

(1992) 07 KAR CK 0038

In the Karnataka High Court

Case No : Regular First Appeal No. 152 of 1984

Dena Bank

APPELLANT

Vs

Bhikhabhai Prabhudas Parekh and Co.

RESPONDENT

Date of Decision : 29-07-1992

Acts Referred:

Karnataka Land Revenue Act, 1964 — Section 156, 158 (1), 161, 190 (c)
Karnataka Sales Tax Act, 1957 — Section 13 (3) (a), 15 (2A)
Partnership Act, 1932 — Section 25

Citation : (1992) ILR (Kar) 2659

Hon'ble Judges : K.A. Swami, Acting C.J.; C. Shivappa, J

Bench : Division Bench

Advocate : K.R.D. Karanth, for the Appellant; B.V. Acharya and U.L. Naryana Rao, Senior Advs., Public Prosecutor Muthanna, General, B.L. Acharya, for R-1 to R-4 and R-6, M.B. Prabhakar, for R-8 to R-12, Venkatachalaiah, Government Advocate for R-13, T.J. Chouta, for R-14 and 15 and M. Viswajith Rao, for P.V. Shetty, for R-16 to 18, for the Respondent

Final Decision : Allowed

Judgement

K.A. Swami, Ag.C.J.

1. This Appeal is preferred by the plaintiff against the Judgment and Decree dated 4th January, 1984, passed by the learned Prl. Civil Judge, Mangalore, in O.S.No. 44 of 1972.

The suit was for recovery of a sum of Rs. 19,27,142-29 paise with future interest thereon at 10 1/2 per cent per annum from the date of the suit and also for creating a charge of the decretal amount on the plaint B-Schedule properties free from the claim or objections of defendants 13 and 16 to 18. The plaintiff also further prayed for expenses incurred by it in respect of the mortgage security and for fixation of a date by the Court for payment of the decretal amount by the defendants and further in default of payment of the said sum, interest, costs, charges and expenses by a date to be fixed for redemption, to sell the suit

schedule properties to recover the amount and, in the event the sale proceeds are found to be inadequate to discharge the decretal liability, to recover the balance personally from defendants 2 to 7.

2. We may point out that Respondents 1 to 18 in this appeal were defendants 1 to 18 in the suit. Respondents 5 and 7, who were defendants 5 and 7 in the suit, died during the pendency of the suit. The legal representatives of Respondent-5 were brought on record. They are respondents 8 to 12. Respondents is the wisdom of Respondent 5 and Respondent 9 to 12 are the children. Respondent-13 is the State. Respondents 14 & 15 are impleaded on the death of Respondent-7 in addition to R-2 to 4 & 6, as the legal representatives of Respondent-7. Respondents 16 to 18 who were defendants 16 to 18 in the suit have been impleaded because they are the tenants in possession of a part of the property over which equitable mortgage is created - in favour of the plaintiff-Bank. The State of Karnataka came to be impleaded because it tried to sell the mortgaged properties in recovery of the sales tax arrears due from the first defendant partnership firm. Thus the suit was one for recovery of money due under the equitable mortgage created by respondents 2 to 7 on 24-4-1969 in favour of the plaintiff-Bank as partners of the first respondent partnership firm.

It is not necessary to summarise the pleadings of the parties because the same have been stated in detail in the judgment of the trial Court. Therefore, we do not consider it necessary to burden our Judgment with the summary of the pleading, as the relevant pleading will be referred to while dealing with the points arising in the Appeal. At this stage it is sufficient to state the issues as framed by the trial Court and the findings recorded thereon.

3. In the light of the pleadings of the parties the trial Court framed the following issues:

- 1) Whether there was any deposit title or the original documents, listed in Schedule-A of the plaint by defendant-7 on 23-4-1969 with intent to create any charge of equitable mortgage over the plaint B-Schedule properties?
- 2) Whether the documents listed in plaint A-Schedule were handed over to the plaintiff for scrutiny of title in September 1967 in connection with the proposal of defendants 2 to 6 to sanction an overdraft facility of Rs. 15 lakhs and whether there is no concluded contract for want of acceptance of the proposal?
- 3) Whether the documents listed in Schedule-A of the plaint are not the document of title of defendants 2 to 7 and whether their deposit cannot create an equitable mortgage?
- 4) Whether the 7th defendant's signature to the letter dated 24-4-1969 was obtained by misrepresentation, fraud and undue influence?
- 5) Whether the signature of defendants 2 to 6 to undated blank printed letter paper by duress as alleged?

- 6) Whether the alleged deposit of copies of documents create any charge or equitable mortgage and is supported by consideration?
- 7) Whether the alleged mortgage by deposit of title or alleged equitable mortgage is invalid for want of a power of alienation in favour of defendants 2 to 7?
- 8) Whether the assets of Devkaran Nanji Bank have become vested in the plaintiff including the alleged debts and securities if any which are the subject matter of the suit?
- 9) Whether the suit is filed by duly authorised attorney of the plaintiff?
- 10) How far the promissory notes and hypothecation deeds and letters of continuity and confirmation of defendants 1 to 6 referred to in the plaint bind the 7th defendant?
- 11) What is the correct amount due by defendants 1 to 6?
- 12) Whether the plaintiff is entitled to recover any amount from the defendants 1 to 7 personally and on the charge of the plaint B Schedule properties and their income?
- 13) Whether the plaintiff has given credit to all the realisation by the sale of supari?
- 14) Whether the interest claimed is excessive and the amount claimed is liable to be reduced?
- 15) Whether the plaintiff is entitled to any decree against the 7th defendant?
- 16) To what reliefs are the parties entitled?

