
(1990) 12 GUJ CK 0017

In the Gujarat High Court

Case No : First Appeal No"s. 1135 to 1137 of 1978

Gujarat Water Supply and Sewerage Board, Gandhinagar

APPELLANT

Vs

Sundardas Hukumatram Shivanani

RESPONDENT

Date of Decision : 10-12-1990

Acts Referred:

Partnership Act, 1932 — Section 69(3)
Transfer of Property Act, 1882 — Section 6

Citation : AIR 1991 Guj 170 : (1991) 2 GLR 825

Hon'ble Judges : R.D. Vyas, J;B.S. Kapadia, J

Bench : Division Bench

Advocate : K.H. Baxi, for the Appellant; M.N. Bhavani and Dayani, for the Respondent

Judgement

Kapadia, J.—The aforesaid appeals have been filed by the State of Gujarat against the common judgment and decrees passed in the Civil Suits Nos. 3001, 3010 and 3011 of 1972 passed by the learned Judge of the City Civil Court, Court No. 2, Ahmedabad, on 1-4-1978.

2. In Civil Suit No. 3001 of 1972 decree was passed in favours of the plaintiff and against the defendant for a sum of Rupees 30,617/- with interest at the rate of 6% per annum on that amount from the date of the suit till the date of the decree and at the same rate and on the same amount from the date of decree till realisation. The defendant was ordered to bear its own costs and would bear the costs of the plaintiff to the extent the plaintiff has succeeded. The plaintiff was ordered to bear his costs to the extent he has failed.

3. In Civil Suit No. 3010 of 1972 decree is passed in favours of the plaintiff and against the defendant for a sum of Rs. 27,744/- with six per cent interest on that amount from the date of the suit till the date of decree and at the same rate and on the same amount from the date of decree till realisation. The defendant masquerade to bear its own costs and to bear the costs of the plaintiff to the extent the plaintiff" has succeeded. The plaintiff was ordered to bear his costs to

the extent he has failed.

4. Similarly, in Civil Suit No. 3011 of 1972 decree is passed in favours of the plaintiff and against the defendant for a sum of Rs. 38,741/- with six percent interest on that amount from the date of the suit till the date of the decree and at the same rate and on the same amount from the date of decree till realisation. The defendant was ordered to bear its own costs and to bear the costs of the plaintiff to the extent he has succeeded. The plaintiff was ordered to bear his costs to the extent he has failed.

5. The plaintiff as the proprietor of M/s. Crown Construction Company, Engineers and Contractors, has filed the aforesaid suits against the State of Gujarat. The facts leading to filing of the said suits can be shortly stated as under:

6. The Executive Engineer of the Public Health Division, Ahmedabad, invited tenders for the work of Sabarmati Water Supply Scheme. As it was a large Scheme it was divided into several divisions and tenders were invited separately for each such-division. M/s. Crown Construction Company, a partnership firm submitted its tender for Parts-VI, III and IV. Thereafter disputes arose between the plaintiff and the State of Gujarat with regard to all the aforesaid Parts and hence said suits were filed.

7. Before stating further facts it is necessary to mention that copy of the partnership deed of the plaintiff-firm is produced at Ex. 200. Two of the partners of the said firm retired by retirement deed dated 20-1-1970, a copy of which is produced at Ex. 201. Accordingly out of three partners only partner who remained was the present plaintiff, who, as per the said retirement deed was entitled to all the rights and liabilities of the firm including right to recover debts and damages due to the firm. It may also be noted that the plaintiff who was the residuary partner of the practically dissolved firm intimated to the Government about the aforesaid retirement deed and requested the Executive Engineer concerned to renew the security deposit in his name instead of the firm. Said fact was intimated by the plaintiff vide his letter (Ex. 203).

