Modi Vanaspati Manufacturing Company ... vs Katihar Jute Mills (Private) Limited on 28 June, 1968

Equivalent citations: AIR1969CAL496, AIR 1969 CALCUTTA 496

JUDGMENT

Ray, J.

1. This appeal is from the judgment of Mallick J. dated 29 July 1964 awarding the plaintiff a decree for Rs. 45,000 against the defendant Modis and a decree for Rs. 25,000 against the defendant Bhaduris.

2. The defendant Modi Vanaspati Manufacturing Company (hereinafter referred to as the 'Modis' for the sake of brevity) is the appellant. The respondents arc plaintiff Katihar Jute Mills (Private) Ltd. and the defendant Bhaduri Sen and Company Ltd. (hereinafter referred to as the 'Bhaduris' for the sake of brevity).

3. The plaintiff filed the suit against the Modis and the Bhaduris and claimed a decree for Rs. 80,960 as mentioned in paragraph 17 of the plaint and if necessary an enquiry into damages and decree for such sum as might be found due. The . plaintiff's case was that by exchange of letters and telegrams between the month of July 1952 and the month of November 1952 it was inter alia agreed that the Bhaduris would sell two sets of generating plants to the plaintiff with parts and equipments more fully mentioned in the correspondence to the plaintiff and the price of each plaint would be Rs. 70,000. The correspondence was set out in schedule A to the plaint. The plaintiif alleged that the Bhaduris were at all material times in the matter of the sale of the generating plants the agents of the Modis. In the month of October 1952 the plaintiff paid a sum of Rs. 35,000 for the price of the said generating plants, whereof Rs. 15,000 was to be appropriated towards the price of the first generating plant and the balance of Rs. 20,000 for the second set. The plaintiff alleged that the plaintiff obtained delivery of the first set. In paragraph 5 of the plaint the plainiilT alleged that the plaintiff paid the price of the second set as mentioned in that paragraph. The particulars of the payment of Rs. 70,000 arc that in addition to the said Rs. 20,000 there was a draft in favour of the Bhaduris for Rs. 15,000 and there were four drafts in favour of the (sic) aggregating Rs. 35,000. Fur-ther allegations in the plaint are that the defendant Modis by their acts and conduct held out the Bhaduris as their agents or allowed the Bhaduris to hold themselves out a.s agents. In paragraph 9 of the plaint it was alleged that the Modis at all material times knew that the plaintiff was acting in the matter of the sale of the sets on the basis that the Bhaduris were the agents of the Modis and by accepting the money and by acts and conducts the Modis intentionally caused or permitted the plaintiff to believe that if payments were made to the Bhaduris the second set would be delivered to the plaintiff. The plaintiff also alleged that the Modis were estopped from denying that the Bhaduris

were their agents and were precluded from refusing delivery of the second set. The other pleading was that if the Bhaduris were not the agents of the Modis the plaintiff was entitled to relief against the defendants on the basis of the agreement or breach of warranty of authority. The plaintiff in the alternative claimed loss and damages assessed at Rs. 70,000. The plaintiff alleged that by refusing to allow the plaintiff to take possession or delivery of the second set to which the plaintiff became entitled the defendants deprived the plaintiff of the same and caused loss and damage amounting to Rs. 70,000. The plaintiff also alleged that the defendants or any of them were not entitled to retain and were liable to refund Rs. 70,000.

4. Written statements were filed by both the defendants.

5. At the trial various issues were raised. One of the principal contentions was whether there was a contract between the plaintiff on the one hand and the Modis on the other hand through the Bhaduris. The other important issues were whether there was any breach of contract committed by the Modis. A short controversy between the parties was whether the plaint disclosed any cause of action. The fourth issue was whether the suit was competent against the Modis.

6. The learned judge reached the conclusion that the contract between the parties to the suit was that there was to the knowledge of all parties concerned three parties to the transaction, namely, the plaintiff; the defendant Modis and the defendant Bhaduris and held that there was one contract for sale in which the plaintiff was the buyer and the defendant Modis were the seller and the defendant Bhaduris acted as agent to bring the buyer and the seller together to complete the sale. The second conclusion of the learned judge was that Bhaduris received in the beginning a part of the price as the plaintiff's agent and subsequently the plaintiff was asked to make payment to the seller Modis direct and the plaintiff made payments to the Modis direct and not through the Bhaduris and held that the Bhaduris acted more as the agent of the plaintiff than as the agent of the Modis. Another conclusion of the learned Judge was that though the Bhaduris acted as agent nevertheless as agent they agreed to remain responsible for the delivery of the set to the plaintiff.

7. With regard to the plaintiff's allegation of breach of contract the learned judge came to the conclusion that tne Modis could not be held to have committed a breach of contract on the ground of non-delivery and therefore, the plaintiff's claim for damages against the Modis on that basis should fail.

8. With regard to the plaintiff's case that the defendants were not entitled to retain and were liable to refund Rs. 70,000 the learned judge relied on the decision of the Judicial Committee in Muralidhar Chatterjee v. International Film Company Ltd. and came to the conclusion that when a party having right to put an end to the contract elected to do so the party was liable to restore the benefit he had received under the contract and therefore, the defendant Modis were held liable to return to the plaintiff the sum of Rupees 45,000. The learned judge further held that the plaintiff was entitled to a decree against the 'Bhaduris' for the sum of Rs. 25,000.

9. The plaintiff's claim for damages assessed at Rs. 7,500 was rejected by the learned judge. With regard to the contention on behalf of the defendants as to whether the suit against the Modis was

competent the learned judge recorded in the judgment that counsel for the Modis did not dispute that the provisions contained in Order 30, Rule 10 of the Code applied to a company carrying on business under an assumed name and style and on the basis of that concession held that the suit was maintainable.

10. Counsel on behalf of the appellant Modis contended that there were three separate contracts between different parties on different dates and on different terms. The first contract was said to be entered into on 6 October 1952 between the plaintiff and the Bhaduris for the purchase of two sets of generating plants for Rs. 1,40,000. The second contract was said to be entered into on 27 October 1952 between the Bhaduris on the one hand and the Modis on the other hand for sale of one set amounting to Rupees 60,000. The third contract, was said to be entered into on 2 February 1053 between the Bhaduris on the one hand and the Modis on the other hand for sale of a second set for Rs. 60,000. It may be stated here that the plaintiff paid Rupees 35,000 to the Bhaduris on 7 October 1952 whereof Rs. 15,000 was meant for the first set and Rs. 20,000 was meant for the second set. On 18 December 1952 the plaintiff paid Rs. 20,000 to the Bhaduris and on 27 January 1953 the plaintiff paid Rs. 35,000 to the Bhaduris in full payment of the purchase price of the first set. Sometime in the month of April 1953 the delivery of the first set was complete. In the month of June 1953, Rs. 15,000 was paid by the plaintiff to the Bhaduris and thereafter in April 1954, Rs. 20,000 was paid by 3 drafts in favour of the Modis and in the month of July 1955 two drafts were sent to M. B. Chatterjee of Bhaduri Sen and Co. Ltd. whereof one draft was for Rs. 15,000 drawn in favour of the Modis. On these facts counsel for the appellant contended that the contract between the plaintiff on the one hand and the Bhaduris on the other hand was in the month of October 1952 for two sets at a total price of Rs. 1,40,000. It was said by counsel for the appellant first that Rs. 70,000 was not the price that the Modis contracted to obtain for either of the sets from the Bhaduris. Secondly, it was said that if the Modis were a party to the sale on 6 October 1952 it would appear that the Modis agreed to sell nothing on that date because the Modis entered into two separate independent contracts with the Bhaduris one of which contract was in the month of October 1952 and another was in the month of February 1953. Thirdly, it was said that the correspondence would indicate that the Bhaduris were not acting as agents of the Modis because, in that case, the Bhaduris would not be bargaining for reduction of price. This aspect was emphasized by counsel for the appellant in support of the contention that the transaction between the Modis and the Bhaduris was between two independent principals and not as agent of the Modis. Fourthly, it was said that the purchase by the Bhaduris from the Modis was subject to approval by M. B. Chatterjee and it was consistent with the view that it was a principal to principal contract. The fifth contention was that the Modis were free to sell and the Bhaduris were free to buy and the correspondence indicated that on 6 October 1952 there was no binding contract between the Modis on the one hand and the Bhaduris on the other hand. Sixthly it was said that it was significant that there was not a single letter between the plaintiff on the one hand and the Modis on the other hand with regard to the contract being entered into between the plaintiff and the Modis through the Bhaduris as the agent of Modis. Seventhly it was said that the oral evidence that Gopilal Sharma, a representative of the plaintiff who went to Modinagar, the place of business of the Modis, for inspection of the sets would not have the effect of turning the transaction between the Modis and the Bhaduris into a contract between the plaintiff and the Modis. Finally, it was said that the lapse of time between the contract of the plaintiff and the Bhaduris and the other two distinct contracts between the Modis and the Bhaduris would indicate

that there was distinct and genuine independent bargaining between the Modis and the Bhaduris and it had no nexus with the contract between the plaintiff and the Bhaduris.

