

BOMBAY HIGH COURT

Cooverji Varjang

Vs.

Cooverbai Nagsey Champsey

O.C.J. Appeal No. 33 of 1939 and Suit No. 1158 of 1930

(John Beaumont, Kt., C.J. and Kania, J.)

14.03.1940

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal against an order of Mr. Justice B. J. Wadia made on a chamber summons taken out by the respondent under Order XXI, Rule 50(2).

2. The material facts are that in the year 1930 a suit was filed by Messrs. Chenabhai Virji & Co. against Nagsey Champsey, and in due course there was a reference to the Commissioner for Taking Accounts. The Commissioner made his report to which the defendant took out exceptions. On November 11, 1937, the exceptions were allowed by the learned Judge and the plaintiffs were ordered to pay certain costs to the defendant. A question then arose as to who were liable to pay those costs, i.e. who were covered by the firm-name of Chenabhai Virji & Co. On July 15, 1938, the legal representative of the defendant, who had died in the meantime, took out this chamber summons under Order XXI, Rule 50(2), of the Civil Procedure Code, for leave to execute the order of November 11, 1937, against the appellants as partners in the plaintiff firm, and the learned Judge gave the leave required. From that order this appeal is brought.

3. The first point taken is a preliminary objection that an application under Order XXI, Rule 510(2), is an application in execution and cannot be made unless in the first instance a regular darkhast has been filed in compliance with Order XXI, Rule 11. Mr. Munshi contends that there must be a regular application and then, after having started the execution proceedings in a regular manner, an application can be made to the Court for leave to execute the decree against a particular defendant. Rule 10 of Order XXI provides that when a holder of a decree desires to execute it he shall apply to the Court which passed the decree, and under Rule 11 he has to specify the manner in which he proposes to execute the decree. Under Rule 50(1) it is provided that where a decree has been passed against a firm execution may be granted against partners

who have been served. We are not concerned with the first sub-rule, but Sub-rule (2) says :

Where a decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in Sub-rule (1), Clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

4. Therefore, before executing a decree against a firm against some alleged partner who has not been served it is necessary to get the leave of the Court under that sub-rule. It is difficult to see what useful purpose is served in making an application to execute the decree before leave has been obtained. Mr. Munshi contends that an application under Rule 50 is an application in execution, and one of the modes of execution which must be specified under Rule 11. But the application is one preliminary to taking any effective step in execution against persons who are covered by that rule. Conceding that it is an application in execution, nevertheless, it is a special form of application which is covered by a particular rule. It seems to us that it is not apt to say that an application for leave under Rule 50 is a mode of execution referred to in Rule 11. It is preliminary to any mode of execution which may be proposed against a particular party. Therefore on the wording of the rule we see no reason to differ from the learned Judge who thought that an application under Rule 50 (2) could be made without any previous application for execution under Rule 11. We understand that the learned Judge asked the Prothonotary to inform him what the practice in this matter¹ was on the original side, and the Prothonotary made a note to the effect that formerly on the original side an application to execute used to be made, and in that application a notice under Rule 50 was made returnable before the Chamber Judge to show cause why the decree should not be executed against the particular person alleged to be a partner ; but, while the late Sir Dinshah Mulla was the Chamber Judge he changed the practice, and held that no application for execution could be made until leave was first obtained by the executing creditor, and he directed that that should be done by means of a chamber summons and not by an application for execution. That practice has since been followed on the original side. We are not prepared to go so far as Sir Din shah Mulla is said to have gone in saying that an application for execution cannot be made unless leave has first been obtained under Rule 50 (2). It may be desired to execute the decree against one partner in the firm who has been served and in respect of whom no leave is required, and also against another alleged partner who has not been served. We think that an application under Rule 11 seeking to execute the decree against these two persons, showing that the application against one of the persons is contingent on leave being obtained under Rule 50(2), would be a good application for execution, and we do not wish to commit ourselves to the view, which seems to have appealed to the late Sir Din shah Mulla, that an application under Rule 50 (2) is not an application in execution. We are inclined to think that it is, but, we are entirely in agreement with the view taken by the trial Judge that it is not necessary to apply in execution first, and then apply for leave afterwards. In a case covered by

Rule 50(2) we think that the logical course is to apply for leave first, and to execute the decree afterwards. Therefore, in our opinion, the preliminary objection fails.