8. It may also be noted that in pursuance of sub-section (3) of Section 18 of the Gujarat Water Supply and Sewerage Board Act, 1978 (Gujarat Act No. 18 of 1979) the Gujarat Water Supply and Sewerage Board was substituted for the State Government in these proceedings. Sub-section (3) of Section 18 of the said Act provides that where immediately before the appointed date the State Govt. is a party to any legal proceedings with respect to any properties and assets transferred to the Board under clause (a) of sub-section (1) or with respect to any of the rights, liabilities of obligation, which have become the rights, liabilities or obligations of the Board, under clause (b) of sub-section (1), the Board shall be deemed to be substituted for the State Govt. as a part to those proceedings and the proceedings shall continue accordingly. Aforesaid Act was published on 6-6-1979 in the Gujarat Government Gazette and that is the date on which it came into force. The Court has passed decrees in the aforesaid suits on

1-4-1978. Therefore, appeals have been filed by the State Government, but with a view to complete the record three civil applications were filed in these appeals for substituting the name of the appellant from State of Gujarat to Gujarat Water Supply and Sewerage Board and by the consent of learned Advocates appearing for the parties said applications were granted and accordingly the Board is the appellant in all three appeals.

[Paras 9 to 16. x x x x x x] 17. Mr. K. H. Baxi, learned Advocate for the appellant-Gujarat Water Supply and Sewerage Board has first submitted before us before making his submissions on merits that the suits are not maintainable inasmuch as they are filed by the plaintiff as a proprietor of the firm while the suit contract was entered into with the partnership firm. He further submitted that present suits are not maintainable because they are suits for recovering damages which is a mere right to sue which cannot be transferred u/s 6(a) of the Transfer of Property Act. He has also submitted that after the dissolution of the firm as the deposits are transferred in the name of the plaintiff a fresh agreement is entered into which agreement is not in consonance with provisions of Article 299 of the Constitution of India and, therefore, present suits are not maintainable. Lastly Mr. Baxi has submitted that present suits -which are filed for recovering the dues and damages due to the firm are not maintainable in as much as the said firm was not a registered firm.

18. On behalf of the respondent in all the three appeals it is submitted by Mr. Dayani, learned Advocate that there is no merit in any of the aforesaid contentions raised on behalf of the appellant. So far as the maintainability of the suits is concerned, he submitted that there is ample evidence on record which has come through the oral evidence of the plaintiff Sundardas Hukumatram Shivanani (Ex. 34) that partnership deed between him and other, partners was executed on 15-12-1960 a copy of which is produced as Ex. 200; that thereafter except the present plaintiff other two partners have retired as per the retirement deed dated 30-11-1969 copy of which is produced at Ex. 201 and that all the rights and liabilities of the firm are with the present plaintiff and therefore, the contention that the suits are not maintainable is devoid of any merits.

19. Mr. Dayani has also pointed out that so far as clause (a) of sub-section (3) of Section 69 of the Indian Partnership Act is concerned, there is no bar in filing the suit for realising the property of the dissolved firm though it was not registered. He further points out that once when all the rights and liabilities of the firm are transferred incidentally right to sue for the breach of the contract is also included and therefore, principle of mere right to sue cannot be transferred would not come into operation in this case. He has lastly pointed out that it was never the case of the plaintiff either in the pleadings or in the evidence that fresh contract was entered into between the present plaintiff and the defendant merely because security deposits were transferred in the name of the plaintiff and, therefore, there is no question of attracting applicability of Article 299 of the Constitution of India.

20. It may be mentioned that all the aforesaid points were not raised in the trial court. On the contrary, only after the amendment of the written statement as per order on Ex. 18 contention was raised that the suit contract was entered into by M/ s. Crown Construction Company which was a firm through its partners namely, the present plaintiff and other partners in the said firm. It was therefore, submitted by the defendant that the suits filed by the plaintiff in his capacity as proprietor of M / s. Crown Construction Company is not tenable at law. In view of the said contentions raised in all the three suits issue No. 5 was raised by the learned trial Judge and that issue has already been answered in the negative i.e. in favours of the plaintiff and against the defendant.

