

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.03.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.36 of 1997

M/s.Yarn Distributors,
a partnership firm
having its office at
113, B, Manoharadas Katra
Calcutta 700 007.
rep. by its partner
Sri Gopalal Mundra.

... Appellant

Vs.

1.National Textile Corporation
(Tamil Nadu & Pondicherry) Ltd.,
a Public Limited Company,
Registered under the
Companies Act 1956 and having
its registered office at NTC House,
10/6A Somasundaram Mills Road,
Coimbatore 641 009.
Unit : Somasundaram Mills, Coimbatore.

2.Y.D. Agencies,
a partnership firm,
having its office at
113-A, Manohardas Katra,
Calcutta 700 007
Rep by it partner Sri Pannalal Mandra.

3.Sri Pannalal Mundra,
S/o.Ramachandra Mundra,
113-A, Manohardas Katra,
Calcutta 700 007.

4.Sri Sivaprakash Mundra

5.Sri Vivek Mundra

6.Mrs.Jyoti

... Respondents

Prayer : Civil Miscellaneous Second Appeal filed under Order 21 Rule 58 (4) r/w Section 100 of C.P.C., against the judgment and decree dated 09.08.1995 and made in C.M.A.No.19 of 1994 on the file of District Judge, Coimbatore, confirming the judgment and decree dated 06.12.1993 and made in REA No.672/92 in E.P.No.13 of 1991 in O.S.No.924 of 1989 on the file of II Additional Sub Judge, Coimbatore.

For Appellant : Mr.T.S.Baskaran

For Respondents : Mr.R.Parthiban for R1
Not ready in notice for RR2 to 6

The judgment and decree dated 09.08.1995 passed in C.M.A.No.19 of 1994, confirming the judgment and decree dated 06.12.1993, passed in R.E.A.No.672 of 1992 in E.P.No.13 of 1991 in O.S.No.924 of 1989, is under challenge in the present civil miscellaneous second appeal.

2. The case on hand is a classic case where the real agony started for the plaintiff after obtaining a decree from the Civil Court. It is to be reiterated that the decree was passed in the year 1989 which was an exparte decree against respondents 2 to 6. Such a decree obtained in the year 1989 in the money suit is yet to be executed even after a lapse of more than 32 years, which exactly is the reason for the frustration caused amongst the civil litigants.

3. The suit was instituted for recovery of money in O.S.No.924 of 1989, and within a short span of period, the suit was decreed in favour of the plaintiff in the very same year 1989. Thereafter, the decree holder viz., National Textile Corporation Ltd., the first respondent herein, filed E.P.No.13 of 1991, seeking execution of the decree passed in O.S.No.924 of 1989 dated 22.12.1989. The execution petition was filed against the immovable property measuring 8666 Sq.ft, now in T.S.No.113 in Bashyakaralu Street, Coimbatore. The attachment was effected on 17.01.1991. Admittedly, the property as of now is under attachment.

4. The appellant M/s.Yarn Distributors, a partnership firm, is a third party to the decree passed in O.A.No.924 of 1989. The decree was passed against the M/s.Y.D. Agencies, a partnership firm. It is relevant to make an observation at this juncture that the first appellate Court made an observation that M/s.Y.D.Agencies/judgment debtor appears to be only an abbreviated form of M/s.Yarn Distributors who is the appellant

in the present appeal. The appellant M/s.Yarn Distributors originally filed E.A.No.603 of 1991 under Order 21 Rule 58 for raising the attachment of the immovable property made in E.P.No.13 of 1991. The petition was filed not in a verified form, but, with affidavit and petition. Objection was raised for non filing the verified petition as required and the petition in E.A.No.603 of 1991 was withdrawn by the appellant. Subsequent to the withdrawal of E.A.No.603 of 1991, the appellant filed E.A.No.672 of 1992.

5. The contention of the appellant is that the immovable property shown in the execution petition absolutely belonged to the appellant firm. While so, the first respondent, National Textile Corporation Ltd., had wrongly attached the said property, for which, the first respondent has no right to do so. The second respondent M/s.Y.D. Agencies, the fifth respondent Sri vivek Mundra and the sixth respondent M/s.Jyoti, have no connection with the appellant firm viz., M/s.Yarn Distributors. The other respondents 3 and 4 had already retired from the appellant firm viz., M/s.Yarn Distributors by the deed of retirement dated 01.10.1993. As the business carried on by the second respondent M/s.Y.D. Agencies Firm has no relevance or connection with the appellant firm, a petition was filed for raising the attachment under order 21 Rule 58.