Additional issues framed on 5-8-1972

- 17) Whether defendants 1 to 6 are entitled for credit of any amount under E.G. and G.C. Policy as pleaded in para-I of the additional statement?
- 18) Whether the defendants 1 to 6 are entitled for the credit of any amount on Insurance Policy of hypothecation of goods as pleaded in para 4 of the additional written statement?
- 19) Whether defendants 1 to 6 are entitled for the credit of value of 10 bags of supari coveted by the Burglary Policy and a sum of Rs. 742.34 received by him by way of refund as contended in para 3 of the additional written statement?

Additional issue No. 20 framed on 17-1-1976

- 20) Whether the defendants are entitled to the benefits of Rs. 10 lakhs received by the plaintiff-Bank from ECGC Corporation Ltd., and kept in the suspense account?

Additional issues framed on 10-1-1978

21) Whether the defendants prove that the sum of Rs. 10,00,000/- received by the plaintiff from ECGC Ltd., in October 1973 enures to the benefit of the defendants?

22) Whether the plaintiff has realised the value of 10 bags of supari and the value thereof has not been credited to the defendants account as contended by defendants 1 and 2?

23) Whether 1693 bags of supari was pledged or hypothecated by defendants 1 and 2 with the plaintiff bank?

24) Whether the same was lost by theft or mishandling by the employees of the plaintiff bank; if so, whether the plaintiff is liable to reimburse the same?

Additional issues framed on 5-2-1981

25) Whether the defendants 16, 17 and 18 prove that the alleged leases in their favour are genuine, prudent and were executed in the ordinary course of management of the mortgaged properties?

26) Whether the sub-lease by the 16th defendant is valid and binding on the plaintiff?

27) Whether the leases in favour of defendants 16, 17 and 18 are hit by lis pendens?

28) Whether the leases are governed by the Karnataka Rent Control Act, 1961?

29) Whether the plaintiff is entitled to bring the properties to sale free from the objection of the defendants 16 to 18?

Addl. issues framed on 20-11 -1982

30) Whether the attachment of the plaint "B" schedule properties made by the 13th defendant for the arrears of sales tax is hit by lis pendens?

31) Whether the plaintiff is entitled to a decree against defendants 1 to 12 free from the 13th defendant's claim of sales tax, if any, against the said defendant?

32) Whether the 13th defendant proves that the arrears of sales tax and penalty due to it has got priority over the plaintiff's claim in this suit?

33) Whether the plaintiff further proves that since the "B" schedule properties are the personal properties of the defendants 2 to 12, the 13th defendant cannot bring those properties to sale for the alleged arrears of sales tax due from the first defendant firm?

34) Whether the plaintiff proves that it issued a valid notice u/s 80 C.P.C. to the 13th defendant?

4. In support of the claim of the plaintiff, it examined two witnesses as P.Ws. 1 and 2 who were working as Managers in the Bank during the relevant time. The

plaintiff has also produced as many as 149 documents which were marked as Exts. P.1 to P.149. Defendants-6 examined himself as D.W.1 and the partner of the 16th defendant firm, a tenant examined as D. W.2 and an Accountant of the 16th defendant firm was also examined as D.W.3. Similarly, an Accountant in the 17th defendant firm was examined as D.W.4. A tenant under the 7th defendant was also examined as D.W.5. In addition to this 5 more witnesses also were examined as D.W.s 6 to 10 by the State of Karnataka. The defendants also produced 724 documents, which were marked as Ext. D-1 to D-724.

5. After hearing both the sides and on appreciating the evidence on record the learned trial Judge answered issues 1, 6, 8, 13, 19, 22 (first part) 29, 30, 31, 33 and 34 in the affirmative. The remaining issues were answered as per the findings recorded in the course of the judgment. We may also point out that though the learned trial Judge answered issue No. 34 in the negative, the reasoning given by the trial Judge would go to show that this issue should have been answered in the affirmative. Some mistake appears to have crept in while answering this issue. Hence, we treat that this issue is answered by the trial Court in the affirmative. Therefore, issue No. 34 is taken as answered in the affirmative by the trial Court.

6. In the light of the answers recorded on the aforesaid issues, the trial Judge dismissed the suit mainly on the ground that there was no authority empowering Sri Rajnikant Ambalal Mehta (R.A. Mehta) to file the suit on behalf of the Bank. The rest of the findings were in favour of the plaintiff. Therefore, the plaintiff has come up in Appeal.

7. Before we raise the points for determination we may also refer to the development that has taken place in this Appeal.

The appellant and respondents 1 to 4, 6, 8 to 12, 14 and 15 have entered into a compromise and the Compromise Memo has also been filed. It is signed by the authorised representative of the appellant-Bank and also respondents 2 to 4, 6, 8 to 12, 14 and 15. The respective counsel have also signed it. The Compromise Memo was not recorded when it was presented before the Court because the State did not agree to it. The parties to the compromise have also given up respondents 16 to 18. It may be pointed out that the right, title and interest of respondents 16 to 18 is not affected by the compromise because they are the tenants of the portions of the B-Schedule properties. By the compromise filed before Court, their interest is not going to be affected in any manner. However, the interest of the State is going to be affected by recording the compromise to which the State has not agreed. Therefore, it has become necessary for us to decide the points that arise for consideration with reference to the defence put forth by the State. Hence, we will take up the compromise after we record our findings on the points that arise between the appellant and the respondent-State and also the aforesaid respondents to the compromise.

8. In addition to this we may also point out that the appellant- Bank has also

filed an application seeking permission to adduce additional evidence. Along with the application, the original Power of Attorney constituting Sri Rajnikant Ambalal Mehta as the Power of Attorney of the Bank to institute the suits and defend the suits for and on behalf of the plaintiff-Bank. The learned Advocate General for the State does not object to the application. As the Power of Attorney is very relevant to the issue as to whether the suit filed by R. A. Mehta on behalf of the Bank is competent or not. In fact, the trial Court has answered that issue against the appellant-plaintiff only on the ground that the Power of Attorney has not been produced.

