, which is the share of the first respondent, whereas if the appellant and the second respondent were separate partners in H.R. & Co. in equal proportions of 6 annas each, the liability of the appellant will be proportionately reduced.

The facts may be thus summarised. The appellant, who is a business man on a large scale, having his principal place of business at Indore, was concerned in many subsidiary partnerships in other parts of India. Among these was the firm of H.R., which had its principal office at Bombay. In 1916, he decided to embark on business operations in Japan and for that purpose the firm of H.R. & Co. was formed, its partners being the firm H.R., the first respondent and one Vali Mahomed, who was in charge of the Kobe or Japan branch. The shares were at first Vali and the first respondent $2\frac{1}{2}$ annas each, H.R. 11 annas. The partnership

agreement was in writing and was originally for three years. H.R. provided the capital. At the end of 1919, the agreement was extended for a further period of three years and the partners' shares were varied, Vali's share being increased to 3 annas and the share of H.R. being decreased to 10½ annas. This was indorsed on the agreement. About the end of 1921, it was discovered that Vali had been guilty of irregularities in Japan. It was decided to dissolve the partnership. Vali was to go out and his share of 3 annas was to be divided into two parts, 1½ annas share going to the first respondent, the other 1½ annas share going to the other partner or partners, so as to make a 12 annas share. The dispute is whether at the same time, what had been beyond question up to that time the undivided interest of H.R. was split up into two separate and equal shares of 6 annas each, one share being that of the appellant and the other that of the second respondent. Wadia J. accepted the appellant's evidence that this had been agreed at an interview in December, 1921, at which the two respondents were present or represented, though Vali was neither present nor represented. The High Court in appeal found it impossible to take that view, as the onus to establish this change in the constitution of H.R. & Co. rested on the appellant and in their opinion he had failed to satisfy that onus. The High Court in appeal accordingly allowed the appeal from Wadia J. and declared that the shares in H.R. & Co. were 12 annas in the rupee for the appellant and second respondent as partners in H.R. and 4 annas in the rupee for the first respondent. The appellant now appeals.

The question is purely one of fact, partly depending on the voluminous oral evidence, partly on a number of documents, partly on the probable inferences from proved facts. Wadia J. really decided the case on the oral evidence of the appellant, as to what passed at the interview referred to above. He said he regarded the appellant as a generally reliable witness, though on certain not unimportant matters he could not accept his evidence. On the other hand, he rejected the evidence of the other side denying that any such arrangement changing the constitution of H.R. & Co. had been arrived at. There was no corroboration of the appellant's testimony as to the material allegation, unless some corroboration is to be found in the accounts of H.R. & Co. kept at Bombay for the years 1926 to 1928 inclusive, which show the profits of H.R. & Co. as credited in equal 6 annas shares to the appellant and to the second respondent. The same position appears in statements sent to the appellant at Indore from Bombay and in the appellant's books kept at Indore. The Bombay books were kept at Bombay by the first respondent, in the same office as that of the appellant. There were no profits after 1928, and before 1926 the books are not forthcoming, so that it is impossible to say if any change was made after 1921. There is no evidence which explains satisfactorily why these books were not produced and there is no ground to justify holding that one party or the other was guilty of deliberately keeping them back.

These accounts undoubtedly form some evidence of a division of the profits of H.R. & Co. in 6 annas shares to the appellant and the second respondent as separate partners, but on the other hand they may do no more than show the distribution of the profits which was actually followed, splitting up what was *quoad* H.R. & Co. the 12 annas share of H.R. into the equal shares of the two partners in H.R. It is impossible in any event to infer from these accounts the agreement which the appellant alleges. It is therefore necessary to decide whether his evidence can be accepted on this matter. It is true that the appellant has been believed on this part of his evidence by Wadia J., and that the learned Judge had the advantage of seeing and hearing him. But even so, in this, as in other cases, an Appellate Court, which is a Court of Appeal on facts as well as law, so that the appeal is a rehearing, may have to consider whether there are not such surrounding facts as make it impossible to accept the finding of the Judge. And in the present case it must also be remembered that the onus is on the appellant to establish the change in the firm which he alleges.

The High Court have come to the conclusion, which is carefully explained in the judgments of Beaumont C.J. and Rangnekar J., that the appellant's case cannot be accepted. Their Lordships agree with that conclusion. As they also agree in substance with the reasons of the Judges of the High Court, they can state their own reasons briefly.

