

Ratan Lal Goenka

Vs

Madhab Prasad Goenka and Others

Civil Appeal No. 1781 of 1970

(D.G. Palekar, A. Alagiriswami JJ)

23.04.1973

JUDGMENT

ALAGIRISWAMI, J. -

1. This appeal by certificate is against the judgment of the Division Bench of the Calcutta High Court dismissing the appellant's appeal against the judgment of a learned Single Judge who upheld the right of the first respondent to execute a compromise decree.

2. The facts relating to the matter may be set out in a short compass. Four person, including the first respondent, founded a partnership under the name of "Sadhuram Tularam". They were also the managing agents of tow private limited companies, Shree Radhakissen Cotton Mills Co. Ltd., and Goenka Properties Ltd. On the death of one of the partners in 1940, his son the first respondent, became a partner of the firm. In September, 1948 the first respondent file suit No. 3059 of 1948 for dissolution of the partnership. Pending the suit a sum of Rs. 9,09,500 was adjusted by transferring certain properties to the first respondent. On August 7, 1951, the suit was decreed in terms of an agreement, the relevant parts of which we are setting out below :

(1) That the parties (Keshav Prasad Goenka of the first part, Mannalal Goenka and Ratanlal Goenka of the second part and Madhav Prasad Goenka of the third part) would carry on the business of Commission Agents under the firm name of Sadhuram Tularam with branches at various places under different names and styles as heretofore and the said parties would each have one-third share therein and would execute and enter into a partnership for the purpose.

(2)

(3) That in further part liquidation of the sum of Rs. 10,52,301/11/8 pies or such sum as should be finally ascertained and entered the parties as members of the firm of Sadhuram Tularam with it branches would within three months from the date of the passing of the decree mentioned in the agreement sell and transfer to Madhav Prasad Goenka or his nominee, Sree Goenka Mills at Shivpur, District Benaras and house properties being premises No. 11, Gyan-bapika Fatak in the city of Benaras at or for the price of Rs. 4,50,000.

(4)

(5)

(6)

(7) On such stay order being made and obtained Shree Radha Kissen Cotton Mills Ltd. would be nominated by Madhav Prasad Goenka as the purchaser from the said firm of Sadharam Tularam of the landed and house properties at Benaras mentioned in clause (3) in his place for the said sum of Rs. 4,50,000.

(8) That all the parties agreed and undertook to cause the said Shree Radhakissen Cotton Mills Ltd. to enter into an agreement with the firm of Sadharam Tularam and Madhav Prasad Goenka for such purchase and to secure the payment by the said company of the said sum of Rs. 4,50,000 with interest at the rate of 5 per cent. by the issue of 900 debentures of the face value of Rs. 500 each under a Debenture Trust Deed by which the said company would charge all its assets and properties moveable and immoveable including book debts and the said properties so to be purchased from the firm and that the Trust Deed would amongst other usual covenants and conditions give right to Madhav Prasad Goenka and the trustees to be appointed thereby to enforce the security in default of payment by the company of any three instalments of interest whether consecutively or otherwise.

(11)

(13) If any party or parties should fail, neglect or refuse to act in accordance with the terms contained in clauses (3), (7) and (8) hereof of any of them the same shall be executable in the said Suit No. 3059 of 1948 without recourse to a fresh suit treating these presents as the decree binding upon the parties."

It is not disputed that the stay order mentioned in clause (7) has been made. The execution petition which gave rise to the present appeal was for enforcing the provisions of clause (3). The objection on behalf of the appellant is found in paragraphs 16 and 19 of the affidavit filed by the appellant which we shall set out below :

"16. I say that subsequent to the said agreement dated the 7th August, 1951, the plaintiff from time to time withdrew and/or was duly debited with diverse sums of money in his account in the said partnership business. Diverse sums of money were also credited into the said account of the plaintiff since the 7th August, 1951. On proper accounts being taken it will be found that subsequent to August 7, 1951 the plaintiff has overdrawn his account with the said partnership to a large extent."

"19. (a) During the year 1948 when the agreement was originally entered into a large sum of money was due to the Income Tax Authorities from the partners of Sadharam Tularam including the plaintiff Madhav Prasad Goenka. Further monies have also become due to the Income Tax Authorities from time to time from the said partners. A large number of certificate cases have been initiated by the Income Tax Authorities. A large number of certificates have been filed with the Certificate Officer under the Public Demands Recovery Act. Particulars of the certificates so far as I am aware are annexed hereto and marked "B".

(b) Large sums of money have from time to time been paid out of the till of the firm to the Income Tax Authorities in pro tanto satisfaction of the said certificates. Particulars of the payments so far as I am aware are set out in a schedule annexed hereto marked "C".

I say that some of the certificates referred to sub-paragraph (b) above are

outstanding. I am unable to specify which of the certificates have been actually paid off and cancelled.

