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[MANU/WB/0124/1960](#)

Equivalent Citation: AIR1960Cal463

IN THE HIGH COURT OF CALCUTTA

Award No. 36 of 1951

Decided On: 30.07.1959

Appellants: **Juggilal Kamlapat**
Vs.
Respondent: **Sew Chand Bagree**

Hon'ble Judges:

G.K. Mitter, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Tibrewalla, Adv.

For Respondents/Defendant: Ghose, Adv.

Subject: Commercial

Catch Words

Mentioned IN

Acts/Rules/Orders:

Partnership Act, 1932 - Section 45(1); Indian and English Law

Cases Referred:

Chundee Churn Dutt v. Eduliee Cowasiee Biinee, ILR 8 Cal 678; Jwaladutta R. Pillani v. Bansilal Motilal, AIR 1929 PC 132; Pramatha Chandra Kar v. Bhagwandas Madanlal, AIR 1932 Cal 236; Bhai Shankar Motiram v. Lakshmi Dyeing Works, AIR 1930 Bom 449; Court v. Berlin, 1897-2 QB 396; Tower Cabinet Co. Ltd. v. Ingram, (1949) 2 K.B. 397; M. and S.M. Rly. Co. v. Bazwada Municipality, 71 Ind App 113, AIR 1944 PC 71

Disposition:

Application dismissed

Case Note:

Commercial – liability – Section 45 (1) of Partnership Act, 1932 – award holders did not admit that there was dissolution of firm – under Section 45 notwithstanding dissolution of firm liability of partners continues until public notice given of dissolution – Proviso to Section 45 (1) exempts estate of partner who dies or adjudicated insolvent or retires from firm if act done after date on which he ceases to be partner independently – Proviso to Section 45 (1) applied and other two previous partners not liable to pay decretal amount – application dismissed.

ORDER**G.K. Mitter, J.**

1. This is an application in execution of a decree on an award made by the Bengal Chamber of Commerce dated June 14, 1950 on a dispute between Juggilal Kamlatpat, the award holders, and Sew Chand Bagree, against whom the award was made. The decree was passed on May 28, 1951 for a total sum of over Rs. 31,000/-. The application is one under Order 21 Rule 50(2) of the Code of Civil Procedure to execute the decree against Manik Chand Bagree, Moti Chand Bagree and Jankidas Bagree as partners of the firm of Sew Chand Bagree.

2. The award was given in respect of a contract entered into between Sew Chand Bagree and Juggilal Kamlatpat on September 25, 1948. The application is being opposed by Manik Chand Bagree and Moti Chand Bagree whose case is that the firm of Sew Chand Bagree was dissolved in October 1945 by mutual consent of its partners and that thereafter their brother Jankidas Bagree started a new business in the name of Sew Chand Bagree with which they the other brothers had no concern. Sew Chand Bagree the individual was the father of the three persons already mentioned. From a copy of entries in the Register of firms maintained by the Registrar of Firms, West Bengal, it appears that the business of Sew Chand Bagree was established in the year 1924, that it was formerly a joint Hindu family business and that the partnership firm was started on October 28, 1933. The three partners, shown in the said record are Manik Chand Bagree, Moti Chand Bagree and Jankidas Bagree. This document does not show that there has been any change in the constitution of the firm ever since its inception. It is contended by the award holders that no change in the constitution of the firm having been notified and no public notice of the dissolution of the firm having been given under the provision of the Indian Partnership Act, all the partners continue to be liable for any act done by any of them. The award holders further do not admit that there was a dissolution of the firm in the year 1945 as alleged by the Bagrees. On the evidence adduced I must hold that there was a dissolution of the firm, On this finding the question is whether Sub-section (1) of Section 45 of the Partnership Act is brought into play or whether the point is covered by the proviso to the said Sub-section.

3. As the matter could not be determined on affidavits it was set down for trial on evidence of the issue as to the liability of Manik Chand Bagree and Moti Chand Bagree under the decree based on the award.

