

(1997) 03 BOM CK 0027

In the Bombay High Court

Case No : First Appeal No. 81 of 1989 (A) with Cross Objection

M/s. Lalchand Manakchand and sons

APPELLANT

Vs

M/s. Vijay Enterprises and others

RESPONDENT

Date of Decision : 31-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Limitation Act, 1963 — Article 1, 18
Partnership Act, 1932 — Section 45

Citation : (1998) 1 BomCR 374 : (1998) 4 BOMLR 480 : (1998) 1 MhLj 202

Hon'ble Judges : D.D. Sinha, J;A.D. Mane, J

Bench : Division Bench

Advocate : S.M. Godsey and A.M. Kenande, for the Appellant; V.T. Choudhary, P.F. Patni, for the Respondent

Judgement

A.D. Mane, J.—A short but important question is involved in this First Appeal, as to whether the suit filed by the appellant-firm was within limitation on basis of open, mutual and current account of the respondent-firm after it's dissolution.

2. In order to appreciate this question we may refer to the facts of the case. For the sake of convenience, the appellant is referred as plaintiff, respondent No. 1-firm and respondents 2 to 5, who were it's partners as "defendants".

3. The plaintiff filed suit on 29-4-1983 to recover certain amount due on the foot of the account for the period from accounting year 1977-78 to 1981-82. The plaintiff alleged that it maintains accounts of different firms in it's account books. Advances made by the plaintiff to the defendants and repayments thereof, are debited and credited respectively in the accounts of the defendants in books of accounts maintained by the plaintiff. The balance, at the end of each accounting year was forwarded in the next year. According to the plaintiff, the account books of the defendants are open and running account and the amount received by the plaintiff from defendants was credited towards the general balance due at the end of the account and not towards any particular advance made to the

defendants. The last advance made by the plaintiff to the defendants was on 15-1-1980 and the last payment received by the plaintiff from the defendant No. 5 towards the general balance due from the defendants was on 8-9-1981.

4. The plaintiff's further case is that the plaintiff demanded the amount of advance by its Advocate's letter dated 10-2-1981 but the defendants failed to satisfy the said demand.

5. In response to the suit summonses issued, the defendants 1, 3 and 4 appeared and filed application Exhibit 5 raising a contention that the plaint was liable to be rejected under Order VII, Rule 11 of the Civil Procedure Code. In this context, it was contended that the defendant No. 1 firm was dissolved with effect from 9-12-1979. Defendant No. 5 Lalchand Manakchand Mehta is the common partner of the plaintiff, as well as of the defendant No. 1-firm. Plaint is signed by Vijay Lalchand Mehta, who is son of the defendant No. 5-Lalchand. Other sons of defendant No. 5 are the partners of the plaintiff firm. Defendant No. 5 and his sons form a joint Hindu family and defendant No. 5 is the Manager and Karta of the joint family. Notice of dissolution of partnership firm was given by Lalchand by publishing it in the news paper. Taking into account this aspect, it was contended by the plaintiff firm that dissolution of the defendant No. 1 firm took place on 9-12-1979 and as such last payment made by one of the partners viz. defendant No. 5 of the firm will not bind the firm and will not save limitation. Therefore, the plaint was liable to be rejected under Order VII, Rule 11 of the Civil Procedure Code.

6. The learned trial Judge considered the objection and held that the plaintiff's claim was not within limitation. The plaint was, therefore, rejected under Order VII, Rule 11 of Civil Procedure Code.

7. We heard Shri Godsey, learned Counsel for the appellant and Shri Patni, learned Counsel for the respondents.

8. Shri Godsey, learned Counsel urged that the learned trial Judge misconstrued the provisions of Order VII, Rule 11 of the CPC and grossly erred in following the said provisions. It is submitted that the learned trial Judge virtually decided the question of limitation on merits without framing any issue to that effect and without giving the appellant an opportunity to present case and to rely upon document and oral evidence. Therefore, the impugned order is un-just and illegal.

9. In the first place, it may be stated that Order VII, Rule 11 of the CPC enables the defendants to raise a preliminary objection against maintainability of the suit on account of formal defect in the plaint, consequent upon, the Court is under obligation to decide the objection. It provides that the plaint shall be rejected where the suit appears from the statements in the plaint to be barred by any law.

10. In para No. 2 of the plaint, it is clearly averred that,

"The plaintiff understands that the defendant firm now stands dissolved with effect from 9th December, 1979. The plaintiff states that one Lalchand

Manakchand Mehta is common partner of plaintiff as well as defendant firm".

