BOMBAY HIGH COURT

Bhagvan Manaji Marwadi

Vs.

Hiraji Premaji Marwadi

First Appeal No. 27 of 1930

(Patkar and Murphy, JJ.)

15.01.1932

JUDGMENT

Patkar, J.

1. One Gamnaji Jethaji, styling himself as the proprietor of the shop of Hiraji Premaji, brought Suit No. 151 of 1921 in the Court of the First Class Subordinate Judge at Bijapur against the firm of Mulchand Raychand by its partners (1) Dullabh and (2) Babasing. Dullabh referred the matter to arbitration without the leave of the Court and an award was made and a decree passed for ₹ 3,261/- against the firm of Mulchand Raychand. Suit No. 297 of 1927 was brought by Dullabh, Babasing, and Rayohand claiming some amount from Gamnaji in respect of the same matter, but the suit was dismissed. The decree-holder recovered ₹ 2,585/- from the partnership property by several darkhasts in 1922, 1923, 1924 and 1927, and darkhast No. 43 of l928 was brought by Chhaganlal, son of Gamnaji, who died in the meanwhile, for recovery of ₹ 2,478/-, the balance of the decretal amount from the private property of the other partners who were not served in the suit, namely, Mulchand, Bhagvan and Rayohand, and an application was made under Order 21, Rule 50, Clause (2), for leave to execute the decree personally against the other partners who were residents of Sarpore under the Bulsar Court in the Surat District. An application was made to the First Class Subordinate Judge at Bijapur to send the decree for execution to the Bulsar Court under Order 21, Rule 5.

2. The three partners against whom the decree was sought to be executed personally, namely, Mulchand, Bhagvan and Raychand, brought Suit No. 414 of 1928, for a declaration that the decree in Suit No. 151 of 1921 was not binding on them, in the Court of the First Class Subordinate Judge of Bijapur. The application under Order 21, Rule 50, Clause (2), was stayed till the decision of this suit. The learned Subordinate Judge dismissed the suit on the ground that Dullabh had implied authority to make the reference to arbitration. The learned Judge, therefore, granted leave under Order 21, Rule 50, Clause (2), and issued a certificate under Order 21, Rule 5, for transfer of execution to the Bulsar Court. Bhagvan, Mulchand and Raychand filed First Appeal No. 27 of 1930 to the High Court against the decision of the First Class Subordinate Judge in the application of the decree-holder under Order 21, Rule 50, Clause (2), but only

Mulchand and Bhagvan filed an appeal to the District Court in Suit No. 414 of 1928. The learned District Judge held that Dullabh, one of the partners, had no power to refer the matter to arbitration and the decree was not binding against the other partners who were not served in the suit. But as Raychand had not appealed against the decree of the lower Court, he allowed the decree to stand as regards Raychand and allowed the appeal of Mulchand and Bhagvan, Chhaganlal, the decree-bolder, filed a Second Appeal No. 380 of 1931.

3. Three points have been taken in Appeal No. 27 of 1980 brought by the partners who were not duly served in the suit brought against the firm of Mulchand Raychand, It is urged firstly that Chhaganlal cannot recover the amount without the production of a succession certificate under Section 214 of the Indian Succession Act; secondly, that the application under Order 21, Rule 50, Clause (2), is not within time; and thirdly, the appellants being partners who were not personally served in the suit, the award made under a reference, to which only Dullabh was a party, is not binding on the other members of the firm and therefore they are not liable to be proceeded against under Order 21, Rule 50, Clause (2).

