

(1975) 02 PAT CK 0002
In the Patna High Court
Case No : A.F.O.O. No. 314 of 1972

Rajindra Prasad Sinha

APPELLANT

Vs

Karam Chand Thapar and Co. (Coal Sales) Ltd.

RESPONDENT

Date of Decision : 11-02-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1, 47

Citation : AIR 1975 Patna 265 : (1977) 10 PLJR 130

Hon'ble Judges : H.L. Agarwal, J

Bench : Single Bench

Advocate : L.K. Choudhury and Parmanand Sharma, for the Appellant; Bimal Bhusan Sen and Mihir Kumar Roy, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agarwal, J.—This is a Miscellaneous First Appeal u/s 47 of the CPC on behalf of judgment-debtor No. 3.

2. In order to appreciate the various questions of law that arise for decision in this case, it is necessary to state the few relevant facts. Respondent No. 1 instituted Money Suit No. 77 of 1955 in the Court of the Subordinate Judge, Patna, against a firm, namely. M/s. Kameshwar Sinha and Company, and two of its partners, for realisation of Rs. 18,771/- due to it as the balance of the price of coal sold on credit to the firm, who was defendant No. 1. In that suit, the first two defendants did not appear in spite of service of summonses. The plaintiff and defendant No. 3, who is the appellant before me, filed a compromise petition. In the said compromise petition it was stated that the appellant was not a partner of the defendant No. 1 firm at all and the plaintiff therefore, agreed to exonerate him from the claim, in the suit "which was hereby withdrawn against him." Later on, the Court passed an ex parte decree on the 26th June 1957 against the other two defendants. The plaintiff thereafter levied Execution Case No. 1 of 1960. In the execution proceeding, the decree-holder proceeded against a sum of Rs. 5,000/-standing to the credit of defendant No. 1 in its Saving Bank Account in

the General Post Office, Patna. On this action of the decree-holder, several proceedings were started from time to time by the appellant as well as some other persons as heir and legal representative of a deceased partner of defendant No. 1. Firstly, an appeal against the judgment and decree of the trial Court was filed in this Court in forma pauperis which was registered as M. J. C. No. 550 of 1957. The M. J. C. application having been dismissed and the court-fee not having been paid on the memorandum of appeal within the time allowed, the appeal was dismissed for default. Then several Miscellaneous cases under different provisions of the CPC were filed in the execution proceeding from time to time and the matter had come up to this Court twice; firstly in Miscellaneous Appeal No. 348 of 1965 and secondly in Civil Revision No. 345 of 1969. It appears that the Miscellaneous Appeal and the Civil Revision were filed in the name of the judgment-debtor firm itself, although through some or the other person. Repeated attempts had all through been made to circumvent and frustrate the attempt of the decree-holder to fall upon the aforesaid sum of Rs. 5,000/- standing to the credit of defendant No. 1 in its Savings Bank Account in the General Post Office, Patna. Ultimately, in the Civil Revision, this Court directed that the executing Court should proceed against the money in question under Order 21, Rule 52 of the Code.

3. The appellant thereafter seems to have filed an application in the executing Court that the decree passed by the trial Court is a nullity, having been passed against defendant No. 2 (Choudhary Indra Narain Jha), as well who was already dead, and, therefore, the execution could not proceed. This argument has been repelled by the executing Court on various grounds, including that this plea was barred by principles of res judicata.

4. In this Court Mr. L. K. Choudhury appearing in support of this appeal contended that the decree against defendant No. 1 itself was inexecutable inasmuch as the defendant firm was dissolved or stood dissolved on the date of the passing of the decree as defendant No. 2 (Choudhary Indra Narain Jha), one of the partners, had died. The contention has got no substance and must be rejected for various reasons. Firstly, it is not always necessary that on the death of a partner a firm must be dissolved. It all depends upon the terms of the agreement of the partnership between them. No evidence has been led on behalf of the appellant on this question. Secondly, the proposition as such has also got no substance in the eve of law. It is well settled that if the cause of action has already accrued in favour of a person before the dissolution of a firm, such a person can institute a suit in the name of the firm and prosecute it against such a firm, although it might have been dissolved in the meantime. This view finds full support from a Bench decision of this Court in the case of Ram Swarup Maru Vs. State of Bihar and Another, .

5. Mr. B. B. Sen on behalf of the decree-holder respondent raised two further points against the appellant. The first point is that the filing of the various proceedings by and in the name of the defendant No. 1 itself, referred to above,

clearly proved the fact that the defendant firm was not dissolved and was in existence and would also attract the doctrine of estoppel against the appellant to raise this question. It is not necessary to conclusively decide this question for the view that I have already taken that the plaintiff's decree against the firm, on the facts and in the circumstances of this "case, was quite valid and enforceable.

However, there seems to be great force in the second contention of Mr. Sen to the effect that the objection of the appellant cannot be held to be u/s 47 of the Code as he had no authority to file the objection petition under that Section. If that be so, then the present appeal is not maintainable on this ground alone. Learned counsel contended that the appellant should not be deemed to be a party to the suit within the meaning of Section 47 of the Code, and the explanation that the defendant against whom a suit of the plaintiff had been dismissed should be treated to be a party to the suit, would have no application, inasmuch as on the basis of the stand taken by the parties in the compromise petition, it was specifically accepted that the appellant was wrongly impleaded as a defendant and he had no liability for the dues against the firm, namely, defendant No. 1. because he was not a partner of the firm. Learned counsel contended that the effect of this statement in the compromise petition amounted to a statement that this appellant was wrongly impleaded as a Party defendant in the suit and therefore, he would be deemed to be not before the Court for all practical purposes, although no prayer was made in this behalf and the suit was allowed to be dismissed against him. This contention seems to be well founded and is supported by two decisions; one of this Court and the other of the Madras High Court. A Bench of this Court in the case of Mt. Kusmi and Others Vs. Sadasi Mahto and Others, held that if instead of striking out the name of a person from the plaint, the Court merely dismisses the suit against him, such a person cannot be said to be a party to the suit within the meaning of the explanation to Section 47 of the Code. A similar view was expressed in the case of Katragadda China Ramayya Vs. Chiruvella Venkanraju and Another, .

6. On the authority of the aforesaid two decisions, I feel inclined to take a view that the appellant will not be considered to be a party to the suit within the meaning of Section 47 of the Code. Even assuming that his objection in the executing Court could be treated under any other provision of the Code of Civil Procedure, and once it is held that it was not u/s 47 of the Code, this appeal is incompetent as no appeal lay to this Court from the order in question, not being u/s 47 of the Code.

7. For all the foregoing reasons. I do not find any merit in this appeal. It is, accordingly, dismissed; but in the circumstances, I shall make no order as to costs.