NARAYANAN v. COMMISSIONER OF INCOME-TAX, MADRAS.

LEACH C.J.

were $16,047 and his loss at Ipoh amounted to $6,598. The profit was therefore $9,449. It was only to this extent that the Income-tax Officer could hold that the remittance was out of profits. The decision on the question whether a particular remittance represents profits or capital will turn on the particular facts of each case, but there can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

The reference having been answered in favour of the assessee there will be an order for costs in his favour. These we fix at Rs. 250. His deposit will also be refunded.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1938, September 29.

T. MUHAMMAD SHAMSUDDIN RAVUTHAR & BROS. (FIRST DEFENDANT), APPELLANTS,

v.

MESSRS. SHAW WALLACE & COMPANY AND TWO OTHERS (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 233—Principal and agent—Agent personally liable—If both principal and agent could be sued.

In India under section 233 of the Indian Contract Act a person can sue both the principal and the agent in a case where the agent is personally liable.

The dictum of COUTTS TROTTER C.J. in *Kuttikrishnan Nair* v. *Appa Nair*(1), that the section could only be construed as

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* Original Side Appeal No. 49 of 1936.

(1) (1926) I.L.R. 49 Mad. 900.

meaning that a plaintiff might sue both the principal and the agent in the alternative but he could not get judgment against both of them jointly for the amount sued for, *dissented from.*

APPEAL from the decree and judgment of WADSWORTH J., dated 7th May 1936 and passed by the High Court in its Ordinary Original Civil Jurisdiction in Civil Suit No. 173 of 1931.

T. L. Venkatarama Ayyar for appellants.

V. V. Srinivasa Ayyangar for second respondent.

R. Sundararajan for third respondent.

First respondent was not represented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant firm and the firm of M. A. P. Muhammad Hussain Ravuthar & Sons (now represented by the Official Assignee, the third respondent) were defendants in a suit instituted on the Original Side of this Court by the first and the second respondent firms. The first respondents are a firm of European merchants carrying on business in Madras. The second respondents are their "guarantee brokers", which means that for consideration they guarantee to the first respondents the fulfilment of the obligations of those contracting with them. The appellants are manufacturers of brass and copper articles and carry on their business at Pettai, Tinnevelly. The firm of M. A. P. Muhammad Hussain Ravuthar and Sons (for the sake of convenience I will hereafter refer to this firm as "the M.A.P. Firm") were merchants and commission agents carrying on business at Pettai, Madras and Bombay, with their

LEACH C.J.

SHAMSUDDIN RAVUTHAR v. SHAW WALLACE & Co.

LEACH C.J.

head office at Pettai. The suit was filed to recover a sum of Rs. 16,940-11-10 in respect of contracts entered into by the M.A.P. Firm with the first respondents for the purchase of brass sheets. Of this sum, Rs. 1,008-10-5 represented a claim for damages for breach of a contract dated 22nd January 1930, the balance representing the price of goods sold and delivered under earlier contracts. The figures are not in dispute and the liability of the M.A.P. Firm is admitted, but as they were insolvents and a decree against them alone would be infructuous it was sought to make the appellants also liable. The plaintiff-respondents alleged that the appellants through their principal partner, one Muhammad Shumsuddin Ravuthar, had guaranteed the liabilities of the M.A.P. Firm. This was their main contention in the Court below, but they advanced other pleas which may be summarised as follows:—(i) The business of the M.A.P. Firm was really the business of the appellants, (ii) if the business of the M.A.P. Firm did not belong to the appellants absolutely, the members of the appellant firm must be regarded as partners in the M.A.P. Firm and (iii) in any event, the M.A.P. Firm acted as the agents of the appellants for the purposes of the contracts with the first respondents.

The case was tried by WADSWORTH J., who held that the alleged guarantee had not been proved, but granted a decree against the appellants on the ground that they were principals and that the M.A.P. Firm were merely their agents. Although he did not say so, the learned Judge seems to have treated the appellants as undisclosed principals. The appellants deny that the M.A.P. Firm were their agents. They say that the M.A.P. Firm dealt with the first respondents as principals and that they had nothing to do with the

contracts. The plaintiff-respondents contend that the learned Judge erred in holding that the guarantee had not been proved. They maintain that the appellants and the M.A.P. Firm are really one and the same firm, but, if not, the appellants are liable as the contracts were entered into by the M.A.P. Firm as the agents of the appellants. The plea of partnership has been abandoned in this Court, but the appeal throws open all questions except that of partnership.

