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Ashutosh Vs. State of Rajasthan and ors.

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Court : Supreme Court of India

Decided On : Aug-30-2005

Reported in : AIR2005SC3434; 2005(4)AWC3869N(SC); IV(2005)BC13(SC); 2006(1)BomCR760; 2005(4)CTC408; [2006(2)JCR155(SC)]; JT2005(8)SC58; 2005(4)KLT264(SC); (2005)7SCC308

Judge : Ruma Pal and; AR. Lakshmanan, JJ.

Acts : Arbitration Act; Code of Civil Procedure (CPC) - Sections 96, 144 and 145 - Order 21, Rules 49, 49(2), 49(3), 49(4), 49(5), 50, 50(1), 50(2) and 58 - Order 30, Rules 6, 7 and 10; Transfer of Property Act, 1882 - Sections 53; Indian Partnership Act, 1932 - Sections 24, 25 and 30; Karnataka Sales Tax Act, 1957

Appeal No. : Civil Appeal No. 5345 of 2005 (Arising out of S.L.P. (Civil) No. 4120 of 2004)

Appellant : Ashutosh

Respondent : State of Rajasthan and ors.

Advocate for Def. : Aruneshwar Gupta, Addl. Adv. General and ; Naveen Kumar Singh, Adv.

Advocate for Pet/Ap. : Manoj Prasad, Adv

Prior history : From the Judgment and Order dated 12.11.2003 of the Rajasthan High Court in S.B. Civil Execution First Appeal No. 2 of 1998

Judgement :

AR. Lakshmanan, J.

1. Leave granted.

2. The unsuccessful appellant in S.B. Civil Execution First Appeal No. 2 of 1998 before the High Court of Rajasthan is the appellant before us by special leave. The appeal is preferred against the judgment and final order dated 12.11.2003 passed by the High Court of Rajasthan in S.B. Civil Execution First Appeal No. 2 of 1998 whereby the appeal preferred by the appellant was dismissed.

3. Briefly stated, the facts are that a decree for Rs. 37,255.07 was passed against the State of Rajasthan on 6.6.1970 in respect of the construction work of irrigation department under Arbitration Act in case No. 4 of 1969 entitled Sharma & Co. v. State of Rajasthan. The said company filed execution and recovered Rs. 37,592.57. As against the said amount, two securities were furnished, one by Shri Gurbachan Singh for Rs. 2927.57 and another by Smt. Kamla for Rs. 37,592.57. Along with the aforesaid surety bonds, House No. 79B Block Sri Ganganagar was also furnished against security. The appeal preferred by the State of Rajasthan against the aforesaid judgment and decree was allowed ex parte by the High Court. An application under Section 144 C.P.C. was moved on behalf of the State which was registered as Civil Misc. Case No. 2 of 1981. The State of Rajasthan impleaded Sharma & Co., Smt. Kamla Devi and Shri Gurbachan Singh as respondents to the said proceedings. Smt. Dhanwanti Devi, the wife of Shri Shiv Lal Sharma was the exclusive owner of House bearing No. 80B Block Sri Ganganagar. She executed a Will dated 7.12.1983 bequeathing the aforesaid house in favour of her daughter's son Ashutosh. Smt. Dhanwanti Devi died in May, 1985. It is stated that the probate proceedings are pending in respect of the aforesaid Will. The District Judge, Sri Ganganagar allowed the application filed by the State of Rajasthan under Section 144 C.P.C. and held that the action can be taken against Smt. Kamla Devi and that the applicant-State was entitled to interest from Sharma & Co. and that the aforesaid application was maintainable under Sections 144 & 145 C.P.C. The Court while allowing the said application held as

follows:

'On the basis of the above discussions, we reach to the conclusion that this application is maintainable under Sections 144-145 C.P.C. against the non-applicant Nos. 1 and 2 and the applicant is fully entitled to get the action taken. Recovery against non-applicant No. 2 be made up to the extent of Rs. 35,592.57 as per the security while the action for the recovery for the interest amount of Rs. 37,592.57 @ Rs. 1.1/2 per hundred per month that would be worked out from the date of filing the application dated 21.4.1981 will be taken against non-applicant No. 1.'