4-7. (His Lordship examined the evidence of the witnesses and proceeded:)

8. Mr. Tibrewalla, Counsel for the Juggilal Kamlatpat, argued that it had not been established by the evidence that the firm of Sew Chand Bagree had ever been dissolved. He submitted that no attempt had been made to get any alteration in the constitution of the firm noted in the records of the Registrar of Firms upto the year 1959 although dissolution is alleged to have taken place in the year 1945. Counsel submitted that the Bagrees had not examined any disinterested third party to show that the dissolution, if any, was known to outsiders, that no advertisement of the dissolution had appeared in any newspaper, that there was no evidence of the issue of any circular with regard to it and that no broker other than Sriratan Damani had been examined. He relied strongly on the absence of the books of account of Sew Chand Bagree and contended that the same, if produced, would have established that the firm had never been wound up. There is certainly some force in these contentions, specially the comment on the non-production of the books of account. But I must hold on a consideration of the entire evidence adduced that the firm had been dissolved. The deed of agreement prepared by Messrs. Dutt and Sen and signed by the Bagree brothers, the issue of the trade license by the Corporation of Calcutta, the opening of the account with Hindusthan Commercial Bank Ltd., and the letter written to Bank of Baroda Ltd., all corroborate the oral testimony adduced on behalf of the Bagrees. The contracts of Juggilal Kamlatpat with Manik Chand Bagree in a name and style other than Sew Chand Bagree tend to prove the disruption in the

family. On the evidence as a whole I accept the case of the Bagrees that the firm of Sew Chand Bagree had come to an end in the year 1945.

9. In order to appreciate fully the point for consideration it is necessary to refer to a few sections of the Indian Partnership Act.

10. Chapter V of the Act contains Sections [31 to 38](#) and relates to in-coming and outgoing partners. The retirement of a partner and the effect thereof is dealt with under Section [32](#) of the Act. Sub-section (1) shows how a partner may retire. Sub-section (2) provides for the discharge of a retiring partner by agreement from any liability to any third party for acts of the firm done before his retirement and lays down that such an agreement may be implied in certain circumstances or by a course of dealing. Under Sub-section (3) "notwithstanding the retirement of a partner from a firm he and the partners continue to be liable as partners 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 until public notice is given of the retirement; provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner." Under Section [34\(i\)](#) a partner in a firm who is adjudicated an insolvent ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved. Under Sub-section (2) of the section "where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made." Under section [35](#) "where under a contract between the partners the firm is not dissolved by the death of a partner, the deceased partner is not liable for any act of the firm done after his death."

11. Chapter VI of the Act headed "dissolution of a firm" contains Sections [39 to 55](#) inclusive and provides for dissolution of a firm and the rights and liabilities arising thereon including the mode of settlement of accounts between partners and the sale of goodwill of the firm. The dissolution of the firm takes place under Sec, [39](#) of the Act when the partnership between all the partners of the firm comes to an end. Sections [40 to 44](#) of the Act comprehend all the various ways in which a firm may be dissolved by a Court or otherwise. Under Section [42](#), which is subject to contract between the partners, a firm is dissolved inter alia, by the death of a partner and by the adjudication of a partner as an insolvent.

12. Section [45](#) provides as follows:

"(1) 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:

Provided that the estate of partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retire from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under Sub-section (1) may be given "to any partner."

13. The registration of the firm under the Act is not compulsory but unless the firm is so registered it cannot file a suit to enforce a right arising out of a contract. The application for registration must comply with the provisions of Section [58](#) of the Act. Registration is effected under Section [59](#). Provision is made for recording of (a) alterations in the firm's name, (b) changes in the names and addresses of partners, (c) changes in and dissolution of the firm under Sections [60 to 63](#) of the Act. Under Section [68](#) "any statement, intimation or notice recorded or noted in the Register of

Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated." Under Section 72 of the Act a public notice under the Act relating to the retirement of a partner from the registered firm or to the dissolution of a registered firm etc., has to be given by notice to the Registrar of Firms and by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business. For the proper interpretation of Section 45 of the Partnership Act, Mr. Tibrewalla referred me to a judgment of Garth C. J., in *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee*, ILR 8 Cat 678. This judgment turned on the interpretation of Section 264 of the Contract Act of 1872 which provided:

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

The facts in Eduljee's case were as follows: The suit was brought on a pronote dated 23rd April, 1881 against Eduljee and 2 others. At the trial it was admitted (i) that he had carried on business with the other defendants up to February 29, 1880, (ii) a deed of dissolution of partnership was executed on May 21, 1880 wherein it was recited that the dissolution was effective from February 29, 1880. (iii) notice of dissolution was advertised on May 27, 1880 in several newspapers and the Exchange Gazette but not in the Calcutta Gazette or Gazette of India, (iv) no direct notice of dissolution had been given to the plaintiff, (v) the pronote was in the name of the firm, (vi) that Eduljee had not after February 29, 1880 resided or worked in Calcuta except so far as he might be considered to be a member of the firm under Section 264 of the Contract Act, (vii) that there had been other dealings of the firm with the plaintiff before the dissolution but unconnected with the promissory note. Garth C. J. felt great difficulty in ascertaining the true meaning of the Section especially as regards old customers who had dealt with the firm before its change or dissolution. He thought that the Section meant that all persons dealing with a firm, whether old customers or new, would be affected by any dissolution of the firm if they had actual notice of the fact, This was in consonance with English law. The learned Chief Justice also said that there was force in the contention that all persons, old and new customers included, were meant to be affected by the dissolution if public notice thereof had been given. But he took the view that

"if it had been intended to introduce such a serious change into the law as that construction would involve, the language used would have been much more clear and explicit, and that the rule would have been laid down in an affirmative and not in a negative form."

The learned Chief Justice observed (at p. 684),

"Each partner is the agent of his co-partners for the purpose of debts and obligations in the usual course of conducting partnership business (see Sections 249 and 251 of the Contract Act). And when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them (see Section 208 of the Contract Act). In the case, therefore, of a dissolution of the partnership, or of the retirement of one of its members, the agency as between the partners themselves would cease from the time of such dissolution or retirement, but as regards third persons, the agency would continue until it had been duly notified."

14. The judgment of the learned Chief Justice was approved by the Judicial Committee in the case of *Jwaladutta R. Pillani v. Bansilal Motilal*, AIR 1929 PC 132 as also in the case of *Pramatha Chandra Kar v. Bhagwandas Madanlal* [MANU/WB/0078/1931](#). Referring to *Jwaladutt's* case, AIR 1929 PC 132 Rankin C. J., pointed out in the last mentioned case,

"In that case it was conceded before the Bombay High Court that unless the plaintiff knew that a particular person was a partner prior to the dissolution he could not get the benefit of Section 264. That was conceded before the Appeal Court in Bombay and

the case went to the Privy Council on another point, namely upon the point whether an old customer, as it is said, requires to have an express notice of the dissolution — a point which has been decided in this Court in ILR 8 Cal 678. The Privy Council in their judgment upheld the decision in that Calcutta case but in no way dealt with the question whether a person who did not know that a certain man was a partner of the firm prior to the dissolution could under Section 264, in the absence of any notice of any kind, claim to hold him liable upon transactions entered into after the dissolution."

Rankin C. J., also referred to the case of *Bhai Shankar Motiram v. Lakshmi Dyeing Works*, AIR 1930 Bom. 449 where Marten C. J., took the view that a person who was not known to be a partner was not within Sec. 264. At page 240 of the report, the learned Chief Justice observed that Section 264 purported to deal with cases where no public notice had been given and the plaintiff had no notice of dissolution. He posed the question "Are we then to say that the section only applies to cases where particular individuals who are sought to be made responsible as partners were known to have been partners to the parties seeking to make them so responsible?" His Lordship, felt entirely unable to say that there was any sufficient reason to cut down the prima facie and direct meaning of the words of the Section so as to exclude from its operation persons who were not known to be partners. Mr. Tibrewalla also referred me to the judgment of the Court of Appeal in England in *Court v. Berlin*, 1897-2 QB 396. There the action was brought by a solicitor for the amount of his bill of costs against three defendants, named respectively Berlin, Brook and Benjamin. It appeared that these three had carried on business in partnership as furriers under the name of I. Berlin, Berlin managing the business, and Brook and Benjamin being dormant partners. The plaintiff, who did not know that Brook and Benjamin were partners in the business, was retained by Berlin to bring an action against one Hyman in the firm name for a debt due to the partnership. While the action was pending, the defendants dissolved partnership and the dormant partners retired from the business. No notice of the dissolution of partnership was given to the plaintiff, nor did the dormant partners do anything by way of withdrawing the plaintiff's retainer. Berlin succeeded in getting judgment for the debt. The defendants relied on Section 36 Sub-section (3) of the English Partnership Act which provides that "the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been (known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