11. Counsel for the appellant contended that the allegation in paragraph 2 of the plaint was that the Bhaduris at all material times acted as agents in the matter of the transaction and the other allegations were that the Modis held out that the Bhaduris were the agents. It was said by counsel for the appellant that there was no evidence of holding out.

12. Counsel for the plaintiff respondent on. the other hand contended first that the correspondence would indicate that there were allegations in paragraphs 1, 2, 9 and 10 of the plaint that the Bhaduris acted as agents and the allegations were supported by facts. Secondly, it was said that the most important clue to find out as to whether there was an agency or not would be to find out as to how the Modis treated the transaction. Counsel for the plaintiff respondent contended that it would appear from the oral evidence that the Modis had several busi-nesses and Modi Vanaspati Manufacturing Company was one such and that the Modis maintained all books of account in this Vanaspati manufacturing company business. It was therefore, said that the withholding of the books would raise the adverse presumption against the Modis that the real nature of the transaction was against the contention of the Modis and that is why the books were not disclosed. Thirdly, it was said that Gopilal Sharma, a representative of the plaintiff, went to Modinagar, the place of business of the Modis, in the month of September 1952 and it was said that this inspection by Gopilal Sharma was the foundation of the transaction. It was said by counsel for the plaintiff respondent that the visit of Gopilal Sharma was not denied but the statements that were made by Gopilal Sharma to Bachraj Chamaria were denied and therefore the court would have to find out as to what weight should be given to that evidence. Fourthly, it was said that if it could be established that there was a contract between the plaintiff on the one hand and the Modis on the other hand through the Bhaduris it would not make any difference that the Bhaduris and the Modis entered Into contracts on the same subject-matter. Fifthly, it was said that it was indisputable that the same sets were being purchased by the plaintiff and the money was being paid by the plaintiff and therefore in view of the subiect-matter being the same and the consideration for the purchase flowing from the plaintiff it could not be denied that there was one transaction between the plaintiff on the one hand and the Modis on the other hand through the Bhaduris.

13. The correspondence which became the plaintiff's exhibits and in particular the exhibits between the month of September 1952 and the month of November 1952 would indicate that the plaintiff was writing to the Bhaduris on the subject-matter of secondhand steam generating set at Modinagar, Meerut. The significant feature of the correspondence between the plaintiff and the Bhaduris is that the plaintiff was invariably writing to the Bhaduris that the plaintiff was prepared to purchase or the plaintiff was purchasing the set through the Bhaduris, This would fortify the view that the Bhaduris did not possess the set that the plaintiff wanted to buy. Particularly the correspondence between the plaintiff and the Bhaduris would indicate that the Bhaduris very often wrote to the plaintiff about the sellers. The letter dated 7 October 1952 written by the Bhaduris to the plaintiff contained a paragraph that the terms of payment and delivery were subject to the confirmation of the sellers, Vanaspati Manufacturing Co. Ltd. Modinagar, Meerut, and should there be alteration in the terms of payment and delivery the same would have to be accepted by the plaintiff. This letter was contended

by counsel for the plaintiff respondent to show beyond any measure of doubt that the Bhaduris acted as the agents and therefore, the terms of payment and delivery were subject to confirmation. This letter dated 7 October 1952 (exbt. L) certainly has reference to Vanaspati Manufacturing Co. Ltd. but it has not the effect of showing that the transaction entered Into on 6 October 1952 between the plaintiff and the Bhaduris was subject to confirmation by the Modis. The Bhaduris indicated that if there was any alteration in the terms of payment and delivery the plaintiff would have to accept the same. In the other letters, particularly the letters dated 21 October 1952 fexbt. N) and 23 October 1952 (exbt. O) the parties, namely the plaintiff and the Bhaduris, exchanged correspondence referring to the principals. In the plaintiff's letter it was said that it was "peculiar that without concluding terms with your principals" the bargain was closed and the Bhaduris in their letter stated that they wanted to impress on the plaintiff that the Bhaduris left no stone unturned to induce the seller to accept the Bhaduris' terms of payment but the Bhaduris had been unsuccessful In their letter dated 24 October 1952 the plaintiff wrote to M. B. Chatterjee, representative of the Bhaduris, that the plaintiff expected that the Bhaduris would finalise the transaction with their principals. The plaintiff closed that letter with the observation that if the Bhaduris had reason to suspect the quality or condition of the plants, the transaction should not be closed. Again in the letter dated 21st November 1952 (exbt. V) the plaintiff wrote to the Bhaduris on the subject of purchase of Steam Generating Set purchased through the Bhaduris from Modis, and stated that a draft for Rs. 20.000 payable to Modis, Modinagar, in part payment of the value of the set was enclosed. The Bhaduris by a letter dated 23 April 1953 (exbt. EE) informed the plaintiffs that the Bhaduris had been served with a strong notice by the sellers regarding payment of the second instalment of the set. The Bhaduris again in the month of August 1953 wrote to the plaintiffs that "our party at Modinagar" meaning thereby the Modis had served the Bhaduris with a notice recording a breach of contract as the materials were not removed on payment and further that the Modis threatened forfeiture of the advance payment.

14. The correspondence between the plaintiff and the Bhaduris would indicate that the transaction between the plaintiff and the Bhaduris came into existence in the month of October 1952. The letter dated 6 October 1952 was rightly relied on by counsel for the appellant as constituting the definite bargain between the parties, namely, the plaintiff and the Bhaduris. To my mind it appears that if the Bhaduris acted as the agents of the Modis there would not be subsequent contracts between the Bhaduris on the one hand and the Modis on the other hand. The most noticeable feature of the case is that the contract between the plaintiff and the Bhaduris was for the purchase of two sets at the total price of Rs. 1,40,000. The very fact that there were subsequent contracts between the Bhaduris and the Modis with the additional feature of a different price would indicate that the transactions were independent and separate. One of the tests of finding out agency is as to who was to pay the price. The Supreme Court in the recent decision of Gordon Woodroffe and Co. (Madras) Ltd. v. Shaik M.A. Majid and Co.. considered as to whether the defendant in that case was acting as agent of the plaintiff or whether the defendant was the outright purchaser of the goods. The respondent in that case was a trader at Madras in hides and skins. The appellant Gordon Woodroffe and Company (Madras) Limited was doing business as exporters of hides and skins. For several months commencing January 1949 there were many contracts. The case of the respondent was that he entered into an agreement with the appellant to act as agents. In that case the express terms of the contract were decisive of that question. But there are certain observations of the Supreme Court

which may be referred to. The first observation is that if the defendants in that case were intended to be constituted as the agents for sale the terms of the contract in that case would have been entirely different. The terms in that case were inter alia as follows: "we confirm buying from you for re-sale the following subject to U. K. import licence." The second important feature there was that a definite price was fixed in the contract for the plaintiff's goods. According to the plaintiff in that case the rates fixed in the contract were the ones at which the goods were sold to London purchaser and not a different rate and the defendants were agents who were obtaining for him only the price at which the goods were sold at London. In that context the Supreme Court observed "the important point is that if the contract was one of agency there was no need to mention the price at all as between the plaintiff and the defendants." The reason why I referred to this decision is to show that the difference in price as also the difference in the terms and parties in the present case would indicate the transaction between the Bhaduris and the plaintiff on the one hand and the transaction between the Bhaduris and the Modis on the other hand to be absolutely independent of each other. In order to establish agency it is true that surrounding circumstances are to be looked into but the surrounding circumstances in the present case establish that the contracts between the parties are totally distinct and different and came into existence at different points of time on different terms at different prices. It will not therefore, be correct to conclude that the contracts, though they are separate and independent, should still be regarded as one composite contract between the parties.