6. The first respondent, National Textile Corporation Ltd., objected the said contention by stating that M/s.Y.D. Agencies is an abbreviated form of M/s.Yarn Distributors who is the appellant and it is the property of the judgment debtor and the shares of the partners are brought for sale. The retirement of two partners viz., Sri Panalal mundra and Sri SivaPrakash mundra in the petition is an intentional for the purpose of the case and the important factum of retirement was not even pleaded in E.A.No.603 of 1991. The appellant M/s.Yarn Distributors and the second respondent M/s.Y.D. Agencies are different entities, is the findings arrived by the E.P. Court. However, the E.P.Court disbelieved the retirement of the third and fourth respondents and found the retirement from the appellant firm is not in pursuance of the provisions of the Partnership Act. Accordingly, the E.P Court rejected the contention of the two partners viz., the third and the fourth respondents and further, the judgment relied upon by the appellant reported in AIR 1966 SC 1300 was held as not applicable with reference to the facts of the case.

7. The E.P.Court raised the attachment in respect of other three partners of M/s.Y.D.Agencies who were not the partners in the appellant firm M/s.Yarn Distributors. However, in respect of the two partners, the attachment is confirmed and accordingly, the property attached was directed to be put on sale for the

purpose of realising the decree amount.

8. The appellant filed an appeal in C.M.A.No.19 of 1994. The first Appellate Court independently and elaborately considered the facts, circumstances as well as the documents and evidences produced by the respective parties to the lis. Issues were framed. Even before the First Appellate Court, the appellants have raised the ground with reference to the provisions under Order 21 Rule 49 of C.P.C. It was contended that the partnership firm's property cannot be subjected to attachment in the absence of any decree in the name of the firm. The decree in the name of one or two partners of the firm would not provide a cause for attaching the property belongs to the firm itself. Thus, the procedure adopted as well as the judgment made by the E.P.Court is in violation of Order 21 Rule 49 of C.P.C., was the argument putforth by the appellant before the First Appellate Court.

9. It was contended that there was a limitation contemplated in bringing the property belongs to the partnership firm. In view of the limitation, the property as a whole cannot be attached as done by the E.P. Court and the interest of the partners alone is to be attached by following the procedures contemplated under Order 21 Rule 49, if necessary by way of appointing a receiver. Thus, the attachment made as a whole by the E.P. Court is not in consonance with the provisions of C.P.C. It was contended that even if the decree is passed personally against the partners, their property in the capacity of the partners of the firm cannot be attached. It was admitted that the third respondent and the fourth respondent who were the partners in M/s.Y.D.Agency, are liable to pay debts of the second respondent firm. But, they cannot be made liable in their capacity as the partners of the appellant firm.

10. Considering those arguments, the First Appellate Court made a categorical finding in paragraph Nos.13 and 14 of the judgment which reads as under:

"13. The property-vacant site measuring 86' x 66' vs attached on 17-1-1991. Considerable doubt arises about the genuineness of various documents of retirement filed by R-3 and R4. Ex.A-6 the Certificate issued by Additional Registrar of Firms, Societies and Non-Trading Corporation, West Bengal that (1) Sri. Pannalal Mundra and (2) Sri Prakash Mundra retired on 1-10-1990. Ex.A-7 (Xerox copy) is said to be (end of page No.8 in the Original) the letter written by the Appellant/claimant firm to the Income Tax Officer informing them about the retirement of R-3 and R-4. If really, R-3 and R-4 retired from the partnership concern even on 1-10-90 it would have been definitely mentioned in E.A.603

of 1991 the earlier Claim Application filed by the Appellant-Firm. There is no whisper about the retirement of R-3 and R-4 in the Affidavit filed in E.A. No. 603 of 1991. No plausible explanation is offered by the Appellant as to why the factum of retirement was not mentioned in E.A. No.603 of 1991.