21. It may be mentioned that the learned trial Judge has elaborately dealt with this point after considering the evidence of the plaintiff as also other relevant factors. It would, therefore, be not necessary to deal with the said point in great details here. However, it may be stated that undisputedly M/s. Crown Construction Company was a partnership firm. Copy of the partnership is already on the record vide Ex. 200. Other two partners were Thankoredas Dayaldas and Dayaldas Hemantdas. However, the main active partner was the present plaintiff. Said partnership was dissolved and said two partners have retired from the said firm vide deed of retirement produced at Ex. 201. Under Clause 3 of the said Deed of Retirement (Ex. 201) it is specifically stated that all the assets and liabilities of the partnership firm have been taken over by the party No. 2 i.e. Sundardas Hakumatram Shivnani, the present plaintiff, including all security deposit with the Departments Fixed Deposits with the Banks, claims, bills of extra items with the government-departments and semi-government departments, machinery, vehicles, stores, etc. standing in the name of and owned by M/ s. Crown Construction Company, Said clause is so wide that it includes the claim arising in the present suits. The learned trial Judge has also recorded the concession given by the concerned Government Pleader who appeared in the trial court that the suit was not barred so far as plaintiff's claim to recover security deposit, deduction for non-extension of time and part-rates were concerned, but his contention was only with regard to the maintainability of the suits with regard to damages. His submission was that Clause 3 of the said retirement deed would not include suit for damages arising from the contract. similar contention was raised by Mr. Baxi, learned Advocate appearing for the appellant before us on the ground that so far as Section 6(a) of the Transfer of Property Act is concerned, the claim of damages would be barred there under because it would be transfer of mere rights to sue, If there would have been only transfer of right to sue for damages on account of breach of contract committed by the defendant possibly we, would have agreed with the contention of Mr. Baxi, but as stated in this case all the rights and liabilities of the firm as per Clause 3 of the retirement deed (Ex. 20 1) were transferred and incidentally right to sue for damages was also transferred. In that view of the matter contention that suits are not maintainable merely because Section 6(e) of the Transfer of P property Act would hit suits for damages, cannot be accepted.

22. It may be stated that the learned Judge has rightly considered the position of law on this point and we agree with the learned trial Judge that the basis of the exception being that a transaction savoring of maintenance or champers should not be recognised. It follows that a transaction not open to the charge would be upheld. Therefore, soon an exception to the rule of a bare right of action being assignable came to be recognised. This exception provides that a right of action may be assigned if it be incidental or subsidiary to a conveyance of property. From the aforesaid historical background it is clear how Section 6(e) of the Transfer of Property Act, which provides that a mere right, to sue cannot be transferred is associated with the exception of bare right of action not being assignable. The learned trial Judge has also considered the commentary of Mulla on the Transfer of Property Act, which considered number of illustrations. The learned trial Judge has specifically considered the illustration to the effect that a partner's unascertained interest in a dissolved partnership is transferable. We are in agreement with the legal proposition made by the trial court. When that is so, what was transferred by the deed of retirement was the share of the retiring partners in the assets and liabilities of the firm and, therefore, transfer of a claim to damages would be only incidental to the transfer of greater interest. Hence we hold that there is no substance in this contention raised by Mr. Baxi.

