
(1957) 04 BOM CK 0022

Bombay High Court

Case No: Second Appeal No. 866 of 1956

Shaikh Yakub Ibrahim
Sathia

APPELLANT

Vs

Mahomadali Haiderali
Vohra

RESPONDENT

Date of Decision: April 2, 1957

Citation: AIR 1958 Bom 51 : (1957) 59 BOMLR 870

Hon'ble Judges: S.T. Desai, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

S.T. Desai, J.

This second appeal raises a short but interesting question of law. The appellant who was the original defendant No. 1 and his two sons who were defendants Nos. 2 and 3 to the suit entered into a partnership with the respondent in respect of a business of taking forests on contract and the plaintiff-respondent filed the suit for dissolution and account of that partnership. It was common ground that the partnership was dissolved on October 17, 1947. The suit was filed on June 11, 1951, and one of the contentions raised on behalf of the defendants was that the suit was barred by limitation. Various issues were raised by the trial Court which held that defendant No. 8 was not a partner in the business and the partnership consisted of the plaintiff and defendants Nos. 1 and 2. The plaintiff in, order to save the bar of limitation relied on a letter addressed by defendant No. 1 to him on July 22, 1949. In that letter there was a clear acknowledgment of liability made by defendant No. 1. Therefore, to the contention of defendant No. 1 that the suit against him was barred by limitation, there was a complete answer furnished by this acknowledgment of liability which would have the effect of extending the period of limitation so far as he was concerned. Before the trial Court it was contended on behalf of the plaintiff that the acknowledgment of liability made by defendant No. 1 was binding on defendant No. 2 also because defendants Nos. 1 and 2 were partners and there was mutual agency

between them. The learned Judge came to the conclusion that defendant No. 1 had implied authority to bind defendant No. 2 by this acknowledgment of liability and he passed a preliminary decree for accounts.

2. Defendants Nos. 1 and 2 appealed to the District Court at Godhra against the decision of the trial Court. That Court in appeal held that the suit against defendant No. 2 was barred by limitation and negated the contention of the plaintiff that defendant No. 1 had implied authority to bind defendant No. 2 by the acknowledgment of liability. The District Court, however, dismissed the contention of defendant No. 1 in that appeal that if the suit was barred by limitation against defendant No. 2, it could not proceed against defendant No. 1, the suit being a partnership suit for accounts, and passed a preliminary decree for accounts against him alone. Defendant No. 1 has now come to this Court in second appeal.

3. Mr. D.V. Patel, learned Counsel for the appellant, has contended that the lower appellate Court was in error in passing a preliminary decree for accounts in a firm of three partners when the suit by one partner for accounts against the other two was barred as against one of those two partners. Reliance has been placed on a decision of the Calcutta High Court, *Ramdoyal v. Junmenjoy Coondoo* ILR (1887) 14 Cal. 791. where in a suit for partnership accounts, upon objection of the defendant, it was found that a necessary party defendant who was also one of the partners had been omitted and such party had been afterwards added as a defendant at a time when the suit against him was barred, and it was held that the whole suit was rightly dismissed.

4. The subject-matter of a partnership suit generally is the severance of the jural relationship and the determination of the mutual rights of the partners. There being mutual agency and mutual obligation to render accounts, the position of parties in a partnership suit is in some particulars different from that of parties in an ordinary suit. Each of the partners, in a partnership suit, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights or liability relatively to the other partners which the Court endeavours to determine by its decree. In such a suit it is well established that a decree can go either in favour of the plaintiff against the defendant, or in favour of any defendant or defendants against any other party or parties to the suit. Now in a partnership suit all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the Court, or the suit will fail. Proper and complete accounts cannot be taken as between some only of the partners. The necessary corollary of this is that if a necessary party has been omitted and added at a time when the suit against him is barred, the whole suit will be dismissed as happened in the Calcutta case relied on by Mr. D.V. Patel. The same consideration must apply where in a partnership action by a partner against his other partners, the claim is barred against some of those partners but the bar of limitation is saved against some other or other partners by virtue of any acknowledgment, and this is for the simple reason that when accounts are taken in any such suit, all the partners would not be before the

Court. The reason for the rule is that accounts between a number of partners cannot properly be taken by the Court in the absence of any of them. It may be that in a particular case this rule might result in hardship or even defeat a just claim of one partner against another. It may be that the absence of the partner against whom the suit is barred by limitation would not ultimately have made any real difference in the actual result of the accounts. It may also be that on proper taking of accounts that partner might turn out not to be a debtor of the firm or of the other partners but something may be found due to him. But all these considerations cannot override the application of the statute of limitation and after all these statutes of repose are not intended to help those who slumber and sleep over their rights. Therefore, if the plaintiff did not choose to bring this action for nearly 4 years after the dissolution of the partnership, he has to blame himself if he is not able to get any relief from the Court.

5. Three contentions have been urged before me by Mr. Gambhirwala, learned Counsel for the plaintiff-respondent, in support of the judgment of the lower appellate Court. It is said that the suit when instituted was competent because the plaintiff had taken care to bring on record all the partners, who, according to him, were partners in the firm. I do not see how that consideration can have any real bearing on the question before me. The next contention has been stated in the form of an interrogation. Is it open to defendant No. 1 who has acknowledged his liability to account to the plaintiff now to contend that the suit is bad because it is barred by time against defendant No. 2 ? The suggestion seems to be that it is highly improper for defendant No. 1 to raise this contention and he should, therefore, not be heard when he says that the suit against him is not maintainable in spite of the fact of acknowledgment of liability passed by him. There can be a number of answers to this, but one short answer will suffice and it is that there is no estoppel and defendant No. 1 is entitled to rely on the fact that all the necessary parties to a suit for account are not now before the Court.

6. It is lastly urged by Mr. Gambhirwala that in the title to this second appeal defendant No. 2 has been joined as one of the respondents. The argument has proceeded that it is open to this Court to take the same view that was taken by the trial Court in respect of the position and liability of defendant. No. 2. Now, defendant No. 2 has not appeared before me in this appeal and in the absence of cross-objections or cross-appeal, it is not competent to this Court to pass any order which can affect the rights of defendant No. 2. The suit against him has been dismissed on the ground that it is barred by limitation and that position cannot in any manner be modified by this Court.

7. The result is that the appeal succeeds and the suit will be dismissed. There will be no order for costs of the suit or of the two appeals.