4. The creditor firm of Hiraji Premaji consisted, according to the appellants, of one partner Gamnaji Jethaji, and therefore, the suit could not be brought in the name of the firm under Order 30, Rule 1, of the Civil Procedure Code. The objection seems to be well founded as one man cannot constitute a firm, and a person trading him self as a firm or in an assumed or trading name may be sued in his trading name under Order 30, Rule 10, but he cannot sue in that name. See *Rampratab v. Gavrishankar*[1] and *Mason v. Mogridge*[2] Chhagan lall, therefore, cannot proceed with the execution of the decree without the production of a succession certificate under Section 214, Clause (b), of the Indian Succession Act. There is no evidence in the case that Chhaganlal was a partner with his father Gamnaji in the business carried on in the name of Hiraji Premaji. It, therefore, follows that if Chhaganlal is entitled to execute the decree against the appellants, the partners who were not served in the suit, he must obtain a succession certificate under Section 214, Clause (b), of the Indian Succession Act.

5. The next question is whether the application against the appellants, who were partners of the firm of Mulchand Raychand and were not personally served in Suit No. 151 of 1921, is within time. The learned Subordinate Judge held that there is no limitation for an application under Order 21, Rule 5, for transfer of the decree. This position is conceded on behalf of the appellants. The learned Judge held that the application under Order 21, Rule 50, Clause (2), is not shown to be beyond time as the liability of the partners is a continuing liability, and it is open to the decree-holder to apply at any time till the decree is satisfied. The decree obtained against the firm of Mulchand Raychand is alive on account of the applications for execution filed in the years 1922, 1923, 1924) and 1927, and an amount of ₹ 2,585/- was recovered from the partnership property and from the personal property of Dullabh and Babasing, who were served in the suit.

6. Under Order 21, Rule 50, when a decree is obtained against a firm, execution may be granted as a matter of course against the property of the partnership and against any person who has appeared in the own name under rule 7 of Order 30, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, and against any

[1](1922) 25 Bom. L.R. 7
[2](1892) 8 T.L.R. 805

person who has been individually served as a partner with a summons and has failed to

appear; but if the decree-holder claims to execute the decree against any other partner who is not served in the suit, he has to apply under Order 21, Rule 50(2), to the Court which passed the decree, and if such person or persons do not dispute the liability, the Court may grant leave, but where the liability is disputed, the Court may order that the liability of such person or persons be tried and determined in any manner in which any issue in a suit is tried and determined. Under Order 21, Rule 50, Clause (3), an order in such an application shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

7. I think that the application under Order 21, Rule 50, is an application for execution of the decree obtained against the partnership, and if the liability is not disputed it can be executed against the personal property of the partners who were not served in the suit, but an opportunity is given to any partner or partners, who were not served, to dispute the liability under the decree. As observed by Lindley L.J. in *Western National Bank of City of New York v. Parez Triana & Co*[3]. when a firm's name is used it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues the partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names. The same view is taken in the case of *Rampratab v. Gavrishankar*[4] where it was observed that there is no such thing as a firm known to the law and a suit against a firm is essentially a suit against the partners constituting the firm.

8. It would, therefore, follow that the application for execution of the decree obtained against the firm of Mulchand Raychand is not barred on account of the previous applications made from time to time. Under Order 21, rule 60, it is permissible for the partners who were not served in the suit to dispute their liability on any valid ground, but the application for execution would be governed by Article 182 of the Indian Limitation Act and is, in my opinion, within time. The application under Order 21, Rule 50, Clause (2), for leave to execute the decree against the partners who were not served is merely an ancillary application in the application for execution, and unless leave is granted, the decree does not become an executable decree personally against the partners who were not served. So long as the decree is alive, an application can be made under Order 21, Rule 50, for leave to execute the decree against the partners who were not served in the suit. Such an application for execution in which an application is also made under Order 21, Rule 50, Clause (2), for leave to execute the decree against the partners who were not personally served in the suit is, in my opinion, not barred so long as the decree against the firm is alive.

