Jayanatilal Mohanlal Vs Narandas and Sons

Court: Bombay High Court

Date of Decision: Sept. 29, 1982

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 11
Partnership Act, 1932 â€" Section 32
Presidency Towns Insolvency Act, 1909 â€" Section 7, 99

Citation: AIR 1983 Bom 226

Hon'ble Judges: Sharad Manohar, J

Bench: Single Bench

Advocate: N.V. Adhia, for the Appellant; M.A. Rane and A.M. Mody, for the Respondent

Judgement

1. This is a revision application filed by a retired partner of the firm against which firm money decree has been passed by the Court. After passing

of the decree, the decree-holder wanted to execute the same against the petitioner on the ground that the was a partner of the firm at the time of

the suit transaction. The petitioner claims to have retired from the partnership. The plaintiff filed the requisite application to the Executing Court

under Court. 21, R. 50 (2 of the Civil P. C. for bringing on record the petitioner and other partners of the defendants firm so that he could execute

the decree against them individually. This was done by him by taking out a notice in that behalf. This notice was opposed by the present petitioner

on various grounds. all of which have been negatived by the trial Court and an order has been passed that the execution should proceed against the

present petitioner. It is this order which the petitioner wants to be revised by this Court.

2. The facts relevant for the purpose are as follows:--

For the sake of convenience, the parties will be referred to with reference to their position in the trial Court save and except that the petitioner,

who was respondent No.4 in the trail Court, will be referred to as "petitioner" only.

One Miss Geetaben N. Jatania who was defendants No. 2 in the suit had deposit a sum of Rs. 7,000 with the firm M/s Damodar Vithaldas, which

was defendants No. 1 in the suit. The firm/ defendants No. 1 executed a despot receipt in favour of said Miss Jatania/ Defendants No. 2. It is not

disputed that said Miss Jatania/ defendants No. 2 assigned her right, title and interest in the said deposit receipt in favour Court the plaintiff.

About the next fact there is a slight ambiguity. Contention of the present petitioner is that he retires from the partnership firm/ defendants No. 1 on

31-10-1976. However, this ate is also referred to as 24-10-1976 in the judgment of the trail Court. Whatever that may be, it is an admitted after

that the present petitioner retired from the partnership firm/ defendants No. 1 after the execution of the deposit receipt by the firm in favour of

defendants No. 2.

On 15-10-1979 the plaintiff filed a suit against the firm/ defendants No. 1 and also against defendants No. 2 Miss Jatania for recovery of the

amount due under the deposits. In the said suit decree was passed on 17-6-1980 against the firm/ defendants No. 1 for a sum of Rupees 9,992.91

ps. The decree directed that amount was to be refunded by instalment of Rs. 300 each. The first instalment was to be paid on or before 15th day

of each month. On 26-9-1980, the plaintiff took out Miscellaneous Notice No. 1781/80 against the present petitioner Jayantiala Mohalal , who

was shown a respondent No. 4 in the said notice and against some other respondent . By the application in question the plaintiff sought to bring on

record the partners of the firm/ defendants No.1 so that the plaintiff could execute the defendants against the said partners also. Evidently, the

application was made under Court. 21. R. 50 (2) of the Civil P. C. The learned Judge who head the notice, however, appear to have taken the

view that such an application was not competent because the original judgment-debtor, defendants No. 1 had not made any default in payment of

the decretal instalment. The learned Judge observed that the original judgment-debtor. defendants No. 1, was always ready and willing to pay the

amount. I may state here that the fact that on the date when the said application viz. Miscellaneous Notice No. 1781/80 was made, the fir/

defendants No. 1 was ready and willing to pay the amount of decretal instalment, is not disputed before me. As a matter of fact is has been the

specific contention of the present petitioner in the trial Court that the original firm/ defendants No. 1 against whom the defendants was passed had

in fact offered the amount of the instalment to the plaintiff but that the plaintiff themselves refused to accept the amount. This position appears to be

to have been accepted by the learned Judge also. Evidently, according to the learned Judge. the decree was an instalment decree and question of

the exception of the decree would not arise unless there was any default made in payment of any instalment. Since no default was proved to have

been made by the defendants-firms, question of execution of the decree does not arise. It was with this reasoning. evidently, that the learned Judge

dismissed the said notice by order dated 29-10-1980.