15. There are certain important features in this case to show as to what was the real transaction between the parties. The learned judge referred to an important feature in this case that right from the beginning it was known that the plaintiff was wanting to purchase the generating sets lying at the place of business of the Modis and secondly that the Bhaduris were not wanting to buy the generating sets for themselves but the Bhaduris were acting to buy the sets only for the benefit of the plaintiff. In other words, the transaction that was entered into by the Bhaduris with the Modis was in aid of and for the benefit of the purchase of the sets by the plaintiff. The correspondence to which reference has already been made would indisputably indicate that the Bhaduris were not having any interest in the generating sets for themselves but that the Bhaduris were procuring the generating sets for the plaintiff. In fact, the delivery of the first set to the plaintiff establishes the fact. The payment of money it is to be noticed, was by the plaintiff. The Bhaduris did not pay any moneys of theirs towards the purchase price of the generating sets. The evidence establishes that the plaintiff paid moneys to the Bhaduris in aid of purchase of the generating sets. The Bhaduris utilised the money paid by the plaintiff in purchasing the first set and also in making payments to the Modis towards the purchase price of the second set.

16. I am therefore of opinion that as far as the Bhaduris are concerned it is manifest that the Bhaduris dealt with the plaintiff on the footing that the plain tiff intended to purchase the generating sets belonging to the Modis lying at Modinagar.

17. The Modis, as I have already indicated, did not enter into any direct contract with the plaintiff for the sale of the generating sets. The Modis entered into direct contract with the Bhaduris for sale of the two generating sets. It is noticeable that though the contract between the plaintiff and the Bhaduris was one composite contract for the purchase of two generating sets, the Modis and the Bhaduris had two separate and independent contracts for the two generating sets. In regard to the

entire transaction as I have already indicated the case of the Bhaduris being the agents of the Modis cannot be accepted because of the paramount consideration that there were independent contracts between the Bhaduris and the Modis. A contract between the plaintiff on the one hand and the Modis on the other hand through the agency of the Bhaduris would have been entirely of a different character The learned judge, at one stage, described the Bhaduris to be the middlemen. The distinction in law between agent and middleman is summed up in Cheshire and Fifoot, Law of Contract, Gth edition at page 401 as follows: "The question sometimes arises whether a man has acted as an agent or as an independent contractor in his own interest. A retailer who, in response to an order from a customer, buys goods from a wholesaler and then resells them to the customer is clearly acting as an independent contractor. He is a middleman, not the agent of the wholesaler. "It is true that the analogy of the wholesaler and retailer is referred to but in law the position will not be different in any other case for the obvious reason that the real distinction is whether the contract is independent and stands on its own footing and is enforceable vis-a-vis the partis to the contract. In the present case, the Bhaduris acted as middlemen. The price element in the contracts between the plaintiff and the Bhaduris and in the contract between the Bhaduris and the Modis to which I have referred affirms the position of the Bhaduris not to be an agent of the Modis.

18. It was said on behalf of the respondent that the surrounding circumstances in the present case would indicate that the Modis knew that the moneys came from the plaintiff for the purpose of purchase of the generating sets. There are the following features in the transaction. It is established that Gopilal Sharma, a reuresentative of the plaintiff, went to inspect the generating sets in the month of September 1952. Gopilal Sharma came and stated to Bachraj Chamaria a director of the plaintiff that Gopiial had met some of the Modis at Modinagar. Bachraj Chamaria said in questions 62 and 366 that Gopilal Sharma met Modiji the proprietor of Modi Vanas-pati and further that Modiji asked his representative to take Gopilal Sharma to the power house to inspect the generating sets, Gopilal Sharma further said that he had met Chatterjee, a representative of the Bhaduris at Modinagar. After inspection Gopilal Sharma met Modiji and said that the inspection had been made and Gopilal Sharma was satisfied with the working of the sets. In question 366 Bachraj Chamaria was asked to give the name of the person described as Modiji whom Gopilal Sharma had met. Bachraj Chamaria said that the engineer Gopilal Sharma had said that there were three or four persons of Modi Vanaspati at Modinagar and the names given were Gazzar-malji, Kedarnathji and Bisewarlalji. The witness on behalf of the Modis was Baldeo Sahai Modi, General Manager, Modi Sugar Mills Ltd. He was asked in question 208 following that the Modis either Gazzarmal Modi or Kedarnath Modi or Biseswarlalji had met Gopilal Sharma and whether their witnesses knew anything about it. The witness said that he know nothing about it except that Gazzarmal Modi was a managing director ana Kedarnathji and Biseswarlalji had nothing to do with company's affairs. In questions 227 to 229 the witness from the Modis said that he did not know Gopilal Sharma and he did not know whether Gopilal Sharma had come to inspect and in question 229 the witness said that nobody from Katihar Jute Mills ever went to inspect the sets. In questions 257, 258 and 259 the witness from the Modis said that Kedarnath and Gazzarmal were both at Modinagar. In question 420 and question 575 following the witness from the Modis said that Kedarnath Modi was not looking after the business but was a director. In question 575 the witness from the Modis was asked whether the telegram (ext. F) from Modinagar to the plaintiff's place of business at Calcutta referred to Gopilal Sharma, the engineer of the plaintiff.

19. On this evidence counsel for the respondent rifihtly contended that it was established that Gopilal Sharma went to Modinagar. It is true that Gopilal Sharma went and counsel for the respondent rightly contended that Gazzar-mal Modi and Kedarnath Modi did not give any evidence to contradict the case of the plaintiff that actually Sharma went and met them. A question arose as to whether the statement of Gopilal Sharma would be admissible in evidence. Under Section 32 of the Evidence Act such statement would be admissible if it is in the ordinary course of business. There is evidence that Gopilal Sharma went in the ordinary course of business for the purpose of inspection and it is in evidence that he came and reported the matter in the ordinary course of business to Bachra.i Chamaria. The visit of Gopilal Sharma to Modinagar, the place of business of the Modis and the inspection by Gopilal Sharma is, in my opinion, established in evidence. It is established that the Modis knew that the plaintiff was interested in purchasing the generating sets. The plaintiff's interest in the purchase of the generating sets is established strongly by the fact that the plaintiff sent drafts in the name of the Modis. It is true that the Bhaduris could have given the draft in the name of the Modis drawn by the plaintiff in discharge of the liabilities of the Bhaduris to the Modis. Normally, in commercial transactions, the question would arise as to what would be the occasion for the plaintiff to send drafts in the name of the Modis. The Modis did not have any direct correspondence with the plaintiff but, in rny opinion, the absence of any direct correspondence with the plaintiff should not stand in the way of ascertaining the correct position between the parties. The overwhelming evidence in the present case indicates, beyond any doubt, that the sum of Rs. 45,000 which went to the Modis belonged to the plaintiff and the payment went through the Bhaduris, and the moneys that the Modis received were intended for the benefit and use of the plaintiff in regard to the purchase of the generating sets.

20. Counsel for the appellant contended that there was no privity of contract between the plaintiff and the Modis and therefore, the plaintiff would not be entitled to any refund of Rs. 45,000 on the ground of unjust enrichment. It was said by counsel for the appellant first that the Modis kept the sets for several years in dismantled condition and eventually the second generating set was sold in the year 1961 for Rs. 77,000 and the Modis were entitled to costs, charges, expenses, godown rent and damages. The Modis did not make any case claiming godown charges or other expenses for custody and care of the goods. Secondly, it was said on behalf of the appellant that the money was not received by the Modis from the plaintiff and therefore, there would be no ground for restitution of the amount by the Modis to the plaintiff. It was said that there could not be any promise to repay because there was neither privity of contract between the plaintiff and the Modis nor did the Modis receive the money from the plaintiff. Reliance was placed on the statement of law in Halsbury's Laws of England, 3rd edition, volume 8, page 236, paragraph 411, footnote (e) in support of the proposition that without privity of contract the fact that the defendant is wrongfully in possession of the money held for the benefit of the plaintiff or even in possession of the plaintiffs own money, does not enable this form of action for money had and received to be maintained. The authority cited for this proposition is the decision in Transvaal and Delagoa Bay Investment Co. Ltd. v. Atkinson (1944) 1 All ER 579.