15. Lord Esher M.R. held that

"The retainer given to the plaintiff by the active partner for and on behalf of himself and the dormant partners was to conduct the action on the ordinary terms. Whilst the plaintiff was engaged in so conducting the action the dormant partners retired from the partnership. I do not think that it can reasonably be contended that, by doing something of which he had no notice, they withdrew the authority which was given to him to continue conducting the action on their behalf. Such a contention seems to me to be contrary to the very essence and meaning of the transaction according to the ordinary course of business."

This case to my mind does not help Mr, Tibrewalla at all.

16. The only case which was cited to me by Mr. Ghose, Counsel for the Bangrees, was *Tower Cabinet Co. Ltd. v. Ingram*, (1949) 2 K. B. 397. In this case Ingram and Christman used to carry on business in partnership under the name of Merry's. The partnership was registered under the Registration of Business Names Act, 1916. In 1947 the parties agreed to dissolve their partnership and Ingram gave notice to the firm's banker's that he had ceased to be a partner. He arranged with Christmas that latter should notify those dealing with the firm that he had ceased to be connected with it, but no advertisement appeared in the London Gazette. During the subsistence of the partnership the firm's notepaper had been headed "Merry's" under which the names A. H. Christmas and S.G. Ingram appeared. After the dissolution new note-paper was printed from which

Ingram's name was omitted and the words "A.H. Christman, director," were added. In 1948 "Merry's" sent, on the old notepaper used by the firm, an order to the respondents for six bedroom suites. This was signed by Christman as "manager". The Company sought to make Ingram liable as a partner and the Master of the Supreme Court held that he was so liable. This was upset in appeal the court holding that Ingram had not by words spoken or written or by conduct represented himself to be a partner. The Company also relied on section 36 of the English Act which provides as follows:

Section 36: (1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or the change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively.

17. Lynskey J. observed (page 403)

"that apparent members means members who are apparently members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the note paper, or from some sign outside the door, or because the customer had had some indirect information about them. Both Sub-sections 1 and 2 in my view, are concerned with cases where they are apparent members."

According to the learned Judge,

"Sub-section (3) deals with the particular individual. It does not deal with the public at large, its words are simple and obvious. It is not concerned merely with questions of apparent members or non-apparent members, but applies the test indicated by the words 'A partner who, not having been known to the person dealing with the firm to be a partner'. Those words are equally applicable whether he was an apparent partner or a dormant partner. If the person dealing with the firm did not know that the particular partner was a partner, and that partner retired, then as from the date of his retirement he ceases to be liable for further debts contracted by the firm to such person. The fact that the former partner was a partner seems to me to be irrelevant, because the date from which the Sub-section operates is from the date of the dissolution. If at the date of the dissolution the person who subsequently deals with the firm had no knowledge at or before that time that the retiring partner was a partner, then Sub-section (3) comes into operation, and relieves the person retiring from liability."

18. Mr. Tibrewalla tried to distinguish this Case by saying that this was a case of holding out, but that is not correct. It will be noticed (p. 399) that the Master held that the appellant Ingram was liable as a partner under Section 36 of the Partnership Act 1890 and not under Section 14 for holding himself out as a partner. This is also clear from the judgment of Lynskey J, (pp. 401-02).