3. On 24-11-1980, the plaintiff took out second notice Miscellaneous, Notice No. 2260/80 to bring the names of persons mentioned as

respondent Nos. 1 to 5 on record in the decree. Evidently, this application was also made under Court. 21, R. 50 (2). Respondent No. 4 is none

other than the present petitioner and the present petitioner and other respondent were sought to be brought on record on the ground that they were

the partners of the jurisdiction-debtor firm. It is the order on this application that has given rise to the present revision application. Only the present

petitioner and original respondent No. 5 appeared in response to the notice. The present petitioner filed his reply on behalf of original respondent

No. 5. To the rely there was rejoinder filed by the plaintiff-decree-holder and to the rejoinder the present petitioner filed a surrejoinder. It is

unnecessary to set out the contentions raised to the reply and surrejoinder separately. The substance of the contentions of the present petitioner in

reply to the plaintiff notice was as follows:

(a) Firstly, according to the petitioner the second application under Court. 21, R. 50 (2) of the Court was bared by the principles of the res

judicata, having regard to order dismissing its first notice for similar relief:

(b) Secondly, according to the petitioner he was only a dormant partner of the defendants-firm and hence, was not liable for the dues of r the

partnership firm.

(c) Thirdly, the defendants-firms was always ready and willing to pay the decretal amount by instalments as fixed by the decree. Contention was

that the amount of each instalment was in fact offered by the defendants-firm to the plaintiff-decree-holder which amount was unjustifiably rejected

by the plaintiff.

(d) Fourthly, it was contended that the petitioner had retired from the partnership on 31-10-1976 much before the date of the filing of the suit and

hence no decree could be passed against him.

(e) Lastly, it was contended, by way of sur-rejoinder that firm-defendant No. 1 was adjudicated insolvent by an order of adjudication passed by

this Court on 17-2-1981. Contention was that in view of the said order of adjudication no partner of firm could be proceeded against and hence

the application had become infructuous.

4. All the abovementioned contentions of the petitioner were rejected by the trial Court. As regards the first contention, the trial Court found that

the first notice which was dismissed on 29-10-1980 was not dismissed by the Court on merits at all but it was dismissed because according to that

Court the question of execution had not arisen at all. The Court dealing with the first notice had found that there was no default committed by the

defendants-firmed in the matter of payment of the instalments fixed by the decree and hence there was no further question of decree being

executed against any of the partners of the firm. The second plea relating to the petitioner being mere dormant was not seriously pressed at all and

hence the Court found it to be wholly untenable. So far as the 3rd contention was concerned, it does not appears to have been pressed into

service at all before the trial Court. The only contentions which were really adjudicated seriously were that:

(i) The plaintiff"s second notice which was an application under Court. 21, R. 50 (2) of the Civil P. C. was not maintainable.

(ii) That the defendants having been adjudicated insolvent each of the partners of the firm, must be deemed to have become insolvent and he could

not be proceeded against in any Court.

The plea that the petitioner was absolved from the liability because he had retired from the partnership on 31-10-1976 was repelled by the Court

on the ground that the notice of his retirement was not given by him as required under the Partnership Act. So far as the plea of insolvency was

concerned. the learned Judge held that the firm which was declared insolvent was a totally different entity from the firm-defendant No. 1. The

learned Judge further found original respondent Nos. 1, 2, 3 and 5 were also the partners of the firm M/s Damodardas Vithaldas (Export) and that

they were adjudicated insolvent but the present petitioner was not a party to the insolvency proceedings and was not adjudicated insolvent in the

said proceedings. In this view of the matter, the learned Judge held that so far as the present petitioner was concerned. there was absolutely on

reason why the application under Court. 21. R. 50 (2) of the Civil P. C. should not be allowed and as to why the execution should not proceed

against the petitioner. By his order dated 24-7-1981. the learned Judge made the notice absolute so far as the present petitioner was concerned

and discharged the notice as against rest of the original respondent..