(c) I say that the said Benaras properties were attached by the certificate officer and the attachment was pending on May 10, 1957. A copy of the said application form is annexed hereto and marked "D".

(d) I also crave leave to refer to a joint affidavit of myself and Mannalal Goenka affirmed on August 13, 1954 in these proceedings as a part of my present affidavit.

(e) In the premises aforesaid I say that the applicant Madhav Prasad Goenka is not entitled to any execution of the said decree by means of conveyance of the said Benaras properties belonging to the said partnership in his own favour."

The first respondent filed a reply affidavit the relevant portion of which reads :

"15. With reference to paragraphs 16 and 17 of the said affidavit I say that subsequent to the said agreement dated 7th August, 1951 the business of the said firm of Sadhuram Tularam was continued. Various sums of money were credited and debited to my account in the said partnership since 7th August, 1951 and also after 4th September, 1951. There are large sums now due from the said firm to me. I emphatically deny that I have overdrawn my account as alleged or at all. In any event, I deny that the question of the accounts of the said firm can stand in the way of the execution of the said decree. I say that I am entitled to execute the said decree. I deny that my attempt to execute the said decree is wrongful or illegal. I deny that Mannalal Goenka is aiding or abetting me. I deny that Mannalal Goenka or myself have committed any wrongful act. I deny the other allegations contained in paragraphs 16 and 17 of the said affidavit."

Before the Division Bench it seems to have been argued that the 1st respondent had not nominated Shree Radhakissen Cotton Mills as the party in whose favour the conveyance of the properties mentioned in clause (3) was to be made, and as he had not done so he was not entitled to execute the decree in so far as those properties were concerned. It was also argued that as the partnership continued the amount due to any one of the partners could not be ascertained until full partnership accounts were taken and nothing could be done unless there was a final and complete accounting between the partners by dissolution. Both these contentions were overruled.

3. Before us Mr. M. C. Chagla appearing on behalf of the appellant raised two contentions -

(1) that part of the decree found in clause (3) could be executed only if the amount due to the 1st respondent was finally ascertained, and

(2) that the 1st respondent was not entitled to execution but only Shree Radhakissen Cotton Mills.

We are of opinion that there is no substance in either point. It is immaterial whether the effect of clause (1) is deemed to be that the old partnership ceased to exist and a new partnership came into existence or the old partnership was itself deemed to continue. It does not affect the executability of the decree in so far as it concerns the matter included in clause (3). Clause (3) gives the sum due to the 1st respondent to the last pie. Though it refers to "such sum as should be finally ascertained and entered", the transfer of the properties mentioned in that clause is not made conditional on such final

ascertainment. The value of the properties to be transferred is given as Rs. 4,50,000. While the sum mentioned in the earlier part could be more or less by a few lakhs it could never come down below Rs. 4,50,000. The parties could not have been so ignorant of the state of the accounts as to make a mistake to the tune of nearly Rs. 6 lakhs in mentioning the sum that would be found to be ultimately due to the 1st respondent. The transfer of the properties mentioned in clause (3) was to be made either to the 1st respondent or his nominee and by clause (7) the 1st respondent was obliged to nominate Shree Radhakissen Cotton Mills for the purpose of taking a sale deed of the properties mentioned in clause (3), but this did not confer a right on the Radhakissen Cotton Mills itself to execute the decree. It did not become an assignee of the decree. It did not take away the right conferred on the 1st respondent by clause (3). It should be also noticed that the 1st respondent's obligation to nominate the Radhakissen Cotton Mills was dependent upon the conditions mentioned in clause (8) being complied with. In any case, both of them are so closely interconnection that one clause cannot take effect without the conditions mentioned in the other clause also being complied with. The learned Single Judge as well as the Division Bench have come to a concurrent finding that the 1st respondent did do all that agreement and it was the neglect on the part of the others that made it not possible for the 1st respondent to nominate the Radhakissen Cotton Mills. The Division Bench has elaborately gone into the question and held that it was the duty of all the partners to cause the Radhakissen Cotton Mills to enter into an agreement with the firm of Sadhuram Tularam as also the 1st respondent for the necessary arrangements to be made. Clause (8) in fact provides for the consideration to be paid to the 1st respondent in order to enable him to nominate the Radhakissen Cotton Mills and that has not been done. Nothing has been shown to us which would enable us to come to a contrary conclusion. In the circumstances we are of opinion that the failure of the 1st respondent to nominate the Radhakissen Cotton Mills was due to the failure on that part of the other partners to carry out the terms embodied in the agreement and clauses (3) and (7) do not in any way affect the right of the 1st respondent to execute the decree.

4. The appeal is, therefore, dismissed, the appellant will pay the costs of the 1st respondent.

</html