14. Section 32 of the Partnership Act contemplate the procedure as to how a partner may retire from the firm. Under Section 72, Public Notice is to be issued for the retirement or expulsion of a partner. Under Section 63 of the Act, the changes in the constitution of the firm are to be recorded in case of retirement or dissolution of the firm. In the partnership act, various other procedure is laid down either for the retirement or expulsion of a partner. No authenticated documents for due compliance of Sections 32, 72 and 63 of Partnership Act is filed by the Appellant-firm to bring home the point that R-3 and R-4 have retired. In the absence of any such concrete evidence, no credence could be attached to Ex.R-4 Retirement deed."

11. The First Appellate Court had gone one step further and made a finding that under Order 41 Rule 33, the Appellate Court has wide powers to rectify the mistake in the judgment of the Lower Court suo moto. The power under Order 41 Rule 33, cannot be stretched to such an extent so as to cause prejudice to the appellant/claimant. The First Appellate Court formed an opinion that the Central Government undertaking National Textile Corporation Ltd., is expected to be more vigilant in filing the cross appeal assailing the line of reasonings adopted by the E.P.Court, however, it is unfortunate that the National Textile Corporation Ltd., has not come forward to ascertain its right as against the unscrupulous conduct adopted by the third respondent and the fourth respondent who were the partners in second respondent M/s.Y.D. Agencies. Based on the findings, the First Appellate Court could not able to agree that the line of reasonings adopted by the E.P.Court in the absence of any cross appeal by the National Textile Corporation. However, the First Appellate Court had no other option except to concur with the conclusion of the Lower Court and invoking some powers of the First Appellate Court resulting dismissal of the claim petition in toto, would cause prejudice to the interest of the appellant.

12. Based on the said observation, the judgment and decree passed by the E.P.Court was confirmed by the First Appellate Court.

13. The learned counsel for the appellant once again reiterated the ground stated before the First Appellate Court with reference to Order 21 Rule 49 C.P.C. The learned counsel for the appellant solicited the attention of this Court about the spirit of Order 21 Rule 49 where it is stated the property belonging to the partnership shall not be attached and sold in execution of the decree. Insisting the said phraseology, the learned counsel for the appellant reiterated that the spirit of the said phraseology in Order 21 Rule 49 was not considered by the E.P.Court as well as the First Appellate Court.

14. The learned counsel for the appellant contended that the procedures to be followed in such circumstances are also contemplated under Sub Clause 2 to Order 21 Rule 49 and when there is a definite procedure for attachment of the property belongs to the partners are contemplated, there is no reason to deviate the same and make an attachment as a whole in respect of the property belongs to the appellant partnership firm. Thus, the judgment of the both Courts are liable to be set aside.

15. The learned counsel in support of the said contention, cited the judgment of the Kerala High Court in the case of K.P.Shobana Vs.Catholic Syrian Bank Ltd., reported in (1989) 1 KLJ 19, wherein, the similar circumstances were considered by the Kerala High Court and relied on paragraph Nos.4 and 8, which reads as follows:

" 4. It is a well-established principle that during the subsistence of the partnership, the right of a partner is only to get his share of profit, if any, accruing to the partnership from the realisation of the property and upon dissolution of the partnership to a share in the value of the assets of the firm which remain after satisfying the liabilities set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) of section 48 of the Partnership Act. During the subsistence of the partnership, no partner can deal with the property of the partnership as his own. During the subsistence of the partnership, a partner, however, can assign his share to another and in that case, what the assignee would get would be only that which is permitted by section 29(1) of the Partnership Act, that is to say, the right to receive the share of profits assigned and accept the account of profits agreed to by the partners. See Addanki Narayanappa v. Bhaskara Krishnappa, AIR 1966 SC 1300.

8. In the light of what is stated above, the finding of the Court below that the doctrine of res judicate would disentitle the petitioner to raise the above objections is liable to be vacated. It is all the more so because the property proclaimed for sale indisputably belongs to the firm and not to the judgment-debtor and the decree sought to be executed in not against the firm."

16. In the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and 13 others, reported in (1966) 3 SCR 400, which was relied on by the Kerala High Court. In the cases cited supra, it is again referred by citing that the Kerala High Court has decided the case relying on the Hon'ble Supreme Court Judgment and therefore, the judgment made in the present case is liable to be raised.