We are of the view that the Power of Attorney produced along with the application is quite relevant and necessary for the purpose of deciding one of the material controversies involved between the parties as to maintainability of the suit filed by R.A. Mehta on behalf of the plaintiff-Bank. Therefore, the application is allowed. The Power of Attorney is permitted to be produced. The genuineness, execution and validity of the Power of Attorney is not disputed by the respondents. Accordingly, we admit the Power of Attorney and mark it as Ex.P-150.

9. With these preliminary facts we now proceed to raise the following points that arise for consideration in this Appeal:

- (i) Whether Sri R.A. Mehta was empowered to file the present plaint for and on behalf of the plaintiff - Bank for recovery of the amount claimed in the suit?
- ii) Whether the Sales Tax arrears due from the first defendant partnership to the State of Karnataka can be recovered in preference to the suit claim of the plaintiff-Bank?
- iii) Whether the partners of the first defendant partnership firm are personally liable for the arrears of Sales Tax due from the first defendant partnership to the State of Karnataka?
- iv) What decree or order?

10. POINT NO. (i): This point need not detain us any longer in view of the Power of Attorney Ext.P-150 produced by the plaintiff constituting R.A. Mehta as the General Power of Attorney for instituting the suits on behalf of the plaintiff-Bank and defending the suits filed against the Bank. The Power of Attorney was executed on 19th June, 1963 by the Managing Director and one another Director. It was notarised on 7th July, 1966. Thus, the Power of Attorney came to be executed in favour of R.A. Mehta, who has filed the suit in question on 13-4-1972 on behalf of the plaintiff-Bank. Therefore, we answer Point No. (i) in the affirmative.

11. POINT NO. (ii): It is not in dispute that a sum of Rs. 19,27,142-29 paise was due as on 4-6-1974 from the first defendant partnership to the State of Karnataka being the arrears of Sales Tax, both under the Karnataka Sales Tax Act and also under the Central Sales Tax Act. Over this, penalty has to be worked out

as per the provisions of Karnataka and Central Sales Tax Acts. Under the Karnataka Sales Tax Act the arrears relate to the assessment years 1957-58 and 1966-67 to 1969-70 as per the assessment orders at Ext.D-698 to D-702 and Ext. D-712 to D-714. The Sales Tax due under the Central Sales Tax Act relate to the assessment years 1958-59 to 1964-65 and 1967-68 to 1969-70. The demand notices have also been produced at Ext.D-703 to D-707 and Exts. D-715 to D-724.

11.1. According to the contention of the plaintiff-Bank and also of respondents 1 to 4, 6, 8 to 12, 14 and 15, (hereinafter referred to as the contesting Respondents), it is not open to the State to recover the Sales Tax arrears in question due from the first defendant partnership firm from the partners personally because the partnership firm is a separate entity for the purpose of Sales Tax, as such its liability cannot be fastened on the partners; therefore the arrears of Sales Tax cannot be recovered by the sale of personal properties of the partners. It is the contention of the plaintiff and the partners of the firm - contesting respondents, that the arrears due from the partnership can be recovered only from the assets of the partnership and not from the personal properties of the partners, that as the B-Schedule properties which are mortgaged to the appellant-Bank are not the properties of the partnership and they are the personal properties of the partners, the same cannot at all be sold for recovery of Sales Tax arrears of the partnership firm. It is also submitted that the State also cannot have preference over the secured debt due to the plaintiff from the contesting respondents who are the firm and the partners of the firm. Under this point we are required to consider only whether the State will have a preference over the secured claim of the appellant and recover the amount by sale of B-Schedule properties. The State has placed reliance on the provisions contained in the Karnataka Land Revenue Act, 1964 and the Karnataka Sales Tax Act, 1957, which will hereinafter be referred to as "the Land Revenue Act" and "the Sales Tax Act" respectively.

12. The provisions of the Land Revenue Act on which reliance is placed by the learned Advocate General are as follows:

"Sections: 158: Claim of State Government to have precedence over all others -

(1) Claim of the State Government to any money recoverable under the provisions of this Chapter shall have precedence over any other debt, demand or claim whatsoever whether in respect of mortgage, judgment, decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.

(2) In all cases, the land revenue for the current revenue year, of land for agricultural purposes, if not otherwise discharged, shall be recoverable, in preference to all other claims, from the crop of such land."

"Section 161. Process for recovery of arrears -- An arrear of land revenue may after serving a Written notice of demand on the defaulter u/s 162 be recovered by any one or more of the following processes, namely:

(a) by forfeiture of the occupancy or alienated holding in respect of which the arrear is due, u/s 163;

(b) by distraint and sale of the defaulter's moveable property including the produce of the land u/s 164;

(c) by attachment and sale of the defaulter's Immovable property under Sections 165 to 168;

(d) in the case of alienated holding consisting of entire villages or shares of villages, by attachment of the said villages or shares of villages and taking them under Government management under Sections 183 to 187."

"Sections 190.- Recovery of other public demands.- The following moneys may be recovered under this Act in the same manner as an arrear of land revenue, namely.-

(a) (b) xx xx xx

(c) all sums declared by this Act or any other law for the time being in force to be recoverable as an arrears of land revenue."

