
(1986) 12 KL CK 0021

In the High Court Of Kerala

Case No : Second Appeal No. 931 of 1981

State of Kerala and Others

APPELLANT

Vs

Saroja and Others

RESPONDENT

Date of Decision : 17-12-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 114, 115
Partnership Act, 1932 — Section 25, 32, 32(3), 45, 45(1)

Citation : AIR 1987 Ker 239

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : Govt. Pleader, for the Appellant; P. Krishnamoorthy and B. Krishnamoni, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—O. S. 14 of 1979 on the file of the Munsiff's Court, Quilon which gave rise to this second appeal by defendants 4 to 6 (Kerala State, District Collector, Quilon and the Sales Tax Officer, Quilon) represents a typical example of human tendency to avoid liability under the guise of enforcement of statutory rights by resorting to dubious methods. It also reflects a tendency to find out loopholes in law by resort to mala fide methods as is the practice of cantankerous litigants.

2. The two plaintiffs are sisters and defendants 2 and 3 are their relations. First defendant is a registered partnership firm under the name and style M/s. Vijay & Co., dealing in provisions. The business was started by the 2nd plaintiff as her proprietary concern. On 1-4-1974 it was registered as a partnership the partners being plaintiffs 1 and 2 and second defendant. On 1-4-1977 third defendant was also admitted as a partner. For the year 1978-1979 sixth defendant assessed the firm to sales tax. Since the amount was not paid, revenue recovery steps followed. Assets of plaintiffs were proceeded against. At that time the suit was

filed alleging that the partnership was dissolved on 19-8-1977 and plaintiffs 1 and 2 retired from the partnership. It is said that thereafter defendants 2 and 3 alone are running the business under the same name and style. Since the assessment is for the period subsequent to the dissolution and their retirement plaintiffs alleged that they are not liable. They also pleaded that public notice and individual notice contemplated by the Indian Partnership Act were given. The suit is for a declaration that they are not liable for the claim and for consequential injunction against revenue recovery proceedings.

3. Defendants 2 and 3 representing the first defendant also supported the entire plaint allegations in their written statement. Defendants 4 to 6 disputed the alleged dissolution or retirement of the plaintiffs and contended that there was no public notice and no notice too notice to the sales tax department. It is said that the partnership is continuing and it was accordingly assessed to sales tax. Therefore they took the stand that plaintiffs continue to be liable as partners of the firm.

4. The only witness examined for the plaintiffs is P. W. 1 the husband of the 2nd plaintiff. None of the plaintiffs have gone to the box. The documents produced by them are Exts. A1 to A3. Ext. A1 is copy of the alleged dissolution deed signed by all the four partners. Ext. A2 is delivery book maintained by the firm and it was produced to show that there is an entry in it on 13-9-77 by some officer of the Office of the Assistant Commissioner Sales Tax, Quilon acknowledging receipt of the original of Ext. A1. Ext. A3 is an order by the Sales Tax Officer which has no relevance for our purpose. Defendants 2 and 3 did not examine themselves and they did not adduce any evidence also. On behalf of the appellants, the Sales Tax Officer was examined as DW 1 and the sales tax file relating to the firm was produced as Ext. B1. On the above evidence, the trial court rejected the plea of dissolution of the firm or retirement of the plaintiffs from the partnership. It was also found that provisions regarding notice were also not complied with and plaintiffs continue to be liable. Suit was therefore dismissed. The District Judge, I may say so with due respect, resorted to a process of curious reasoning and reversed the finding of the Munsiff. It was found that Ext. A1 is genuine and the firm was dissolved and the plaintiff retired on its basis. So also Ext. A2(a) entry in Ext. A2 delivery book was accepted as genuine and on its basis it was found that Sales Tax Department had individual notice of dissolution on 13-9-1977 and hence absence of public notice cannot affect the claim of plaintiffs. Appeal was allowed and the suit was dismissed.