It was not till 1930 that H.R. & Co.'s financial difficulties had to be dealt with, and the position created by the insolvency of the second respondents had to be arranged. There came into existence one document which in their Lordships' judgment cannot be regarded as other than conclusive against the case made by the appellant. It was necessary to wind up the affairs in Japan of H.R. & Co. and for that purpose a power of attorney was prepared appointing a firm of Gokaldas Dossa & Co. of Japan to act for the winding up in Japan of H.R. & Co.'s business and affairs. It is obvious that if the power were to be effective it was necessary that it should be executed by and in the name of the partners of H.R. & Co. The document which was prepared in Bombay by the appellant's solicitors was sent to the appellant's Indore office for execution from the appellant's Bombay office on the 23rd August, 1930, and was not returned to Bombay until the 18th September, 1930. It was expressly sent to obtain the signature of the appellant in the name of H.R. in the presence of a Government official. It was in fact on the 16th September, 1930, executed by the appellant personally in the name of H.R. in the presence of the Resident Magistrate at Indore, and was then returned to Bombay, where it was executed by the first respondent. The document recites that H.R. and the first respondent were carrying on business at Kobe and Osaka under the firm style of H.R. & Co. It seems clear that the execution of this document could not have taken place if the appellant's story was true. The

appellant at the trial volunteered an explanation which Wadia J. rejected. He was not prepared to accept the appellant's elaborate description of a conversation between him and the first respondent, in which the first respondent was said to have requested the appellant to sign the power of attorney. Wadia J. suggests that the appellant may have signed the document inadvertently. But that seems incredible for many reasons. It is clear that not only was the document carefully prepared, but must have been examined by the appellant's standing legal adviser, Mr. Jal, at Indore and by his munim at Bombay, Mr. Ramgopal. The only possible inference is that it was not until after the date of this document that the case was advanced that the appellant's liability in respect of H.R. & Co. was limited to a 6 annas share. The action was not commenced until the 13th October, 1931, and even then, though it was alleged in the plaint that the appellant held a 6 annas share in H.R. & Co., the first respondent a 4 annas share, and the second respondent a 6 annas share, no particulars of any interview or conversations were given until the appellant gave his evidence at the trial in 1935. There is no written record of it. It is a curious story. No explanation is given why this change in constitution of the firm H.R. & Co. should have been made. The date stated by the appellant about the middle of December, 1921, appears impossible, because Vali did not arrive from Japan until about the end of December, 1921. He was a necessary party to the dissolution and the reconstitution of H.R. & Co., but the appellant does not say he was present at any discussion. There were many matters to be canvassed, such as the readjustment of the 3 annas share which had been that of Vali. Yet no evidence is forthcoming of any interview or discussion on these matters.

There were three other documents brought into existence in 1930 which have been relied on by the first respondent as inconsistent with the appellant's story. One was a written assignment by the appellant dated the 17th April, 1930, of all monies due on taking the accounts to the appellant from the second respondent in respect of the various businesses carried on by him in partnership with the second respondent, and in some cases with other partners as well. This document in one of its recitals states that the appellant was carrying on business in partnership with the second respondent and the first respondent in the name of H.R. & Co. in Japan, and in the firm of H.R. & Co. the share of the first respondent was 4 annas and the remaining share of 12 annas belonged in equal shares to the appellant and the second respondent. This recital is clearly inconclusive. The composition deed entered into between the second respondent as debtors and trustees for their various creditors, including H.R. & Co., contains in a schedule among the firms in which the second respondents were partners, the firm H.R. & Co., and gives the names of the partners as H.R. 12 annas, Hansraj Harji 4 annas. This document was signed by Ramgopal, the appellant's munim

in Bombay in his capacity as one of the trustees for the creditors. No doubt in a sense Ramgopal in doing so represented the interests of the appellant, but their Lordships do not regard this as an admission binding the appellant. At the same time it was a matter of serious comment that Ramgopal, though present throughout the trial, was not called by the appellant, and indeed at a later stage when the first respondent sought to call him the appellant's counsel successfully placed difficulties, so that in the result he was not called.

There is also a notice of dissolution of H.R. & Co. dated the 3rd April, 1930, which describes H.R. & Co. as composed of the first respondent and H.R., but that again was not a document signed or issued by the appellant, and may be disregarded for this purpose.

On the whole case, their Lordships are of opinion, in agreement with Beaumont C.J. and Rangnekar J., that the appellant has failed to discharge the onus which rests upon him to establish that the single share held by him and the second respondent in H.R. & Co. was split up into two separate shares. They are accordingly of opinion that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

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In the Privy Council.

SIR HUKUMCHAND SARUPCHAND, Kt.

v.

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DELIVERED BY LORD WRIGHT

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