The provisions of the Karnataka Sales Tax Act on which reliance is placed are as follows;

"Section 13 - Payment and recovery of Tax. -

(1) The tax or any other amount due under this Act shall be paid in such manner in such instalments subject to such conditions, on payment of such interest and within such time, as may be prescribed.

xx xx xx

(3) Any tax assessed, or any other amount due under this Act from a dealer or any other person may without prejudice to any other mode of collection be recovered -

(a) as if it were an arrears of land revenue, or xx xx xx

12.1. A reading together of the provisions contained in Sections 158, 161 and 190(c) of the Land Revenue Act makes it clear that any money due to the State either under Chapter XIV of the Land Revenue Act or under any other law for the time being in force can be recovered as arrears of land revenue in precedence over any other debt, demand or claim whatsoever whether in respect of mortgage, judgment, decree, execution or attachment or otherwise howsoever, by attachment and sale of the defaulter's immovable property under Sections 165 to 168 of the Land Revenue Act. In addition to this, Section 13(1)(c) of the Sales Tax Act also provides that the tax and any other amount due under the Sales Tax Act can be collected without prejudice to any other mode of collection, as if it were an arrears of land revenue. Sub-section (2) of Section 158 of the Land Revenue Act is not relevant for our purpose. Thus, in this regard, both the

enactments supplement each other. In other words, they are complementary.

12.2. Section 161 of the Revenue Act provides for the processes of recovery of arrears. It provides that arrears can be recovered by forfeiture of the occupancy or alienated holding in respect of which the arrear is due u/s 163 or by distraint and sale of the defaulter's moveable property including the produce of the land u/s 164; or by attachment and sale of the defaulter's Immovable property under Sections 165 to 168. Clause (d) is not relevant for our purpose. In addition to this, Section 190(c) of the Land Revenue Act among other things also provides that moneys due under any other law for the time being in force, is recoverable as an arrear of land revenue in the same manner as an arrear of land revenue is recovered under the Land Revenue Act. These three provisions read with Sections 13(3)(a) of the Sales Tax Act which provides that any tax assessed or any other amount due under the Sales Tax Act from a dealer or any other person may without prejudice to any other mode of collection be recovered as if it were an arrear of land revenue. Thus it is abundantly clear that the amount due under the Sales Tax Act can be recovered as an arrear of land revenue. Therefore, logically arrears of sales tax for the purpose of recovery become arrears of land revenue recoverable under the Land Revenue Act. Consequently, u/s 158(1) of the Land Revenue Act it will have precedence on suit claim of the plaintiff even though it is a secured debt based on the equitable mortgage.

13. A contention is advanced by Sri Karanth, learned Counsel for the appellant, that as the Sales Tax Act itself does not provide for recovery of sales tax arrears as arrears of land revenue, the mere fact that the Land Revenue Act provides for recovering the amount due under any other law as arrears of land revenue will not be of any efficacy because substantive law being the Sales Tax Act does not provide for recovering the arrears as arrears of land revenue; that the Land Revenue Act only provides the procedure for recovery of the arrears of land revenue, as such it cannot be read into the Sales Tax Act. Therefore, it is not permissible to hold that the Sales Tax arrears due to the State will have a preference over the claim of others. This contention would have been of considerable significance, had there been no provision as contained in Section 13(3)(a) of the Sales Tax Act. We have already referred to the said provisions which specifically provides that any tax assessed or any other amount due under the Sales Tax Act from a dealer or any other person may be recovered without prejudice to any other mode of collection as if it were arrears of land revenue. Therefore, the Sales Tax Act itself specifically provides for recovery of the dues under the Sales Tax Act as arrears of land revenue. Thus, in view of these aforesaid specific provisions contained in Sales Tax Act and the Land Revenue Act, we do not consider it necessary to refer to the several Decisions referred to by Sri Karanth, in support of his contention that sales tax arrears cannot be recovered as arrears of land revenue and cannot also have preference over the claim of the plaintiff. However, we only mention the Decisions that are relied upon by the learned Counsel for the appellant. They are (1) BUILDERS SUPPLY CORPORATION v. THE UNION OF INDIA AND ORS. (2) COLLECTOR OF

AURANGABAD AND ANR. v. CENTRAL BANK OF INDIA AND ANR.

We may also point out that in the case of Collector of Aurangabad Sections 14 and 104 of the Hyderabad Land Revenue Act did not provide for recovery of other taxes due as arrears of land revenue. Therefore their Lordships of the Supreme Court held that the other taxes due under any other law other than the Land Revenue Act cannot be recovered in preference to the other claim.

13.1. We accordingly answer Point No. (ii) in the affirmative and hold that having regard to the provisions contained in Sections 156, 161 and 190(c) of the Land Revenue Act r/w Section 13(3)(a) of the Karnataka Sales Tax Act the arrears of sales tax and any other amount due under the Sales Tax Act to the State shall have precedence over the suit claim of the plaintiff and the same can be recovered by the State in preference to the suit claim.

14. POINT NO. (iii): It is contended by the learned Counsel for the appellant that for the purpose of sales tax, the Sales Tax Act recognises partnership as a different entity; therefore, the arrears of sales tax due from the partnership cannot be recovered from the personal property of the partners. In other words it is contended that the partners of the firm are not personally liable for the sales tax arrears of the firm. It is the assets of the partnership firm alone are liable. It is also submitted that Sub-section (2A) of Section 15 of the Sales Tax Act which was introduced by the Karnataka Act No. 23/83 with effect from 18-11-1983 is not retrospective, as such it cannot be construed to cover the sales tax arrears pertaining to the assessment years prior to 18-11-1983, that construing of Sub-section (2A) of Section 15 of the Sales Tax Act as applicable to the arrears of sales tax due in respect of the assessment years prior to 18-11-1983 would be nothing but giving retrospective effect to Sub-section (2A) of Section 15 of the Sales Tax Act which is not permissible, having regard to the language of the Section, and it would also result in creating a new liability on the partners which did not exist when the taxable event took place and when the assessment orders were passed. It is further contended that the Sales Tax Act being a fiscal statute, it should be construed strictly; that as the provisions contained in Sub-section (2A) of Section 15 of the Sales Tax Act do not specifically provide that the said provisions are retrospective, the interpretation to be placed on such a provision should be in favour of the subject and not in favour of the Revenue. The learned Counsel has also placed reliance on the Decisions of the Supreme Court in THE STATE OF PUNJAB v. JULLUNDUR VEGETABLES SYNDICATE and also in GOVINDDAS AND ORS. v. THE INCOME TAX OFFICERS ANR.