However, para No. 12 of the plaint averts that,

"The claim of the plaintiff is on the balance due at the foot of the account and the entire claim of the plaintiff is in time as the said is within three years from the close of the accounting year in which the last payment is made by the defendants towards the General Balance due and as mentioned in the accounts namely, on 8-9-1981 and in any event the moneys were payable by the defendants on demand and the plaintiff made a demand for the same on 10-2-1981 by if's Advocate's letter and hence the suit is in time".

11. There is no controversy on the following points:

- (a) that there was mutual, open and current account between the parties,
- (b) that there was no actual transaction as such between the parties after December, 1979, and
- (c) that the public notice of dissolution of defendant No. 1 firm was issued on 13-12-1979.

It may be stated that the averments made by the plaintiff in para No. 2 of the plaint were subsequently re-affirmed in positive way in their reply to the application Exh. 51 filed by the defendants. Therefore, it goes without dispute that there was a public notice of dissolution of defendant No. 1 firm given on 13-12-1979.

12. It is also appropriate to mention that Article 1 of the Limitation Act provides three years" period of limitation in case of suits relating to accounts. Article 1 says that for the balance due on mutual open and current account, where there have been reciprocal demands between the parties, period of limitation is of three years and the close of the year in which last item admitted or proved is entered in the account, such year would be completed in account for computation of period of limitation. We may observe that the mutuality, openness and currency of the account presupposes the continuance of the mutual dealings between the parties. If an event has taken place which will make it impossible for the parties or either of them to continue the dealings, then certainly it would be difficult to say that the account continued to be open or mutual. On plaintiff's own saying at the end of each accounting year the balance due from defendant-firm was ascertained and carried forward to the next accounting year.

13. Now, main contention of the plaintiff is that last advance made by the plaintiff to the defendants was on 15-1-1980 and the last payment received by the plaintiff towards general balance due from the defendant No. 5 was on 8-9-1981.

14. This statement of fact, however, is seriously disputed by the defendants. It is clear from the plaint averments that the actual transaction between the parties

took place prior to 1979, inasmuch as scrutiny of the account produced before the trial Court shows that before 31-12-1979 last transaction was of 11-10-1979. It would, therefore, be reasonable to draw an inference that the mutuality or continuance of the account has come to an end in October, 1979. That situation appears to have been arisen because admittedly the defendant No. 1 firm came to be dissolved on 9-12-1979.

15. Significantly, though the plaintiff firm in para No. 2 of the plaint avers that the plaintiff understands that the defendant firm was dissolved with effect from 9-12-1979 in subsequent reply filed by the plaintiff to the application made by the defendants at Exhibit 51, it has been specifically admitted that the defendant No. 1 firm was dissolved on 9-12-1979. Not only that but there is no challenge to the fact that there was a public notice of dissolution of the defendant firm on 13-12-1979. If the defendant firm was dissolved, it became incapable of continuing the dealings between the parties. Logical corollary would be closure of the accounts between the parties.

16. The question therefore, arises, whether if the defendant No. 1 firm came to be dissolved and there was closure of dealings between the parties, how the suit claim was well within time of limitation, based on open, mutual and current account alleged to have been operated by a common partner e.g. defendant No. 5 after he ceased to be a partner of defendant No. 1 firm.

17. In view of this controversy regard must be had to section 45 of the Indian Partnership Act, 1932. This section deals with the liability of partners for the acts done after dissolution and provides that the partners continue to be liable to third parties for acts done by any one of them even after dissolution, until public notice is given of the dissolution. That means, where there is a public notice of dissolution, it is sufficient to absolve the partners from liability. There is no dispute that in the present case, defendant No. 5 had given a public notice as envisaged by section 45 of the Partnership Act. Therefore, the acknowledgement given of any liability by one of the partners of the dissolved firm does not hold good against other partners and the plaintiff would not be correct in its contention that the transaction was made between the parties within three years next before the date of the suit. We, therefore, find no fault with the finding recorded by the learned trial Judge to reject the plaint under Order VII, Rule 11 of the Civil Procedure Code.

18. The first appeal fails and is dismissed. No order as to costs.

19. The Cross Objection has been filed by the defendants who succeeded in their objection for rejection of the plaint under Order VII, Rule 11 of the Civil Procedure Code. The cross-objections are directed mainly for non-awarding the cost to the defendants by the trial Court. The question of grant of cost is a discretionary and we do not find any justifiable ground to interfere with the question of awarding costs.

20. Cross objection is disposed of as rejected, without an order for costs.

21. Appeal dismissed.