APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1940

Feb. 14.

BILASROY AND ANOTHER

v.

THE SCINDIA STEAM NAVIGATION CO., LTD.*

Contract of carriage of goods by sea—Burma Carriage of Goods by Sea Act, ss. 2, 4 ; art. 2, art. 3, rule 6—Incorporation of terms of Act into contract—Damage to goods during transit—Cause of action on contract, not tort—Limitation—Suit by partners of a dissolved firm—Unregistered firm—Registration during pendency of suit—Conclusive proof of statements in certificate—Partnership Act, ss. 42, 68, 69.

Where under a contract to which all the terms and conditions of the Burma Carriage of Goods by Sea Act are to apply, a claim is made against the carrier for damages for deterioration in the value of goods owing to their being stowed in an unsuitable place on board the ship, the liability arises under the contract and not by way of tort. A suit to enforce such liability must be brought within one year from the date of delivery of the damaged goods.

Registration of a firm which has been dissolved is not contemplated by the Partnership Act, and the partners of a dissolved firm which has not been registered may, under s. 69 (5) of the Act file a suit to realize the property of the dissolved firm.

But if the partners at the hearing of the suit tender in evidence a certified extract from the Register of Firms maintained by the Registrar of Firms showing that a partnership commencing from the date of contract in suit has been still subsisting between the partners, they are bound by such statement in view of s. 68 (1) of the Partnership Act and it is conclusive proof as against them of the facts stated therein. Further, assuming that a firm may effect registration after filing such a suit, it can only validate the suit from the date of registration and if such date is more than a year from the date of the cause of action, the suit must fail.

P. K. Basu (with him *Kalyanvala*) for the appellants. S. 69 (2) of the Partnership Act, as its wording implies, applies to cases arising out of contract and not out of tort. The present action is based on negligence in failing to take proper care of the goods entrusted to the defendant. Under clause 17 of the Schedule to the Carriage of Goods by Sea Act there was a statutory obligation imposed on the defendant, and clause 8

* Civil First Appeal No. 143 of 1939 from the judgment of this Court on the Original Side in Civil Regular Suit No. 64 of 1938.

thereof gives a right of action to the plaintiff for failure to perform the statutory duty. A breach of statutory duty which results in damages is actionable as a tort. *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (1); *P. B. Bose* v. *M.R.N. Chettiar Firm* (2).

Even if the original relationship had arisen from contract yet, if, apart from contract, there was a tort the plaintiff could waive his right of action under contract and sue in tort. For example, a doctor's negligence is actionable apart from contract—*Harnett* v. *Fisher* (3). The same principle applies when the plaintiff submits himself or his goods to the special care of the defendant. *Heaven* v. *Pender* (4); *Le Lievre* v. *Gould* (5); Clerk & Lindsell on Torts, at p. 261.

In a series of decisions in England it has been held that a passenger in a train has a remedy in tort for injury caused to him by the negligence of the Railway authorities, which is a remedy in addition to, and apart from or in spite of the contract between the parties. *Hayn* v. *Culliford* (6); *Vosper* v. *Great Western Railway Company* (7); *Elder Dempster & Co.* v. *Patterson Zochonis & Co.* (8).

In the present case the plaintiffs are suing "in spite of" the contract. The contract provides that the defendant shall not be liable for negligence, but by reason of cl. 17 of the Schedule the defendant cannot contract himself out of this statutory liability. *Fagan* v. *Green & Edwards, Ltd.* (9).

No issue on partnership has been raised by the pleadings. The mere use of the word "partner" or "partnership" does not necessarily make a joint venture a partnership. S. 6 of the Partnership Act;

(1) (1934) A.C. 1.
(2) [1938] Ran. 303.
(3) (1927) A.C. 573.
(4) 11 Q.B.D. 503, 510.
(5) (1893) 1 Q.B. 491, 504.
(6) 4 C.P.D. 182.
(7) (1928) 1 K.B. 340.
(8) (1924) A.C. 522.
(9) (1926) 1 K.B. 102.

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Annamalai Chettiar v. *A.M.K.C.T.M. Chettiar* (1). If an issue had been framed the plaintiffs could have shown as a matter of fact that there was no partnership at all, and that they were merely joint promisees.

Even assuming there was a partnership it was dissolved when the joint venture came to an end. S. 42 (*b*) of the Act. Consequently, the present suit would be a suit for the recovery of property of a dissolved partnership, and s. 69 (3) applies. No registration is necessary.

Beecheno for the respondent was called upon only on the question of dissolution of partnership and registration. S. 69 (3) (*a*) has no application to this case. This was a suit, not to recover the property of a dissolved firm, but to enforce a right arising from a contract on behalf of a firm existing but unregistered at the date of the institution of the suit.