5. Normally I would not have interfered with these findings of the District Judge because they are findings on questions of fact arrived at by appreciation of evidence and a second appeal could be heard and decided only on some substantial question of law. But a finding on a question of fact can also, though seldom, give rise to a substantial question of law. If a finding on a question of fact having material bearing on the rights of parties is vitiated for any reason that can give rise to a substantial question of law. A fact alleged by one party

and denied by the opposite party may require existence of facts or absence of facts and circumstance to be proved for entering a finding. If burden of proof is wrongly cast on its basis a finding is arrived at materially affecting the right of a party it will give rise to a substantial question of law. Courts could enter findings on questions of facts only on the basis of materials on record taking into account the available legal presumptions and burden of proof. If finding on a fact is entered without any material at all simply on the basis of surmises and conjectures that finding is definitely vitiated. That will be the case if material items of acceptable evidence or legal presumptions are overlooked in entering findings. Acceptance of inadmissible evidence for entering findings also may create a similar situation. Drawing inferences or basing findings from inadmissible materials may also vitiate the finding. In all such cases those factual findings could be interfered with in second appeal. If there is acceptable evidence its insufficiency for the finding or the possibility of a different finding may not be a reason for interference. Likewise a wrong finding on a question of fact by appreciation of acceptable evidence may also not justify interference in second appeal. Bearing in mind these principles, I am just trying to consider the findings of the appellate court.

6. The two material controversies to be decided in this case are (1) whether on 19-8-1977 there was a dissolution of the firm or retirement of plaintiffs from the partnership, and (2) whether notice of it was duly given as contemplated in the statutory provisions. Existence of these two facts entitling the plaintiffs to escape liability was denied by the appellants. Admittedly at least till 19-8-1977 there was a partnership firm in which plaintiffs and defendants 2 and 3 were partners. In the absence of allegation supported by evidence that the firm was dissolved or that plaintiffs retired, the presumption will be in favour of continuance of the partnership with the plaintiffs as partners. If so the legal position u/s 25 of the Partnership Act is that every partner is jointly and severally liable for all the acts of the firm. That liability will continue even after dissolution or retirement until public notice or individual notice as contemplated under the relevant provisions is given. When a person pleads exemption from liability which is available only on proof of existence of certain facts or compliance of certain provisions the burden is on him to prove that those facts exist or those provisions are complied with. If he fails to allege and prove the decision must be against him. If at least preponderance of probability is not established the opposite side has no liability to let in rebuttal evidence. These aspects were not at all considered by the District Judge.

7. The two items of evidence relied on by the plaintiffs to prove dissolution of partnership or their retirement as partners are Ext. A 1 and the deposition of P. W. 1 who is the husband of the second plaintiff. Regarding notice the items of evidence are only Ext. A2(a) entry in Ext. A2 delivery book and the deposition of P. W. 1. These two aspects were denied by the appellants not only in the written statement but also in the cross-examination of P.W. 1. It was even suggested in cross-examination that Ext. A2(a) is a manipulation for the purpose of this case.

It is true that, whether the original of Ext. A1 is a deed of dissolution or deed of retirement, it is not a compulsorily registrable document for which attestation of witnesses may not be necessary. Appellate court lost sight of the fact that Ext.A1 is only a carbon copy in plain paper which could be manipulated at any time if plaintiffs and defendants 2 and 3 collude. The relationship of the parties and the stand taken by defendants 2 and 3 in their written statement admitting the plaint allegations in their entirety was also lost sight of by the appellate court. D.W.1 has definitely stated in chief-examination itself that there is no information that the partnership is dissolved. Of course it is true that he has not in so many words stated in the box that Exts. A1 and A 2(a) are manipulations. At the same time he said that Ext. A2 is the delivery book kept by the firm for delivery of articles to the Sales Tax Department. Neither Ext. A1 nor Ext. A2(a) was put to him in cross-examination. Ext.A1 nor Ext. A2(a) asked whether the fact of dissolution was intimated and he said he does not know. Regarding Ext. A1 the only question asked to him in cross-examination was whether he would deny the fact that plaintiffs retired from the firm. He said he cannot deny. From the answers given by DW 1 the maximum that could be said in favour of the plaintiffs is that he pleaded ignorance of the genuineness or otherwise of Exts. A1 and A2(a). That cannot be taken as proving or probalising the case of the plaintiffs without at least some evidence on the side of the plaintiffs. At the same time there is also the evidence of DW 1 that the dissolution is not known and it was not intimated. These answers only suggest that Exts. A1 and A2(a) were denied by DW 1 in the box.

