

(1922) 08 BOM CK 0006

In the Bombay High Court

Case No : O.C.J. Appeal No. 32 of 1922 and Suit No. 2417 of 1919

Jivraj Laloobhai Patel

APPELLANT

Vs

Bhagvandas Gordhandas

RESPONDENT

Date of Decision : 11-08-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50

Citation : AIR 1923 Bom 66 : (1922) 24 BOMLR 1037

Hon'ble Judges : Lallubhai Shah, J;Crump, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shah, Acting C.J.

1. This appeal arises out of execution proceedings. An ex parte decree was passed on February 24, 1921, against the firm of Raghunathdas Mulji. The only partner of the firm that was served was Vachharaj. A summons was taken out by the assignees of the original decree-holder Keshavji Ramji against the executors of Raghunathdas Premji for leave to execute the decree against his estate on the ground that the deceased Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. Raghunathdas died on April 23, 1919, leaving a will dated February 7, 1919. The present appellant obtained probate on October 24, 1921. It appears that no notice of the suit was given to partners other than Vachharaj.

2. It was contended before the learned Judge who heard the summons that the original decree-holder Keshavji had knowledge of the death of Raghunathdas Premji, at the date of the suit, the suit having been filed in August 1919, and further that even if he had no such knowledge, under the provisions of Rule 50 of Order XXI the transferees of the original decree-holder could not execute the decree against that part of the estate of Raghunathdas Premji which did not form part of the partnership assets. The executor did not dispute that Raghunathdas Premji was one of the partners. The learned Judge found that the original decree-

holder had no knowledge of the death of Raghunathdas Premji prior to the filing of the suit. He further held against the present appellant on the construction of Rule 50 and accordingly granted leave for the execution of the decree against the estate of Raghunathdas Premji.

3. The first point argued in support of the appeal relates to the question of fact as to whether Keshavji had knowledge of the death of Raghunathdas Premji before the filing of the suit. This question of fact is important in view of the provisions of Order XXX, Rule 3, as under the proviso to that rule it is clear that if the original plaintiff had knowledge of the dissolution of the partnership, before the institution of the suit the summons should have been served upon each of the partners. We have to decide this question on affidavits. The material affidavits have been read to us. On the one hand we have the affidavits of Shamji Gillabhai and Jagjivandas Oodhavji of March 9, 1922. On the other hand we have the affidavit of Keshavji, the original plaintiff, dated March 11, 1922. It appears that Raghunathdas Premji died at Sihor, a place in the Bhavnagar State in Kathiawar. It is quite possible, however, that as Raghunathdas Premji had his business in the Market where the parties were carrying on business, the fact of his death would be known. But the case put forward by Keshavji is that he did not know at the date of the suit that Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. That is a question upon which there is a conflict of statements in the affidavits, and in that state of the evidence it is quite impossible to say that the view taken by the lower Court is wrong. It seems to me inconceivable that if Keshavji knew that Raghunathdas Premji, who apparently was a well-to-do merchant, was a partner and that he was dead, he would not take care to serve the summons on his legal representative. The present appeal must, therefore, be decided on the footing that the original plaintiff had no knowledge of the dissolution of the partnership, which was essential to invite the application of the proviso to Rule 3 of Order XXX.

4. Two questions have been raised relating to the construction of Rule 50 of Order XXI. First, it is urged that Sub-rule (4) of Rule 50 ought to be so read as to give practical immunity to any partner unless he has been served with a summons to appear and answer. Sub-rule (4) is really intended to make clear the implication of Sub-rule (1). It does not in any sense affect the provisions of Sub-rule (2) of that rule. The meaning of Sub-rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. If the contention of the appellant were accepted, it would have the effect of abrogating the provisions of Sub-rule (2). I see no justification whatever for such a construction. This point, however, was not seriously pressed after this aspect of the question was realised by the learned Counsel for the appellant in the course of the argument.

5. But it has been argued by Mr. Desai that Sub-rule (2) applies only to the case of a living partner, and that the provisions of that sub-rule could have no

application when the partner is dead. I am, however, unable to accept this contention. It really means that in a case where the decree is passed against a firm the estate of a deceased partner other than the partnership assets would practically remain entirely exempt from the liability to satisfy the decretal debt unless, of course, the partner has been served with a summons of the suit, That is a position which does not appear to me to be just nor does it appear to have been contemplated by Sub-rule (2). I am slow to accept the construction suggested on behalf of the appellant which involves such a result. Further I do not think that on the wording of Sub-rule (2) that construction is proper. That sub-rule provides that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in Sub-rule (1), Clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute it. It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner. The result, therefore, is that the appeal is dismissed with costs.

Crump, J.

6. I concur.