15. On the contrary it is contended by the learned Advocate General that the partners of the firm are personally liable for the sales tax arrears due from the firm to the State, in view of the clear provisions contained in Section 25 of the Partnership Act and also the provisions contained in Sub-section (2A) of Section 15 of the Sales Tax Act. It is contended that there is no question of giving retrospective effect to Sub-section (2A) of Section 15 of the Sales Tax Act because it is applied and enforced only from the date it has come into effect;

that as on the date Sub-section (2A) of Section 15 of the Act came into force there were arrears of sales tax due from the partnership (1st respondent) and the partners of the partnership firm have also become personally liable for those dues from the date Sub-section (2A) of Section 15 of the Act has come into force. It is contended that it does not amount to creating any new liability. Learned Advocate General has placed reliance on the Decisions in V.LAKKANNA v. STATE OF MYSORE; MALABAR FISHERIES CO. v. THE COMMISSIONER OF INCOME TAX, KERALA; DEPUTY COMMISSIONER OF SALES TAX (LAW) BOARD OF REVENUE (TAXES) v. K.KELUKUTTY and also GOVINDJI PUNSHI AND ANR. v. TAHSILDAR, SAVANUR AND ANR.

16. In M/s. Jullunder Vegetables Syndicate, the Supreme Court considered the case wherein the partnership was dissolved before the assessment was made for the assessment years in question therein. The facts of the case are stated in para-2 of the Judgment, which are as follows:

Messrs. Jullunder Vegetables Syndicate was a firm doing business in Jullunder from October 4, 1952 to July 11, 1953. It was dissolved on July 11, 1953. An intimation of the dissolution of the firm u/s 16 of the East Punjab General Sales Tax Act 1948 was sent to the Department on July 18, 1953. The firm was assessed to sales tax on May 30, 1953, by the Sales Tax Officer under the provisions of the Act in respect of its turnover for the period between October 4, 1952 by the Financial Commissioner on the ground that the authority which made the assessment had no jurisdiction to do. However on September 3, 1955 the Sales Tax Officer made a fresh assessment on the turnover of the said firm. The firm was dissolved before the proceedings for fresh assessment were initiated. Therefore the question that arose for consideration was as follows:

"Whether a Partnership firm, which was a registered firm under the provisions of the Punjab Sales Tax Act and which was in existence throughout the period for which assessment of Sales Tax has to be made, ceased to be liable to the said assessment by the mere fact that it was dissolved before the proceedings for assessment are initiated."

The Supreme Court held that the firm was an independent assessable unit for the purpose of the Sales Tax Act and it was given the status under the Sales Tax Act as was given to it under the Income Tax Act. Though under the partnership law the firm was not a legal entity but only consisted of individual partners for the time being, for tax law, Income Tax as well as Sales Tax, it was a legal entity. If that be so, on dissolution, the firm ceased to be a legal entity. Thereafter on the principle unless there was a statutory provision permitting The assessment of a dissolved firm there was no longer any scope for assessing the firm which ceased to have a legal existence. Therefore, it was held that unless there was express provision no assessment could be made on a firm which had lost its character as an assessable entity. The Supreme Court also held that Section 16 of the East Punjab General Sales Tax Act, 1948 did not expressly state that the dealer, if it happened to be a firm, continued to have legal existence even if it ceased to be a

firm. The said Section did not even by necessary implication have that effect. Therefore in that case it was held that the High Court was right in holding that the assessment order on the dissolved firm could not be supported under the provisions of the East Punjab General Sales Tax Act, 1948.

17. Based on the aforesaid proposition it is contended by Sri. Karanth, learned Counsel for the appellant that Sub-section (2A) of Section 15 of the Sales Tax Act which came to be introduced long after the taxable event and also long after the passing of the orders of assessment cannot have the effect of making the partners personally liable for the arrears of sales tax due from the partnership firm and it cannot also be interpreted to mean that. The learned Counsel has also placed reliance on para-7 of the Decision of the Supreme Court in COMMISSIONER OF SALES TAX, MADHYA PRADESH AND ORS. v. RADHAKRISHAN AND ORS. It reads thus:

"In Kapurchand Shrimal Vs. Tax Recovery Officer, Hyderabad and Others, a case arising out of the Income Tax Act, this Court held that the Legislature having treated a Hindu undivided family as a taxable entity distinct from individual members constituting it, proceedings for assessment and recovery of the tax having been taken against the Hindu undivided family, it was not open to the tax recovery officer to initiate proceedings against the manager of the Hindu undivided family for his arrest and detention. These two cases clearly establish that a firm in a partnership and a Hindu undivided family are recognised as legal entities and as such proceedings can only be taken against the firm or undivided family as the case may be. Neither the partners of the firm nor the members of the Hindu undivided family will be liable for the tax assessed against the firm or the undivided Hindu family. It may be noted that Section 276(d) of the Income Tax Act specifically includes all partners within the definition of the word "firm" and a company includes directors. In Bombay Sales Tax Act, 1959 u/s 18 it is specifically provided that where any firm is liable to pay tax under the Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment, in the absence of a specific provision as found in Section 18 of the Bombay Act the partners of the firm cannot be held liable for the tax assessed on the firm. On this point we agree with the High Court that the partners cannot be made liable for the tax assessed on the firm."

