
(1963) 03 CAL CK 0010
In the Calcutta High Court
Case No : A.F.O.O. No. 70 of 1960

Juggilal Kamlapat

APPELLANT

Vs

Sew Chand Bagri and Others

RESPONDENT

Date of Decision : 21-03-1963

Acts Referred:

Partnership Act, 1932 — Section 32, 45, 45(1)

Citation : AIR 1963 Cal 505 : (1963) 1 CALLT 441

Hon'ble Judges : D.N. Sinha, J;A.K. Mukherjea, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sinha, J.—This is an appeal against an order of Mitter, J., dated the 30th July, 1959. The facts are shortly as follows :

2. One Sew Chand Bagri had three sons, Moti Chand, Manik Chand and Jankidas. During his life time, the said Sew Chand Bagree and his sons constituted a Hindu joint family and carried on business as such, under the name and style of Sew Chand Bagree. In 1932, Sew Chand Bagree died. The three brothers constituted a partnership and continued the business. In 1934 the partnership was registered. We have before us a certificate granted by the Registrar of firms which shows that on the 18th April, 1934 the firm of Sew Chand Bagree was carrying on business in partnership at 32 Cross Street, Calcutta, of which the partners were Manik Chand Bagree, Moti Chand Bagree and Jankidas Bagree. This partnership is said to have been dissolved after Dewali 1945. On or about the 7th June, 1946, a deed of dissolution was drawn up in the form of an agreement, a copy whereof is set out at pages 154 to 155 of the Paper Book. This agreement states that the three brothers were carrying on business under partnership in the name and style of Sew Chand Bagree at No. 32 Cross Street, Calcutta, and that they had agreed that after the Dewali day of 1945, they would not carry on any business under that name and style, but would be at liberty to start their own business and carry on such new business. It was agreed that

Manik Chand would carry on business in the name of "Manik Chand Bagree", and Moti Chand would carry on a business in the name and style of "Sew Chand Moti Chand", but Jankidas Bagree would be entitled to carry on business under the name and style of "Sew Chand Bagree".

3. Sometime in September, 1948 the appellant Juggilal Kamlapat entered into a contract with the firm of Sew Chand Bagree for a number of jute bags. These goods not having been delivered, the appellant demanded damages and referred the dispute to the arbitration of the Bengal Chambers of Commerce. On the 14th June, 1950, the Bengal Chambers of Commerce made an award in favour of the appellant and against Sew Chand Bagree. On the 28th May, 1951, a judgment upon award was passed by this Court. On the 16th April, 1958, an application was made by the appellant under the provisions of Order 21 Rule 50 2. of the Code of Civil Procedure, for leave to execute the decree against the respondents Manik Chand, Moti Chand and Jankidas on the footing that they were all three partners of the firm of Sew Chand Bagree. Manik Chand and "Moti Chand have appeared and contested this application. They say that in the facts and circumstances they were not liable, and the decree could not be executed against them.

4. Three points arise for determination in this case. The first is as to whether there was any dissolution at all as alleged, that is to say whether the partnership firm of Sew Chand Bagree was dissolved on or after Diwali 1945, as has been recited in the deed of dissolution dated the 7th June, 1946. The second point is as to whether, if there was a dissolution, the two previous partners Manik Chand and Moti Chand can be made liable. This question of liability really brings us to the third point, namely, whether they would be liable u/s 45 of the Indian Partnership Act, if the appellant did not know at the time of entering into the contract that either Manik Chand or Moti Chand were at that time partners of the firm of Sew Chand Bagree.

5-6. Upon the application being made, the learned Judge below was of the opinion that the matter could not be determined on affidavits only and it was set down for trial and evidence was taken. After a narration of the evidence His Lordship proceeded..

7. From a consideration of all these documents the learned Judge below has come to the conclusion that the partnership of Sew Chand Bagree had been dissolved in the manner stated in the deed of agreement dated the 7th June. 1946. We see no reason to differ from this finding.

