
(1927) 03 BOM CK 0034

In the Bombay High Court

Case No : O.C.J Appeal No. 79 of 1926 and Suit No. 1184 of 1925

Jwaladutt R. Pillani

APPELLANT

Vs

Bansilal Motilal

RESPONDENT

Date of Decision : 29-03-1927

Acts Referred:

Citation : AIR 1927 Bom 560 : (1927) 29 BOMLR 1244

Hon'ble Judges : Blackwell, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amberson Marten, Kt., C.J.—This is an issue under Order XXI, Rule 50, of the Civil Procedure Code, as to the liability of one Pillani in respect of a decree passed by myself on February 22, 1926, against the Wadia Woollen Mills Ltd. and Husseinbhai Pillani Wadia & Co. for Rs. 2,00,000 and interest at 8 1/4 per cent, per annum from April 3, 1924. Mr. Pillani disputed his liability on the ground that the liability in respect of which the decree was passed occurred after the date when he had retired from the second defendant firm, and that inasmuch as he had given public notice by advertisement in the Bombay Government Gazette and in four local newspapers, to wit, The Times of India, The Bombay Chronicle, The Bombay Samachar and The Sanj Vartman, he was not liable for the liabilities which the continuing partners incurred after the date of his retirement, For that purpose he relied on Section 264 of the Indian Contract Act. Mr. Justice Taleyarkhan decided this point against Mr. Pillani. The latter now appeals.

2. There is another branch of the case altogether as to what in fact was the liability on which the decree of February 22, 1926, was founded, viz., whether it was on a liability which accrued after the date of the dissolution, or whether it was on a liability which accrued before that date. But I will deal with this second question later.

3. Turning, then, to Section 264 of the Indian Contract Act, it runs :-

Persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution.

Now it will be seen that that section does not state affirmatively that if public notice has been given, then persons dealing with a firm will be affected by a dissolution. Counsel for the appellant asks us in effect to hold that this is implied. Counsel for the respondent contends the contrary.

4. Now, if this section was perfectly clear on its wording, then I take it that it would be unnecessary or even wrong to refer to the earlier law on the point, or to do anything more than follow the exact language of the section, leaving it to others to move the Legislature to alter it, if it was found inconvenient to business men or the public generally. But that is not the view which we take of this section, and I think anybody who listened to the able arguments that have been addressed to us on either side on this particular section would be bound to agree with us to this extent at any rate. I propose, therefore, to put myself in the arm-chair, as if it were, of the draftsman of the Act at or before the date it was drafted in much the same way as it has often been said that one is entitled to put oneself in the arm-chair of the draftsman of a testator's will. That being so, I would note that dealing as we are here with a case on the Original Side, we have succeeded to the rights and powers of the Supreme Court under the Charter of 1823 as subsequently modified, and that accordingly a great deal of the English common law or equity would be applicable in matters of contract or in matters of partnership. I need only refer to two recent cases in this appellate Court-the one dealing with our jurisdiction under Clause 12 of the Letters Patent, and the other dealing with a question of tort, viz., slander on a married woman,-to illustrate what I refer to. (See *Hatimbhai v. Framroz Dinshaw* (1926) 29 Bom. L.R. 498 and *Hirabai Jehangir Mistry Vs. Dinshaw Edulji Karkaria*,

5. That being so, it would be quite clear that under English law a distinction was drawn between old customers and new customers as at the date of dissolution, and that as regards old customers it was incumbent that they should have actual notice of a dissolution, if they were to be affected by it. On the other hand, in the case of new customers dealing with the firm of the continuing partners for the first time after the date of dissolution, then quite apart from actual notice, public notice by advertisement in the London Gazette would be sufficient to affect them. Thus, in *In re Hodgson: Beckett v. Ramsdale* (1885) 31 Ch. D. 177 Sir James Hannen, in the course of his judgment, says (p. 184):-

Upon the second question of fact, namely, whether or not the Plaintiffs had notice or knowledge of the withdrawal of James Hodgson from the partnership, which took place in 1877, it is elementary knowledge that where persona have had dealings with a partnership firm the mere publication of the dissolution in the Gazette is not sufficient to affect such persons with notice, if they continue to give credit on the footing of the continuance of the partnership. It is necessary in such a case that actual knowledge should be brought home to the persons who

had previously given credit to the firm.

