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Court : Mumbai

Decided On : Apr-04-1935

Reported in : AIR1935Bom357; 158Ind.Cas.159

Appellant : Babu

Respondent : Dayambai and ors.

Judgement :

Beaumont, C.J.

1. This is an appeal from a judgment of Rangnekar, J. in which he dismissed the plaintiff's suit on the ground that it was barred by limitation. The facts are not substantially in dispute. The defendants represent a firm which, at the material dates, consisted of three partners, Alibhai, defendant 1, Esoofalli, whose widow and heirs are defendants, and Tyaballi, whose widow and heirs are also defendants. These three persons carried on business as partners in Bombay in a firm dealing in canvas, and they had, at one time, in the firm a raehta named Ratansey, who was the father of the plaintiff. Ratansey died in 1921, and in 1922 a sum of Rs. 15,000 odd was advanced to the firrrii whose name, I should have said, was Esoofalli Moosaji & Co., by the representatives of Ratansey. The loan is entered in the samadaskat book kept by the representatives of Ratansey, i.e. the creditors, and it was the custom for payments on account of that loan and the interest thereon to be entered up and a balance struck in that samadaskat book, the entries being signed by one of the partners on behalf of Esoofalli Moosaji &

Co. There are various entries in the samadaskat book of payments on account of that debt, of which the later payments are relevant. A sum of Rs. 125 was paid on 5th March 1929, and another sum of Rs. 125 was paid on 30th May 1929, and the balance of the debt was thereby reduced to Rs. 6,098 odd, and an entry to that effect was signed by defendant 1 on behalf of the firm. On 21st November 1928, Esoofalli, one of the partners, died and that date is very material upon the question as to the liability of his estate. This suit was not commenced until 16th May 1933, and, therefore, unless the suit is to be barred by limitation, we have to find some acknowledgment or part-payment made within three years of 16th May 1933, and something which will bind the estate of Esoofalli, who died in 1928. Now the acknowledgment and part-payment principally relied on is an entry in the samadaskat book signed by defendant 1 on behalf of the firm showing the amount due in respect of the debt on 22nd October 1930, at Rs. 6,173-1-3, and also showing that on 10th November 1930, the sum of Rs. 2,173-1-3, was paid off, thus reducing the debt to Rs. 4,000, to which a sum of Rs. 262-14-0 was added for interest. In the next entry the balance is shown as Rs. 4,262-14-0, 10th November 1931, and this again is signed by defendant 1 on behalf of the firm.

2. The learned Judge held that on the death of Esoofalli the partnership was dissolved, and that there was no evidence of any new partnership between the two surviving partners and the heirs of Esoofalli. I think the view he took was that the two surviving partners started a new partnership between themselves, and not that they merely carried on the old business for the purpose of winding up. The evidence on the point is not very clear, but I will accept the learned Judge's view that probably there was a new partnership between the two surviving partners, Tyaballi and defendant 1. Tyaballi subsequently died on 13th May 1932. On that finding of fact the learned Judge came to the conclusion that the plaintiff's claim was barred. He held that surviving partners had no power to give an acknowledgment of the debt which would keep the debt alive as against the representatives of the deceased partner. He held also that the Part-payment of Rs. 2,173-1-3 could not be relied upon, because the proviso to Section 20, Lim. Act, was not shown to have been complied with. That proviso is that an acknowledgment of part-payment must appear in the handwriting of or in a writing signed by the person making the payment. It is not very easy to see how that

proviso can be complied with when the person making the payment is an artificial person, a firm, or a company, which can have no handwriting and cannot make a signature. But assuming that the proviso would be complied with by a signature on the part of somebody having authority to sign the name of the firm, I think the learned Judge was right in holding that we have nothing evidencing the payment which is in the handwriting of any particular person, or in a document signed by any particular person.