19. Section 45 Sub-section (1) of our Act without the proviso is no doubt somewhat similar to

Section 36 Sub-section (1) of the English Act but the provisions of the two Acts are not identical. Under Section 45 notwithstanding the dissolution of a firm the liability of the partners continues until public notice is given of the dissolution in respect of any act which would have bound the firm if done before the dissolution. But the proviso to this Sub-section restricts the scope of it considerably and exempts the estate of a partner who dies or who is adjudicated an Insolvent or of a partner, who not having known to the person dealing with the firm to be a partner, retires from the firm if the act is done after the date on which he ceases to be a partner. Under Section 36(1) of the English Act an apparent member continues to be liable to an outsider unless the latter has notice of the change in the firm. But even if there be no such notice a partner who was not known to the outsider as such ceases to be liable after his retirement under Sub-section (3) of Section 36. In the Indian Act the proviso replaces Sub-section (3) of the English section. The only difference between Section 36 Sub-section (1) of the English Act and Section 45 Sub-section (1) of the Indian Act seems to be that under the former any one who is an apparent member continues liable while under the latter any one who was a member whether apparently so or not remains liable until public notice of dissolution is given. But the proviso to the Indian Section cuts down the liability in the case of a partner who was not known as such to the person seeking to make him liable. Except for the use of the qualifying word "apparent" in Sub-section 1 of Section 36 of the English Act the effect seems to be the same.

20. "The proper function of a proviso" said Lord Macmillan in *M. and S.M. Rly. Co. v. Bazwada Municipality* [MANU/PR/0034/1944](#) "is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case". But for the proviso the dissolution of a firm would not have affected the liability of a partner who had gone out of it or of a dormant partner until public notice of the dissolution was given. The effect of the proviso is to except the case of a partner who was not known to the person dealing with the firm to be a partner and who has retired from the firm without any public notice of dissolution being given.

21. It was admitted by Rameswar Agarwalla that he did not know Manik Chand Bagree and Moti Chand Bagree to be partners of Sew Chand Bagree until six months or a year ago and even this he came to know only from a copy of the entries made in the records of the Register of Firms. These persons, therefore, were not known to Juggilal Kamlatpat to have been partners of the firm and they had gone out of the firm before the contract in this case was entered into. Clearly the proviso is attracted to the facts of this case and] Manik Chand Bagree and Moti Chand Bagree can-not be made liable for payment of the decretal amount.

22. Mr. Tibrewalla argued that the exception, if any, is limited to the case of a partner who "retires from the firm" and does not apply to the case of a dissolution of the firm whereby the relationship of all the partners inter se is put an end to for ever. In my view, this contention has no substance because the case of a retiring partner is expressly provided in Section 32 of Sub-section (3) and the proviso to the said Sub-section. It certainly would have been better if instead of the words, "retires from the firm", the legislature had used the-expression "severs his connection with the firm". Probably the actual words used have been taken from the English Act. Without entering into speculation of this kind it is not difficult to find out what the legislature intended. It appears to me, however, that the contingencies of death, insolvency,, retirement and even expulsion of a partner having; already been provided for by the Indian Act in Sections 35, 34, 32 and 33 of the Act respectively Section 38 might well have dealt with the case of a dissolution of firm simpliciter.

23. The fact that the entries in the record of the Registrar of Firms still show that Manick Chand Bagree and Moti Chand Bagree are partners of the firm of Sew Chand Bagree. does not help the decree-holder in this case. If the decree-holder had adduced evidence to the effect that these records had been scrutinised by it before the transaction was entered into the position might have been different.

24. The cases cited by Mr. Tibrewalla which turned on the interpretation of Section 264 of the

Contract Act before its alteration in 1932 have been rendered obsolete after the passing of the Partnership Act of 1932.

25. The application will, therefore, be dismissed with costs as against Moti Chand Bagree and Manick Chand Bagree. There will be an order to terms of prayer (a) as against Jankidas Bagree and the applicant will be at liberty to add the costs of the application as against Jankidas Bagree alone to its claim.

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