The appellant firm consists of three brothers, Muhammad Shumsuddin Ravuthar, Muhammad Ghanni and Peer Mohideen. The M.A.P. Firm was founded many years ago by one M. A. P. Muhammad Hussain Ravuthar, the brother-in-law of the partners in the appellant firm. When the M.A.P. Firm was started the appellant firm had not been constituted. Muhammad Hussain Ravuthar had with him as his partners his two sons, Muhammad Yusuf Ravuthar and Muhammad Abu Bakar Ravuthar. The business was that of general merchants and commission agents. Muhammad Hussain Ravuthar died on 1st December 1927 when his sons were aged 32 and 28 years respectively. After the father's death the sons carried on the business. The M.A.P. Firm supplied goods to the appellants as principals and also as commission agents. It is the appellants' case that in so far as brass and copper sheets were concerned the M.A.P. Firm were the actual sellers, unless such goods were obtained from Bombay in which case they were supplied on a commission basis. It is clear that from 1925 onwards the M.A.P. Firm had not sufficient capital to finance their contracts with the appellants. The result was that the appellants had to make advances to the M.A.P. Firm. At the end of the financial year in 1926 the books of the M.A.P. Firm showed

SHAMSUDDIN RAVUTHAR v. SHAW WALLACE & Co.

LEACH C.J.

that the appellants were creditors for the sum of Rupees 16,338–13–4. At the end of 1927 the M.A.P. Firm owed the appellants Rs. 10,433–4–7; at the end of 1928, Rs. 27,432 and at the end of 1929, Rs. 21,235–6–9. The partners of the M.A.P. Firm were adjudicated insolvents on 24th April 1930 and at that time they were indebted to the appellants in the sum of Rs. 15,421–10–3 in respect of advances made. The appellants have in fact proved in the insolvency as creditors for this sum.

It is admitted that according to the books of the respective firms the M.A.P. Firm bought as principals brass and copper sheets and sold a large proportion of their purchases to the appellants.

[His Lordship discussed the evidence and held that the allegation that the appellants had guaranteed the first respondent had not been proved and that the appellants and the M.A.P. Firm were not one and the same entity, and proceeded :]

The question which remains to be considered is whether the M.A.P. Firm acted in the transactions in suit as agents for undisclosed principals, but before alluding to the facts it is necessary to deal with a legal argument advanced by the learned Advocate-General on behalf of the appellants. He says that it is not open to the plaintiff-respondents to contend that the appellants were principals because the second respondent had already proved in insolvency against the M.A.P. Firm. He says that the doctrine of election here comes in and the proof in insolvency amounts to obtaining a judgment against agents which precludes a suit being subsequently maintained against their principals. In this connection he has cited *Morel Brothers & Co., Limited* v. *Earl of Westmorland*(1),

(1) [1904] A.C. 11.

Moore v. *Flanagan and Wife*(1) and *Firm of R.M.K. R.M.* v. *Firm of M.R.M.V.L.*(2). In the case of *Morel Brothers & Co., Limited* v. *Earl of Westmorland*(3) the House of Lords held that a judgment signed against one defendant was conclusive evidence of an election not to proceed against the other and, following this decision, the Court of Appeal in *Moore* v. *Flanagan and Wife*(1) held that the plaintiff having signed judgment against the agent could not afterwards recover judgment against the principal in respect of the same debt. The case of *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.*(2) was decided by the Privy Council on an appeal from a judgment of the Supreme Court of the Straits Settlements. A judgment had been obtained against the agent of a local money-lending firm, but in a subsequent suit it was sought to make the firm liable. The Judicial Committee, however, held that the second suit did not lie. These decisions expound the law of England and of the Straits Settlements, but it does not necessarily follow that the law in British India is the same. We are here governed by the provisions of the Indian Contract Act, and section 233 of that enactment states that, in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable. An illustration is given to the section and it is in these words :

"A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton."

Therefore, there is in India a statutory provision allowing a plaintiff to sue both the principal and the

(1) [1920] 1 K.B. 919. (2) [1926] A.C. 761.
(3) [1904] A.C. 11.