The partnership was registered on the 12th August 1939, and the certified copy of entry relating to the registration is, under s. 68, conclusive proof of the existence of the firm. The Act does not contemplate the registration of a dissolved firm. See the wording of s. 58 and the observations of Beaumont C.J. in *Nijlingappa* v. *Subrao Babaji* (2).

P. K. Basu in reply. The rights of the parties are to be determined as at the date of the suit, and the Court cannot take into account anything happening thereafter, *Smith* v. *Heptonstall* (3). The mere fact that the appellants mistakenly registered a dissolved firm should not affect their rights as at the date of the institution of the suit.

S. 68 of the Registration Act renders conclusive statements under s. 58, but a statement as to whether a

(1) I.L.R. 8 Ran. 645 (P.C.). (2) I.L.R. [1938] Bom. 104.
(3) [1938] Ran. 6.

firm has been dissolved or is functioning is not covered by s. 58 or s. 68. This is a matter for proof, and there cannot be any conclusive evidence by implication.

A firm cannot register itself after it has ceased to exist. Such registration would be a nullity.

ROBERTS, C.J.—This was a suit brought by the appellants for the recovery of Rs. 22,773-7-3 as damages against the respondents in connection with a consignment of potatoes which was carried for reward by the respondents in pursuance of a contract with the appellants in the steamship Jalaratna proceeding from Moulmein to Calcutta in the month of October 1937. The potatoes were alleged to have been stowed in an unsuitable place on board the vessel by the respondents, and by reason of the respondents' negligence to have become overheated and to have suffered a consequent reduction in value which is represented by the damages claimed.

At the close of the examination of Mr. Bilasroy, the first appellant, the learned advocate for the defendants drew attention to the fact that the witness had said: "Ganpatroy is my partner. His share is half in the business in profits and losses. The partnership has not been registered." In examination-in-chief he had said: "I have never done business in partnership with the second plaintiff except in this particular transaction, the subject matter of this suit." This was on the 10th of August 1939.

The case came on for further trial on the 15th of August, when the learned advocate for the plaintiffs produced a certified true extract from the Register of Firms by the Registrar of Firms at Rangoon showing that a partnership between the appellants was registered on the 12th August, 1939. The date of the commencement of the partnership is given upon the certificate as

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the 15th September, 1937, and this is the very date on which the contract in this suit was made. At the time of producing this certificate the learned advocate for the plaintiffs said that he did not admit that the plaintiffs were ever partners.

By section 69 (2) of the Partnership Act, no suit to enforce a right arising from a contract shall be instituted in any Court on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

The learned Judge held that the plaintiffs were partners in the transaction. Having referred to the provisions of sections 4, 8 and 42 of the Act, he came to the conclusion that there was cogent evidence that they had at least carried on a business in particular adventures or undertakings and, as I understand him, that the fact that they had registered themselves on the 12th of August 1939 and described the partnership as having commenced on the 15th September, 1937, was conclusive proof (by reason of section 68 of the Act) as against them of the facts therein stated.

He then considered what would happen if the suit was deemed to have been instituted on the date of registration.

It has been a matter of differing judicial opinions whether it is permissible to deem this, and I express no opinion on the point because, putting it in the way most favourable to the appellants, if so instituted it would be barred by limitation. This is so for by reason of Article III, paragraph 6, of the Schedule relating to Bills of Lading in the Burma Carriage of Goods by Sea Act, 1925, which was expressly incorporated (as indeed it was bound to be) in the contract between the parties ; the carrier and ship shall be discharged in any event from all liability in respect of loss or damage

unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Such a date would be in the month of October, 1937, and the time would run out ten months before registration. Accordingly, the learned Judge dismissed the plaintiff's suit.

It was first contended for the plaintiffs as appellants that section 69 (2) was not applicable because the right which it was sought to enforce did not arise from a contract but from a tort; that there was a breach of statutory duty amounting to negligence; that the section did not deal with all suits arising out of contractual relationships, but only with suits to enforce a right arising from a contract and that the right to sue for negligence was not given by the Bill of Lading, and did not arise out of it, but out of the statutory obligations of the respondents which were annexed thereto.

The contract however clearly stated that all the terms provisions and conditions of the Burma Carriage of Goods by Sea Act, 1925, and all the Schedule thereto are to apply to the contract contained in the Bill of Lading; they are not independent of the contract but are to apply to it. Article II of the Schedule to the Act says that, subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, etc., shall be subject to the responsibilities and liabilities hereinafter set forth. It states that he shall be liable under the contract, and not by way of tort in addition to it. I must hold that the appellants were seeking to enforce a right arising from their contract. The terms of the Act and the Schedule are clearly incorporated in the contract itself.

The next contention was that there was no partnership at the date of the institution of the suit, the 5th March, 1938. Though it must be admitted in this Court that the appellants were partners at the date of

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the contract and for the purposes of this adventure or series of undertakings with regard to the preparation and assemblage of the cargo and the receipt and disposal of it after transit, yet by section 42 (*b*) of the Act if a partnership is instituted to carry out one or more adventures or undertakings it is dissolved by their completion.