4. The attachment order in respect of House No. 80B Block Sri Ganganagar was passed by the District Judge in Execution Case No. 2 of 1989 on 21.11.1992 on the application of the State. It was reiterated that the aforesaid house exclusively belonged to Smt. Dhanwanti Devi and she had bequeathed the same in favour of the appellant - Ashutosh on 7.12.1983 and that Smt. Dhanwanti Devi was not a party to the suit at any point of time. It was prayed that House No. 80B Block Sri Ganganagar be released in his favour as the same can not be attached in execution. It was further alleged that the appellant-Ashutosh had become the exclusive owner of the house pursuant to the Will executed by Smt. Dhanwanti Devi in his favour and no other person had any title or interest in the same house. The State of Rajasthan filed reply to the application under Order 21 Rule 58 C.P.C. It was asserted that Smt. Dhanwanti Devi was the partner of the aforesaid firm to the extent of 12= paise and she was liable for payment of suit liability. It was also stated that Smt. Dhanwanti Devi had executed the Will in order to escape from her liability to the suit claim. The Additional District and Sessions Judge dismissed the application under Order 21 Rule 58 C.P.C. filed by the appellant herein. It was also held that Smt. Dhanwanti Devi had no right to execute the Will in respect of the disputed house. The Review Application filed by the appellant was also dismissed. Being aggrieved, the appellant filed S.B. Civil Execution First appeal No. 2 of 1998 under Order 21 Rule 58 read with Section 96 C.P.C. The High Court of Rajasthan dismissed the first appeal filed by the appellant. The High Court held that the Will was prepared to defraud the creditor and not with an intention to bonafidely bequeath the property to the appellant, daughter's son.

Aggrieved by the said judgment and order dated 12.11.2003, the appellant preferred the above appeal.

5. We heard Mr. Manoj Prasad, learned counsel appearing for the appellant and Mr. Aruneshwar Gupta, learned Additional Advocate General, appearing for the State of Rajasthan.

Learned counsel appearing for the appellant raised two questions for consideration. (a) A decree cannot be executed against a partner when the decree was against the partnership firm; (b) A decree cannot be executed in violation of Order 21 Rules 49 and 50 C.P.C.

Learned counsel appearing for the appellant submitted that Smt. Dhanwanti Devi had purchased House No. 80B Block Sri Ganganagar from the State of Rajasthan on 7.7.1947 and that except Smt. Dhanwanti Devi no other person including her husband had any right, title or interest in the said property. It was further submitted that the proceedings in the instant case were initiated in utter disregard of the provisions of Order 21 Rules 49 and 50 C.P.C. and, therefore, the procedure adopted as against the property of Smt. Dhanwanti Devi was manifestly illegal and is liable to be set aside. It was further submitted that Section 53 of the Transfer of Property Act, 1882 does not apply to the facts of this case and that the Will was executed bonafidely by Smt Dhanwanti Devi on 7.12.1983 in favour of the appellant and that there was no question to defeat the claim of the respondent.

6. Per contra, Mr. Aruneshwar Gupta, learned Additional Advocate General, appearing for the State of Rajasthan, submitted that a partner of a partnership firm is always liable for partnership debt unless there is implied or express restriction and that where the transfer is made to defeat the execution of a decree then in those cases, provisions of Order 21 Rules 49 and 50 C.P.C. will not be applicable. While replying to the arguments advanced by the learned counsel appearing for the appellant in regard to the fraudulent transfer, Mr. Aruneshwar Gupta submitted that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditors so defeated or delayed. He further submitted that the original amount due and payable by the firm was Rs. 37593/- which was received on 17.10.1992 , however,

interest of Rs. 61,890/- on the principal amount had become due and payable as on 17.10.1992 and that the appellant is also liable to pay the subsequent interest on Rs. 37593/- from 17.10.1992.

7. We have carefully considered the rival submissions and perused the entire pleadings, the judgments of the Courts below and all the annexures and documents filed along with the appeal.

Both the contentions raised by the learned counsel appearing for the appellant have absolutely no merit. It is not in dispute that the decree was passed against the firm in which Smt. Dhanwanti Devi was also a partner. Under the provisions of the Partnership Act, one partner is the agent of the other. The partner is always liable for partnership debt unless there is implied or express restriction. In the instant case, notice was duly served on Smt. Dhanwanti Devi and her husband at House No. 80B , Block Sri Ganganagar. Sections 24 & 25 of the Indian Partnership Act, 1932 can be usefully referred to in the present context which are reproduced hereunder:

'Section 24- Effect of notice to the acting partner - Notice to the partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.'

'Section 25 - Liability of a partner for acts of the firm - Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner.'

Section 24 deals with the effect of notice to a partner. Such notice may be binding if the following conditions are satisfied:

(a) the notice must be given to a partner;

(b) the notice must be a notice of any matter relating to the affairs of the firm;

(c) fraud should not have been committed with the consent of such partner on the firm.