3. The only evidence is that the payment was made by a cheque, and the bank-book of the firm shows that the cheque was paid, but we have no evidence as to the person who actually signed the cheque. However, in my view, it is not necessary to go into the various questions, some of them by no means free from difficulty, as to the effect of part-payment and acknowledgment, which are dealt with by the learned Judge. Nor is it necessary to consider whether there is any distinction between the liability of the heirs of Esoofalli and the heirs of Tyaballi. The first point taken by Mr. Jayakar on this appeal is that the plaintiffs had no notice of the dissolution of the firm which occurred on the death of Esoofalli, and that, therefore, they were entitled to go on dealing with the firm in the same manner as theretofore. He relies on Section 264, Contract Act, which is one of the sections of the now repealed Ch. 11, Contract Act, re-enacted in the Indian Partnership Act, but the rights in this suit are governed by Ch. 11, Contract Act. Section 264 provides:

Parsons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

4. The learned Judge dealt with this matter very shortly. Apparently the point was not pressed before him. He merely says that one of the plaintiffs, Odhavji had notice of the dissolution, and that all the plaintiffs must be treated as having such notice. But the evidence is that all that Odhavji knew was that Esoofalli had died, since Odhavji had paid a condolence visit on the occasion of that death. But mere notice of death to one of the plaintiffs cannot affect all the plaintiffs with notice that the 'firm had been dissolved. Under Section 253, Contract Act, death only dissolves a partnership in the absence of any contract to the contrary, and there is

no evidence here that any of the plaintiffs knew that there was no contract which would prevent death dissolving the firm. Indeed there is no allegation in either of the two written statements, which were filed that the plaintiffs in fact had notice of the dissolution, and no issue on the point was raised. It is contended by the Advocate-General that Section 264 does not apply to dissolution occasioned by death. He points out that that is the rule under English law. In *Lindley on Partnership*, Edn. 9, p. 282, it is said:

Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease. For by the law of England the authority of an agent is determined by the death of his principal, whether the fact of death is known or not.

5. But in the English Partnership Act, there is no provision such as we have in Section 264, Contract Act, and we have been referred to no authority holding that that section does not apply to the case of dissolution by death, which is one of the causes of dissolution which are referred to in Section 253 of the Act. We were referred to a dictum of Sir Amberson Marten in *Jwaladutt Pillani v. Bansilal Motilal* 1927 Bom 560, where he does say that Section 264 must be construed in such a way that it is not to apply to cases of dormant partners, nor to cases of death. He was in that case not dealing with a case of death, and he gives no authority for the statement he makes. The decision was affirmed by the Privy Council, but they did not refer to that dictum. It is no doubt true that Section 264 must be construed in conjunction with Section 261, which provides that the estate of a partner who is dead is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death. That seems to be the governing section which would save the estate of a deceased partner from liability under an obligation incurred by the firm after his death; and I [think that Section 264 does not diminish the protection afforded by Section 261. But we are not dealing here with an obligation incurred by the firm after death; we are only dealing with an obligation which axisfced before the death; but which was acknowledged after the death. In the absence of any authority on the point, I do not feel justified in refusing to give to the words of Section 264 their natural jonahing, and to hold that they do not apply to dissolution occasioned on a particular ground, namely death, there

being no such exception in the section. I think, therefore, that we have to deal with this case on the basis that the plaintiffs were entitled to continue to deal with the firm on the same footing as they did before the dissolution occasioned by the death of Esoofalli, and if that is so, it seems to me clear that the entries in the samadaskat book to which I have referred are an acknowledgment of the debt. On that ground the decision of the Judge was wrong, and we must answer the issue with which he dealt as to limitation by saying that the claim of the plaintiff is not barred by limitation, and, as I have indicated, it is unnecessary to go into the other points of law with which the learned Judge dealt.

Blackwell, J.

6. I agree.

7. Per Curiam.--The figures were not in dispute. There will be a decree for Rs. 4,500 with interest at the rate of six per cent, per annum from 31st October 1932, to this day with costs of the suit and of the appeal and interest on judgment at six per cent, per annum in favour of the plaintiff and defendants 8 and 9 against defendants 2 to 4 as heirs of the deceased Esoofalli Moosaji recoverable out of his estate in their hands and against defendants 5 to 7 as heirs of the deceased Tyaballi Moosaji recoverable out of his estate in their hands. Third party notice to be dealt with by the lower Court.

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