

(1998) 03 BOM CK 0025
In the Bombay High Court
Case No : First Appeal No. 642 of 1981

Vinayak Keshav Paranjape

APPELLANT

Vs

Dena Bank and others

RESPONDENT

Date of Decision : 06-03-1998

Acts Referred:

Evidence Act, 1872 — Section 115
Limitation Act, 1963 — Section 18, 19, 20
Partnership Act, 1932 — Section 32(2), 45

Citation : AIR 1998 Bom 356 : (1998) 4 BomCR 186 : (1998) 3 MhLj 395

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : G.S. Godbole, for the Appellant; J.R. Lalit and K.J. Abhyankar, for the Respondent

Judgement

A.B. Palkar, J.—This appeal is preferred by the original defendant No. 2 Vinayak Keshav Paranjape in Special Civil Suit No. 67 of 1978 against a decree for Rs. 26,750/- with costs and future interest at the rate of seventeen and half per cent on the principal amount of Rs. 20,000/- against the appellant along with other two defendants jointly and severally.

2. In order to appreciate the controversy, the following brief summary of facts is material.

The parties are referred to as plaintiffs and defendants as in the trial Court. The suit was filed by Dena Bank against defendant Nos. 1 to 3. Defendant No. 1 being M/s. Suresh Chapel Company, a registered partnership firm dealing in manufacturing foot wears at Nazi of which defendant Nos. 2 and 3 were the partners, at the relevant time when loan was advanced by the plaintiff Bank to the defendant. The plaintiff Bank advanced a loan of Rs. 20,000/- to defendant Nos. 1 to 3, and defendant Nos. 2 and 3 being the partner of defendant No. 1 executed a promissory note and also deed of hypothecation in respect of stock in trade, machinery and other movable property of the firm. The defendants

admitted the liability and acknowledged the dues of Rs. 23,708.67 on 1st January 1978 by signing balance confirmation letter. However, the defendants thereafter failed to pay the balance amount found due with interest in spite of repeated demands and the suit notice, and therefore, the Bank has filed a suit for recovery of Rs. 26,750/- with interest.

3. Defendant No. 2 (appellant) filed a separate written statement and contended that firm M/s. Suresh Chapel Company was not in existence when the suit was filed. The fact that the loan was advanced to the firm is not disputed. However, according to defendant No. 2 the business was being looked after by defendant No. 3 and so defendant No. 3 is primarily liable to repay the loan. The partnership between him and defendant No. 3 has come to an end on 31st August 1976 and he is not liable for any dealing of the firm by defendant No. 3. The document of balance confirmation letter is executed by defendant No. 3 and not by him and as such it is not binding on him, and therefore, the suit claim as against him is barred by limitation.

4. A separate written statement is filed by defendant No. 3. He admitted the claim of the plaintiff. It was admitted by him that the firm was subsisting and defendant No. 2 has even mortgaged his house for the purpose of the said loan and the loan may be recovered by putting house to sell. Defendant Nos. 2 and 3 being only the partners, they are equally liable.

5. On these pleadings Issues were settled by the learned trial Judge and after scrutinising the oral and documentary evidence and after hearing the arguments, the learned trial Judge came to a conclusion that all the defendants are liable, jointly and severally, to repay the Bank loan with interest. The learned trial Judge also came to a conclusion that partnership firm has been dissolved on 31st August 1976 as contended by defendant No. 2 and acknowledgment i.e. balance confirmation letter was not binding on defendant No. 2. However after having held that the acknowledgment in writing was not binding on defendant No. 2 the learned trial Judge held that plaintiff is entitled to a decree as against all the defendants in view of the provisions of Indian Partnership Act and as such he passed the impugned decree.

6. In this Court the factor of advancing loan and written acknowledgment signed by defendant No. 3 were not disputed and therefore, controversy at this stage is very short.