9. The last point, urged on behalf of the appellants is that the partners who were not personally served in the suit against the firm are not liable because the award made in the reference to arbitration by one of the partners, namely, Dullabh, is not binding on the other partners, In *Datoobhoy v. Vallu*[5] it was held, following the case of *Stead v. Salt*[6] that one of the several partners in a partnership cannot bind the others by a submission to arbitration even on matters arising out of the business of the firm, and that it is no part of the ordinary business of a trading firm to enter into a submission to arbitration, The same

[3][1891] 1 Q.B. 304 [5](1899) 1 Bom. L.R. 828
[4](1922) 25 Bom. L.R [6] (1825) 3 Bing. 101

view is taken in *Vallabhdas v. Keshavlal*[7] *Ram Bharose v. Kallu Mal*[8] and *Gopal Das v. Baij Nath*[9] In Lindley on Partnership, 9th Edition, pages 186-187, it is observed :-

> One partner cannot, without special authority, bind the firm by a sub-mission to arbitration. The power to refer disputes, even although they relate to dealings with the firm, cannot be said to be an act done for carrying on its business in the ordinary way...The partner actually referring the dispute is, however, himself bound by the award and the other partners may become bound by ratification.

10. It is contended on behalf of the respondent-decree-holder, relying on the judgment of the Subordinate Judge in suit No. 414 of 1928, that there was a ratification by the other members of the firm. On the other hand, the District Judge has not accepted that finding on appeal. There is no satisfactory evidence in the case to show that there was any ratification by the appellants, the other partners who were not served in the suit against the firm, and the decree against the firm on the award would not be binding against the partners who were not specifically served, as Dullabh had no power to bind the other partners by reference to arbitration. If an action is brought for the recovery of a debt due to the firm, one of the partners cannot bind the firm by con senting to a Judge's order referring all matters in difference between the plaintiffs and the defendants to arbitration. See *Hatton v. Royle*[10] In an action against the firm, one partner has no power to bind the firm by consenting to a judgment against the firm. See *Hambidge v. De la Grouee*[11] and *Munster v. Cox*[12] I may refer in this connection to Lindley on Partnership, 9th Edition, page 354. It would, therefore, follow that the award was an invalid one so far as the other partners were concerned, and the decree based on the award would not be binding on the other partners. See *Dooly Chand v. Musaji*[13] and *Gopal Das v. Baij Nath*[14]

11. Under Order 21 Rule 50, Clause (4), save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer. It would, therefore, follow that unless the partners have been served with a summons to appear in the application under Order 21, Rule 50, for leave to execute the decree and had an opportunity to dispute the liability, the decree against the firm, though it does not release such partners, does not render them liable or otherwise affect them. Ordinarily a decree is binding on an executing Court and no question of the liability of the judgment-debtor can be allowed to be raised in execution. But in the case of partners who have not been served in the suit, a specific provision is made under Order 21, Rule 50, Clauses (2) and (4), that where the liability is disputed the Court may determine that issue in the proceedings and the order shall be appealable as if it were a decree.

12. It is contended on behalf of the decree-holder that the only question arising in the application for leave under Order 21, Rule 50, Clause (2), is whether the persons disputing the liability are partners, and that the parsons who were not served in the suit cannot dispute the liability otherwise than proving that they were not partners. Order 21, Rule 50, corresponds to the rule of the Supreme Court, Order 48a rule 8, and it was held

[7](1926) 29 Bom. L.R. 660
[8] I.L.R. (1899) All. 135
[9] I.L.R. (1925) All. 239
[10](1858) 3 H. & N, 500
[11](1846) 3 C.B. 742
[12](1885) 10 App. Cas. 680
[13](1916) 25 C.L. J. 339
[14] I.L.R. (1925) All. 239

by Stirling L.J. in *Davis v. Hyman & Co*,(1) that the only question which requires solution is whether his liability arises from his being a member of the firm or from his having held himself out as a partner; but under the rule the question to be determined is the general one of the

liability, as a member of the firm, of the person sought to be charged, and that an issue could in a proper case be so framed as to include any appropriate defense. The defence in the present case is that the appellants, who were the partners not served in the suit, are not liable by the award decree passed on a reference made by Dullabh who had no power to refer the matter to arbitration under Section 251 of the Indian Contract Act and under the authorities referred to above. I think, therefore, that the appellants in Appeal No. 27, namely, Bhagvan, Mulchand and Raychand, are not liable to be proceeded against in execution of the award decree which is invalid against them.