8. The only point that was argued against this is the fact that none of the brothers had produced the books of accounts of the firm of Sew Chand Bagree, either before or after the alleged dissolution. It was argued that the books, if produced, would have shown when the alleged dissolution took place, if at all. While it is not an unreasonable argument, we find that the evidence is that the firm was dissolved from 1945 and that it was completely wound up in 1947 see

answer to question No. 13 of Manik Chand Bagree. . It is nowhere in evidence as to what happened to the books of account of the firm which had completely wound itself up in 1947. No question was asked on behalf of the appellants as to the whereabouts of the books of account. It does not follow that simply because Jankidas was continuing the business in the firm name, that he was still in possession of the books of accounts prior to 1947 of the partnership firm and that he was not deliberately producing it. Apart from these books of accounts, which were not produced, and of which very little was heard during the evidence, there appears to be quite a formidable body of evidence to prove the dissolution, which, in my opinion, has been well established.

9. Now, assuming that the dissolution had taken place and that Jankidas was continuing the business in the name of Sew Chand Bagree, what in law was the position as to the liability of the other two brothers, who had gone out of the business? The legal position is governed by Section 45 of the Indian Partnership Act, the relevant portion whereof, runs as follows :

"45 (1). Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner."

10. The general law on the subject is contained in Sub-section 1. . It says that even if the firm has been dissolved, partners would continue to be liable as such to third parties until public notice was given of the dissolution. In this case, we have already found that there has been registration under Sections 58 and 50, of the Indian Partnership Act, and no intimation has been given to the Registrar of any dissolution having taken place, u/s 45 or at all. In fact, it is not disputed that there has been no public notice given of the dissolution. To this general law, there is superadded a proviso, that is to say an exception. The exception deals with the case of death or insolvency with which we are not concerned in this case. But the exception with which we are concerned in this case is that where a person deals with the firm after the retirement of any partner, the retiring partner would not be liable if the person dealing with the firm did not know that he was a partner. The word used in the proviso is "retires". An argument has been advanced upon this choice of the word "retirement" rather than "dissolution", and I will have presently to deal with this argument.

11. Upon the question as to whether the appellants knew as to whether Manik Chand or Moti Chand were partners of the firm of Sew Chand Bagree, the matter is concluded by the evidence by Rameshwarlal Agarwalla, the only person who was called on behalf of the appellants, at the trial. In answer to question No. 5,

he has categorically said that he had no knowledge as to who were the partners of the firm of Sew Chand Bagree. In answer to questions 6 and 7, he has deposed that an enquiry was made by them only about 6 months before he was giving evidence, that is to say, the 26th June, 1959. In other words, at the time of entering into the contract, no enquiry had been made as to who the partners were and it has been frankly admitted that the appellants did not know whether Moti Chand or Manik Chand were the partners of Sew Chand Bagree at any time before the contract was entered into. In fact, they had no knowledge as to who were the partners. That being so, if Section 45 and the proviso applies, Manik Chand and Moti Chand cannot be made liable, because at the time of entering into the contract, the appellants did not know that either of them were partners of the firm of Sew Chand Bagree which had been dissolved in 1945, but of which no public notice was given.

12. The first argument that has been advanced before us, is upon the wordings of the proviso. Mr. Tibrewal has argued that the case here is a case of dissolution and not retirement. He has pointed out that Section 45 is in Chapter VI of the Indian Partnership Act, which deals with the dissolution of a firm whereas the question of retirement is dealt with in Section 32 appearing under Chapter V of the said Act. So far as Section 32 is concerned, it deals with the retirement of a partner. It will be relevant to set out Sub-section 3 thereof which is as follows :-

"3. Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner."

13. There is no doubt that the introduction of the word "retires" in the proviso to Section 45 is somewhat difficult to explain. As I have said above, the incidences as to retirement are contained in Chapter V and specifically in Section 32. Yet we find that the word "retirement" has been introduced in the proviso to Section 45, which appears in the chapter dealing with the dissolution of a firm. It will be, therefore, interesting to consider the "Objects and Reasons", to find the background of the legislation. In the "Objects and Reasons" relating to Section 32, we find the following -

"In this section, the word "retire" is properly confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. It does not cover the case where a partner withdraws from a firm by dissolving it, which should properly be referred as a dissolution and not as a retirement."