Section 24 is based on the principle that as a partner stands as an agent in relation to the firm, a notice to the agent is tantamount to the principles and vice versa. As a general rule, notice to a principal is notice to all his agents; and notice to an agent of matters connected with his agency is notice to his principal.

Under Section 25, the liability of the partners is joint and several. It is open to a creditor of the firm to recover the debt from any one or more of the partners. Each partner shall be liable as if the debt of the firm has been incurred on his personal liability.

8. The judgment in the case of Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and Ors., : [2001]247ITR165(SC) can be beneficially referred to in the present context. Two questions arose for consideration by this Court in this case. Firstly, whether the recovery of sales tax dues amounting to Crown debt shall have precedence over the right of the Bank to proceed against the property of the borrowers mortgaged in favour of the Bank. Secondly, whether property belonging to the partners can be proceeded against for recovery of dues on account of Sales tax assessed against the partnership firm under the provisions of the Karnataka Sales Tax Act, 1957. We are concerned only with regard to the second question. In paragraph 18, R.C. Lahoti, J. observed as under:

'The High Court has relied on Section 25 of the Partnership Act, 1932 for the purpose of holding the partners as individuals liable to meet the tax liability of the firm. Section 25 provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. A firm is not a legal entity. It is only a collective or compendious name for all the partners. In other words, a firm does not have any existence away from its partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm.'

9. In the case of Income Tax Officer (III), Circle-I, Salem v. Arunagiri Chettiar, : (1996)134CTR(SC)167 , this Court considered the question as to whether an erstwhile partner is liable to pay the tax arrears due from the partnership firm

pertaining to the period when he was a partner. The Madras High Court has held that he is not. Disputing the correctness of the said judgment, the Revenue came in appeal before this Court. This Court while allowing the appeal and setting aside the judgment of the High Court observed as follows:

'Section 25 of the Partnership Act does not make a distinction between a continuing partner and an erstwhile partner. Its principle is clear and specific, viz., that every partner is liable for all the acts of the firm done while he is a partner jointly along with other partners and also severally. Therefore, it cannot be held that the said liability ceases merely because a partner has ceased to be partner subsequent to the said period.'

10. We have already referred to the arguments advanced by the learned counsel for the appellant on Order 21 Rules 49 and 50 C.P.C. The High Court has clearly held that the Will was executed by Smt. Dhanwanti Devi to defeat the execution of a decree obtained by the State.

Order 21 Rule 49 reads thus:

'Order 21 Rule 49 : Attachment of partnership property -

(1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payments of the amount due under the decree and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within India.

(5) Every application made by any partner of the judgment- debtor under sub-rule (3) shall be served on the decree- holder and on the judgment-debtor, and on such of the other partners as do not join the application and as are within India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.'

The above Rule provides that no execution can issue against any partnership property except on a decree passed against the firm or against the partners in the firm as such. In the instant case, as already noticed, the State has obtained a decree against the partnership firm. The High Court has clearly held in its judgment that the Will was a created document to delay the recovery proceedings. It is further seen that the liability is not disputed by the firm or partners and that the terms of the order dated 12. 2.1980 were required to be satisfied by the partners.

Order 21 Rule 50 C.P.C. reads as follows:

Order 21 Rule 50 - Execution of decree against firm -

(1) Where a decree has been passed against a firm, execution may be granted -

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be , a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear;

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affected the provisions of Section 30 of the Indian Partnership Act 1932 (9 of 1932).

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

(5) Nothing in this rule shall apply to a decree passed against a Hindu undivided family by virtue of the provisions of rule 10 of Order XXX.'

The execution under this Rule can only be granted where a decree has been passed against a firm. A decree against the firm must perforce be in the firm's name. Under this Rule, execution may be granted against the partnership property. It may also be granted against the partners, in which case the decree-holder may proceed against the separate property of the partners.

11. In the case of Sahu Rajeshwar Rao v. I.T.O., : [1969]72ITR617(SC) , this Court ruled that the liability of the partner of the firm is joint and several and it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners. In a decree against partnership firm, each partner is personally liable except the minor whose liability is limited to his assets in the partnership.

12. In the case of Her Highness Maharani Mandalsa Devi and Ors. v. M. Ramnaram Private Ltd. and Ors., : [1965]3SCR421 , while considering the scope

of Order 21 Rule 50 this Court observed as follows:

'A suit by or in the name of a firm is really a suit by or in the name of all its partners. The decree passed in the suit, though in form against the firm, is in effect a decree against all the partners. Beyond doubt, in a normal case where all the partners of a firm are capable of being sued and of being adjudged judgment-debtors, a suit may be filed and a decree may be obtained against a firm under Order XXX of the Code of Civil Procedure, and such a decree may be executed against the property of the partnership and against all the partners by following the procedure of Order 21 Rule 50 of the Code of Civil Procedure.'