7. According to the appellant (defendant No. 2), the partnership has come to an end as held by the learned trial Judge on 31st August 1976 and the acknowledgment has been given in writing by defendant No. 3 after the said date, and therefore, he is not liable to the plaintiff-Bank. The learned trial Judge has wrongly fastened liability on him in spite of the documentary evidence on record to show that he has ceased to be a partner and the partnership itself has come to an end in as much as there were only two partners and thereafter a new firm was established in which defendant No. 3 and his father are the partners

and acknowledgment in writing i.e. the balance confirmation letter is signed by defendant No. 3 and his father in their capacity as the partners of the newly formed firm and the plaintiff Bank had knowledge of this fact when they accepted the acknowledgment in writing from defendant No. 3 and his father as the partners of the newly formed firm. Even otherwise the acknowledgment given by one of the partners was not sufficient to fasten the liability on the other partners in view of the provisions of section 20 of the Limitation Act.

8. In order to consider the arguments advanced, it is necessary to refer to the facts which are proved. The plaintiffs-Bank examined one of their employees D.K. Bade in his examination-in-chief he has stated that balance confirmation letter dated 1-1-1978 was signed by defendant No. 3 as the partner of the firm and stated further that till 1-1-1978 the plaintiff-Bank was not aware that the partnership is dissolved. He stated further in cross examination that signatures on the balance confirmation letter Exhibit 32 were obtained in the premises of the firm on 1-1-1978 where he had personally gone and there is nothing to show that defendant No. 2 was personally present at that time. He further admitted that this document Exhibit 32 is signed by defendant No. 3 and his father-Prabhakar and he was unable to state as to whether defendant No. 2 was not the partner of the firm on that date (1 -1 -1978). Defendant No. 3 stated that although defendant No. 2 was not regularly visiting the factory premises, he had come in November 1978 i.e. when the acknowledgment was signed. He even denied to have applied for change in sale tax registration number and stated that the old number of registration continues which is falsified by the documentary and oral evidence of the sale tax employee. He has further stated that the employee of the Bank asked defendant No. 2 to sign the balance confirmation letter but defendant No. 2 told that any one partner signing it would be sufficient. Exhibit 37 is the order issued by the sale tax officer on the application dated 30-9-1976 given by the firm and this order states that the sale tax registration certificate No. 23-A/3191 dated 18-2-1975 issued in favour of defendant No. 1 is cancelled with effect from 1-9-1976 and reason for cancellation is to be change in the constitution of the firm. Employee of the sale tax department Ramchandra who appeared as a witness for defendant No. 2 stated that after cancellation of the registration number it was published on notice board of the office and admitted that application Exhibit 46 was received by his office. The original document was taken back by him and the copy of the said document is kept on record. The document shows that Exhibit 46 was an application given by the firm Suresh Chappal Company having two partners viz. defendant Nos. 2 and 3 informing them that defendant No. 2 had retired from the firm on 1-9-1976 and deed of dissolution was yet to be executed. However, the business would be continued by defendant No. 3 and so request was made for cancellation of the sate tax registration No. 23-A-3191 and in pursuance of this letter the order referred to earlier is obviously passed by the sale tax officer. Even the learned trial Judge has accepted the case of the defendant No. 2 and recorded positive findings on Issue Nos. 4-A and 4-B thereby holding that the

partnership firm had come to an end on 31st August 1976 and as such acknowledgment in writing even after that date on 1-1-1978 was not binding on defendant No. 2.

9. The plaintiff-Bank was fully aware that the loan was advanced to Suresh Chappal Company which was a firm having two partners defendant Nos. 2 and 3 and the promissory note as well as hypothecation deed were signed by the said two partners in their capacity as the partners of the firm-defendant No. 1. With this knowledge plaintiff-Bank obtained written acknowledgment from defendant No. 3 and his father by describing them as the partners of M/s. Suresh Chappal Company, and therefore, it was rightly contended by Mr. Godbole, the learned Counsel for the appellant that the document Exhibit 32 imputes the knowledge of the fact that defendant No. 2 had ceased to be a partner and defendant No. 3 and his father had become partners of M/s. Suresh Chappal Company on the date on which this document was executed i.e. on 1-1-1978 and if this knowledge is imputed to the plaintiff Bank then plaintiff-Bank cannot say that only because there was no public notice, defendant No. 2 continued to be liable to the plaintiff Bank in view of the acknowledgment of the loan by defendant No. 3 who was his erstwhile partner.

10. The learned trial Judge has referred to the provisions of the Indian Partnership Act and since the conclusions of the learned trial Judge are based on the interpretation of these provisions, it is necessary to refer to the same.