Since the firm has been dissolved, it was argued, the provisions of section 69 (*3*) (*a*) can be invoked. These say that the provisions of the earlier sub-sections shall not affect the enforcement of any right to realize the property of a dissolved firm. And the contention was made that this action was brought to realize the property of the appellants as a dissolved firm, namely, their chose in action against the respondents.

The argument for the respondents was that the certificate of registration was conclusive as against the appellants in showing that the partnership began in September 1937 and had continued down to the date of registration. It implemented, as it were, the statement made on the 10th August, 1939, by the first appellant that a partnership was subsisting on that date. A partnership determinable at will such as this was described to be at the time of registration may be dissolved in writing [section 43 (*1*)]. And there is, and can be, no such thing as the registration of a firm which has already been dissolved ; for if it has been dissolved there is nothing to register.

Accordingly, it was urged that section 69 (*3*) could not apply, for this was not an action to realize the property of a dissolved firm, but an action to enforce a right arising from a contract on behalf of a firm existing but unregistered at the date of the institution of the suit.

In reply to this, Mr. Basu, for the appellants, at first said that no inference could be drawn that a partnership

was still subsisting at the time of registration. The appellants had registered a pre-existing partnership which had been dissolved. I cannot accede to his contentions on this point. It must be obvious that the appellants, in view of what they had done on the 12th of August, could not pretend that they were not partners when they tendered the certified copy of the Register in evidence.

Under section 58, registration may be effected by sending to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated a statement in the prescribed form. This refers to the present or future address of the firm. Registration of a firm which has been dissolved is not contemplated by the Act. As Beaumont C.J. said in *Appaya Nijlingappa* v. *Subrao Babaji* (1),

"It is to be notified that an existing firm can get over the disability by registering before it brings its suit, but, of course, a firm cannot register after it has ceased to exist."

Then Mr. Basu pressed us to say that the purported registration was a nullity. It seems to me that that brings him into direct conflict with the provisions of section 68 (*1*) of the Act. It is all very well to say that at the time of producing the certificate at the trial it was still contended that the appellants were not partners at the date of filing the suit, but the certificate itself appears to me to be conclusive proof of the contrary and it was put in on their behalf.

A suit could not be filed on the 5th March, 1938, if the plaintiffs were still partners and unregistered as such. It could only be filed if they had been partners for particular adventures or undertakings and if the completion of those undertakings had brought the

(1) I.L.R. [1938] Bom. 104.

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partnership to an end, and they were now proceeding under section 69 (*3*) to realize the property of the dissolved firm.

What is the evidence that they were partners on the date when the cause of action arose? It is above all a document which is conclusive as against them and relates not to two partnerships, one which was subsisting in the Autumn of 1937 and was completed, and another which began at the time of registration ; but of one partnership commencing in September 1937 determinable at will but still subsisting on the date of registration.

It seems to me impossible to permit a litigant to tender in evidence such a document as is referred to in section 68 of the Act and then to say that the registration was a nullity because the firm had been dissolved long before. The Act appears to me expressly to preclude any contention by those making statements which find their way on to the Register of Firms that such statements can be mistaken. The appellants seem to be trying to do the very thing the section is designed to prevent.

I am well aware that if they had not been registered on the 12th August, 1939, there might have been evidence which would have enabled them to succeed having regard to the provisions of sections 42 (*b*) and 69 (*c*) of the Act. But, in my view, by becoming registered on the 12th of August and tendering the certificate they made it impossible to say that the partnership begun in September 1937 was dissolved before the filing of the suit.

I cannot resist the conclusion that the appellants have been first desirous of finding out on what facts they would succeed and then of putting forward those facts as the truth. Directly it is shown that they cannot succeed on one set of facts another set is produced and we are unblushingly asked to accept them.

For example, first it was urged that the appellants were never partners and so need not register. The learned Judge appearing to be doubtful about this, they tendered in evidence a copy of the Register of Firms to say they had been partners from September 1937 and were still partners in August 1939. At the same time they desired to adhere to their contention that they were never partners, in case that should somehow avail them. And next they put forward the contention here that they were partners for a particular adventure only and ceased to be partners before the suit was filed. Discovering that the copy of the Register of Firms (by which they hoped to establish their case at a time when I suppose they omitted to notice that the point about limitation would be fatal to them) would really tend to defeat rather than to assist them, they contended that the registration was a nullity, and based on a mistake in their view of the law. It is not, however, a wrong view of the law but a series of plain statements by them as to facts which were noted in the Register of Firms, and nobody can pretend that these statements do not conclusively show that the partnership there set out as beginning on the 15th September, 1937, is still continuing at the date of registration. It was therefore subsisting at the date of the filing of the suit and, in my opinion, this appeal must be dismissed with costs.

DUNKLEY, J.—I agree.