13. In Suit No. 414 of 1928 brought by the appellants, i.e., the partners who were not served in the suit, the learned Subordinate Judge passed a decree dismissing the suit. But on appeal the learned District Judge held that the award decree was not binding against the partners who were not served in the suit, and set aside the decree so far as Mulchand and Bhagvan were concerned but confirmed the decree so far as Raychand was concerned as he did not appeal to the lower appellate Court. It is urged on behalf of the decree-holder that if the suit was not maintainable under Section 47 of the Civil Procedure Code and if the suit was converted into a proceeding under Section 47 of the Civil Procedure Code by the District Court, it had no jurisdiction to set aside the decree as no appeal lay to the District Court in the execution proceedings in a suit which was filed in the First Class Subordinate Judge's Court and in which the amount claimed was Re. 8,932 and the appeal lay to the High Court. The objection thus raised is, in my opinion, well founded, but it leads to a curious result. The learned District Judge held that Raychand was bound by the decree in the suit against the firm as he did not appeal from the decree of the Subordinate Judge in Suit No. 414 of 1928 but he allowed the appeal of Mulchand and Bhagvan on the merits.

14. If the District Judge had no jurisdiction to hear the appeal, his decree holding Raychand bound by the decree against the firm on the ground that he did not appeal must be set aside. The suit before the First Class Subordinate Judge can be treated as an execution proceeding under Section 47(2) of the Civil Procedure Code, but the appeal in execution of a decree in a suit for an amount exceeding ₹ 5,000/- would lie to the High Court, and not the District Court. For the reasons mentioned above the liability of the partners who were not served in suit No. 151 of 1921 is disputed under Order 21, Rule 50, Clause (2), and leave to execute the decree personally cannot be allowed even against Raychand in appeal No. 27 of 1930. The same result would have followed if the District Judge had acted under Order 41, Rule 4, of the Civil Procedure Code. A subsidiary question arises, whether the proper remedy for the partners who were not served in the suit is to dispute their liability when an application under Order 21, Rule 50, Clause (2), is made, or whether they can bring a separate suit for a declaration that the decree is not binding upon them. The question is not free from difficulty. The decree obtained against a firm is binding on all the partners constituting the firm. It can be executed against them as regards partnership property. It can be executed against persons who appear under rule 6 or 7 of Order 30, or who admitted on the pleadings that they were, or who have been adjudged to be, partners, and also against any person who has been individually served as a partner with a summons and has failed to appear in the suit. Where a decree has been obtained against a firm it can be executed personally and against the private property of a partner who is not served in the suit after leave has been granted under Order 21, Rule 50, Clause (2), and in the application for leave a partner has a right to dispute his liability and the question of liability must be tried and determined.

Under Order 21, Rule 50, Clause (4), unless he is so served with a summons in the application for leave, he shall not be rendered liable or otherwise affected. The proper procedure, therefore, for a partner who has not been served in the suit is to dispute his liability when an application for leave is made under Order 21, Rule 50, Clause (2), and I am inclined to hold that in the absence of any fraud or collusion on the part of other partners resulting in a decree against the firm, it is not open to any partner who has not been served in the suit against the firm to bring a suit for a declaration that the decree is not binding upon him. It is unnecessary to go into the question whether the suit is within time.

15. I would, therefore, in Second Appeal No. 360 of 1931 dismiss the suit with costs throughout; and in Appeal No. 27 of 1930 I would allow the appeal of the partners who were not served in the suit with costs on the ground that they were not liable to be proceeded against in pursuance of the award under a reference made by Dullabh who had no power to refer the matter to arbitration so as to bind the other partners, I would, therefore, dismiss the application for execution with costs throughout.