21. In the Transvaal and Delagoa Bay Investment case, (1944) 1 All ER 579 the plaintiffs were a South African company which had a London Committee for the purpose of distributing dividends to shareholders in Europe. The first defendant was the secretary of the committee who by fraudulent

means had obtained cheques which were intended for shareholders and paid them into a banking account for his wife, the second defendant. By an arrangement between the defendants half the moneys so paid into the account were paid out to the first defen-dant. At no time was the second defendant aware that the money so paid into the account belonged to the plaintiff company. The plaintiff company brought an action for damages for fraud or, alternatively, to recover the money as money received for the use of the plaintiffs, it was held that the plaintiff company was entitled to judgment against the first defendant. It was held that no contract to repay the money could be implied between the second defendant and the company. Nor could the company recover against the second defendant on the ground of unjust enrichment at their expense unintended by them, for the second defendant received the money as agent for the first defendant and, before notice of the company's rights, had paid it away to her principal or on his instructions. In the Transvaal and Delagoa Bay Investment Co.'s case, (1944) 1 All ER 579, it was said that the bank had no authority from the defendant to receive anything on the wife's behalf nor had the plaintiffs any authority to pay anything to the bank for the wife's account or on her behalf. What really happened was that the husband stole certain signed cheques and forged them by making false entries and instructed the bank to receive and deal with the proceeds. Atkinson, J. said in that case that the money no doubt reached the defendant's coffers and she had the money in that sense of possession which was necessary to found tracing orders, but she did not get, and there was no receipt of it, in the sense which was necessary to raise the implication of a promise to repay. In the present case, the receipt of moneys by the Modis establishes that the Modis knew that the moneys came from and belonged to the plaintiff and that the moneys were intended for the plaintiff's purchase of the generating sets. In the Transvaal case, (1944) 1 All ER 579 no doubt arose as to an implied promise to pay in the case of the first defendant who obtained the money. Receipt of the moneys by the Modis with the knowledge that the moneys belonged to the plaintiffs for the purchase of the generating sets raises not only an implied promise to pay but also to pay to prevent any unjust enrichment of the Modis at the expense of the plaintiff when the generating sets have not been delivered to the plaintiff.

22. The decision in Sinclair v. Brougham reported in 1914 AC 398 is an authority for the proposition that if there is a void contract and if moneys are received under void contracts there cannot, be restoration of moneys received under such void contracts purely on the ground of privitv of contract because that would amount to validating an invalid contract. In 1914 AC 308 a building society developed a banking business which was admitted to be ultra vires. In connection with this banking business customers deposited sums of money in the usual way. An order winding up the society was made, and the assets of the society, after payment in full of all the outside creditors and the costs, were found to be sufficient to pay the unadvanced shareholders in full, but were not sufficient to pay them in full and also the customers of the bank on deposit and current accounts. It was held that the doctrine of ultra vires excluded any claim in personam based on the circumstances that the society had been improperly enriched at the expense of the depositors with the bank and so the depositors could not re-cover thier money unless adopting the dealings by the society with the money and claiming in rem they could trace their money into the hands of the society as actually existing assets. It was held that money could be followed not only where a fiduciary relationship existed, but in any case where the property in the money had not passed and the money could be earmarked In the hands of the recipient or traced into assets acquired with it and that was true where money had been paid under an ultra vires contract under which no property could pass. In equity it was held that

when money had been paid to a person, who had wrongfully obtained it the Court would declare that there was a charge on the fund in the bank with which the money had been mixed, and that doctrine applied in the cases of money acquired under a transaction which was ultra vires the recipient. On that reasoning in 1914 AC 398 the depositors had the right to follow the money so far as it was invalidly converted into the, possibly depreciated, assets in which it had been invested, whether those assets were mere debts due to the society or ordinary securities.

23. The doctrine enunciated by Lord Mansfield in Moses v. Macferlan (1760) 2 Burr. 1005 = 97 ER 676 is that if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case as it were upon a contract. The observations of Lord Sumner in 1914 AC 398 on which counsel for the appellant relied are that the action for money had and received cannot be extended beyond the principles illustrated in the decided cases and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use that no authority extends them far enough to help the appellant in the case of 1914 AC 398. The observations of Lord Sumner are also to be read in the context of these observations: "The depositor's case has been put first of all as consisting in a right enforceable in a common law action. It is said that they paid their money under a mistake of fact or for a consideration that has wholly failed, or that it has been had and received by the society to their use. I am of opinion no such action can succeed. To hold otherwise would be indirectly to sanction an ultra vires borrowing. All these causes of action are in species of the genus assumpsit All now rest, and long have rested, upon a notional or imputed promise to repay whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid. The rules and objects of the society were accessible to all. The only mistake made was a mistake as to the law, or that mistake of conduct to which all of us are prone of doing as others do find chancing the law. There was no failure of consideration. Further, the depositor's money was not had and received by the society, but by its officers, and receipt is an essential. If if was ultra vires for the society to take customers' account and that is, in the eye of the law to borrow the money on its promise to repay, it was ultra vires for it to authorise its officers to do so on its behalf. The society has the proceeds, or rather the liquidator has them in that sense of possession which is necessary to found "tracing orders" and otherwise for the purpose of the winding up, but it has not got them and there is no receipt of them in the sense which is necessary to raise the implication of a promise to repay, that would bind the society." These observations of Lord Sumner were relied upon by counsel for the appellant to show that in the absence of privity of contract there could not be any promise. There are two noticeable features in 1914 AC 398 first that receipt of the money by the society could not be established because the transaction was ultra vires and recognition of receipt of the money by the society would be validating the transaction. Secondly, there was no receipt of the money to raise the implication of a promise to repay and no action could be against the society in personam.

24. The observations of Lord Sumner came up for discussion in two later cases before the House of Lords. The first was the case of United Australia Ltd. v. Barclays Bank Ltd., 1941 AC 1 and the second in the Fibrosa Spolka Akeyjna v. Fairbairn. Lawson Combe Barbour, Ltd., 1943 AC 32. In the case of United Australia Ltd., 1941 AC 1, E the secretary and director of the plaintiff company with authority endorsed the cheque made payable to the company and the defendant bank accepted it for

collection and credited the proceeds to the account of M. F. G. Trust Ltd. Subsequently, the plaintiff company commenced an action against M. F. G. Trust Ltd. to recover the value of the cheque as a loan, or in the alternative, as money had and received. Before final judgment, M. F. G. Trust Ltd. went into liquidation. The plaintiffs put in a proof for the sum alleged to be due In the liquidation, but the proof was not admitted as the funds to meet the demands of creditors were merely trivial. Then an action was brought against the bank for wrongful conversion of the cheque. The defence was that the plaintiff had ratified E's endorsement of the cheque by suing the M. F. G. Trust Ltd. and had, therefore, waived tort. The plaintiff's contention was that in any event, the defendant bank was liable because the tort of conversion, of which the bank was guilty was a tort quite separate from that of M. F. G. Trust Ltd. Lord Atkin dealt with the question of an action on the case of assumpsit and said that if there be an express promise the matter would be simple. Lord Atkin said thereafter as follows: "To find a basis for the actions in any actual contract, whether express or to be implied from the conduct of the parties was, in many of the instances given, obviously impossible. The cheat or the blackmailer does not promise to repay to the person he has wronged the money which he has unlawfully taken; nor does the thief promise to repay to the owner of the goods stolen the money which he has gained from selling the goods. Nevertheless, if a man so wronged was to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract, for there was no action possible other than debt or as-sumpsit, on the one side, and action for damages for tort, on the other. The action of indebitatus assumpsit for money had and received to the use of the plaintiff in the cases above enumerated was. therefore, supported by the imputation by the Court to the defendant of a promise to repay. The fiction was so obvious that in some cases the judge created a fanciful relation between the plaintiff and the defendant. Thus, in the cases where the defendant had wrongfully sold the plaintiff's goods and received the proceeds, it was suggested in some cases, though not in all that the plaintiff chose to treat the wrongdoer as having sold the goods as his agent, and so as doing under an implied contract to his principal to repay,"

25. In the Fibrosa case, 1943 AC 32 Lord Wright said "It is clear that any civilized system of law is bound to provide remedies for cases what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

26. Lord Wright In his Legal Essays and Addresses states that restitution is not compensation for breach of contract nor is it damages for torts but it is a remedy for what if not remedied would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff. In essence, restitution is not based on loss to the plaintiff but on benefit which is enjoyed by the defendant at the cost of the plaintiff and which it is unjust for the defendant to retain. It is this unjust retention of what should be restored to the plaintiff which constitutes a relationship on which the remedy is based. Restitution covers an area which is often called quasi-contract. The basis of liability on quasi-contract is controversial. There are two views. First, the defendant is liable because he has been unjustly benefited at the expense of the plaintiff. This view was expressed as early as decision in (1760) 2 Burr. 1005 = 97 ER 676. Secondly, the defendant is liable only on the basis of fictitious or

imputed promise to pay. This was the view expressed in 1914 AC 398.