On the basis of the aforesaid proposition it is contended that as there was no specific provision made making the partners of the firm personally liable either during the assessment year or at the time when the assessment order was passed, the partners cannot be made personally liable for the aforesaid arrears by a later amendment.

18. It appears to us that it is not possible to accept these contentions. We are of the view that there is no question of giving retrospective effect to the provisions contained in Sub-section (2A) of Section 15 of the Sales Tax Act. On the date when Sub-section (2A) of Section 15 of the Sales Tax Act was inserted by Act No. 23/1983 with effect from 18-11-1983, the first respondent partnership firm was

assessed to tax and the sales tax arrears of the firm were due to be paid to the State Government. The same partners continue to be the partners of the firm. u/s 25 of the Partnership Act every partner is liable jointly with all the other partners and also severally for all acts of the firm done while he is a partner. Therefore, every partner is liable for sales tax arrears due from the firm.

19. In Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. K.Kelukutty it is observed that the true solution has to be found not in the tax law but in the partnership law. Therefore if the Sales Tax Act contains specific provisions excluding the partners of the firm from the liability of the firm regarding arrears of tax due from the firm, the principles contained in Section 25 of the Partnership Act cannot be made applicable. In the absence of such specific provision in the Sales Tax Act, as observed in para-8 of the aforesaid Decision, it does not confer a corporate personality on the firm. Beyond the area within which that principle operates, the general law, that is to say, the partnership law holds undisputed domain. In addition to this in the instant case, as already pointed out, Sub-section (2A) of Section 15 of the Sales Tax Act makes the partners of the firm jointly and severally liable for the sales tax arrears of the firm. Even if that provision is considered to be not applicable to the arrears relating to the assessment years prior to 18-11-1983 on the principles laid down in paras 7 and 8 of the Decision of the Supreme Court in M/s. K.Kelukutty, we are of the view that the partners will be jointly and severally liable for the sales tax arrears of the firm as per Section 25 of the Indian Partnership Act. In addition to this we are of the view that as on the date when the recovery is effected, the provisions contained in Sub-section (2A) of Section 15 of the Sales Tax Act will be attracted.

20. It is not possible to agree with the contention of Shri Karanth, learned Counsel for the plaintiff, that application of the provisions contained in Sub-section (2A) of Section 15 of the Sales Tax Act to the recovery of the sales tax arrears in question would amount to giving retrospective effect to the aforesaid provisions. The liability of the partnership continues to exist, partners continue to be the same. Section 25 of the Indian Partnership Act, as already pointed out, makes the partners liable to the liability of the partnership-firm. Prior to Sub-section (2A) of Section 15 of the Act, there was no specific provision contained in the Act in this regard. Therefore, as observed by the Supreme Court in M/s. K.Kelukutty's case the true solution has to be found not in the tax law but in the Partnership law. We are of the view, that the partners are personally liable for the sales tax arrears of a partnership firm. It also does not amount to creating a new liability on the partners because, Section 25 of the Partnership Act makes them liable for the arrears due from the partnership. The Decision in Govinddas's case turned on the facts of that case. In that case, the assessment was made after the partnership was dissolved. Therefore, having regard to the provisions contained in Section 171(6) of the Income Tax Act, it was held that the liability created thereunder was a new liability. In para-6 of the Judgment, their Lordships have stated thus:

"6. Though several contentions were raised in the petition and also argued before the High Court, the petitioners at the hearing of the appeals before us confined their attack against the validity of the orders dated 13th August 1974 and 3rd September 1974 to only one contention and that related to the applicability of Sub-section (6) read with Sub-section (6) of Section 171 of the new Act by a two fold argument. In the first place, the petitioners contended that Section 25A of the old Act did not impose any personal liability on the members for the tax assessed on the Hindu Undivided Family in case of partial partition. This liability was created for the first time by Sub-section (6) of Section 171 of the new Act and this sub-section could not, therefore, be construed to have retrospective effect so as to apply to assessments made on the Hindu Undivided Family for any assessment year prior to 1st April 1962 when the new Act came into force. The present case, which related to the assessment years 1950-51 to 1956-57, was in the circumstances governed by Section 25A of the old Act in so far as the question of personal liability of the members was concerned and Sub-section (6) of Section 171 of the new Act had no application to it. Secondly, it was urged on behalf of the petitioners that even if Section 171, Sub-section (6) of the new Act, were applicable in a case like the present, the conditions of this sub-section were not satisfied, as there was no finding of partial partition recorded by the Income Tax Officer after making due inquiry as contemplated in Sub-section (3) of Section 171 of the new Act. Of these two arguments, the first is, in our opinion, well founded and hence it is not necessary to consider the second."

Again in para-9 thereof, the position has been made clear, It reads thus:

"9. Now it is clear on the plain grammatical construction of the language of Sub-sections (2) to (5) of Section 171 that these sub-sections contemplate a case where at the time of making assessment under Sections 143 or 144, a claim is made by or on behalf of any member of a Hindu family that a total or partial partition has taken place among its members. Then the claim would be investigated by the Income Tax Officer and if satisfied, the Income Tax Officer would record a finding that there has been such partition of the joint family property and the assessment of the total income of the joint family would then be made as if no such partition had taken place. And in such a case all the members would be jointly and severally liable for the tax assessed as payable by joint family and for determining their several liability, the tax assessed on the joint family would be apportioned among the members - "according to the portion of the joint family property allotted to" each of them. But it may happen that at the time of making assessment under Sections 143 or 144 no claim of partition, total or partial, is put forward on behalf of any member of a Hindu family either because no such partition has taken place or because of inadvertent or deliberate omission on the part of the members of the Hindu family and where that happens, the Hindu family would continue to be assessed as a Hindu undivided family and the tax determined as payable by it would be recoverable only out of the joint family properties and no member would be personally liable for any part of the tax, even though an order recording partition may have been

passed after the assessment, since Sub-section (4)(b) of Section 171 would have no application in such a case. That was also the position u/s 25A of the old Act with this difference that under the Section the only partition which could be recorded was total partition and not partial partition. The legislature, while enacting Section 171 in the new Act, decided to introduce another radical departure from the old Act by providing in Sub-section (6) that even where no claim of total or partial partition is made at the time of making assessment u/s 143 or Section 144 and hence no order recording partition is made in the course of assessment as contemplated under Sub-sections (2) to (5), if it is found, after the completion of the assessment, that the family has already effected a partition, total or partial, all the members shall be jointly and severally liable for the tax assessed as payable by the joint family and the tax liability shall be apportioned among the members according to the portion of the joint family property allotted to each of them. Sub-section (6) of Section 171 thus for the first time imposed, in cases of this kind, joint and several liability on the members for the tax assessed on the Hindu undivided family and this was a personal liability as distinct from liability limited to the joint family property received on partition."

Having regard to the facts of that case and the provisions contained in Section 171(6) of the Income Tax Act and other related provisions therein, it was laid down that it was not permissible to make an assessment after the partnership was dissolved inspite of the fact that tax liability had accrued during the period when the partnership was in existence. Such a position does not exist in the case on hand. On the date the taxable event took place and the assessment order was passed, the partnership was in existence and the present contesting respondents were the partners of the partnership firm. Therefore, there was no change in the partnership and its partners. As the matter stood prior to introduction of Sub-section (2A) of Section 15 of the Act, there was no specific provision contained in the Act either excluding the partners or specifically making them personally liable for the sales tax arrears under the Act. As such, Section 25 of the Partnership Act held the field. The insertion of Sub-section (2A) in Section 15 of the Sales Tax Act, is nothing but extension of the joint and several liability of a partner for all the acts of firm done while he is a partner as contained in Section 25 of the Partnership Act to the sales tax arrears which otherwise existed. This position flows from the provisions contained in Section 25 of the Partnership Act. Thus, we are of the view that Point No. 3 has to be answered in the affirmative. It is accordingly answered in the affirmative.

21. POINT NO. (iv): Under this point, we have to consider the nature of the decree to be passed. In this appeal, the contesting respondents do not dispute the suit claim of the plaintiff-appellant. However, the contesting respondents have entered into a compromise with the plaintiff-appellant and settled the suit claim to a particular sum. The compromise signed by the authorised Officer of the plaintiff-Bank and also by the contesting respondents and their respective Counsel. The terms of the compromise are as follows:

"The plaintiff-appellant and defendant-respondent Nos. 6, 8-12, 14 and 15 agreed amicably to settle all their outstanding disputes in the above proceedings and prayed that a decree may be passed against them in terms of this compromise petition:

1. In view of this compromise petition, the appeal shall continue only against defendant-respondent No. 13 (The State of Karnataka represented by its Deputy Commissioner, South Canarat Mangalore),

2. The plaintiff-appellant gives up the defendant-respondent Nos.16to 18.

3. The plaintiff-appellant and defendant-respondent Nos.1 to 4, 6, 8-12, 14 and 15 having amicably settled the disputes in regard to the subject-matter of the suit, the judgment and decree of the lower Court in so far as it is against the plaintiff-appellant on issue No. 9 set aside and the appeal may be allowed and a decree may be passed in terms set out herein below:-

a) The defendant-respondent Nos. 1-4 6, 8-12, 14 and 15 do hereby withdraw all the contentions raised by them including the plea that the suit is not properly instituted. The defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 admit the equitable mortgage of the plaint schedule property.

b) The suit be decreed in favour of the plaintiff-appellant against the defendant-respondent Nos.1-4 and 6, jointly and severally, and defendant-respondent Nos. 8-12, 14 and 15 on the charge of the assets received by them for a sum of Rs. 25,00,000 (Rupees twenty five lakhs) only and a final decree be passed for sale of plaint schedule property subject to the terms and conditions hereinafter set forth. In the event of the mortgage property being insufficient to satisfy the decree in the sum of Rs. 25 lakhs and the interest that may be payable, the plaintiff-appellant shall be entitled to proceed personally and recover the balance amount from defendant-respondent Nos. 1-4 and 6. It is made clear that the liability of defendants 8-12, 14 and 15 are restricted to the extent of share in the property and are not personally liable.

c) The decree amount of Rs. 25 lakhs shall be paid within a period of 2 years from the date of the decree, The defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 shall pay the said sum of Rs. 25 lakhs with interest thereon from 1.12,1990 at 10.5% p.a. (simple interest) till the date of payment.

d) On the failure of the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 to pay the decretal amount in the sum of Rs. 25 lakhs together with interest thereon from 1.12.1990 as stated above the plaintiff-appellant shall be entitled to execute the decree to be passed on this compromise petition as a final decree and bring to sale the plaint schedule property. In doing so the schedule property shall be made into 8 different lots as per the enclosed sketch/chart. The sale to be made of the property in execution shall be in the order in which they are numbered i.e., Lot No. 1 shall be sold first and thereafter in the event of decretal amount being not satisfied. Lot No. 2 and so on until the full decretal amount of

Rs. 25.00 lakhs and the interest thereon is realised by the plaintiff-appellant. On the realisation of the aforesaid sum of Rs. 25 lakhs with interest thereon, the plaintiff-appellant shall report satisfaction of the decree to the executing Court and the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 shall stand discharged from all liability pertaining to the suit claim and the property shall be free from any claim or charge by the Bank and the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 shall stand discharged from all liability pertaining to the suit claim and the property shall be free from any claim or charge by the bank and the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 shall be entitled to deal with the said property or such portion as has not been sold in execution as full and absolute owners. The plaintiff-appellant shall return all documents deposited within to the defendants-respondents.