The present petitioner filed an application to the Full court of the Court of Small Causes against the said order but by its order dated 4-12-1981,

the Full Court entirely agreed with the judgment of the trial Court as also the reasoning on which it was based. Hence, the Full Court dismissed the

said application.

5. The only points that were urged before me by Mr. Adhia, the learned Advocate appearing for the petitioner are the following:

(a) That the second notice taken out on 24-11-1980 was barred by the principles of res judicata in view of the order of dismissal of the earlier

notice dated 29-10-1980 for the same relief.

(b) The proceedings under O. 21. R. 50 (2) could not be decided on affidavits. Contention was that since facts were in dispute, the question in

issue had to be decided in the same manner as the trial of a suit and by deciding the question on the strength of the affidavits only. the petitioner

was deprived of the opportunity to lead evidence to prove that the firm was defendant No. 1 in the suit against which firm the decree is passed by

the Court:

(c) In view of the insolvency of the defendant-firm, the decree could not be executed even against its partners having regard to the provisions of

Ss. 7 r/w. 99 of the President Towns Insolvency Act.

The answer to the first contention of Mr. Adhia is already indicated above while stating the facts. The answer given by both the Courts below to

this contention is quite correct. the order dated 29-10-1980 dismissing the petitioners" application for bringing the partners of the firm on record

was not dismissed on merits: it was dismissed on the ground that after all the partners were sought to be brought on record with a view to execute

the decree against them, but that the question of execution of the decree did not arise because there was no default in the payment of the instalment

decree passed against the firm. The Court. on the previous occasion did not hold that in no circumstances the partners could be brought on record.

The Court held, by necessary implication, that if there was a default committed by the partnership, decree could be executed by the plaintiff against

the firm and at that time the question of bringing the partners of the firm on record would be relevant. I do not mean to suggest that the reasoning is

correct or unassailable or that it might be approved of by this Court. The point is that the previous Court had not rejected the application for

bringing the partners of the firm on record for all the times. on the other hand, by necessary implication, the Court had given liberty to the firm to

make such an application if occasion for execution of the decree against the firm arose. It is nobody"s case that on the date of the second

application under O. 21. R. 50 (2) such occasion had not arisen. There is no evidence to show that the firm had in fact paid all the instalments due

till date of the second application. If that is the position. the second application under O. 21, R. 50 (2) could certainly be entertained. The plea of

res judicata in such a case would be misconceived.

6. The pea about want of jurisdiction for the Court to decide the dispute on affidavits is equally misconceived. The contention is that the liability of

the petitioner for a decree passed against the firm was disputed by the present petitioner and under O. 21. R. 50 (2) such a dispute has got to be

tried in the same manner in which the suit may be tried. A suit cannot be decided. contends Mr. Adhia, only on the basis of affidavits. He contends

that this constitutes a material irregularity in the exercise of its jurisdiction by the Court.

This aspect is further sought to be highlighted by reference to the finding recorded by the learned Judge, viz. that the firm which was adjudicated

insolvent was not the same firm against which the decree was passed in the present suit. Contention is that if the proceeding was tried as a suit oral

evidence would be led by the petitioner to show that the firm against which the decree was passed in the suit was the self-same the insolvency

proceedings.

In the first place, to my mind, the contention has no statutory basis at all. O. 21, R. 50 (2) specifically states that if the partner who is sought to be

brought on record disputes his liability, the liability shall be tried in any manner in which any issue in the suit may be tried and determined. The

words ""any manner in which any issue in a suit may be tried"" are the key-note for this purpose. Under O. 19, R. 1 of the Code, any Court may at

any time, for sufficient reasons. order that any particular fact or facts may be proved by affidavit. The proviso to the said rule enjoins that if either

or the parties bona fide desires the production of the witness for cross-examination and that such witness is available for cross-examination, the

evidence shall not be recorded by the Court by affidavits. Applying that provision to the procedure in this case, it will be seen that whatever may

be the contentions of the present petitioner with a view to dispute his liability, that dispute does give rise to certain issues between parties and such

issues could be tried by affidavit by virtue of the provision of the said O. 19, R. 1. It is to be noted that at no time the present petitioner even gave

an indication to the Court that he wanted oral evidence to be led in support of his contention nor did he express any desire to cross-examine any of

the affidavits of the affidavits. the grievance is being made for the first time only before me. That being the position. I find no jurisdictional

irregularity in the order passed by the Court after examining the affidavits filed by the parties.