27. Lord Mansfield in (1760) 2 Burr. 1005 = 97 EH 676 said that the kind of equitable action to recover back money which ought not in justice to be kept lies only for money which, ex aequo et bono, the defendant ought to refund. Lord Sumner in 1914 AC 398 said that all actions for money had and received and all other quasi-contractual remedies must be classified as contractual and all rest upon a notional or imputed promise to pay.

28. Lord Wright in the Fibrosa case, 1943 AC 32 said that the common law could employ the action for money had and received as a practical and useful instrument to prevent unjust enrichment as was found in 1914 AC 398. Lord Wright said that the observations of Lord Sumner in 1914 AC 398 might close the door to any theory of unjust enrichment.

29. In Cheshire and Fifoot, Law of Contract, Sixth Edition at page 550 three observations are made, First, the principle of unjust benefit need not be based on any division between Tort and Contract. Secondly, the necessity of basing an action for money had and received on the implication of a contract may produce difficulties in solution. Thirdly, it is difficult to evolve a common formula to imply a promise to repay money received to the plaintiffs dues (sic).

30. In any claim for money paid by the plaintiff to the defendant's use the plaintiff must prove, first, that the plaintiff was ronstrained to pay the money and secondly, that it is money for which the defendant was legally liable. In other words the recovery of a voluntary payment is not permissible.

31. Another species of quasi-contract is recovery of money had and rpceived from a third party to the plaintiff's use. The old rase of Slovens v. Hill (1805) 5 Esp. 247 illustrates how a defendant who had been instructed by Admiral Smith to pay to the plaintiff £ 15 was sued by the plaintiff for non-payment of £ 15 after the defendant had received £ 40 on the Admiral's account. The plaintiff in that case received an order written by the Admiral to the defendant requiring the defendant to pay £ 15. Lord Ellenborough said that "it was an appropriation of so much to the use of the holder of the draft and made him liable on the receipt of any money upon the credit on which it was drawn." In the recent case of Shamla v. Joory, 1958-1 QB 448 X asked the defendant in England to pay to the plaintiff, brother of X, a sum which the defendant owed X. The defendant sent the plaintiff a cheque which was not paid. The plaintiff then sued the defendant for money had and received to his use. It was held that if a fund was available the plaintiff might sue the defendant. It was held that all' that the law requires is that there must be in the hands of the defendant a sum of money or monetary liability over which the transferor had a right of disposal.

32. The "Implied Contract" theory which found favour with Lord Sumner in 1914 AC 398 could not be imputed in that case because money had been paid under the contract which was ultra vires. The aequum et bonum theory was not negatived in 1914 AC 398. In Brook's Wharf and Bull Wharf, Limited v. Goodman Bros., (1937) 1 KB 534, A had been compelled to pay to B money which C was legally bound to pay B and A claimed repayment by C. Lord Wright based it on the 'unjust benefit' which would accrue to C if he did not repay and said that it was a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract. In the

Fibrosa case 1943 AC 32 the action was to recover money for a consideration that was alleged to have wholly failed owing to frustration and Viscount Simon suggested as an alternative to the 'implied term' theory an obligation to repay arising from circumstances. In Morgan v. Ashcroft, (1938) 1 KB 49, Greene M. E. rejected the aequum et bonum theory and adopted the 'implied contract' theory but Scott, L. J. considered that the 'implied contract' for money had and received had no element of agreement about it but it was implied by law. In Cravcn-Ellis v. Canons Ltd., (1936) 2 KB 403 the Court of Appeal held that where A did work for B under an agreement which was void as a contract, A could nevertheless recover reasonable remuneration by the quasi-contractual remedy, Quantum meruit. The implied contract theory is prevalent and true basis of quasi-contractual obligations is 'natural justice' or what is reasonable.

33. These decisions indicate that an implied promise to repay will arise if it can be established that the moneys which the defendant received belonged to the plaintiff and the plaintiff did not want the property in the money to go to the defendant without the consideration therefor. In the present case, the amounts which were paid by the plaintiff as I have already indicated went through the Bhaduris to the Modis. The receipt of moneys by the Modis through the Bhaduris does not alter the character of the property in the money that the plaintiff had intended to be earmarked in performance of the plaintiff's purchase of the generating sots. It has sometimes been said that the criterion of unjust benefit is difficult to apply. That is why Lord Sumner in 1914 AC 393 said that it was hard to reduce to one common formula the conditions under which the law will imply a promise to pay money received to the plain-tin's use. The implied promise will arise from the circumstances showing the receipt of the money. In the present case it is established that the moneys came to the defendant from the plaintiff to the benefit and use of the plaintiff in relation to the purchase of the generating sets. The generating sets have not come to the plaintilf. The money is with the Modis. Therefore, the law implies an obligation to repay that money which came from the plaintiff to the Modis, The observations of Lord Wright in the Fibrosa case, 1943 AC 32 are that action for money had and received is employed to prevent unjust enrichment as was available in 1914 AC 398.

34. The question of privity was raised by counsel for the appellant in the sense that if there was no contract at all there would be no implied promise to repay. The word 'privity' has also received judicial interpretation in the light of different heads of claim. The core of the doctrine of privity is that consideration must move from the promisee. In commercial contracts payment is sometimes made through letter of credit or commercial credits. To illustrate, the buyer asked the bank to open a credit in the seller's favour. The buyer makes an agreement with the bank whereby the bank undertakes to open a credit in return for the buyer's promise to reimburse. The buyer's bank informs the seller of the opening of the credit to be drawn as soon as the seller presents the established documents. What would be the legal position in the case of refusal of the bank to honour the promise to pay the seller? These commercial credits have been held by Jenkins L. J., in Malas v. British Imex Industries, Ltd., (1958) 2 QB 127 to constitute a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. That is why in Cheshire and Fifoot, in the Law of Contract, 6th edition, page 385 it is observed that businessmen have thus prevailed on the judges to relax in their favour the rigid rule of privity, In the present case there is no privity of contract but the liability of the Modis to the plaintiff

arises on the prevention of unjust benefit or. enrichment.

35. The doctrine of a stranger to a contract having a right to sue was also canvassed in this present appeal. Counsel on behalf of the appellants contended that a stranger to a contract could sue only if it were established either that there was trust or that the person who sued had a benefit under a contract. In support of the contention reliance was placed on the decisions of the Judicial Committee in Nawab Khwaja Muhammad Khan v. Nawab Husaini Bcgam, (1910) 37 Ind App 152, Jamna Das v. Pandit Ram Autar Pande, (1912) 39 Ind App 7, the Bench decision in Krishnalal Sadhu v. Pramila Bala. and the Bench decision in Jnan Chandra Mukherjee v. Monoranjan Mitra, ILR . In Nawab Khwaja Muhammad Khan's case, (1910) 37 Ind App 152 there was a registered agreement by which the Nawab declared to pay a certain sum to his daughter and further promised that the Nawab's heirs would not deviate from the monthly payment to the daughter in perpetuity for the expenses. It was held that the daughter, although no party to the agreement was entitled to proceed in equity to enforce the claim. The agreement in that case specifically charged property for the allowances which the Nawab bound himself to pay to the daughter who was the only person beneficially entitled under that. In Jamna Das's case, (1912) 39 Ind App 7 the purchaser of an equity of redemption who by an agreement with the vendor-mortgagor retained the amount of the mortgage debt out of the price due was held to be not personally liable to the mortgagee in respect thereof. It was said that the mortgagee who brought the action to enforce against the purchaser the undertaking to pay could not avail of it as he was no party to the sale. Counsel for the appellant placed emphasis on Pundit Ram Autar Pande, (1012) 39 Ind App 7 decision in support of the proposition that similar consideration would arise in the present appeal. In Krishnalal Sadhu's case Rankin C. J. said that in India persons who are not parties to a contract could not sue thereon except where there was an obligation in equity amounting to a trust arising out of the contract- In Jnan Chandra Mukher.ire's case defendants 1 and 2 were two brothers who took a loan of Rs. 2,500 from the plaintiffs and executed two hundis. Defendants 3 and 4 also signed both the hundis as co-debtors along with the defendants 1 and 2 though it was said that they were only sureties for the latter. The loan was taken on 12 August 1924. On 8 August 1927 Rs. 5 was paid towards interest on the hundis and that amount was paid by all the defendants and the endorsements were signed by all of them, There were two other subsequent payments of interest, one of Rs. 10 and the other of Rs. 5 on 20 April 1930 and 18, April 1933. On these occasions the payments wore made by defendants 1 to 3 and not by defendant 4. On 20 June 1932 defendants 1 and 2 executed a kobala in respect of certain properties in favour of defendant No. 4 and as consideration for the same defendant No. 4 undertook to pay the debts due to the plaintiff as well as to another creditor whose names were specifically mentioned in the schedule to the conveyance. As no money was paid by any of the defendants the plaintiff insti-tuted a suit. Defendant No. 4 denied any personal liability on the hundis and contended that the suit was barred by limi-talion. Defendant No. 4 was in that case held to be a co-contractor of defendants 1 and 2 and the payment by the latter was held not to entitle the plaintiff to get an extension of time as against defendant No. 4. No liability was founded against the defendant No. 4 on the contention advanced that the defendant No. 4 constituted himself a trustee in respect of the property as the consideration money payable for it.