8. The evidence of P. W. 1 shows that he does not know anything. It is true that he said in chief-examination that the partnership was dissolved under the original of Ext. A1, that notice was given to the Sales Tax Department evidenced by Ext. A2(a) and that notice to the Registrar of Firms and public notice were also given. In cross he admitted that there was no publication in the gazetteer newspaper and that even though there is record available with the plaintiffs to show that notice was given to the Registrar of Firms it was not produced. He has no direct knowledge regarding such a notice or the execution of the original of Ext. A1. He also admitted that he does not know who gave the dissolution deed to the Sales Tax Department and who wrote and signed Ext. A2(a) entry. At the same time he admitted that even at the time when the suit was filed in 1979 the partnership firm was in existence and it ceased to exist only subsequently. Thus the evidence of P.W.1 did not prove either Ext.A1 or Ext. A2(a) but only disproved them. There is no admission of these documents or the factum of dissolution or intimation by D. W. 1. The question of denial by way of rebuttal evidence will arise only when the plaintiffs at least discharged their initial burden.

9. Apart from Ext. A1 being only a carbon copy of a document which is not having the sanctity of registration or attestation, neither Ext. A1 nor its original has seen the light of day except when Ext. A1 was produced in court in support of the disputed claim. Though the original of Ext. A1 is claimed to have been given to the Sales Tax Department under Ext. A2(a) that version remains as a myth in the light of the evidence of P.W. 1 and D.W.1. Collusion between plaintiffs

and defendants 2 and 3 is patent from the relationship and the contention taken up by defendants. The original of Ext. A1 is claimed to have been executed in view of the strained relationship with defendants 2 and 3. Still the alleged dissolution or retirement was kept secret from the authorities and the public. If the strained relationship and the dissolution or retirement are correct it would have been in the interest of the plaintiffs themselves to see that the provisions regarding public notice are complied with so that they could avoid future liabilities. Further there is nothing to show that accounts were settled or plaintiffs got what is due for them. No suit was also filed. The admission of P. W. 1 is that as on the date of suit also the partnership firm was continuing. The case of plaintiffs is that after Ext. A1 defendants 2 and 3 alone continued the business. If that is correct Ext. A2 book must have been with defendants 2 and 3 and the disputed entry in Ext. A2(a) must have been obtained at their instance. If the entry is also correct defendants 2 and 3 would not have given Ext. A2 to the plaintiffs for being produced in court. Plaintiffs have not explained how they got Ext. A2.

10. It is in the light of what is stated above that the reasonings of the appellate court to disagree with the trial court will have to be considered. The District Judge says that D. W. 1 has not disputed that the firm was dissolved and that he was not bold enough to do so. He said that he was not aware of any dissolution and that fact was not intimated. How can he definitely say that the firm was not dissolved. The plea of ignorance of dissolution coupled with denial of notice cannot in any view be taken as admission of dissolution or notice. Another reason is that DW 1 was not able to produce any record to show that plaintiffs were continuing as partners or that the firm was in existence. It appears that the District Judge was under the impression that burden was on the appellants. When the plaintiffs on whom burden lay failed miserably in discharging it why should the appellants be blamed. Are they to adduce negative evidence when no burden lay on them. On the other hand appellants produced Ext. B1 file kept in the ordinary course of business. Original of Ext. A1 or intimation regarding it is not in the file. Ext. B1 shows that assessment for 1978-79 was made as if the firm with all the partners is continuing and notice of assessment was given to the firm. It is not known what more the District Judge wanted. The District Judge says that P. W. 1 gave positive evidence regarding dissolution and intimation. I have already referred to the evidence and said that P. W. 1 had no knowledge of these things. The District Judge seems to have relied on the admission of defendants 2 and 3 in their written statement as proof against the appellants regarding dissolution. In the first place written statement is not evidence. Secondly defendants 2 and 3 have colluded with plaintiffs. Thirdly their admissions cannot be proof against the appellants. On the basis of non-production of records obtained under Ext. A2(a) by the appellants the appellate court drew adverse inference also against them forgetting the fact that Ext. A2(a) and the intimation were not proved. The findings of the District Judge are thus in the complete absence of evidence and on wrong assumptions of burden