11. Section 32 of the said Act is in respect of the retirement of a partner. Sub-section (2) of Section 32 makes a provision that a retiring partner may be discharged from the liability to a third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm. It also states that such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement. Similarly Section 45 of the said Act makes provision that notwithstanding the dissolution of a firm, 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 dissolution, until public notice is given of the dissolution. The learned Counsel appearing for the appellant Mr. Godbole placed reliance on the judgment of Division Bench of the Madras High Court Central United Bank Ltd. and Another Vs. B.A. Venkatarama Naidu, . In this case the Madras High Court has observed in para 8 as under :-

"Section 32(1) provides for a case in which a partner may retire without disturbing the firm. Sub section (3) to section 32 puts an end to the partnership between partners qua the retiring partner. The consequence is that rule as to the agency of each partner to the rest of the partners would cease to apply in the case of the retiring partner. A strict application of this rule would cause hardship to third parties who were having and continue to have dealings with the firm without knowing that a particular partner had retired. Its object therefore is; not to impose a statutory liability on the retiring partner but to protect third parties,

embodying a rule of estoppel so far as the retiring partner is concerned, for repudiating the agency of others. In *Benjamin Scarf v. A.G. Jardine* (1882) 7 A.C. 345, Lord Selborne observed,

The principle of law which is stated in *Lindley on Partnership* is uncontroversial, namely, that where an ostensible partner retires or where 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 of which they are entitled to assume is that of the estoppel of a person who has accredited another as his known agent for denying that agency at a subsequent time as against the person to whom he had accredited him by reason of any secret revocation. Of course in partnership there is agency-one partner is the agent of another and in the case of those who, under the direction of the partners for the time being, carrying on 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."

12. The principle of law which is stated in *Lindley on Partnership* was referred to by the Division Bench and it was stated that the same was uncontroversial. It was further pointed out by the Division Bench that section 32(3) enacts a liability on the well known principle of holding out, and this principle is also recognized in the case of dissolution u/s 45 of the Indian Partnership Act. The Division Bench also made a reference to AIR 1929 PC132, *Jwaladut R. Pillani v. Bansilal Motilal*, and observed in para No. 9 as under :

Thus the law prior to the enacting of the Indian Partnership Act was the same as in England. The Law in England can be stated thus; (1) a creditor who had previous dealings with the firm is entitled to treat all those whom he knew to be members of it as remaining until he has actual notice to the contrary; (2) a creditor who has had no previous dealings with the firm but who knew who the partners were because of the use of their names in the note paper etc., is entitled to treat such persons as the remaining members of the firm until either he receives actual notice to the contrary, or the retirement is published in the London Gazette, (3) a creditor who has not had previous dealings with the firm or acknowledged of its constituents is not entitled to hold the retired partner liable for debts incurred by the firm subsequently to his retirement notwithstanding that no notice of any sort is given (*Vide Pollock on the Law of Partnership*, 15th Edn., page 96)

Taking the first two cases referred to above, the disadvantage of the law is that it envisages no uniform method of issuing notice of retirement to all those who have dealings with the firm before and after the retirement. What section 32 of the Indian Partnership Act does is to remove the distinction between public notice and private notice. It enacts that public notice would be sufficient both in the case of the old customers as well as those who dealt with the firm after the retirement of the particular partner, the third category of cases referred to above

rests on a different basis. That principle would remain unaffected by section 32(3) as before. In other words section 32(3) is not intended to create a liability where none existed before or to penalize a retired partner who failed to give public notice of his retirement. The true basis of the liability of a retiring partner is, as we said, on the principle of holding out. There can be no holding out if the person who deals with the new firm is aware of the retirement of a particular partner, In Firm Ratanji Bhagwanji and Co. Vs. Prem Shanker, Misra, J. recognized that a retiring partner could escape liability in respect of transactions entered into by the continuing partners after his retirement if the third party was aware that the former had ceased to be a partner of the firm.