23. When the suits are maintainable the question would be whether the said suits would lie in view of the fact that the original firm was not registered. Answer to this question is provided in clause (a) of sub-section (3) of Section 69 of the Partnership Act. On this point Mr. Dayani has first relied on the judgment of the Bombay High Court in the case of Appaya Nijlingappa Hattargi Vs. Subrao Babaji Teli, . In the said case Chief Justice John Seamount held that "a suit to recover a debt due to a firm which is dissolved, brought by persons who were the only members of the firm at the date of dissolution is a suit to enforce a right to realise the property of a dissolved firm. Such a suit falls within the exception to S. 69 of the Indian Partnership Act, 1932, and is maintainable, even though the partnership is not registered under the Act". In the said case learned Chief Justice did not agree with the interpretation given to the word "property" u/s 14 of the Partnership Act and held that debt due to the firm falls within the description of the property being property acquired for the firm. He also did not agree with the contention that whole of the clause (a) of sub-section (3) of Section 69 should be read together and that the last sentence to which the learned Chief Justice has referred must be read ejusdem generis to the words which precede it. The learned Chief Justice further observed that "the first part of the sub-clause deals with the right to sue for dissolution of a firm or for accounts of a dissolved firm, and it is said that the further reference to the realisation of the property of a dissolved firm must be read as: covering only the case of realisation with a view to a dissolution or winding up of the firm and would cover for instance the recovery of debts by a receiver appointed in a partnership suit." He also did not agree that the words ought not to be given wider meaning of covering any suit to recover the debt due to a dissolved firm brought by any

person or persons entitled to recover such debt, and it is observed that "sub-section (3), however, in terms introduces exceptions both to subsections (1) and (2) and in my view the two parts of sub-clause (a) of sub-section (3) must be read as referring respectively to the first two subsections. As I have pointed out, the first subsection deals with the right to enforce a contract by the one partner against the other and the second sub-section deals with the right to enforce a contract by the firm against third parties". With the above discussion the learned Chief Justice further observed that "I think I must read the first sentence of sub-clause (a) as creating exceptions from sub-section (1), the exceptions being enforcement of a right to sue for dissolution or accounts of a dissolved firm, and the last sentence of that sub-clause is directed to sub-section (2) and creates an exception in respect of a suit to enforce any right to realise property of a dissolved firm."

24. Mr. Dayani has also relied on the judgment of the Bombay High Court in the case of Bhagwanji Morarji Goculdas Vs. The Alembic Chemical Works Co. Ltd., wherein it is held that a suit by the partners of a dissolved firm to recover unliquidated damages for breach of contract is a suit to realise the property of the dissolved firm. Damages for breach of contracts are assets of the firm and as such they can be realised by the partners of the dissolved firm although the firm has not been registered. The partners are not debarred from maintaining a suit u/s 69 of the Act. It is true that the transferability and attachability are two of the important insignia of the property but they are not the only ones. A right to sue for damages for breach of contract though not Transferable or attachable is property within the meaning of Section 69(3)(a). "Accordingly, it was held in the said case that "the plaintiff in filing this suit to recover damages for breach of a contract is exercising his right to realise the property of the dissolved firm of which he alleges he was a partner and although that firm was not registered, he is not debarred from maintaining the suit under Section. 69 of the Partnership Act."

25. The third judgment cited by Dayani is the judgment of the Patna High Court in the case of Bihari Lal Shyamsundar v. Union of India AIR 1960 Patna 397 , wherein Division Bench after considering the aforesaid judgment of the Bombay High Court Appaya Nijlingappa Hattargi Vs. Subrao Babaji Teli, held that Section 69 imposes a disability for non-registration only during the subsistence of the partnership, and the words in S. 69(3)(a), particularly "or any right or power to realise the property of a dissolved firm" remove any disability which existed during the continuance of the partnership. Hence, where a suit is brought by the partners of a dissolved firm for compensation from the railway for non-delivery of consignment, subsection (2) has no application". In the said case judgment of the Madras High Court reported Shanmugha Mudaliar Vs. P.V. Rathina Mudaliar and Another, was also considered. In the said Madras case it was held that "the intention of the legislature was to impose a disability for non-registration only during subsistence of the partnership, and the words in S. 69(3), particularly "or any right or power to realise the property of a dissolved firm" removed any

disability which existed during the continuance of the partnership. Where an unregistered partnership has been dissolved, money due to the partnership from a third party in respect of dealing between him and the partnership during its subsistence can be recovered by means of a suit."