4. In consideration of the plaintiff-appellant agreeing to receive a lumpsum of Rs. 25 lakhs towards the decree claim, the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 agree that the plaintiff-appellant shall be entitled to receive and withdraw from the Court the entire rental and other income collected and deposited by the Receiver appointed in the suit by the City Civil Court, Mangalore. The said sum and any other sums that may be collected and deposited by the Receiver, until this compromise is made into a decree of Court shall also be paid to and drawn by the plaintiff-appellant which shall be in addition to the sum of Rs. 25 lakhs referred to hereinbefore. The Receiver shall stand discharged on this compromise being made into a decree of Court.

.."Provided however that if the above defendant-respondents, fail to make the payments within two years from the date of the decree as agreed. Defendants-respondents 1-4, 6, 8-12, 14 and 15 agree that the plaintiff-appellant shall be entitled to move the Court for the appointment of the Receiver pending recovery and the aforesaid defendants-respondents hereby agree that they shall consent to the same."

5. The amount received from the Court shall be adjusted by the Bank towards the suit expenses or otherwise as the Bank may deem fit and proper. Similarly a sum of Rs. 1000/- which is kept in the bills purchase account of the First defendant-respondent in the plaintiff-appellant Bank shall also be adjusted by the Bank in the manner in which it deems proper. The defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 or any of them shall not be entitled to question the right of the Bank to so adjust the said amount which shall be in addition to the decretal amount of Rs. 25 lakhs and the interest referred to herein before, These defendants-respondents have no objection to the payment being made to the plaintiff-appellant by the lower Court.

6. In consideration of the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 paying a lumpsum of Rs. 25 lakhs in addition to the amount set out in clauses 4 and 5 above which shall be towards the principal sum, interest and cost, plaintiff-appellant waives accrued interest pendent lite in excess of the above agreed amount. The liability of the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15

shall however to pay interest @ 10.5% (simple interest) from 1.12.1990 till payment on the quantified sum of Rs. 25 lakhs agreed to herein before.

7. That the defendant-respondent Nos. 1-4, 6, 8-12, 14 and 15 are at liberty to sell the plaint schedule property either in portion or in one lot within a period of 2 years from the date of the decree. The plaintiff-appellant shall co-operate with the defendants-respondents in such sale or sales and the price (sale proceeds) shall be credited by the defendants-respondents to the account of the plaintiff-appellant Bank and the plaintiff- appellant shall thereafter give their consent and no objection to such sale or sales.

8. The plaintiff-appellant shall be entitled to refund of the Court fee paid on the appeal memo and an appropriate direction may be issued by the Hon''ble Court.

9. The parties shall bear their respective costs in this Court and the lower Court." A sketch is also annexed to the compromise indicating the manner in which the properties to be sold. As far as the State is concerned, it does not dispute the compromise, but it is submitted by the learned Advocate General that the plaintiff be permitted to execute the decree within the specified period; that from and out of the amount recovered in execution, the Sales Tax amount due to the State be first discharged as it has priority and that out of the remaining amount the liability under the decree may be discharged.

21.1. While considering Point No. 2 we have already held that the sales tax arrears due to the State from the first respondent- partnership, shall have preference over the plaintiff's claim. Therefore, we accept the compromise except Clauses 7 and 8 and other terms which affect the preferential claim of the State to recover Sales Tax arrears by sale of suit properties, and decree the suit of the plaintiff, in terms of the compromise, subject to exceptions as stated above and subject to the condition that the sale tax arrears including the penalty, if any, due under the Sales Tax Act from the 1st respondent and its partners shall have preference over the plaintiff's claim, and the plaintiff shall have to first pay the amount recovered during the course of execution to the State towards the sales tax arrears and the other amount due under the Sales Tax Act from the 1st respondent and its partners and thereafter the plaintiff is entitled to adjust the remaining amount towards the amount due under the decree.

21.2. On the basis of the submission made by Sri K.R.D.Karant and the learned Advocate General, we further direct that though the State has a preferential claim, the right to recover the amount is assigned to the plaintiff on condition that the amount recovered shall first be paid towards the arrears of sales tax plus penalty, if any, under the Sales Tax Act and then adjust the balance amount if any towards the amount due under the decree.

21.3. The Appeal is allowed. The judgment and decree of the trial Court are set aside. The suit of the plaintiff is decreed for a sum of Rs. 25 lakhs as per the terms of the compromise subject to exceptions and conditions specified above. The amount deposited by the Receiver into the Court upto this date shall be paid

over to the plaintiff. The period of six months from today is fixed for redemption. If the contesting respondents fail to discharge the decretal amount, the plaintiff shall bring the property for sale immediately on the expiry of six months and complete the execution within a period of one year from today. In the event the contesting respondents pay the decretal amount within the aforesaid stipulated period, the State will be at liberty to recover its sales tax arrears with penalty, if any, under the Act, by sale of the suit schedule properties. As far as the plaintiff and the contesting respondents are concerned, they have compromised and in the compromise they have agreed to bear the respective costs throughout. As far as the State is concerned, it is one of the defendants in the suit and it is one of the respondents in this Appeal, The trial Court also has directed the parties to bear their own costs. Further, the State is benefited by getting its right of preference adjudicated in a suit filed by the Bank, Under these circumstances, we order no costs in this Appeal as far as the State is concerned.