7. But even apart from the factual position mentioned above and apart from the question of the inter-action of the provisions of O. 21, R. 50 (2)

and O. 19 (1) of the Code, what is to be noted is that the question to be decided under O. 21. R. 50 is the narrow question as to whether he was

a partner of the firm at the relevant time or not. He cannot question the liability of the firm itself. It was open for him to contend that he was not the

partner of the firm in question at the relevant time. It was also open for him to contend that the decree passed against the firm of which he was a

partner, was the result of collusion, or fraud or of similar other circumstances. But save and except the above contentions, no contention was

available for him to defeat the decree passed against the firm as such. Further, once the decree against the firm was found not to be collusive or

fraudulent, even partner of the firm by bound by the decree. If any authority is necessary for this proposition, it is to be found in the decision of the

Supreme Court in the case of Gambhir Mal Pandiya Vs. J.K. Jute Mills Co., Ltd., Kanpur and Another, . The head-note of the report correctly

sets out the ratio of the decision as follows:

Order 21, R. 50 (2) deals with executions, but really is a part of the provisions relating to suits against firms contained in O. 30 and must be

viewed along side to get the true meaning of the words ""The liability of such person"". O. 30 permits suits to be brought against firms. The summons

may be issued against the firm or against persons who against the firm or against persons who are alleged to be partners individually. The suit,

however. proceeds only against the firm. Any person who is summoned can appear. and prove that he is not a partner and never was: but if he

raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but

cannot enter upon issues between themselves. When the decree is passed, it is against the firm. such a decree is capable of being executed against

the property of the partnership and also against two classes of persons individually. They are: (1) persons who appeared in answer to summons

served on them as partners and either admitted that they were partners or were found to be so, and, (2) persons who were summoned as partners

but stayed away. The decree can also be executed against persons who were not summoned ins the suit as partners. but R. 50 (2) of O. 21 gives

them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the persons summoned to reopen the

decree. He can only prove that he was not a partner. and in a proper case. that the decree is the result of collusion, fraud or the like. But he cannot

claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special

defence of collusion. fraud etc. the Court must give lease forthwith. The proper meaning of the words ""The liability of such person"" in Order 21, R.

50 (2) thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the

firm, when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit

tried over again or to raise issues between himself and his other partners. It is to be remembered that the leave that is sought is in respect of

execution against the personal property of such partner and the leave that is granted or refused affects only such property and not the property of

the firm. Ordinarily. when the person summoned admits that he is a partner. leave would be granted unless he alleged collusion. fraud or the like"".

In the lower Courts, the petitioner''s contention was that he was not a partner of the firm on the date of the suit or on the date of the decree but it

was rightly negatived by the courts below and it was rightly not even urged before me. In the circumstances, the only question that remains for the

Court to decide is as to whether the petitioner proves that he was not a partner of the firm at the relevant time. The relevant time, in the instant

case, is the date 20-10-1976 when the deposit receipts was executed by firm in favour of the defendant No. 2. On this date, the petitioner was

admittedly a partner of the firm. The question to be decided by the Court, therefore, was a very narrow question. This question could be decided

conveniently on affidavits and the answer to it could not be anything but that the petitioner was liable for the decree passed against the firm. This is

so for the simple reason that no partner of the firm can get himself absolved from the liability towards the creditor of the firm by resorting to the

simple expedient of retiring from the firm after the firm becomes indebted to the creditor. The lower Court has held that petitioner was liable for the

dues because he had not given notice of retirement. But to my mind apart from the question of absence of the notice of retirement. even if the

notice of retirement was given. still the petitioner could not be absolved from the liability by giving his unilateral notice of the retirement. He would

have to satisfy the Court that after the notice of retirement, the creditor acquiesced in that position and agreed to get his dues satisfied from the

newly constituted partnership firm. Nothing of this kind has happened in this case. This being the position the liability of the petitioner for the

partnership dues till the date of his retirement cannot be avoided by him.