17. The learned counsel for the appellant further cited a judgment of the Calcutta High Court, in case of Kurseong Hydroelectric Supply Co. Ltd., Vs. Lakshmi Narayan Sukhani and another, reported in AIR 1941 Cal 364, wherein the Calcutta High Court held that the debt due to a firm from a customer is a property of the firm within the meaning of Order 21 Rule 49, C.P.C., as such property it is not attachable under Order 21 Rule 46 in execution of a decree obtained against one or some of the partners in his or their individual capacity; and so a garnishee order cannot be made in such execution in respect of such a debt under Order 21 Rule 46 A which authorises garnishee proceedings only when a debt can be validly attached wider Rule 46 and has in fact been attached. The learned counsel relied on the following portion of the said judgment.

"Or. 21, r. 49 is specific and mandatory cl.

(1) of that rule lays down that except as provided for in that rule, property belonging to a partnership cannot be attached or sold when the decree under execution is not against the firm or against the partners as such. In such a case a charging order, with or without appointment of a Receiver, is the mode prescribed by cl. (2) of that rule. The scheme is to provide satisfaction to the decree-holder of such a person either by intercepting the share of the profits due to the latter through a Receiver and or by sale of his interest in the partnership. The scheme is not to break up the firm by a direct action on the part of executing Court, or to paralyse or hamper the activities of the firm by intercepting any part of its gross income. The share of the judgment-debtor in the profits-the net income-can only be intercepted through the Receiver for the purpose of

making satisfaction to the judgment-creditor or the Interest of the judgment-debtor in the partnership as a going concern can be sold, leaving it to the purchaser at the Court sale to take such steps as he may be advised to take. Even the Receiver appointed by the Court will not have, during the continuance of the partnership, the right to interfere in the management or administration of the firm, or to require accounts of the partnership transactions, or to inspect the books of the firm without an express order of the Court and such an order would not be passed except in special circumstances, as for instance with a view to the dissolution of the firm. This scheme is based on a broad head of public policy, namely the protection of commerce, which is considered to be an important source of national wealth. If the debt in question is the property of the firm, Sundar and Rai, garnishee proceedings in respect thereto would be inconsistent with the scheme of Or. 21, r. 49, which in substance is a reproduction of sec. 23 of the English Partnership Act, for the garnishee order would then have the effect of intercepting from the firm a portion of its gross income. The interest of a partner on which a charging order operates is the share of that partner in the firm and is nothing more than his proportion of the partnership assets, which in turn is the gross assets converted into money less the debts and liabilities of the firm. On the principles we have discussed above a debt due to a firm from a customer is the property of the firm within the meaning of Or 21, r. 49."

18. The learned counsel appearing on behalf of the respondent National Textile Corporation Ltd., in toto disputed the argument advanced by the learned counsel for the appellant. He contended that the First Appellate Court has elaborately adjudicated all the grounds raised in the present appeal. Further, it is contended that the substantial question of law raised is not genuinely substantial, but relatable to the facts and circumstances which were adjudicated by two grounds and therefore, the appeal is liable to be dismissed in limine.

19. The learned counsel for the first respondent National Textile Corporation Ltd., reiterated that E.A.No.603 of 1991, initially filed by the appellant was withdrawn. Perusal of the petition, there was no mentioning about the retirement of the partners nor the procedures followed for such retirement with reference to the provisions of the Partnership Act. In the

absence of any such evidence to establish the legal retirement, there is no reason to believe or trust upon the statement made regarding the retirement from the partnership firm. It is contended that any such formal retirement in the absence of valid evidence in consonance with the provisions of law, cannot be trusted upon, only be taken into consideration for the purpose of exoneration or fixing liability. Thus, the very contention raised in this regard, is unsustainable. The second execution appeal in E.A.No.672 of 1992, was filed, wherein, for the first time, it is mentioned that the two partners who have shares in the judgment debtor partnership firm, had retired from the firm.

20. Under those circumstances, the First Appellate Court ascertained the genuinity of the contention regarding the retirement from the partnership firm and made a finding that M/s.Y.D. Agencies appears to be the abbreviated form of M/s.Yarn Distributors and it is only the property of the judgment debtor and the shares of the partners are brought for sale. Thus, the retirement of third and fourth respondents pleaded, is only an intentional for the purpose of the case.