SHAMSUDDIN RAVUTHAR v. SHAW WALLACE & Co.

LEACH C.J.

agent in a case where the agent is personally liable. In *Kuttikrishnan Nair* v. *Appa Nair*(1) COUTTS TROTTER C.J. expressed the opinion that the section could only be construed as meaning that the plaintiff might sue both the principal and the agent in the alternative, but he could not get judgment against both of them jointly for the amount sued for. I find myself unable to accept this construction. There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter, but we are not called upon to consider that question here. Even if proof in insolvency amounted to a judgment for the purposes of the doctrine of election—I express no opinion on the point—it appears that the action which the second respondent took in the Insolvency Court was entirely without prejudice to the rights of the parties in this suit. For these reasons we reject the argument of the learned Advocate-General that it is not open to the plaintiff-respondents to advance in this suit the plea that the appellants were principals.

The learned Advocate-General is, however, on much firmer ground when he says that the evidence does not warrant the conclusion that the M.A.P. Firm were agents of the appellants. As I have already pointed out, the M.A.P. Firm dealt with the first respondents as principals and they sold to the appellants as principals. The books and the course of dealing are entirely inconsistent with the suggestion that the M.A.P. Firm were acting as agents of the

(1) (1926) I.L.R. 49 Mad. 900.

appellants. But there is also a letter which shows that the two firms were distinct. On 29th May 1928 the Madras agents of the M.A.P. Firm when writing to the appellants at Pettai in respect of a shipment of brass sheets enclosed the bills of lading and asked that as soon as they were received by the appellants they should take "the signature of the principal and do the needful". The principal was the M.A.P. Firm in Pettai.

The learned trial Judge observed that if the M.A.P. Firm were merely selling to the appellants it is inconceivable that the appellants would have been a large creditor of the M.A.P. Firm. Considering that the partners in the appellant firm were the uncles of the partners in the M.A.P. Firm there is nothing extraordinary in this financial aid. Moreover the appellants were requiring brass sheets for their own business and if they wanted to secure their requirements from the M.A.P. Firm, which was only natural considering the relationship, they had to finance the transactions. They had to finance transactions at a time when the two firms were deemed by the plaintiff-respondents to be distinct. The learned trial Judge considered that the action of the M.A.P. Firm in quoting market prices to the appellants' firm, not their own selling prices, and asking for instructions regarding the placing of orders was evidence that they were acting as agents. We do not view the position in this light as I have already indicated. There was undoubtedly a close connection between the two firms, but there is no evidence which in our opinion justifies the conclusion that the M.A.P. Firm acted in these transactions as agents for the appellants. In fact we regard the evidence as pointing directly the other way.

SHAMSUDDIN RAVUTHAR v. SHAW WALLACE & Co.

For these reasons we allow the appeal and the suit will be dismissed with costs both in this Court and in the Court below against the plaintiff-respondents.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

1938, September 20.

M. PARAMASIVAM PILLAI (FIRST PLAINTIFF), APPELLANT,

v.

A.V.R.M.S.P.S. RAMASAMI CHETTIAR AND ANOTHER (THIRD DEFENDANT AND FIFTH PLAINTIFF), RESPONDENTS.*

Surety bond—Stay of proceedings pending appeal—Surety bond executed as a condition of, providing for payment of specified amount in event of appellant's failure in that appeal—Failure of appellant in that appeal but success in Letters Patent Appeal therefrom—Enforceability of liability under bond in case of—Code of Civil Procedure (Act V of 1908), Appx. G, Form No. 2—Modification of, so as to provide for more appeals than one—Desirability of.

In a suit upon a mortgage a receiver was appointed at the instance of the mortgagee. The third defendant in the suit filed an appeal, Civil Miscellaneous Appeal No. 375 of 1931, in the High Court against the order appointing the receiver and along with the appeal filed an application for stay of further proceedings by the receiver. Stay was ordered on condition of the third defendant giving security for one year's income from the mortgaged property fixed at a sum of Rs. 1,600. In accordance with that order the third defendant executed a surety bond which provided: "If the C.M.A. No. 375 of 1931 preferred by me to the High Court against the order appointing receiver is decided in favour of the said first

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* Appeal Against Order No. 378 of 1936.