

**IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI**

**CIVIL REVISION PETITION No.1322 OF 2014**

% Dated 07.01.2021

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Dasari Ramachandra Rao

S/o Bulliganiraju

R/o D.No.14-5-18, Samalkota

East Godavari District and two others

..... Petitioners

Vs.

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Koripalli Venkata Rao

R/o Kunduru, K. Gangavaram Mandal

Ramachandrapuram

East Godavari District and two others

..Respondents

JUDGMENT PRONOUNCED ON: 07.01.2021

**THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reporters/Journals
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

**\* THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

**+ CIVIL REVISION PETITION No.3039 OF 2013**

% Dated 07.01.2021

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Dasari Ramachandra Rao  
S/o Bulliganiraju  
R/o D.No.14-5-18, Samalkota  
East Godavari District and two others ..... Petitioners

Vs.

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Koripalli Venkata Rao  
R/o Kunduru, K. Gangavaram Mandal  
Ramachandrapuram  
East Godavari District and two others ..Respondents

! Counsel for the petitioner : Sri Lasetty Ravinder

^ Counsel for the respondent : S. Sridhar

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> HEAD NOTE:

? Cases referred

1. AIR 1964 SC 581
2. AIR 1956 Bomb 513
3. AIR 1927 CAL 758
4. AIR 1926 BOM 585
5. AIR 1921 BOM 482
6. (1925) 2 KB 127
7. 1966 (3) SCR 400
8. (1979) 120 ITR 49
9. (1964) 5 I.T.R. 755
10. (1966) 9 SCC 3
11. 1963 AIR 243
12. (1925) 2 KB 127
13. (2000) 5 SCC 694
14. AIR 1965 SC 1718

**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL REVISION PETITION NO.1322 OF 2014**

**ORDER:**

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in E.A.No.585 of 2011 in E.P.No.43 of 2010 in O.S.No.77 of 2004 dated 20.09.2012 passed by the I Additional Senior Civil Judge, Kakinada, whereby, a petition filed under Order XXI Rule 50(2) C.P.C to grant leave to the petitioner to file execution petition against the partners of the first judgment debtor was allowed.

The parties before the Court will hereinafter be referred, as arrayed before the executing Court, for the sake of convenience.

The petitioner/decree holder obtained a decree against the first judgment debtor i.e. partnership firm – Siddi Vinayaka Raw boiled rice mill for recovery of amount. In order to recover the decree amount, it is necessary for the petitioner to proceed against the partners of the first judgment debtor, who are shown as Respondent Nos. 2 to 5. In such circumstances, it is necessary to obtain leave by the petitioner to file execution petition against the partners of the first respondent/judgment debtor and sought leave to proceed against the partners of the firm.

The Respondent Nos. 1 and 2 filed counter affidavit, denying material allegations, *inter alia*, contending that Item No.1 of the E.P. schedule property is the absolute property of judgment debtors and Item No.2 is the absolute property of the fifth judgment debtor.

Respondent Nos. 3 to 5 are not parties to the suit O.S.No.77 of 2004. The decree passed in O.S.No.77 of 2004 never intended to execute the said decree against the property of Judgment Debtor Nos. 3 to 5, which absolutely belongs to them. It is further contended that, the property was never used for business purpose relating to the first Judgment Debtor firm. It is contended that, the decree holder has got no right whatsoever to execute the decree against the properties belonging to Judgment Debtor Nos. 3 to 5, except proceeding against the assets belonging to Judgment Debtor Nos. 1 and 2, the decree holder has no right to proceed against the assets of the respondents Nos. 3 to 5 and prayed for dismissal of E.A.No.585 of 2011.

During the course of enquiry, the petitioner/decreed holder examined himself as P.W-1 and marked Exs.A-1 and A-2, while the fifth respondent/Judgment Debtor himself examined as R.W-1, but no documents were marked.