5. On the merits the only question which can be dealt with under Rule 50(2) is as to the liability of the appellants who are alleged to be partners to answer the decree against the firm. The decree against the firm stands, but the Court has to determine against whom that decree can be executed. From exhibit J which is a deed of dissolution of the firm of Chenabhai Virji & Co. dated December 3, 1924, it appears that prior to that date there were seven partners in the firm, including the appellants, and as from October 28, 1924, the appellants went out of the firm ; but certain debts due to the old firm, including the suit debt due by Nagsey Champsey, were retained. The document provides that those debts belonging to the then partnership shall be retained and shall belong to the seven persons in proportion to their respective shares. Then there is a provision that if in connection with those debts it is necessary to have recourse to Courts then all those seven persons are to pay the costs) by contributions towards the same in the proportion of their respective shares. It seems to us clear that the name of Messrs. Chenabhai Virji & Co. as plaintiffs in the suit covers the old firm because these plaintiffs were suing in respect of a debt due to; the old firm retained by the members of the old firm, and all the facts alleged in the plaint relate to acts of the old firm. So that we have no doubt that the firm which sued was the firm which included the appellants. Mr. Munshi contends that the effect of the dissolution deed was to terminate the partnership for all purposes, and to' retain the excepted debts as debts belonging to the previous partners jointly, and that their right was as joint creditors and not as partners. In our opinion that is not the effect of the dissolution deed. We think the effect of that deed was to dissolve the partnership except as to the excepted debts and that thq excepted debts remained partnership assets. That being so one partner would have the authority to recover the debt on behalf of all the partners. The suit was thus properly brought on behalf of the old firm and is binding on the appellants. In our opinion, therefore, the appeal fails and must be dismissed with costs.

Kania, J.

1. The firm of Chenabhai Virji & Co., described as carrying on business in Bombay, filed suit No. 1158 of 1930 against Nagsey Champsey. In the plaint it was stated that in Section 1977 the defendant was charged with committing murder and for the purpose of his trial different amounts were borrowed from the plaintiffs. It was further alleged that the account between the parties was a mutual, open and current account up to Section 1979 (1922-23). The prayer was to recover sixteen thousand and odd rupees alleged to be due at the foot of that account. To the plaint are annexed particulars of the claim and they start with an opening balance on November 11, 1920. The last item showing a transaction is in Section 1980. Thereafter the account is only carried forward from year to year after adding interest on the balance due at the foot of the previous year's account. The defendant filed a written statement in which he disputed his liability on various grounds. The only relevant point to be noticed here is that it was not contended by the

defendant that the firm which filed the suit in 1930 was not the firm with which he had any dealings. The parties went to a hearing and a decretal order of reference to the Commissioner was made to take the accounts.

2. Velji Versi, who had declared the plaint, gave evidence before the Commissioner, and he was asked about the constitution of the firm in and prior to Section 1977 and thereafter. The reason was that in Section 1980 there was a deed of dissolution between the partners of the firm then existing. This deed is dated December 3, 1924, and provides for the dissolution and winding up of the firm in respect of matters therein mentioned as from October 28, 1924. I shall deal with those terms later on. In the course of his evidence Velji stated that in 1930 three persons (who were other than the appellants) were partners in the firm of Chenabhai Virji & Co. The defendant filed exceptions to the Commissioner's report and at that time, picking up this statement in the evidence of Velji, it appears to have been urged that if Velji's statement was accepted as true, the plaintiffs had no cause of action. The exceptions were dealt with by Somjee J. who ruled that the defendant was not entitled to raise that contention at all because it was too late. Mr. Justice Somjee having allowed the exceptions it was found that the plaintiffs were not creditors of the defendant and the suit was thereupon dismissed with costs. In execution of that order for costs the representative of the original defendant took out a chamber summons under Order XXI, Rule 50(2), to make the appellants liable, and B. J. Wadia J. after hearing the parties found the issue against the appellants. The appeal is from that finding.

3. Three points are urged before us. The first is that the decree passed after the disposal of the exceptions makes the firm of Chenabhai Virji & Co., which was doing business in 1930, only liable and the defendant was not entitled to contend that the appellants who were partners only in the firm that was in existence from Section 1977 to 1980 were included in the firm of Chenabhai Virji & Co. which was ordered to pay the costs. That contention appears to have been put forth on the ground of estoppel and res judicata. Obviously neither of these two grounds can be sustained. In the first instance they were not pleaded in the affidavit filed on behalf of the appellants to show cause against the chamber summons. In order to establish a plea of estoppel it is essential to plead representations on the part of the other side, action on the part of the appellants on the footing of those representations and detriment to them thereby. None of those facts are alleged, much less proved. As regards the plea of res judicata it is obvious that that contention must fail because the very basis of the contention is that the appellants were not parties to that litigation. The contention which may however be formulated is that the decree in fact was passed against the new firm of Chenabhai Virji & Co. which was doing business in 1930 when the suit was brought, and it was that firm which was made liable to pay the costs. That contention is unsound because the Court had not decided (as was attempted to be contended by the appellants) that it was the new firm of Chenabhai Virji & Co. which had brought the suit. When that contention was suggested by the defendant before Somjee J., he was prevented from urging it on the ground that it was too late. Having regard to the pleadings and the order of Somjee J., the decree ultimately passed, instead of supporting the appellants' case, goes against