26. From the above discussion position of law is well settled. However, Mr. Baxi has relied on the judgment of the Supreme Court in the case of Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others, . In the said case the learned Judges of the Supreme Court after quoting Section 69 of the Partnership Act have observed as under in para 21 :

"21. A bare glance at the section is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act

Relying on the aforesaid observation Mr. Baxi submitted that though the plaintiff was a partner in the firm and though the firm was unregistered the suits filed by him are void. It appears that if we read that much portion of the judgment of the Supreme Court, it appears to be in favour of the appellant. However, it requires closer scrutiny and reading of Section 69 of the Partnership Act as a whole as reproduced in para 20 of the said judgment.

27. However, we point out here the relevant facts in the said case that the plaintiff was a financier living and carrying on business in Agra. The respondents Nos. 1 to 3 in the first appeal and appellants Nos. 1 to 3 in the second appeal viz. Ivan E. John, Maurica L. John and Doria Marzano are partners of the registered firm called "John and Company". There were three spinning mills and one flour mill at Jeoni Mandi, Agra, which were compendiously described as "John Mills". Originally members of the John family were the exclusive owners of these mills which have been in existence since the beginning of the "current century. In course of time some strangers acquired interest therein and by the time the present list commenced, the following became the joint owners thereof to the extent noted against their names:

1. Mr. Ivan E. John, Maurica L. John and Doria Marzano, appellants Nos. 1 to 3 in Appeal No. 572 of 1974 and respondents Nos. I to 3 in Appeal No. 416 of 1973 - Partners of the firm "John & Co." appellant No. 4 in Appeal No. 572 of 1974 and respondent No. 4 in Appeal No. 416 of 1973 ... 11/40th share.

2. Seth Munnilal Mehra (respondent No. 6 in Appeal No. 416 of 1973 and respondent No. 9 in Appeal No. 572 of 1974) and Hiralal Patni (respondent No. 3 in Appeal No. 416 of 1973, deceased and now represented by respondents Nos. 511 to 5/7 in the said appeal and represented by respondents Nos. 2 to 8 in Appeal No. 572 of 1974) 19/40th share.

3. Gambhirmal Pandya (P) Ltd. - Partner in M / s. John Jain Mehra and Co8 / 40th shares.

4. Ivan E. John: 2/40th share.

As they were in financial difficulties M/s. John & Company were driven to tap various sources for raising loans for their business and other requirements. On 14th June 1947 they entered into a financial agreement with Sethiya & Co., a partnership firm of the plaintiff and Seth Suganchand. Under this agreement Sethiya & Co. understood to advance to M/s. John and Co. funds to the extent of Rs. 8,00,000/- on the security of yarn and to act as sole selling agents of the latter. On January 29, 1948 the Collector, Agra, attached moveable and of the mills pursuant to a certificate issued for realization of Income Tax dues, which exceeded Rs. 20 lakhs. On February 5, 1948 the Collector, Agra, appointed Ivan E. Marzano as custodians for running the Mills. The aforesaid agreement dated June 14, 1947, with Sethiya and Company conned to operate beyond its original term and it was renewed up to the end of April 1948 by agreement. Said agreement gave an option to the partners of Sethiya and Co. to allow it to continue in full force until their dues were paid in full by M / s. John and Company. Thereafter it appears that M/s. John and Company to meet with the monetary requirements entered into another agreement with proprietary concern of the plaintiff carrying on business in the name and style of M/ s. Tejkaran Sidkaran whereby the latter agreed to advance certain amounts to them against mortgage of cotton, its products, and by-products which might be in their stock from time to time during the continuance of the agreement. By the said agreement M/s. John and Co. also understood to pay to M/s. Tejkaran Sidkaran a sum of Rs. 2,09,245/- and odd which on going into the accounts, was found to be due to the latter in respect of the supply of cotton. Subsequently it appears that on July 6, 1948, the aforesaid partners of M/s. John and Company succeeded in obtaining another financial accommodation from Sethiya and Co. by an agreement by which the financiers agreed, for the efficient working of the mills, to advance loan, as and when required, up to the limit of Rs. 25 1/2 lakhs to the partners of ill/ s. John and Co. on condition that they i.e. the financiers would have a floating and prior charge for all monies due to them for the time being including the amount due to them on the date of the agreement and all monies which they might choose to advance under the agreement on all business assets including stores, coal, oil process, etc. of the aforesaid three spinning mills. On the background of the aforesaid facts describing himself as the sole proprietor of the firm "Sethiya & Co. and M/s. Tejkaran Sidkaran", Seth Loonkaran Sethia filed in the court of the Civil Judge, Agra, on April 18, 1949 an original suit, being Suit No. 76 of 1949 against M/s. John & Co. and its aforesaid partners as also against Munnilal Mehra Hiralal Patni and Gambhirmal Pandya and M/s. John, Jain Mehra and Co. for recovery of Rs. 21,11,500/- with costs, and further interest by sale of the assets of M/s. John and Co. and for permanent injunction restraining the defendants first set from committing any breach of the aforesaid agreement dt. July 6, 1948.