36. Counsel for the appellant also relied on the statement of law in Halsbury's Laws of England, 3rd edition, volume 38, page 822, paragraph 1369 in support of the proposition that there may be a trust

if one of two contracting parties contracts expressly as trustee for another person then that person can enforce the trust. An authority for that proposition is the decision in Re Schebs-man, Ex Parte, The Official Receiver, The Trustee v. Cargo Superintendents (London), Ltd., (1944) Ch 83 = (1943) 2 All ER 768. In that case the question arose as to whether a husband who made a contract with his company that the latter would pay a certain sum to his wife and in the event of the death of his wife to his daughter, a trust arose on the husband becoming bankrupt. It was held that in the performance of the contract between the husband and the company the mandate could not be revoked unilaterally by the husband. The decision is an authority in support of the proposition as to when a trust is created. There is no aspect of trust in the present case but it cannot be denied that the moneys received by the Modis were intended for the benefit of the plaintiff.

37. In the present case the contention on behalf of the respondent that the plaintiff is entitled to the refund of moneys lying with the Modis Is founded on two aspects. First that the plaintiff's money went to the Modis and the plaintiff did not intend the property in the money to go to the Modis until there was consideration for the sum by delivery of the generating sets. Secondly, the payment was not made by the plaintiff through the Bhaduris to the Modis as voluntary payments but the Modis knew that the plaintiff's payments were meant for the benefit and in aid of performance of the transaction of purchase and sale of generating sets.

38. The decision of the Judicial Committee in is an authority for the proposition that where a party to a contract put an end to it he was liable to restore any benefit received under the contract. This decision was relied on by the learned judge in support of the proposition that there was a contract between the plaintiff and the defendant Modis and since that contract was put an end to, the Modis were liable to restore that amount to the plaintiff. In the present case the retention of money by the Modis was defended on the ground that the Modig were entitled to damages and also on the ground that there was no privity between the plaintiff and the Modis to imply any promise to repay. As I have already indicated the moneys in the hands of the Modis are the plaintiff's and these moneys were to the knowledge of the Modis for the purchase of the generating sets. There being in the words of Lord Atkin (1941) AC 1 no intention on the part of the plaintiff to pass the property in the money to the Modis the retention of money cannot be allowed and the money should be refunded to the plaintiff. The conclusion of the learned judge awarding a decree in favour of the plaintiff against the Modis for the sum of Rs. 45,000 is therefore, affirmed for the reasons indicated earlier.

39. The decree in favour of the plaintiff against the Bhaduris for the sum of Rs. 25,000 was not impeached. That decree is affirmed.

40. Two other Important questions arise in this appeal. First, whether the plaint disclosed any cause of action.

It was said by counsel for the appellant that no date of breach was alleged and therefore it could not be said that there was any failure of consideration. Secondly, it was said that neither in the pleading nor in the evidence any cause of action was disclosed. The date of breach would have been material and relevant if any damages had been awarded. Some of the criticisms of the plaint particularly that it was not specifically alleged as to who were the parties to the alleged contract were not without

substance but the plaint read in its entirety discloses a cause of action.

41. The other important contention is that the plaintiff could not maintain the suit against the Modi Vanaspati Manufacturing Firm. Counsel for the appellant contended that the provisions contained in Order 30, Rule 10 of the Code of Civil Procedure did not apply to the case of limited companies which were to be sued under the provisions contained in Order 29 of the Code and secondly it was said that the corporation would not be a person within the meaning of person, under Order 30, Rule 10 of the Code of Civil Procedure. Counsel for the plaintiff respondent on the other hand contended that the company was really before the Court because the written statement had been signed and verified by constituted attorney of the company. It was also said that the company was doing business in the firm name and therefore, under Order 30 the company could be sued.

42. The provisions contained in Order 30, Rule 10 of the Code are that any person carrying on business in the name and style other than his own name may be sued in such name or style as if it were a firm name and so far as the. nature of the case will permit all rules under Order 30 shall apply. It was submitted by counsel for the plaintiff respondent relying on the Bench decision in Jamuna-dhar Poddar Firm v. Jamnaram Bhakat that a person would include a society of persons or body of individuals within the meaning given in the General Clauses Act and therefore, a company would be a person within the meaning of Order 30, Rule 10 of the Code. It was also contended that the description of the defendant Modi Vanaspati Manufacturing Co. Ltd. was really a business name of the defendant company. The learned iudge was pleased to hold on the concession of counsel for the Modis that a company could carry on business in a firm name and therefore, could be sued. This concession was not made at the hearing of the appeal and as a matter of fact the special ground was taken that the plaintiff could not sue Modi Vanaspati Manufacturing Co. Ltd.

43. I am unable to accept the contention on behalf of the respondent that the company is before the Court. The written statement has been filed by Modi Vanaspati Manufacturing Co. The sign-ing of the written statement and the veri-fication by constituted attorney of Modi Sugar Mills Ltd. docs not indicate the ap-pearance of the company as the defendant in this suit. The provisions contained in Order 30, Rule 10 of the Code allow a person carrying on business to bo sued in that business name. The essence of the matter is that there is a legal entity or a juristic personality who is being sued in the firm name. The provisions contained in Order 30 apply to suits where a defendant is sued as a legal entity under the provisions contained in Order 30, Rule 10. The provisions contained in Order 30 allow a body of persons to be sued in their business name or in their firm name. It is well settled that the business name or the firm name is neither a legal entity nor a juristic person. The legal entities are the persons who carry on business under that name. That is how partners are sued in the firm name. That is how persons sue in the firm name. That is how a defendant carries on business. That is how a person and an individual carrying on business in a firm name is sued in the firm name or in the business name. It is said that proprietor of the business of the Modis is a limited company and therefore, the suit in the business name of the company is competent. Counsel for the appellant in my view rightly contended that a company being a legal entity could sue and be sued only in accordance with the provisions contained in Order 29 of the Code of Civil Procedure. To allow a limited company to be sued in the business name, would in my view, be an inroad upon the Code of Civil Procedure in the sense that a suit would be competent against a defendant which had no legal

basis and no legal character. It is only because an individual or a body of individuals carry on business in a certain name that the compendious name is recognised under the provisions of Order 30 of the Code so that it is known that the legal persons are the persons sued in that name. In the present case, the legal person being a limited company I am of opinion that the suit against the Modi Vanaspati Manufacturing Firm is not maintainable and is incompetent. Modi Vanaspati Manufacturing Firm is not a person within the meaning of Order 30 of the Code. The word 'person' in Order 30 refers to individuals and not to corporations because corporations are dealt with in Order 29 of the Code. Further Order 30 does not recognise a trading name but it recognises only the individual persons who are legal entities carrying on trade in a name,

44. For these reasons the decree against Bhaduri Sen and Company for Rs. 25,000 is affirmed and the decree against the Modis for Rs. 45,000 is also affirmed but in view of my conclusion that the suit is not maintainable against Modi Vanaspati Manufacturing Firm there cannot be a decree against the Modi Vanaspati Manufacturing Firm.