of proof and facts giving rise to presumptions. It is rather strange that Exts. A1 and A2(a) which could be manipulated at any time and both of which saw the light of day for the first time when produced in this case coupled with the deposition of P. W. 1 who had no knowledge about the writing or signing of these documents was found sufficient by the District Judge. It is further strange that the plea of ignorance of these documents by D. W. 1 coupled with the statement that dissolution was neither known nor intimated to the Department was also taken by the District Judge as proof of dissolution and intimation. The reasoning of the District Judge reached the climax of its absurdity when the statements in the written statement of defendants 2 and 3 were taken as admissions and as proof of these facts.

11. When a thing or state of things which has been shown or admitted to be in existence within a period shorter than that within which such things or state of things usually cease to exist, the presumption u/s 114, Illustration (d) of the Evidence Act is that it is still in existence unless otherwise proved. The existence of the first defendant partnership firm with plaintiffs and defendants 2 and 3 as partners is admitted to have existed at least till 19-8-1977. The firm as a juridical person is impleaded as first defendant in the case and 2nd defendant is impleaded as its managing partner. This fact is admitted by P. W. 1 in the box when he said that even as on the date of suit in 1979 the partnership was in existence and it was dissolved only subsequently. Ext. B1 shows that even during 1978-79 the firm was continuing with plaintiffs also as partners and the firm was assessed to sales tax as such and plaintiffs were proceeded against on the basis of their liability u/s 25 of the partnership Act. In order to have an effective dissolution or retirement exonerating the partners from liability there must be not only proof of dissolution or retirement but also compliance of certain legal formalities regarding notice. No such evidence is there. In the absence of evidence the presumption must be in favour of continuance of the partnership with all the partners.

12. Section 25 of the Partnership Act says that every partner is liable, jointly with all the other partners and also severally, for all the acts of the firm done while he is a partner. Joint and several liabilities of all the partners is there and it is unqualified. In order to terminate the liability and exonerate a partner for the acts of the firm or other partners certain requirements are needed. Section 32 deals with retirement of a partner and Section 45 with liability of a partner after dissolution. Whether it be u/s 32(3) or u/s 45(1), that is, whether it is a case of retirement or one of dissolution, 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 retirement or dissolution, as the case may be, until public notice is given on the retirement or dissolution. These provisions are intended not only to safeguard the rights of third parties dealing with the firm or its partners from being defrauded or defeated at the hands of the firm or its partners, but also intended to safeguard the interests of the partners themselves. Third parties must be given intimation by public notice that the firm

is dissolved or one or more partners retired and therefore any dealing with the firm or a partner as before will not bind others. Unless there is such notice third parties are likely to have dealings with the firm or the partners as if the partnership is continuing. It is to avoid the consequent difficulties and hardship to third parties and the partners that the provision for continued liability until public notice and termination of liability after public notice are provided. In this case third parties are State and its Officers. There is nothing in the provisions to exclude the State or its Officers from the purview of third parties. There was no such contention also. State and its Officers also in their official dealings could place themselves in inconvenient positions by dealing in the absence of notice.

13. There is no case that any such public notice was given. There is no evidence also to that effect. The business was continued in the same name and style and sales tax was collected. Huge amounts were allowed to fall in arrears. Defendants 2 and 3 say that it is their individual liability and they have filed appeal against the assessment. Evidently that is a collusive contention and the Government Pleader rightly pointed out that it is to defeat the claims of the State because recovery from defendants 2 and 3 is difficult. In order to overcome the lacunae in the absence of public notice contemplated in Section 32(3) or 45(1) read with Sections 63 and 72 of the Partnership Act, it was contended on behalf of the plaintiffs that there was individual notice to the Sales Tax Department evidenced by Ext. A2(a). Therefore the argument was that individual notice is always better than public notice and a third party who had individual notice cannot successfully complain of want of public notice. But I have already found that the plea of individual notice also is not correct.