That was a decision of the Court of Appeal.

6. So, too, in *Scarf v. Jardine* (1882) 7 App. Cas. 345 Lord Selborne states (p. 349) :-

The defendant also might be held liable-about that there can be no doubt; because the principle of law, which is stated in *Lindley on Partnership* is incontrovertible, namely that " when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred"; and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation. Of course in partnership there is agency-one partner is agent for another; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency and has held it out to others, they have a right to assume that it continues until they have notice to the contrary.

7. Next, turning to the English Partnership Act, 1800, which, it will be observed, was framed long after our Indian Contract Act was passed, Section 36 provides :-

(1.) 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.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales,... shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(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 firm 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.

Accordingly, if this was a case under English law, it is perfectly clear that as the plaintiff dealt with the second defendant firm prior to the date of dissolution, then as he had no actual notice of the retirement of Mr. Pillani, Mr. Pillani could still be made liable in respect of subsequent dealings between the plaintiff and the second defendant firm. I should here state that in the Court below Mr. Pillani contended that the plaintiff had actual notice, quite apart from the advertisements which I have referred to. But on the facts the learned Judge found in favour of the plaintiff, viz., that he had no such actual notice, That finding of fact has not been challenged in the appeal before us.

9. Next, turning to Indian law there is a strange dearth of authorities apart from English law. I am not aware that the draftsman of Section 264 would have had before him any authoritative decision as to the law in India on the point up to the date of the Indian Contract Act. I am fully aware of the warning which has been given by their Lordships of the Privy Council that one is not to assume that the Indian Legislature can never be in front of English law as regards amendment, but can only follow English law after it has been amended. (See *Ramdas Vithaldas Durbar v. S. Amerchand & Co.* (1916) L.R. 43 IndAp 164 18 Bom. L.R. 670 But that is really a branch of a point which I have previously dealt with, viz., as to whether Section 264 on its own terms is so clear as to enable us to decide the case without more.

10. Now, in the first place, it does not necessarily follow that because a section like Section 264 expressly provides for a particular event, that necessarily the converse is true as we are asked by the appellant to hold, The argument presented to us by the respondent is that the section really deals with cases where no public notice has been given, and that as regards cases where public notice has been given, there the parties are thrown back on the ordinary law of the land, which in the present case would be the common law of England.

11. The respondent, accordingly, asks us to construe Section 264 in this way, viz, "in cases where no public notice has been given, persons dealing with a firm will not be affected by a dissolution unless they themselves had notice of such dissolution." That construction, I think, in no way involves introducing any new words into the clause. In my opinion it is only a clearer way of putting the existing words in the clause, I appreciate that when you have done that, you do not necessarily solve the question "Well what is to happen in cases where public notice has been given?" One has still to make up one's mind about that. Is it right then to assume that in that event the parties are to be affected by the dissolution, although the Act does not expressly say so ? Or are we to treat it as if the matter is left at large ?

12. Now, in this respect I think the question of dormant partners has some bearing on the point. Counsel on either side accept the position that Section 264 does not deal with dormant partners. Mr. Mulla for the appellant says that it is unnecessary to do so inasmuch as the liability of a partner depends on agency, and where you do not know that a man has ever been a partner, then the fact of his retirement can make no difference. You may be able to sue him up to the date of retirement but not afterwards; and you are not damnified because you never gave him credit nor did he ever hold himself out as a partner.

13. Before citing authorities on that particular point, I should like to refer to the leading authority on this section, viz., *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* ILR (1882) Cal. 678, a decision of Sir Richard Garth and Mr. Justice White, There the head-note runs:-

Section 264 of the Contract Act is not intended to be an exhaustive exposition on

the question of notice of a dissolution of partnership.

The mode of notification of dissolution required in the case of old customers who are known to the firm as having dealt with it, is an express or specific notice by circular or otherwise. But in the case of the general public the most effectual public notice which can reasonably be given is requisite.

In that case there had been a notice of dissolution in the official Calcutta Gazette but the Court held, after carefully considering Section 264 and the English law on the point, that (p. 685) :-

In this particular case the plaintiff was an old and known customer of the firm. There was no reason why he should not have had express notice of the retirement of the first defendant; and as he had no such notice, and is not proved to have been aware of the fact, we are of opinion that the first defendant was liable upon the promissory note.