45. The learned iudge awarded the plaintiff interest at the rate of 6 per cent on the decretal amount and also interim Interest at 6 per cent and was pleased to hold that the parties would bear their own costs. The decree against Bhaduri Sen & Co. Rs. 25,000 is affirmed with interest at the rate of 6 per cent, on that amount and also interim interest at the rate of 6% as the learned j udge was pleased to order. The order for costs is also affirmed.

46. In view of the fact that there cannot be a decree against the Modi Vanas-pati Manufacturing Co. Ltd. I am of opinion that each party would bear its own costs in this appeal. The appeal against the Modi Vanaspati Manufacturing Co. is allowed and the decree is set aside.

47. Certificate for two counsel as against the respective clients.

S.K. Mukherjea, J.

48. In this case, although the plaintiff had express notice that a company was carrying on business in an assumed or business name the plaintiff has chosen to bring the act-tion against the company not in its corporate name hut in its assumed name. The appellant, took the objection at the trial, as it has before us, that such a suit is not maintainable.

49. An issue was raised at the trial on this question. It appears that counsel for the appellant did not dispute at the trial that Order 30, Rule 10 of the Civil P. C. applies to a company carrying on business in an assumed name or style. The learned judge made it clear in his judgment that he held the suit to be maintainable only on the basis of counsel's admission. He was careful to point out that his finding on this question was not to be taken as a considered judgment. The learned judge, however, expressed the view that the words used in Order 30, Rule 10, that is to say, "any person carrying on business in a name and style other than his own" seem to suggest that the 'person' referred to is a 'natural' person and not a corporation. He observed. "The pronoun 'his' suggests that a natural person was intended to be covered by Order 30, Rule 10. The General Clauses Act Section 3 (42) no doubt provides that a 'person' includes a company; but this is so, unless it is repugnant to

the subject or context. The pronoun 'his' seems to rule out a company. Section 13 of the General Clauses Act provides that words importing masculine gender shall be taken to include feminine. It does not appear to include a neuter gender."

50. Questions of law cannot be, or at least ought not to be, decided by concession of counsel, as was observed by Chakravartti, C. J. in Sohanlal Nagarmull v. Manicklal Seal, .

51. The appellant renewed its objection to the maintainability of the suit in the grounds of Appeal and urged before us that the suit as framed is not maintainable against the appellant and, ought to be, on that ground alone, dismissed. It was not contended by learned Counsel for the plaintiff-respondent that the objection to the maintainability of the suit was not open in the appeal. Under the general law of procedure only a juristic person can sue or be sued. A partnership firm is not a juristic entity. Until the introduction of Order 48 A of the Rules of the Supreme Court in Engand in 1891 and of Order 30 of the Code of Civil Procedure, in India in 1908, a partnership firm could neither sue nor be sued in its own name. An exception to the general law of procedure, namely that an action can be brought by or against a juristic person only, was made in the case of a partnership firm by Order 48-A in England and by Order 30 of the Code of Civil Procedure in India. Order 30, however, did a little more than enable a partnership firm to sue or be sued in its own name. By introduction of Rule 10 which corresponds to Rule 11 of Order 48-A of the Rules of the Supreme Court of England, it became possible to sue any person carrying on business in a name other than his own, in such name as if it were a firm name. It provides:

> "Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit, all rules under this order will apply," This corresponds to Rule 11 of Order 48-A of the Rules of the Supreme Court of England which reads:
>
> "Any person carrying on business within the jurisdiction in a name or style other than his own. name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

52. It will be observed that the concluding words of Rule 10 of Order 30 and of Rule 11 of Order 48-A of the Supreme Court Rules mean the same, that is to say, that all rules relating to proceedings against firms will apply, so far as the nature of the case will permit. Soon after the introduction of Order 48-A in England, the view was expressed by Lord Esher. M. R. and A. L. Smith L. J. in St. Goban, Chauney & Civey Co. v. Hoyermann's Agency, (1893) 2 QBD 96 that the application of Rule 11 is limited to a single individual.

53. Soon thereafter in Meiver v. G. & J. Burns, (1895) 2 Ch 630 Lindley L. J said:

> "Order 48-A refers to actions by or against partnerships. The first ten rules of it relate to actions by or against part-nerships only. Partnerships can now be sued in the name of the firm, whereas formerly they could only be sued in the names of the persons

> who composed the firm. It was necessary to frame some rules to carry out the new procedure, and Rr. 1 to 10 of Order 48-A are addressed solely to suits against partnership. Then comes Rule 11, which has really nothing to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries on business either in the name of a firm, or, as it is expressed in the rule, under some name other than his own."

If one reads Order 30 for Order 48-A, Rules 1 to 9 for Rules 1 to 10 and Rule 10 for Rule 11, the description applies aptly to the procedure introduced by Order 30 of the Code of Civil Procedure.

54. In Chidambaram v. National City Bank of New York, AIR 1936 Mad 707 a Division Bench of the Madras High Court held that Order 30, Rule 10 is applicable only to the case of a single individual. It appears that Buckland J. in an unreported judgment (Suit No. 1207 of 1925) expressed the same opinion. In Lalchand v. M. C. Boid & Co. a case decided by Buckland, J. the learned Judge cited from the unreported judgment in the earlier case where he had said with reference to Order 30, Rule 10 that the words in the heading "persons carrying on business * * * * other than their own." only have reference to Rule 10 under which a single individual may be sued though he cannot sue if he carries on business under a name other than his own." Needless to say that this is in conformity with the view of Order 48-A Rule 11 consistently held in England. As it happened to be the settled law in England that Order 48-A, Rule 11 applies to a single individual only, the Editors of the Annual Practice could say with certitude that "by the concluding words of this Rule, all the foregoing Rules of this Order are to apply to an individual sued, who trades within the jurisdiction as a firm, or who carries on business under an assumed or trading name." (Annual Practice 1963, Vol. I, p. 1169).

55. If by Order 48-A Rule 11 of the Rules of the Supreme Court in England or Rule 10 of Order 30 of the Code of Civil Procedure, only an individual is intended, the rule cannot apply to artificial persons which corporations are. That the rule never contemplated a corporation or a limited liability company and that the omission of any reference to corporations in Order 48-A, Rule 11 is deliberate and is not a case of inadvertent omission is amply borne out by the subsequent development of Order 48-A, Rule 11 in England. The construction that only a single individual is contemplated by Rule 11 has received statutory recognition in the new Rules of the Supreme Court in England, Order 81, Rule 9 of which corresponds to the old Order 48-A Rule 11. It says :--

> "An individual carrying on business within the jurisdiction in a name or style other than his own name, may be sued in that name or style as if it were the name of a firm, and Rr. 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm (The Supreme Court Practice 1967, page 1120)."

56. Although it is not strictly relevant for the purpose of deciding the question raised in this appeal, it may be pointed out that in India there is a conflict of views as to whether Rule 10 of Order 30 is applicable to a single individual only or to more than one individual or to an association of individuals carrying on a business in an assumed name or style. As stated before, the Madras High Court held that the rule applies to a single individual only. So did Buckland, J. in the two cases cited

above. In Mnnshilnl v. Modi Bros., (1947) 51 Cal WN 563, S. R. Das, J. on an analysis of the relevant provisions of the Code of Civil Procedure and the Rules of the Supreme Court in England and, on a elaborate review of judicial decisions Indian and English, expressed the view that the rules apply to a single individual only and expressed his inability to assent to the proposition that a Hindu joint family business may be sued under Order 30, Rule 10 as "a person carrying on business in a name or style other than his own."