21. A strong opinion is formed in this regard by the First Appellate Court. This apart, it was not disputed that the third and fourth respondents are also partners in the judgment debtor firm as well as in the appellant firm. When these facts are not disputed and it was found that the name of these two partnership firms have got the same relevancy and similarity, the contention raised regarding the retirement was not trusted upon.

22. Under those circumstances, the conclusion of the E.P.Court was considered by the First Appellate Court and made a finding that the Trial court has allowed the application filed by the appellant partly only with reference to other partners who are not the partners to the judgment debtor firms.

23. The First Appellate Court considered the grounds raised by the appellant with reference to the facts established before the E.P.Court, has elaborately discussed which is extracted in this judgment. More specifically, In paragraph Nos.13 and 14 of the judgment, the First Appellate Court has held that it is clear that the grounds raised by the appellant were met with and answered with reference to the facts and circumstances of the case. Even the First Appellate Court declined to exercise the suo moto powers under Order 41 Rule 33, keeping in mind that no prejudice would be caused to the appellant and therefore, the First Appellate Court has adopted a balanced approach, so as to arrive a conclusion both in the interest of the decree holder and not by causing prejudice to the appellant firm which is not a party in the original suit. The balanced approach adopted by

the First Appellate Court is candid and convincing.

24. The Appellate Courts are expected to borne in mind that once the suit is adjudicated and decree is passed, then the rights and interest of the decree holder is to be protected. Certain arguments even some times falls within the ambit of one provision of law. Such provision of law is to be interpreted with reference to the facts and circumstances of the case and ultimately the Courts are bound to keep in mind that the decree is expected to be executed in a manner it was passed and not otherwise. If the decree is unable to be executed, then, the reason must be only on the ground contemplated under any provisions of law and not otherwise.

25. Therefore, this Court is of the considered opinion that both the Courts have held that the petition was partly allowed in respect of three partners who were not the partners in the judgment debtor firm and the property was attached in respect of the third and fourth respondents who are admittedly the partners in the judgment debtor firm as well as in the appellant firm.

26. The first Appellate Court though considered the spirit of Order 41 Rule 33 for exercising suo moto powers, had restrained to exercise on the ground that no prejudice should be caused to the appellant claimant who is not a party to the original suit. However, the First Appellate Court concurred with the findings as well as the conclusion arrived by the E.P.Court. Accordingly, confirmed the judgment.

27. Thus, this Court has no hesitation in arriving a conclusion that both the Courts have adopted a balanced approach in order to protect the interest of the decree holder without causing prejudice to the appellant who is the third party as far as the original suit is concerned. In certain unavoidable circumstances, the Courts are bound to take a view that the properties are to be sold and accordingly, the decree is to be realized.

28. The E.P.Court though stated that the E.A. filed by the appellant was partly allowed and the attachment of property is confirmed in respect of the portion of the property of the respondents 3 and 4 who are the partners in the judgment debtor firm as well as the appellant firm, however, it is to be clarified that the property though inseparable, the Execution Court has no option except to sell the same, ascertaining the respective shares of each partners and accordingly, settle the decree holder by following the procedures contemplated.

29. The substantial question of law raised is also relatable to the facts and circumstances which were elaborately

adjudicated by the E.P. Court as well as the First Appellate Court, and this Court is of the opinion that the appellant is not raised any acceptable substantial question of law warranting any further adjudication beyond the ground discussed and decided by the First Appellate Court.

30. In this view of the matter, the judgment and decree dated 09.08.1995, in C.M.A.No.19 of 1994 confirming the judgment and decree dated 06.12.1993 in R.E.A.No.672 of 1992 in E.P.No.13 of 1991 in O.S.No.924 of 1989, stands confirmed. Consequently, C.M.S.A.No.36 of 1997 stands dismissed. No costs.

Sd/-

Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

gsk

To

1.The District Judge, Coimbatore.

2.The II Additional Sub Judge, Coimbatore.

Copy To

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.T.S.Baskaran, Advocate SR.No.19261

C.M.S.A.No.36 of 1997

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GMV(23/06/2021)

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