Sir Richard Garth felt a difficulty because of the words "of which no public notice had been given"; but he also thought that (p. 683) "if it had been intended to introduce such a serious change into the law, as that construction would involve, the language used would have been much more clear and explicit, and that the rule would have been laid down in an affirmative and not in a negative form." And in the course of the argument at p. 681 he said :-

When you look at Section 264, it does not follow that persona dealing with a firm will be affected even if a public notice has been given,-i.e., the converse of the proposition stated in the section is not affirmed.

14. Then, in Jagat Chandra Bhattacharjes v. Gunny Hajee Ahmed ILR (1935) 53 Cal. 214, a decision of Sir Lancelot Sanderson and Mr. Justice Buckland, at p. 227 the learned Chief Justice dealt with the question of Section 264, and said:-

In the first place the section says "persona dealing with a firm," It does not say "persona dealing with a firm before its dissolution," and, I see no reason why the words "before its dissolution" should be interpolated in the section.

Then he proceeds to deal with the decision I have just cited, viz., Chundee Churn Dutt's case, and goes on (p. 229) :-

In nay judgment it is clear that the above-mentioned case is an authority for the proposition that the section applies not only to persons who dealt with the firm before the dissolution, but also to persons dealing with the firm after the dissolution or change of partners.

This, as already stated, is the natural construction of the section giving the ordinary meaning to the words used in the section.

15. The latter is a point which has been taken in some of the cases, but before us counsel for the respondent did not contend that Section 264 should be confined to persons dealing with the firm after dissolution. In my opinion counsel

was right in the course which he took, and his argument was not affected by treating the section as applicable to both old and new customers, subject to the qualification I have already given, viz., that it applies to cases where no public notice has been given.

16. Then, recently in *Ezekiel Moses v. Russa Engineering Works* ILR (1923) Ran. 47 Mr. Justice Heald followed the decision in *Chundee Churn Dutt's* case which he held to be good law.

17. We were also referred to a passage in *Whitley Stokes*, Vol. I, p. 655n., which runs :-

For conjectures as to the meaning of this section see 8 Cal. 683, 684. The effect seems to be that all persons dealing with a firm, whether old or new customers,...are bound by "public notice" of its dissolution, and that when Such notice has been given (by advertisement in gazettes or otherwise) the special notice to which old customers have hitherto been entitled (Lindley, Ptp. 4th edit. p. 415) is dispensed with. This can hardly have been intended, see 1 Agra, 198.

The result is that the learned author while accepting the contention of the appellant thinks that it is a construction which can hardly have been intended. Therefore the passage does not give much support to the appellant's argument.

18. Next, when we come to cases as to dormant partners, in *Ramasami v. Kadar Bibi* ILR (1886) 9 Mad. 492 Sir Arthur Collins and Mr. Justice Parker, in effect, followed the English law, viz., "the retirement of a dormant partner is an exception to the usual rule that a partner's agency ends by notice."

19. In *Greaves v. Purshotam* (1903) 5 Bom. L.R 366 Mr. Justice Tyabji considered the matter in some detail and held that Section 264 only applied to cases where a particular individual, sought to be made responsible as partner, was known to the parties seeking to make him responsible, to have been a partner. The section had no application to a dormant partner as to whom the parties contracting had no knowledge that he was a partner. That decision was dissented from by Mr. Justice Beaman in *Giovani Gorio Vs. Vallabhdas Kalianji*, . But it is not contended before us that this dissenting judgment was correct.

20. We, therefore, get it that Section 264 must in any event be construed in such a way that it is not to apply to cases of dormant partners nor to cases of death. In other words, the apparent wide meaning of the words used must in any event be considerably cut down. I should here refer to Section 208 of the Indian Contract Act, which provides that-

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

On that basis the termination of the agency was not known to the plaintiff at the material date.

21. On a careful consideration, then, of the whole case, it appears that ever since the decision of Sir Richard Garth in 1882, the law at any rate in Calcutta has been similar to that in England on this point, viz., that to affect an old customer like the plaintiff actual notice must be proved. That is a factor, I think, we are entitled to take into consideration before we deliberately in Bombay adopt a different practice on this important point and differ from what has been laid down in two other leading commercial cities, viz., Calcutta and Rangoon.