57. A contrary view has been expressed in the Division Bench judgment of this Court in , Alekh Chandra v. Krishna Chandra, ILR 20 Pat 755 = (AIR 1941 Pat 596), in Rameshwar Prasad v. Keshab Prasad, and in Hari-sankar y. General Merchants Ltd., AIR 1956 Orissa 186. In the latter group of cases it has been held that the rule applies even where a number of persons carry on business under an assumed or trading name even though they do not constitute a partnership firm, as for example, a Hindu joint family business. These decisions, however, do not lay down that Rule 10 of Order 30 is intended to apply not only to individuals but also to artificial persons. The question which has to be decided in this appeal, that is to say, whether the rule is applicable to an artificial person like a limited liability company, has not arisen as far as I am aware, in any reported case here or in England. In England the question could hardly arise, because at a very early -stage it became well-settled that Rule 11 of Order 48-A applied to an individual only. A Corporation which is not an individual was, therefore, necessarily excluded from the operation of the Rule. Under the new rules of the Supreme Court in England, the question cannot arise because the relevant Rule has specifically made it applicable to an individual alone. The result is that in England neither under the old Rule 11 of Order 48-A nor under the new Rule 9 of Order 81 a Corporation could or can be sued in its assumed or trading name. Order 30 is so closely modelled on Order 48-A and Section 3(42) of the General Clauses Act is so much of a replica of Section 9 of the Interpretation Act of 1899, that a construction of Rule 10 of Order 30 of the Code of Civil Procedure which makes it applicable to an artificial person as for example a Corporation, is not, in my opinion, justified. It is not iustified not jonly in the context of Order 30 itself but also on general principles. Order 30, Rule 10 enjoins that so far as the nature of the case will permit, all rules under that Order will apply. "Not only Order 30, Rule 10 can have no application to a company, but also no other rule of Order 30 can possibly apply to a company. Order 29 of the Code of Civil Procedure specifically provides for suits by or against Corporations. Rules 1, 2 and 3 of Order 29 relate to subscription and verification of pleadings, service on Corporation and power of the Court to direct personal appearance of the secretary, director or principal officer of a company and are important safeguards which the law provides in the interest of a Corporation which is an artificial person and in which the interests of a large number of shareholders are often involved. Unless it 13 provided expressly or by necessary in-Itendment, It is not to be assumed that Order 30 intended to deprive a company of these safeguards by permitting an action to be brought under Order 30 against a Corporation in its assumed name. In construing Order 30. Rule 10 it has to be considered bow a decree passed against a Corporation in its assumed name can be executed. If such a decree can be passed at all. There is no provision In the Code for execution of such a decree. It will be remembered that Order 21, Rule 50 of the Code reproduces Rule 8 of Order 48-A of the Rules of Supreme Court and although Order 30, Rule 10 refers back to the preceding rules of Order 30 alone. Order 21, Rule 50 will have to be necessarily referred to for the purpose of execution of a decree passed against a firm or an Individual carrying on business In an assumed name. Order 21. Rule 50. It seems, is not applicable

to execution of decrees passed against the Corporation. In the context of Order 30 Itself, of Order 29 and other relevant provisions of the Code of Civil Procedure and on a consideration of the history of Order 30, Rule 10 I am of opinion that it will be unreasonable to hold that the words "any person" in Order 30, Rule 10 contemplate not only an individual but also an artificial person which a Corporation or a company is.

58. It was urged that in view of the definition of the word 'person in Sub-section (42) of Section 3 of the General Clauses Act 'any person' in Order 30 Rule 10 should be construed so as to Include a Corporation. Sub-section (42) of Section 3 of the General Clauses Act pro-vides:

> "Unless there is anything repugnant in the subject or context. -- 'person" shall include any company or association, or body of individuals, whether incorporated or not."

The definition closely resembles the definition of 'person' in Section 19 of the Interpretation Act, 1899 which consolidated earlier enactments. The section reads:

> "In this Act and In every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporated."

I am alluding to the close correspondence between the definition of 'person' in the Indian Statute and the English Statute because I propose to refer to certain English decisions on the construction of the word 'person' in Acts of Parliament. In the Pharmaceutical Society v. London and Provincial Supply Association Ltd., (1880) 5 AC 827 the House of Lords observed that whether the word 'person' in a Statute can be treated as including a Corporation must depend on a consideration of the object of the Statute, and of the enactments passed with a view to carrying out that object into effect.

59. It was provided by Section 1 of 31 and 32, Vlct., C. 121 that it shall be unlawful for every person to sell, or keep open shop for retailing, dispensing, or compounding poisons or to assume the title of chemist and druggist, unless such person shall be a pharmaceutical chemist, within the meaning of the Act and be registered under the Act" A small body of persons had obtained a registration under the Companies Act of 1862-1867. One only of these persons was qualified, and registered chemist. His share in the company was very small. He was the person who appeared in the shop and conducted the same and he received a salary for his labour in dispensing the drugs. It was held that in these circumstances the word 'person' in the relevant section of the Statute did not apply so as to make the Incorporated company liable to the penalty. The actual seller must be a qualified person. In his speech Lord Blackburn said:

> "Person" may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a "person" does not include an artificial

> person, that is to say, a corporation. Nobody in common talk if he were asked, who is the richest person in London, would answer: The London and Noth-Western Railway Company. The thing is absurd. It is plain that in common conversation and ordinary speech, "a person" would mean a natural person: in technical language it may mean the artificial person: in which way it is used in any particular Act, must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might show in which way the word is to be construed in the Act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that wherever you can see that the object of the Act requires that the word "person" shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly."

60. In Section 46 of the Solicitors Act, 1932, imposing a penalty on any person not having a practising certificate and pretending to be qualified to act as a Solicitor it was held that 'person' does not include a corporation: Law Society v. United Service Bureau Ltd., (1934) 1 KB 34. It has been held that a corporation is not a 'person' within the meaning of The Charitable Uses Act, 1735, Walker v. Richardson 6 LJ Ex. 229. On the other hand, where a trustee of a will had power to grant lease to any person or persons they should think fit, it was held that the will authorised him, to grant a lease to a limited company: Re Jeffcock 51 LJ 507. In Davey v. Shaw-croft (1948) 1 All ER 827 it was held that an unincorporated body is a 'person' within the meaning of Coal Distribution Order. 1943. In Wilmet v. London Roadcar Co. Ltd. (1910) 2 Ch. 525 it was held that "a respectable and responsible person" within the meaning of a covenant included a corporation such as a limited company.

61. In Chuter v. Freeth & Peacock Ltd., (1911) 2 KB 832, the question came up for consideration whether a company is a person within the meaning of Section 20 Sub-section (6) of the Sale of Food and Drugs Act. 1899 which provides:

> "Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence, to a fine not exceeding twenty pounds ..... unless he proves to the.
>
> satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

It was held by Lord Alverstone, C. J. that a corporation is well within the meaning of the expression 'person' because a corporation is capable of giving a warranty through its agents. Incidentally, this case answers the argument that the use of the masculine pronoun with reference to 'any person', in Rule 11 of Order 48A or Rule 10 of Order 30 militates against a construction of the expression 'person' to include a corporation. The fact is that the neuter pronoun 'it' can never be used with reference to a 'person' and therefore, the use of the masculine pronoun cannot affect the question of construction. It may, however, be stated that in some statutes the expression 'person' has been

specifically made to include a corporation, as for example in Trustee Act, 1850 which provides by Section 2 that a 'person' used and referred to in the masculine gender, shall include a body corporate.

62. In my opinion, the learned trial Judge, in doubting that a company is contemplated in Rule 10 of Order 30 in spite of concession on the part of Counsel, was guided, if I may say so with respect, by sound judicial instincts and he was justified in his doubts, not for the reason he gave, but for other reasons which are more cogent.

63. It only remains for me to refer to the statement of the law in Halsbury's Laws of England. Third Edition, Volume 6 at page 444, paragraph 861 where it is said that a company can only sue or be sued in its corporate name.

64. In the view I have taken, I must hold that the expression 'person' in Order 30 Rule 10 does not include a Company because such a construction will be alien and repugnant to the context and to the subject-matter of Order 30 and to the scheme of the Civil Procedure Code. It is a construction which is neither supported by principles nor by precedents.

65. In my judgment, a company cannot be sued in a name other than its own which it assumes for the purpose of carrying on business. It can only be sued in its corporate name.

66. In that view of the matter, the decree passed against the appellants must be held to be null and void as having been passed in a suit which is not maintainable against the appellant.

67. As I have held that the suit as framed against the appellant is not maintainable in law, it is hardly necessary for me to pronounce on the other questions. In my opinion, on the evidence on record, no privity of contract between the appellant and the plaintiff respondent has been established and I am unable to hold that the respondent Sen Bhaduri & Co. were the agents of the appellant as contended by the plaintiff-respondent. I agree, however, that on merits, the plaintiff respondent is entitled to restitution of the sum of Rs. 45,000/- had and received by jthe appellant for the reasons which have commended themselves to my Lord though I am not unmindful of the divergence of opinion on the principles which should govern restitution in favour of a stranger to a contract which has been so lucidly dealt with in the law of contract by Cheshire and Fifoot, 6 Edition at page 547 et seq.

68. In the result I agree that the appeal should succeed and the decree against the appellant should be set aside.

The decree against the respondent Sen Bhaduri & Co. Ltd. is affirmed and the order for costs will be as directed by My Lord.