28. In light of the aforesaid facts observations are made in para 21 of the judgment as under:

"..... In the instant case, Seth Suganchand had to admit in unmistakable terms that the firm "Sethiya & Co." was not registered under the Indian Partnership Act. It cannot also be denied that the suit out of which the appeals have arisen was for enforcement of the agreement entered into by the plaintiff as partner of Sethiya & Co., which was an unregistered firm. That being so, the suit was undoubtedly a suit for the benefit and in the interest of the firm and consequently a suit on behalf of the firm. It is also to be borne in mind that it was never pleaded by the plaintiff, not even in their application that he was suing to recover the outstanding of a dissolved firm"

In view of the aforesaid special facts of the case the Supreme Court held that suit was clearly hit by S. 69 of the Partnership Act and was not maintainable. That is not so here. In the present case contract with the Government was undisputedly entered into by the partnership firm of M/s. Crown Construction Co. said firm consisted of three partners and present plaintiff was one of them. Other two partners have retired vide retirement deed (Ex. 201) which provides that all the rights and liabilities of the said firm are given to the present plaintiff. In that view of the matter it is very clear that plaintiff filed the suits for recovery of rights and liabilities of the dissolved firm. In view of the distinguishing facts of this case the judgment of the Supreme Court cited above would not be applicable. We, therefore, do not find any merit in this contention of Mr. Baxi that the suits are not maintainable, as the partnership firm was not registered.

29. The last preliminary contention raised by Mr. Baxi is that a new contract was entered into after the security deposits were renewed in the name of the present plaintiff and therefore, it violates the provisions of Art. 299 of the Constitution of India.

30. It may be mentioned in this connection that Mr. Baxi has lost sight of the fact that suits were filed in the year 1972. Therefore, there was no question of entering into any fresh contract with the plaintiff by the government. Only the government favored the present plaintiff by renewing the deposits in his name instead of the firm. It is rather surprising as to how the question of entering into new contract or fresh contract would come into existence and that too after filing of the suits. The least that can be said on this point is that it does not require any further discussion. Mr. Baxi wanted to create a ghost and then wanted to kill it. It is not the case of the plaintiff that on account of renewal of the deposits new contract was entered into by the plaintiff with the government. When that is so, we do not find any substance in this contention also raised by Mr. Baxi. Mr. Baxi wanted to rely on certain authorities on the point of agreement or contract with the government as per Art. 299 of the Constitution of India. However, in view of the aforesaid facts of the case this point does not need any further discussion as it would be purely academic and with no utility in this case.

[Paras 31 to 48 x x x x x x x] 49. Appeals dismissed.