14. The argument is sound provided individual notice is proved. Whether it is retirement or dissolution public notice is intended only to serve the purpose of bringing home to the persons concerned the factum of retirement or dissolution. So far as third parties entering into some dealings are concerned, that purpose will be undoubtedly served better by personal or actual service of notice. Purpose is only to fasten the partners with liability, even after dissolution or retirement, to third parties who enter into dealings without notice. In the case of a public notice there is at least the possibility of the notice not coming to the knowledge of some third parties. Even that possibility is avoided in the case of individual notice so far as the particular individual is concerned. Sections 32 and 45 are in fact based on the rule of estoppel also, because in the absence of compliance of the provision for notice third parties may deal with the firm or partners to their disadvantage on the belief that the firm or all the partners continue. But when third parties know well by individual notice what the real position is there is no question of themselves being led into wrong belief and acting to their detriment. If so, in such cases there is no question of application of the rule of estoppel to make the retired partners or the partners of a dissolved firm liable. Liability arises only when a third party acts to his detriment on the basis of a mistaken impression regarding the continuance of the firm or all its partners to which he was misled by the acts or omissions of the persons responsible for bringing the

real facts to his notice by public or individual notice. Even if public notice is not given a third party who had individual notice cannot complain. The object of the provisions in Sections 32(3) and 45(1) read with Sections 63 and 72 is not to confer any statutory rights to third parties or penalise the partners for their omission to comply with provision for notice. This is clear from the word "until" instead of "unless" used in Sections 32(3) and 45(1) of the Partnership Act. I am fortified on these positions by the principles laid down in the decisions in *Natwarlal & Co. v. D. Chaturbhai* (1977) 18 GLR 127, *Thummala Rama Rao and Others Vs. Chodagam Venkateswara Rao and Others*, and *Central United Bank Ltd. and Another Vs. B.A. Venkatarama Naidu*, . There cannot be any dispute that the unqualified liability u/s 25 will continue in the absence of notice whether public or individual.

15. It is immaterial for the purpose of this case whether Ext. A1 is a case of dissolution or retirement of plaintiffs. In both cases mode of giving notice is u/s 72. There must be notice to the Registrar of Firms u/s 63. So also there must be notice by publication in the gazette and at least in one vernacular newspaper having circulation in the District. I have already stated that even PW 1 himself admitted that publication in the gazette and newspaper were not resorted to. Though he said that notice was given to the Registrar of Firms u/s 63 he had no direct knowledge and the records admitted to be in the possession of plaintiffs were not produced. I have also found that individual notice claimed under Ext. A2(a) to the sales tax authorities was also not proved. In this respect non-compliance of the provisions of Sections 32(3) and 45(1) read with Sections 63 and 72 and non-production of the original of Ext. A1 are also relevant. If the contentions of the plaintiffs are correct, they required protection not only against sales tax assessment but against all further dealings of defendants 2 and 3 also. If their case is correct they would have complied with the above provisions. So also they would have settled their accounts with defendants 2 and 3 and produced evidence in that respect also. Ext. A2(a) is that last entry in Ext. A2. It is in different ink, different hand and the initial is also different. Who made that entry is not known and it is not proved. Plaintiffs could have easily manipulated such an entry to achieve their end. These aspects were not at all considered by the District Judge. The findings of the District Judge were not only without any evidence but against the evidence as well as against burden of proof and legal presumptions. The findings are therefore illegal and they are set aside. Plaintiffs were not able to prove either that the firm was dissolved or that they retired. Compliance of the provisions for notice were also not complied with. Therefore they continue to be liable and they cannot get the declaration or injunction. They have also not proved that the declaration under Form 3 envisaged by Rule 5(8) of the Kerala General Sales Tax Rules was given.

16. Second appeal is allowed and the decree of the appellate court is set aside. The suit is dismissed with costs throughout.