Coming now to Section 45, the "Objects and reasons" relating to this Section gives us the clue that the proviso in Section 45 reproduces Sub-section 3. of Section 36 of the English Act. The relevant provisions of Section 36 of the English

Act are as follows : -

"36 (I). Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(3). The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the inn to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

It will be seen that in the English Act, Sub-section 3. of Section 36 deals with "retirement" but not "dissolution". This has been introduced as proviso to Section 45 of the Indian Act. It will be however useful to consider a leading case on the subject. In *Tower Cabinet Co. v. Ingram*. 1949 2. KB 397, the learned Judges were dealing with Sub-section 3. of Section 36. What happened there was that there was a partnership consisting of two partners, who were carrying on business in the name of Merry's. By agreement, the partnership was dissolved in 1947. It was not notified in accordance with law and the question was as to the liability of the outgoing partner after the dissolution. Sub-section 3. of Section 36 was applied and *Lynskey, J.*, said as follows : -

"Sub-section 3 again deals with the particular individual. It does not deal with the public at large. Its words are simple and obvious. It is not concerned merely with questions of apparent members or non-apparent members, but applies the test indicated by the words "A partner who, not having been known to the person dealing with the firm to be a partner". Those words are equally applicable whether he was an apparent partner or a dormant partner. If the person dealing with the firm did not know that the particular partner was a partner, and that partner retired, then as from the date of his retirement, he ceases to be liable for further debts contracted by the firm to such person. The fact that later the person dealing with the firm may discover that the former partner was a partner seems to me to be irrelevant, because the date from which the sub-section operates is from the date of the dissolution. If at the date of the dissolution the person who subsequently deals with the firm had no knowledge at or before that time that the retiring partner was a partner, then Sub-section 3 comes into operation, and relieves the person retiring from liability."

Thus it will be seen that Sub-section 3. of Section 36 of the English Act would cover a case where by the retirement of some partner or partners a firm had been dissolved, and yet one of the partners was continuing the business in the firm name. The facts of 1949-2 KB 397 *supra*. , are almost the same as the instant case before us. What had happened was that in 1945, there was a dissolution and yet one of the partners continued to carry on business in the same name as that of the partnership. Somebody dealt with the business after the dissolution, but never knew as to who the partners were. In other words, they had no knowledge that either Manik Chand or Moti Chand were partners and

never dealt with the firm upon that footing. The whole basis of this provision of law is that if partners give out to the world that the partnership consists of a number of partners, and upon that basis people deal with them, they cannot escape liability merely by a dissolution or by retirement unless the fact of such retirement or dissolution has been publicly notified and the members of the public have had means to know about the same. The exception is based on the principle that if the person dealing with the firm did not know as to who the partners were, there would be no question of his having dealt with the firm upon the basis of any particular person being a partner thereof.

14. I must confess that the word "retires" having been introduced in proviso to Section 45, the Section has become rather inartistic and there is scope for arguing that it does not apply to the case of a dissolution. Taking, however, all the facts and circumstances stated above, and the provisions of the English Act and the Indian counterpart, it is clear to me that the proviso includes the case where, as a result of the retirement of some partner or partners, there has been dissolution, or where there has been a dissolution simpliciter, but one of the partners was carrying on the business in the same name as the original partnership. After all, Section 45 deals with dissolution. The proviso, being an exception to the general law, must necessarily deal with the case of dissolution. A similar proviso has already been appended to Section 32, dealing with retirement. It was therefore unnecessary and inappropriate to introduce such a proviso to Section 45 if the proviso dealt with retirement only, unconnected with any dissolution. In the circumstances, there can be no doubt, that the proviso applies and in order to make an outgoing partner liable, the party enforcing the liability must have knowledge of the fact that he was a partner, otherwise there is no liability. Whether this principle would also apply in a case where no business has been carried on in the same name by a partner after dissolution, is a matter that need not be dealt with now, and is kept open.

15. That being so, I think that the decision arrived at by the learned Judge below was a correct decision and the appeal should be dismissed.

16. There will be no order as to costs.

Arun K. Mukherjea, J.

17. I agree.