BOMBAY HIGH COURT

Iron & Hardware (India) Co

Vs

Firm Shamlal & Bros

(Chagla, J.)

14.01.1954

JUDGMENT

Chagla, C.J.

1. These three revision applications raise a common question. Applications were made by creditors who allege that they are displaced persons within the meaning of Act 70 of 1951 for damages for breach of contract, and two principal questions arise for my determination. One is whether it is competent to displace persons to maintain an application under this Act in the name of the firm in which they are carrying on business, and the second is whether the Act covers cases of damages for breach of contract.

2. Turning to the first point, it is not disputed that the partners of the firm which has made applications against three debtors in these three applications are displaced persons. But what is urged is that the firm does not satisfy the definition of "displaced person" given in Section 2(10). The definition is:

> " 'displaced person' means any person who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances in any area now forming part of West Pakistan, has, after the 1st day of March, 1947, left, or been displaced from, his place of residence in such area and who has been subsequently residing in India, and Includes any person who is resident in any place now forming part of India and who for that reason is unable or has been rendered unable to manage, supervise or control any immovable property belonging to him in West Pakistan, but does not include a banking company;"

Now, what is urged is that this definition by its very nature can only apply to an individual and the Legislature has emphasised the aspect of residence and no other aspect. It would be impossible, it is urged, to suggest that a firm can reside in the sense in which that word is used in this definition. The residence contemplated is a human residence and it cannot apply to an entity

like a firm but it can only apply to individuals. In my opinion it is clear that there is no such legal entity as a firm. A firm is merely a compendious way of describing certain number of persons who carry on business as partners in a particular name, but in law and in the eye of the law the firm really I consists of the individual partners who go to constitute that firm. Therefore, the persons before the tribunal are the individual partners of the firm and not a legal entity consisting of the firm. Therefore, if the individual partners of the firm satisfy the definition of "displaced person' given in the Act, I see no reason why such an application cannot be maintained, and as I said before it is not disputed that all the partners of this firm satisfied the definition of "displaced person".

3. Reliance was placed on a decision of Mr. Justice Pawcett in - 'Dharamsey v. BalKrishna pandurang', AIR 1929 Bom 378 (A). The learned judge there was dealing with the Dekkhan Agriculturists' Relief Act and a suit had been filed against a certain firm on the original Side of the High Court, and the firm contended that the Court had no jurisdiction to try the suit because the partners were agriculturists as defined in the Dekkhan Agriculturists' Belief Act and all the partners resided outside jurisdiction. Mr. Justice Fawcett rejected that contention and he took the view that for the purpose of the Dekkhan Agriculturists' Belief Act, although each partner might be an agriculturist, still it did not make the firm which was being sued an agriculturist, and this is what is being strongly relied upon by Mr. Nain.It should be borne in mind that the principal question that the learned Judge had to decide was a question of jurisdiction and in his judgment he particularly relies on the fact that under Order 30, Rule 1, two or more persons claiming or being liable as partners and carrying on business in British India can be sued as a firm, and what the learned Judge points out is that for the purpose of jurisdiction what was to be considered was whether the firm carried on business within jurisdiction and not whether its partners were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act. In my opinion that decision is not of much help to construe the provisions of the Act which I have before me. That decision is not 'in pari materia' with the question that I have to decide and it turns on a particular provision of Order 30, Rule 1, with which I am not in this case concerned.

4. There can be no doubt that a displaced person may be a person or persons, and if two or more persons are joint contractors and if they satisfy the definition of "displaced person" as given in the Act, I see no reason why they cannot maintain an application merely because that application is in the name of the firm and not in the individual names of the partners. Whether the partners can maintain an application in the name of the firm or not is more a question of procedure than a question of substantive right. It may be said, as it has been said and as I shall presently point out, that the partners who are all displao ed persons, although they have a right to make an application under the Act, cannot make that application in a particular form, viz, in the name of the firm. But that would raise a question of procedure. The right of the partners to maintain the application

cannot be disputed or challenged

5. Turning to the procedural question, what is urged is that o. 30, r. 1, does not apply to the proceedings under the Displaced Persons Act. It is clear that if Order 30, r. 1, did not apply, then the application would not be maintainable in the form in which it has been presented. It is only by reason of Order 30 that a particular facility is given to persons who carry on business in a firm name. Apart from Order 30, every partner would have to be brought on the record as a party plaintiff if he claimed a debt due to the partners from a third party. Therefore, the question is whether Order 30 applies to proceedings under this Act. In the first place we have Section 25 of the Act which provides:

"Save as otherwise expressly provided in this Act or in any rules made thereunder, all proceedings under this Act shall be regulated by the provisions contained in the Code of Civil Procedure, 1908.Now, I find it difficult to understand why in view of this provision this particular proceeding cannot be regulated by Order 30 of the Civil P. C. What is urged by Mr. Nain is that it is only after a proceeding has been admitted that the provisions of the Code apply to such a proceeding, but when a question is as to the form in which the proceeding should be launched the provisions of the Code cannot be made applicable because it has not yet become a proceeding before the tribunal and no question of the application of the provisions of the Code can arise.In my opinion that contention is not tenable. When the application comes before the tribunal and a point is raised that the application is not in proper form, the Court has got to consider whether the form is proper or not in the light of the provisions of the Code. That is the only guidance that the Legislature has given to the tribunal. Whether a proceeding is in proper form or not is a question of procedure and all questions of procedure relating to proceedings before the tribunal are governed by the provisions of the Civil P. C. unless otherwise expressly provided by the Act or by the rules made under it, and it is not suggested that there is any provision in the Act or in the rules made which have provided that o. 30 should not apply to applications made under the Act. Reference may also be made to Section 141 of the Code.

That section provides:

> "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

And it is not disputed that if an independent proceeding was to be initiated in a Court, Order 30 would apply to such a proceeding by reason of this section. But inasmuch as the application under the Act has got to be made not to a Court but to a tribunal, reliance cannot be placed upon Section 141 of the Code and the Legislature had expressly to provide by Section 25 that the Civil P. C. applies to proceedings before the tribunal. Therefore, in effect by reason of Section 25,

Section 141 of the Code has been made applicable not only to proceedings in any Court, but also to proceedings before the tribunal, and therefore just as Order 30 would apply to an independent proceeding in a civil Court, 6. 30 would also apply to a proceeding before the tribunal. Therefore, in my opinion there is no substance in the contention that the application made by the respondent firm is not maintainable as Order 30 does not apply to proceedings before the tribunal.

6. The next contention is of greater substance and that contention is that an application to re cover damages is not an application in respect of a debt as defined by the Act and therefore it was not open to the respondent firm to make an application to recover damages for breach of contract under the Act and the only forum open-to the respondent firm was a civil Court and not the tribunal set up under the Displaced Persons Act. Now, "debt" has been defined in Section 2(6) as any pecuniary liability, whether payable presently or in future, or under a decree or order of a civil or revenue Court or otherwise, or whether ascertained or to be ascertained which was incurred as provided in Sub-clauses. (a) and (b) or is due as provided in Sub-clause (c). This is a case which falls under Sub-clause (c) because the case of the respondent firm is tnat the partners are displaced persons and debts are due to them within the meaning of the Act.Now, in order that there should be a debt there must be an existing obligation. The payment may be due immediately or it may be due in future, but the obligation must arise in order that the debt should be due. It may even be that the actual amount due in respect of the debt may require ascertainment by some mechanical process or by the taking of accounts. But even when the actual amount is to be ascertained the obligation must, exist. It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The 'breach of contract does not give rise to any debt and therefore it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach, of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned.

7. Now, this principle has been accepted by the learned Judge below, but the reason why he has taken a different view is that the definition of "debt" given in this Act is an artificial definition and is nob the definition which has been accepted for the purpose of the Transfer of Property Act, and what is emphasised is that debt is not merely a liability which is ascertained, but it is also a liability which is to be ascertained, and therefore the view is taken that unliquidated damages would constitute a debt within the meaning of this Act. In my opinion, with respect to the learned Judge, greater emphasis should be placed on the expression "any pecuniary liability" rather than on the expression "whether ascertained or to be ascertained". Beiore it could be said

of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breachs has any amount due to him from the other party.As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damage or compensation by reason of any existing obligation on the part of the person who has com mitted the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liablility arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.The expression "to be ascertained" may well apply to a case which I have indicated earlier where the pecuniary liability cannot be ascertained without accounts being taken or some other process being gone through. But the whole basis of a suit for damages is that at the date of the suit there is no pecuniary liability upon the defendant and the plaintiff has come to Court in order to establish a pecuniary liability. Now, whether the case fails under Section 2(6), clause (a), (b) or (c), at the date when the application is made there must be an existing debt, or, in other words, an existing obligation, and when the respondent firm filed its application for damages, there was no debt existing in respect of which an application could be made under the Act. If the intention of the Legislature was that a special tribunal set up under the Act should adjudicate not only upon debts, but also upon damages, nothing was easier than for the Legislature to have said so. But the Legislature advisedly uses the expression 'debt' and not 'damages', and the tribunal is set up for the adjustment of debts and not for the determination of pecuniary liability and the assessment of that pecuniary liability.

8. Therefore, in my opinion, as the respondent firm has filed an application in all these three cases for damages for breach of contract, the applications are not maintainable because they are not applications for recovery of a debt from the petitioners.

9. I would, therefore, set aside the order of the learned Judge below and hold that the tribunal has no jurisdiction to entertain these applications.The result, therefore, will be that these applica tions will be dismissed with costs throughout.

10. Applications dismissed.