
(1932) 11 BOM CK 0002
In the Bombay High Court
Case No : Second Appeal No. 468 of 1928

Shamji Rakhama Patil

APPELLANT

Vs

Mahadev Sadashiv Patil

RESPONDENT

Date of Decision : 11-11-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9
Contract Act, 1872 — Section 43
Co-operative Societies Act, 1912 — Section 42

Citation : AIR 1933 Bom 191 : (1933) 35 BOMLR 282 : (1933) ILR (Bom) 319 : 147 Ind. Cas. 1233

Hon'ble Judges : Patkar, J; Barlee, J

Bench : Division Bench

Judgement

Patkar, J.—It is necessary to state the facts which led to the present litigation.

2. The Darogaon Co-operative Credit Society, of which the plaintiff, the defendants, and others were members and Shravan Shamji was chairman, executed an agreement with the Malegaon Municipality to purchase and remove the manure for five years at the rate of Rs. 2,500 for 1916-1917 and Rs. 100 in addition for each subsequent year. The plaintiff and defendant No. 1 were sureties of the society for the due performance of the agreement. The contract was carried out for some years and was subsequently broken on October 1, 1918. The Malegaon Municipality thereupon brought Suit No. 304 of 1921 against Shravan Shamji, the plaintiff, defendant No. 1., and the liquidator representing the co-operative society. On November 21, 1922, a decree was passed awarding the plaintiff's claim against the society as regards its property represented by the liquidator and against defendant No. 1 and the plaintiff. The claim was dismissed as against the chairman. In the liquidation proceedings the liquidator recovered Rs. 825 and paid it to the Municipality. The present plaintiff paid as surety Rs. 2,891-1-10 and costs and has brought this suit against the co-surety defendant No. 1 and some of the members of the Daregaon Co-operative Credit Society.

The defence of the defendants other than defendant No. 1 was that if the society were to be held responsible, 111 members of the society were necessary parties. It was also objected that the contract was ultra vires of the co-operative society and that Section 42 of the Co-operative Societies Act barred the present suit.

3. The learned Subordinate Judge held that defendant No. 1, the cosurety, was liable to pay the amount of Rs. 1,398-12-5 and the suit as against defendants Nos. 2 to 17 was dismissed.

4. On appeal the learned District Judge on the question of non-joinder of the other defendants held that the defendants did not apply to have the other members made parties, and further held that the liability of the members was unlimited u/s 4 of the Co-operative Societies Act, and the plaintiff who was a surety occupied two positions, viz., as surety and also a contributor. The learned District Judge was of opinion that if a man has two causes of action he is not bound to sue on both and that as surety u/s 140 read with Section 43 of the Indian Contract Act he could bring a suit against some of the members of the co-operative society. He further held that though the decree restricted the liability of the society to the property in the hands of the liquidator, i. e., the property in the hands of or realised by the liquidator, the property of the society included the untapped liability of the members which was unlimited, and therefore the members were personally responsible to the plaintiff's claim. He, therefore, awarded a decree for Rs. 3,065-13-7 against all the defendants including defendant No. 1.

5. It is contended on behalf of the appellants that the suit in absence of the other members of the society did not lie and ought to have been dismissed, and that if Order I, Rule 9, of the CPC applied, the other members ought to have been brought on the record or a decree should have been passed against the defendants to the extent of their proportionate liability and not in respect of the whole amount. It is further contended that the agreement was ultra vires of the society. Lastly it was urged that a decree as against the co-operative society was against the property of the society and the defendants could not be held liable, and that the only remedy against the members of the society was u/s 42 of the Co-operative Societies Act, II of 1912.

6. It is contended on behalf of the respondents that the contract was ultra vires. A decree was obtained against the co-operative society represented by the liquidator in which this point was raised and the decree was passed against the co-operative society limited to the extent of the property. It was held that the contract was intra vires. The society was then in existence, and it was properly represented by the liquidator. "We think, therefore, that so far as the decree proceeded against the property of the society, it was binding against the society, and the point as to whether the contract was ultra vires or not cannot now be re-agitated.

7. The most important point in this appeal is whether the members of the co-

operative society are individually liable. According to Section 4 of the Co-operative Societies Act (II of 1912), proviso (2), the liability of the members is unlimited. In a full bench decision of the Patna High Court, Harihar Prasad v. Bansi Missir ILR (1931) Pat. 174 it was held that as in the case of companies registered under the Indian Companies Act, so in the case of societies registered under the Act now in question, the members are not liable to have executions issued against them in respect of judgments obtained against the society. The members can only be reached individually by the process of winding up. The judgment proceeds on the view of Lord Lindley in the 6th edition of his treatise on Companies at page 1229, and is also based on the provisions of Act II of 1912. There is nothing in the rules which would render the members of co-operative societies liable individually apart from the society. It was held in Harihar Prasad v. Bansi Missir that the method of enforcing a judgment against a society of unlimited liability did not differ from the method which the law allowed in the case of a society of limited liability, and therefore in either case the individual liability of the members did not arise until the stage of winding up was reached.