their contention. The suit was treated as filed by the firm which had dealings with the defendant since Section 1977 and which came to an end in Section 1980. The defendant had not contended that he had no dealings with the firm, as he should have, if he understood the claim to be by a firm which was in existence only in 1930. This contention must be rejected.

4. The second contention was that before a chamber summons under Order XXI, Rule 50(2), could be taken out it was necessary to file an application under Order XXI, Rule 11, and in default the summons must fail. To support this contention the scheme of Order XXI was relied upon. I agree with the line of reasoning stated in the judgment of the Chief Justice just delivered, and want to add a few words on this point. Rule 50 is classified under the heading " Attachment of Property." It is clearly out of place there. The preceding and subsequent rules all deal with attachment of property. Rule 50(7) deals with the question of the Court granting execution. It provides that execution in respect of a decree passed against a firm can be granted against (a) the property of the firm, (b) any person who has appeared under G. XXX, Rules 6 and 7, or who has appeared or been adjudged to be a partner, or (c) any person who has been individually served as a partner with the summons and has failed to appear. Sub-rule (2) then provides for a contingency where a decree on the face of it is not against any individual persons, nor against persons whose liability had been determined under Clauses (b) and (c) of Sub-rule (1). The law permits the liability of such person as a partner to be determined and Sub-rule (2) provides for that contingency. It assumes, as the word "claims" shows, that the decree-holder had not so far established his right to cause the decree to be executed against such a person. Therefore he has to go to the Court and ask for leave to cause the decree to be executed against such person in his capacity as a partner. The concluding words of that sub-rule show that the question has to be determined as if it was an issue in the suit and to leave no doubt on the question whether the order made under Sub-rule (2) was covered by Section 47 or not, sub-rule (3) provides that the decision shall operate as if it was a decree for the purposes of appeal and otherwise. The question is not whether this is a matter in execution or not. The question really is whether the person who holds the decree against a firm can execute it against a person who is not on the face of the decree a judgment-debtor nor a person whose liability as a partner has actually or in law been determined. When such a person is sought to be made liable, the decree-holder has to come to Court and apply for leave first. The practice reported by the Prothonotary as prevailing for many years past, I believe, is based on the ground that an application for execution should be made after the question, whether the person against whom execution is intended to be taken is liable or not as partner under the decree, is determined. To get that question determined leave is necessary and therefore in my opinion an application for execution under Order XXI, Rule 11, is not a condition precedent to an application for leave under Order XXI, Rule 50(2). I therefore agree that the preliminary objection fails.

5. The last point urged was that the partnership which existed in Section 1977 was dissolved by the deed of dissolution (exhibit J) and therefore Velji Virji had no authority to file this suit six years after that deed was executed by the partners. The question therefore depends on what is the

effect of that document. As I read it, the two persons, who did not want to continue in the business of Chenabhai Virji & Co. thereafter carried on, agreed to the accounts of the business so far done. Their claim against the other partners was ascertained and the amounts were included in the accounts. In respect of the outstanding from certain named debtors, the partners did not agree to come to a dissolution. In terms, it was recited that the claims against the there in mentioned persons belonged to the seven partners in partnership. The translation of the word (sick) made in the official translation as " jointly " is not quite accurate. When the original word was pointed out to the learned counsel for the appellants he did not dispute that the word "(sick)" meant partnership. That clearly negatives the contention of the appellants. It is also clear from the document executed by the partners (including the appellants) in 1933 (exhibit H) that they recognized these assets as still belonging to their partnership and it was provided that in respect of the High Court suit which was then pending the costs thereafter to be incurred were to be borne by certain partners only. Relying on that document, in the suit filed for the dissolution of the partnership firm of these seven persons, a consent decree was taken. In that the outstanding to be recovered from the debtors are specifically allocated to certain partners. It is therefore clear that both on. the construction of the documents and as understood by the parties themselves this debt was treated as a partnership property. The appeal therefore fails and I agree that it should be dismissed with costs.

Appeal dismissed.