16. The result, therefore, is that the decree-holder Chhaganlal is not entitled to execute the decree against Bhagvan, Mulchand, and Raychand, the partners who were not personally served in suit No. 151 of 1921 and whose liability is successfully disputed in the application under Order 21, Rule 50, Clause (2).

17. In Second Appeal No. 360 of 1931 the order under Section 35A of the Civil Procedure Code is discharged.

Murphy, J.

18. The occasion of these two appeals was a decree obtained in suit No. 151 of 1921 by a Bijapur one-man firm, against a second firm composed of several partners, some of whom were undisclosed in the course of the suit. There were execution applications in 1922,1923, 1924 and 1927, to the extent of the assets of the defendant partnership, and in 1928 the decree-holders made an application to the First Class Court Bijapur for a certificate, to enable them to proceed personally against three of the undisclosed partners of the original defendant firm. Almost immediately these persons filed a suit for a declaration that they were not liable to be proceeded against. Both the application and the suit were decided by the First Class Subordinate Judge, who allowed the former and dismissed the latter. The appeal against the decree in the suit went to the District Court which reversed the original decree and granted the declaration sought in the cases of the two partners who had appealed, one of them not having done so. The order in the application under Order 21, Rule 50, is before us in first appeal,

19. The central question is whether the undisclosed partners are personally liable, or not, and it arises from the fact that the original decree of 1921 was on an award, filed after a submission to arbitration, to which the partners we are now concerned with were not, at any rate, ostensible parties, and the learned District Judge's decision proceeds on this ground, in holding that they are not personally liable, on the established principle that to submit questions in dispute between a firm and third parties to arbitration is not one of the ordinary powers of a partner, and that if he does so in the absence of the consent, express or implied, of the remaining partners, or of their subsequent ratification, he cannot thereby bind those others. On this principle of law we are in

agreement with the learned District Judge, and we should therefore affirm his decree and reverse the order in the application under Order 21, Rule 50, But there are certain difficulties due to the double line of defense which has been adopted.

20. The first objection taken is that the application for a certificate not being made by the original decree-holder who has since died, but by his legal representatives, is incompetent under the Indian Succession Act, Section 214, without probate or a succession certificate, or some other formal recognition by a Court of the applicant's right to proceed in place of the firm's original owner. This is a legal necessity in the circumstances, but one not fatal to the application, for time to obtain such a recognition may be given.

21. It is next argued that the application under Order 21, Rule 50, is belated and so must fail, No specific period of limitation is enacted for such an application, and I think there is no real difficulty. In this case the application was one for a transfer to the Surat District as well, but in any case it is in essence an application to execute the decree, even though it is coupled with ancillary requests in the shape of that for a transfer and that for execution in the special case, and if this is correct Article 182 would apply, and it being made within three years of the last one, would be in time. Lastly it has been argued as to the point whether or not these undisclosed partners could be made liable in the absence of their consent to a reference and an award, that the only question to be considered in Order 21, Rule 50, is the one whether they were partners or not. This appears to be a narrow interpretation of the rule, the question being whether they are partners who are liable under the decree, or not.

22. My learned brother has dealt with the question whether the District Judge had jurisdiction to hear the appeal from the decree in the suit.

23. The filing of this suit creates a difficulty. Though it has been dismissed as regards two of the unnamed partners, the third did not appeal, though his case was similar to that of the other two.

24. Though the question is very difficult and we have been able to find no authority on it, I think that the issue, whether the unnamed partners were liable personally or not, was one between the decree-holder and the judgment-debtors, for once partnership was admitted, they become in effect judgment-debtors, and if so, the question is one which has arisen-in the course of execution proceedings and should be decided in them and not by a separate suit, and the conversion of the suit to a matter of that character would have been the learned Subordinate Judge's proper course, for the question raised was and is essentially one in execution.

25. I agree, therefore, with the order proposed by learned brother Patkar, J.

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