8. u/s 41 of Act II of 1912, where the registration of a society is cancelled, the society shall cease to exist as a corporate body. u/s 42 (1), where the registration of a society is cancelled, the Registrar may appoint a competent person to be liquidator of the society, and under Sub-section (2) a liquidator appointed under Sub-section (1) shall have power, among other things, to determine the contribution to be made by the members and past members of the society respectively to the assets of the society, and to investigate all claims against the the society and subject to the provisions of the Act to decide questions of priority arising between claimants. The only exception is provided in the ease of the Crown u/s 44 (2) of the Act which lays down that sums due from a registered society to Government and recoverable under Sub-section (1) may be recovered, firstly, from the property of the society ; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability ; and, thirdly, in the case of other societies, from the members. The general rule is that a creditor cannot recover from the members of the society except by the machinery provided by Sections 36 to 42, the only exception provided by the statute being in favour of the Crown u/s 44 of Act II of 1912.

9. It is contended on behalf of the respondents that the present case must be distinguished on the ground that the society has ceased to exist. It appears to me that the ground on which the case is sought to be distinguished rather goes against the contention of the respondent. The effect of the incorporation is to protect the individual members from suits by creditors. When a society is registered and becomes a corporate body the members are only liable to contribute towards the deficiency from the assets in the course of liquidation. If before the cancellation of the society the decreee-holder cannot execute the decree against the members who compose the society, it is difficult to hold that

the members would be liable after the extinction of the society.

10. In Halsbury's Laws of England, Vol. XVII, para 53, page 19, it is laid down :-

The creditors of a registered industrial and provident society must look to society for payment of their debts and not to the individual members.

11. The distinction between partners and members of an incorporated association is emphasized by Cove J. in *In Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 Q.B.D. 470 as follows (p. 476):-

He argued that persons who unite together for trading or making profits in any way are, at common law, liable for all debts which are incurred during the time they are members of the association and that, if the association has ultimately to be wound up, past members must pay their shares of the debts. As a general rule-apart from legislation-that is perfectly true with respect to partners, and with respect to associations in the nature of partnership where there is no incorporation, but with respect to corporations the case is entirely different where the legislature has not thought fit to intervene, or where the charter under which the body is incorporated does not provide otherwise. A corporation is a legal persona just as much as an individual ; and, if a man trusts a corporation, he trusts that legal persona, and must look to its assets for payment : he can only call upon individual members to contribute in case the Act or charter has so provided.

12. Reference was made on behalf of the respondent to Section 5, cl, 2, of Bombay Act VII of 1925 which provides that the liability of a society of which the primary object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists and of which no member is a registered society, shall be unlimited and the members of such a society shall, on its liquidation, be jointly and severally liable for and in respect of all obligations of such a society. The unlimited liability is to come into existence on liquidation and it must be understood in the sense of contributory liability in the liquidation proceeding. It is left to the liquidator to decide in the liquidation proceeding to recover the amount of debt on the basis of equal payment and the contribution is to be recovered from each member during the process of the liquidation and that liability is unlimited. The unlimited liability of the members cannot be enforced in a separate suit when the society is incorporated and is in existence much less after the extinction of the society. I think, therefore, that a decree passed against the defendants other than defendant No. 1 in this suit is erroneous on the ground that the remedy of the plaintiff was to approach the liquidator to enforce the unlimited liability during the process of the liquidation of the several members in order to pay off the decree-holder. If the liquidator had failed to comply with the requisition it would have been open to the plaintiff to approach the Registrar. The plaintiff was entitled as a surety u/s 140 of the Indian Contract Act to the rights of the creditor who had obtained a decree against the estate of the society. The learned District Judge held that the plaintiff was entitled to

proceed against the estate of the society which included the untapped liability of the members, but the individual liability of the members could not be tapped except by the machinery provided by Sections 36 to 42 of the Act.

13. It is, therefore, unnecessary to consider the other point urged whether the other members ought to be made parties to the suit. I think, therefore, that the decree passed by the first Court is right and that the view taken by the lower appellate Court is erroneous so far as defendants other than defendant No. 1 are concerned. As regards defendant No. 1, who is a surety, his liability to pay the amount of Rs. 1,398-12-5 is clear on the agreement of suretyship. That decree was not appealed from and has become final.

14. We reverse the decree of the lower appellate Court and restore that of the trial Court.

15. The order as to costs of the first Court will stand. The appellants will get the costs in this Court and in the lower appellate Court.

16. As regards defendant No. 15, who is the respondent No. 6, it was held that he was not a member and still he was joined as respondent No. 6. He was unnecessarily made a party to the appeal. The appellants must pay the costs of the respondent No. 6.

17. Similarly the appellant must pay the costs of the respondent No. 7, who was defendant No. 16, on the ground that though defendant No. 16's name was struck off in the lower appellate Court he is unnecessarily joined as a respondent in this appeal.

Barlee, J.

18. I agree. It is unfortunate that the plaintiff has misconceived his right in this matter. As a surety he was liable to satisfy the claim of the Municipality against the society and having done so was entitled to stand in the shoes of the Municipality and had the remedies which had been available to that body. But it is not correct to say that the members of the society were joint promisors and as such individually liable to pay the debts of the corporate body to which they belonged. The learned Judge has treated them as partners, but they were not partners. The society was a corporate body created by statute and the Municipality dealt with it and not with the individual members. See *Harihar Prasad v. Bansi Missir* ILR (1931) Pat. 174 The members were subject to a statutory liability to contribute to the debts of the society; but, apart from rules, that liability could only be enforced by the procedure of winding up contained in the Act, and not directly by suit of a creditor. Thus it was not an asset, available to the Municipality, or the plaintiff as surety, which could be reached by the process of suit and execution.