22. On the whole, then, in my judgment, the construction which the respondent asks us to put upon this clause is the correct one. The Code does not deal with cases where a public notice has been given, and accordingly such cases may be left to depend on the ordinary law. That being so, it follows that in my judgment Mr. Pillani is liable here in respect of the decree claim in question, and that the learned Judge rightly decided the matter in the plaintiff's favour.

23. On that basis I can deal quite shortly with the alternative part of the case, Shortly stated, there were two promissory notes, one of April 3 1923, and the other of April 3, 1924. Both were for the same principal sum, viz., Rs. 2,00,000; the first at the rate of 7 3/4 percent, and the second at 8 1/4 percent. The second note was a renewal of the first. Between the dates of these two notes Pillani retired from the defendant firm. The plaint was originally brought on the second note. There were certain amendments made in the plaint, which we have carefully read and which have been the subject of an elaborate argument. In effect we are asked to hold by the respondent that this was a suit on the first promissory note, although he does not go so far as to contend that the plaint was also based on the original advance irrespective of the promissory notes. It, was also said that a mistake had been made in the amendment and that having regard to a previous order the words "under the said promissory note" in para. 2 should be struck out. But on the plaint as it stands it is clear that the promissory note mentioned in para. 2 refers to the promissory note marked A in para. 1a of the plaint, viz., that of 1924 Up to now there has been no application to amend the plaint further, and there has been no further re-declaration of the plaint, as there ought to have been if further amendments of importance were to be introduced into the plaint Further, a decree was passed on the plaint as long ago as February, 1926, and we are concerned today with the liability of Pillani on the decree which was actually passed, and not on some other decree which might have been passed on some different plaint.

24. It seems to me, therefore, that, as far as the present matter is concerned, we must treat it on the amended plaint which we have before us Further, the written statement when properly looked at does not, I think, treat the suit as one on the first promissory note, although of course it refers to and admits it, seeing that it was introduced by amendment into the plaint, A mistake has, however, been made in para 5 where the second reference to "para. 1a of the plaint" should be to para 1.

25. Next, turning to the proceedings before myself as against the firm, it is clear

to my mind that the suit was first heard as against the firm and that then the liability of Pillani was considered separately under Order XXI, Rule 50. I am also quite clear in this that I should never for one moment have passed a decree against the firm for Rs. 2,00,000 and interest at 8 1/4 per cent, if the plaintiffs had said they were suing on the first promissory note. The interest on that note was at 7 3/4 percent, and not 8 percent, as stated in para 1 of the amended plaint. Moreover, there is this further point that if the plaintiffs were suing on the first promissory note, then there would be no question of having this issue against Mr. Pillani because it is common ground that he was a partner at the date of the first promissory note. The whole object of the issue arises from the fact that Mr. Pillani was not a partner at the date of the second promissory note. I hold, then, without hesitation that the judgment I passed was on the second promissory note and not on the first one. Still less was that judgment passed on the original advance irrespective of either promissory note.

26. Under these circumstances, I think it is unnecessary to go into authorities as to the circumstances under which a man who has held two promissory notes, the second of which is a renewal of the first, may fall back on the first, if for certain reasons, i.e., for want of stamp or otherwise, the second promissory note becomes defective. I am not dealing with the question, and it is unnecessary for me to determine, what remedies may have been open to the plaintiff at the time he filed his plaint. I am only taking the remedies that he did actually seek in the amended plaint which he put forward to the Court. It is certainly rather curious that the plaintiff, while employing four counsel to appear for him before us and in the Court below, should yet leave his pleadings in a heavy case of this sort to be drafted by solicitors. I have borne that fact in mind in taking a lenient view of the documents put forward, but having done that I am totally unable to accept any of the suggestions which Mr. Desai has put forward in this respect. If, therefore, it had been necessary to decide the above alternative point, it may well be that we should have found ourselves unable to agree with certain of the conclusions which the learned Judge arrived at on that part of the case. But, under the circumstances, in view of our decision on the first part of the case, we think that that decision is sufficient to dispose of the appeal.

27. The result will be that the appeal will be dismissed with costs.

Blackwell, J.

28. I am of the same opinion. I have nothing to add.