13. We shall now advert to the submissions made by the learned Additional Advocate General appearing for the respondent-State. The starting point for the litigation is the decree dated 6.6.1970 passed against the State of Rajasthan in respect of the construction work of irrigation department. An appeal was preferred by the State of Rajasthan on 12.2.1980, an application under Section 144 C.P.C. was moved on behalf of the State on 2.4.1981 and Smt. Dhanwanti Devi executed a Will on 7.12.1983 and died in the month of May, 1985. In May, 1987, the District Judge, Sri Ganganagar allowed the application filed by the State of Rajasthan under Section 144 C.P.C. The attachment of the property was made of the house in question on 21.11.1992. Several other proceedings were taken thereafter by both the parties opposing attachment and the execution etc. Ultimately, the District Judge dismissed the application filed under Order 21 Rules 49 and 50 C.P.C. and the Review Application was also dismissed on 5.9.1998. Thereupon the appellant filed S.B. Civil Execution First Appeal No. 2 of 1998 and the said appeal was dismissed on 12.11.2003. Now the parties are in this Court.

14. It is not in dispute that the decree amount of Rs. 37,593/- was received by the State on 17.10.1992. The dispute between the parties is only with reference to the interest on the principal amount of Rs. 37,593/- as on 17.10.1992, which according to the State, was payable by the Firm. A sum of Rs. 61,890/- was arrived at as interest on Rs. 37,593/- as on 17.10.1992. Mr. Aruneshwar Gupta submitted that the State has been dragged into Court unnecessarily by filing a vexatious litigation by the appellant and, therefore, the State must be sufficiently compensated by

directing the appellant to pay the interest @ 18% p.a. on Rs.37,593/- from 17.10.1992 till date. Though the argument of Mr. Aruneshwar Gupta appears to be attractive on the first blush, yet on a reconsideration and re-appreciation of the same, the said submission has no merits. Both the parties are in the legal battlefield for all these years. The appellant has also succeeded before the trial Court. The trial Court has held that the Will is genuine and, therefore, necessarily the appellant has to defend all further proceedings initiated by the State in various Courts. Mr. Aruneshwar Gupta submitted that the interest amount of Rs. 61890/- as on 17.10.1992 plus the subsequent interest shall be ordered to be paid to the State without showing any sympathy to a vexatious litigant.

15. It is true that justice must be done at all costs. At the same time, we should not also forget that the justice should be tempered with mercy. Asking a party to pay interest on Rs. 37,593/- at 18% p.a. from 17.10.1992 , in our considered opinion, is on the high side and excessive. This apart, asking both the parties to continue the execution proceedings at this distance of time is also not proper. The State has to wait for some more time to realise the fruits of the decree.

16. We have also calculated the interest payable on Rs. 37,593/- from 17.10.1992 @ 18% p.a. Calculating interest at the said rate, the interest amount comes to Rs. 6,766/- p.a. (approx). Multiplying Rs. 6,766/- X 13 years comes to Rs. 87,958/-. Adding Rs. 61,890/- which was arrived at as interest as on 17.10.1992, The total interest payable on Rs. 37,593/- from 17.10.1992 as on today @ 18% p.a. comes to Rs. 1,49,848/- (Rs. 87,958/- + Rs. 61,890/-) By this order, we are directing the appellant to pay a sum of Rs. 1,00,000/- in full satisfaction of the claim made by State of Rajasthan. The difference will be only Rs. 49,848/-. For recovery of the same, we need not direct the parties to proceed further in the execution at this distance of time. Though the interest is claimed at 18% p.a. by the State, we cannot also shut our eyes at the prevailing bank rate for fixed deposits and for lending which is not more than 6-7%.

17. Without going into the merits of the rival claims any further, we feel that the interest of justice would be amply met if we direct the appellant herein to pay a sum of Rs. 1 lakh in full satisfaction of the claim made by the State of Rajasthan.

Rs. 1 lakh shall be paid within a period of two months from today, failing compliance, the appellant is liable to pay interest @ 18% p.a. on Rs. 37,593/- from 17.10.1992 till the date of payment. Till the sum of Rs. one lakh is paid, there will be a charge over the property bearing House 80B Block Sri Ganganagar. The appellant shall not alienate or encumber in any manner the property bearing House No. 80B Block Sri Ganganagar till the sum of Rs. One lakh is paid and discharged.

18. The appeal stands disposed of. There shall be no order as to costs.

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