In our opinion the proviso to section 32(3) and the corresponding provision in section 45 with its proviso indicate beyond doubt, that only persons who were not aware of the retirement of a particular partner could take advantage of section 32(3) or section 45. The purpose of section 32(3) is more to specify how notice should be given. Its main object is to avoid the necessity of giving actual or private notice to the various persons. In other words, it specifies the mode by which the retiring partner may be relieved of the responsibility of issuing notice to the various classes of persons who might enter into transactions with the surviving partners. Public notice is intended only to serve a purpose, namely, to bring home to the persons concerned the fact of retirement. That purpose will undoubtedly be served in a better way by personal or actual notice. To contend that actual notice cannot take the place of the public notice is to miss the substance of the matter and argue counter to the very principle on which the retiring partner's liability is based.

The Division Bench has also pointed out the scope of provisions of sections 45 and 32(3) and purpose of giving notice and has also held that proviso to section 32(3) and the corresponding provision in section 45 with its proviso indicate beyond doubt, that only persons who were not aware of the retirement of a particular partner could take advantage of section 32(3) or section 45. The purpose of section 32(3) is more to specify how notice should be given. Its main object is to avoid the necessity of giving actual or private notice to the various persons. In other words, it specifies the mode by which the retiring partner may be relieved of the responsibility of issuing notice to the various classes of persons who might enter into transactions with the surviving partners. Public notice is intended only to serve a purpose, namely, to bring home to the persons concerned the fact of retirement. That purpose will undoubtedly be served in a better way by personal or actual notice.

13. I am in complete agreement with the view expressed by the Division Bench of Madras High Court. Therefore, in the present case the Bank having the knowledge that defendant No. 2 no more continued to be a partner of Suresh Chappal Company and in fact the partners were defendant No. 3 and his father who have acknowledged the liability in writing for the loan advanced by the Bank, the question of giving public notice does not arise. It has also to be

considered on the background of the fact that defendant No. 1 was a small firm and the firm was also not registered. They were carrying on business of shoes and chappals. There were only two partners. One of them having retired and partnership firm came to an end and new firm in the same name was started by defendant No. 3 and his father. Intimation of this was given to the Sale Tax Office and sale tax registration was cancelled. After this, the defendant No. 3 and his father gave acknowledgment in writing when the Bank employee visited the premises and specifically defendant No. 3 and his father described themselves as (he partners of defendant No. 1 : The Bank must be deemed to have knowledge of the fact that defendant No. 2 was no more partner of the said firm, and therefore, there was no question of fastening liability on defendant No. 2 merely because he had not given public notice. Therefore, the learned trial Judge was not correct in holding defendant No. 2 liable because of the acknowledgment in writing given by defendant No. 3 in his capacity as a partner alongwith his father, merely because defendant No. 2 had not given public notice of dissolution. Defendant No. 2 has also filed a suit for accounts of the dissolved firm which is wrongly stated as suit for dissolution because there was already dissolution of the firm as stated in the letter to the Sate Tax Office especially because there were only two partners. If one of them retired, the partnership firm automatically stands dissolved.

14. In addition, the learned advocate for the appellant has also drawn my attention to section 20 of the Indian Limitation Act.

"Effect of acknowledgment or payment by another person.---

(1) The expression "agent duly authorized in this behalf in sections 18 and 19 shall, in the case of a person under disability, include his lawful guardian, committee or manager or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed by, or of a payment made by, or by the agent of any other or others of them.

(3) For the purposes of the said sections....."

Sub-section (2) of section 20 clearly shows that in case of joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed by, or a payment made by, or by the agent of, any other or others of them renders other partners or joint contractors, executors etc. liable and this provision was not brought to the notice of the learned trial Judge. In my opinion, even if otherwise, defendant No. 2 is held to be liable this specific provision of Indian Limitation Act absolves him of the liability and as such learned trial Judge was in error in passing a decree against defendant No. 2. However, as defendant Nos. 1 and 3 have not appealed, the decree passed against them has become final. Therefore, this appeal of defendant No. 2 must

succeed.

15. Appeal succeeds and is allowed. Decree passed by the learned trial Judge as against present appellant (defendant No. 2) is set aside and suit as against appellant (defendant No. 2) is dismissed. However, in view of the fact that the appeal succeeds in view of interpretation of legal provisions, the plaintiff-Bank should not be saddled with costs, and therefore, no order as to costs.

16. Appeal succeed.