8. But to my mind, the above objection is capable of being repelled by assuming that whatever the petitioner wanted to prove was in fact proved

by him. He wanted to prove that the firm M/s. Damodardas Vithaldas against whom the decree was passed by the Court was the self-same firm

M/s. Damodardas Vithaldas (Export) against which an order of adjudication of insolvency was passed in the insolvency proceedings. I may

assume that he has proved the fact that the two firms are one and the same. If that is assumed. then the second objection vanishes. Because no

prejudice is caused to him by virtue of decision by the lower Court on the basis of the affidavits. I am assuming this position because the last point

raised by Mr. Adhia arises only if the two firms are assumed to be the same. I make it clear that I do not find any fault with the reasoning of the

trial Court in holding that two firms are not established to be the one and the same firm. But for the sake of argument. I will assume that they are

the same. In that event, the second objection of Mr. Adhia will vanish but the third objection will have to be considered. His third objection is that

once the firm is adjudicated insolvent , the decree passed against the firm cannot be executed against any of its partners. In support on the

provisions of S. 7 read with S. 99 of the Presidency Towns Insolvency Act. But I am not at all satisfied that the said provision warrants any such

conclusion. S. 7 of the Act provides that powers to decide all questions arising in any case of insolvency coming within the cognisance of the Court

or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of

property of the insolvent. Section 99 of the Act provides that any two or more persons. being partners,, or any person carrying on business under

a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm. But from the above provisions. it

doesn"t necessarily follow that once the partnership us adjudicated insolvent, all the persons who appear in the Register of Firms as the partners of

the firm on the date of the adjudication automatically become insolvent. Under the general law, every partner may be individually liable for the dues

of the partnership, but that does not mean that if the partnership firm is adjudicated insolvent without the partner being made party to the insolvency

proceedings, the partner automatically becomes insolvent. If any authority is necessary for the proposition, it can be found in the judgment in AIR

1925 Lah 379. It was held by a learned single Judge of the Lahore High Court in that case that were a decree has been passed against the firm but

all the members have been served individually, the decree can be executed against them personally though the firm has been declared insolvent and

though there has been no application under O. 21, R. 50. From this it necessarily follows that the insolvency of the firm does not result ipsofacto

into the insolvency of the partner of the firm.

But for the purpose of this petition, it is not necessary for me to give a final decision on this aspect of the matter. The point is that so far as the

present petitioner is concerned, on his own admission, he was not a partner of the firm on the date when the firm was adjudicated insolvent. The

provisions of S. 99 of the Insolvency Act. therefore, do not come into picture at all and if as to how S. 7 of the Insolvency Act against the

petitioner. who was the partner of the firm but who is not amenable to the jurisdiction of the Insolvency Act under S. 7 if the Act. The question

between the decree-holder and the partner is not a question arising out of the insolvency proceedings. If the firm becomes insolvent, all the

properties of the firm vests in the official assignee. but the property of the partner who has not become insolvent cannot vest in the official assignee

and if the decree-holder has recourse against such property of the individual partner. the Insolvency Court has no function to perform at all so far

as the questions arising in insolvency are concerned. In this connection. it is to be noted that on the petitioner"s own showing the present petitioner

was not one of the partners of the firm who was adjudicated insolvent in the insolvency proceedings. The trial Court has pointed out that the other

respondents who were sought to be impleaded were adjudicated insolvent in the said proceeding, but the present petitioner was not one amongst

those who were adjudicated insolvent. In fact, it is not his case that he was ever adjudicated insolvent. If he was, and the insolvency was subsisting,

he could not have filed this Revision Application at all. In this view of the matter, it cannot be said that the petitioner was amenable to jurisdiction of

the Insolvency Court or that he was declared insolvent by the Court. If that is the position, it is impossible to see any justification for the contention

that the proceeding against the petitioner under O. 21, R. 50 (2) could not be taken and order under said provision could not be passed against the

petitioner.

For all the above reasons. the Revision Application fails. The Rule earlier issued stands discharged. However, in the circumstances of the case.

there shall be no order as to costs.

9. Application dismissed.