The Executing Court upon hearing argument of both the counsel, granted leave to the petitioner to proceed against the petitioners herein/respondent Nos. 3 to 5, who are the partners of the firm. Aggrieved by the order, the petitioners herein being the partners of the firm, preferred this revision petition under Article 227 of the Constitution of India instead of Section 115 C.P.C, reiterating the grounds urged in the counter affidavit filed by the Judgment Debtor Nos.1 and 2 in E.A No.585 of 2011. However, the petitioners herein/Respondent Nos. 3 to 5 did not file counter affidavit in E.A No.585 of 2011.

The first and foremost ground urged by the petitioners herein/Respondent Nos. 3 to 5 before Executing Court is that, the first respondent herein/decree holder is not entitled to proceed against the petitioners herein/Respondent Nos. 3 to 5 i.e. partners of the firm proposed to proceed, who are not parties to the suit O.S.No.77 of 2004 invoking Order XXI Rule 50(2) C.P.C. It is further contended that the Court below failed to appreciate the contention in proper perspective, though an appeal A.S.No.320 of 2008 is pending against the judgment and decree in O.S.No.77 of 2004 passed by the I Additional Senior Civil Judge, Kakinada, but, granted leave mechanically and requested to set-aside the same.

During hearing, Sri Lasetty Ravinder, learned counsel for the petitioners/Respondent Nos. 3 to 5, mainly contended that, when the suit is filed against the firm and it's Managing Partner, the decree holder is disentitled to proceed against the partners of the firm as the Execution Court cannot go beyond the decree. It is further contended that the law laid down by the Apex Court has no direct or indirect application and therefore, the order of the Court below is erroneous and liable to be set-aside.

Whereas, learned counsel for the respondents supported the order passed by the Executing Court in all respects, while contending that the revision petition ought to have been filed under Section 115 of C.P.C, but not under Article 227 of the Constitution of India and requested to dismiss the civil revision petition.

Considering rival contentions, perusing the material available on record, the point that arises for consideration is:

***“Whether the first respondent herein/Decree Holder is entitled to claim any permission from the I Additional Senior Civil Judge, Kakinada, to proceed against the petitioners herein/Respondent Nos. 3 to 5, who were the partners of the firm – first Judgment Debtor, though no decree was obtained against them. If not, whether the order passed by the I Additional Senior Civil Judge, Kakinada in E.A.No.585 of 2011 dated 20.09.2012 be sustained?”***

**P O I N T:**

Indisputably, the first respondent herein/Decree Holder obtained a decree against Siddi Vinayaka Raw Boiled Rice Mill, represented by partner one Edala Suryanarayana, Managing Partner of the firm for recovery of the amount. The petitioners herein/Respondent Nos. 3 to 5 before the Court below, who were the alleged partners of the firm, did not file counter affidavit in E.A No.585 of 2011. Only, Respondent Nos. 2 and 3 herein/Respondent Nos. 1 and 2 Judgment Debtors filed their counter affidavit against which the decree holder intended to proceed. It is not denied about the admission of the petitioners herein as partners in the first Judgment Debtor firm. To prove that they were partners of the firm, the first respondent herein/decree holder himself was examined as P.W.1 and filed his affidavit under Order XVIII Rule 4(1) C.P.C in lieu of examination-in-chief. He specifically testified that the petitioners herein were the partners of the firm. Ex.P-1 is the partnership deed dated 01.01.2000 and Ex.P-2 is the amended partnership deed dated 01.04.2000 i.e. reconstituted partnership firm. These documents would show that the petitioners herein were the partners of the firm.

In the cross-examination, except eliciting the ownership of the property, no suggestion was put to P.W-1 that the petitioners before this Court were partners of the firm. Therefore, the first respondent herein/decreed holder could substantiate his contention that the petitioners before this Court were partners of Judgment Debtor firm, but they were not arrayed as parties to the suit, since they are also equally liable being the partners of the firm.

A special procedure is prescribed under Order XXX C.P.C for service of summons on the partnership firm and its partners and filing of appearance on protest etc. The procedure prescribed under Order XXX C.P.C is an exception to the general rule.

In **Gajendra Narain Singh v. Johrimal Prahlad Rai**<sup>1</sup>, the Supreme Court held that, appearance under protest by the persons sued render the service of summons as regards the defendant firm ineffective. The plaintiff may obtain a fresh summons against the firm and serve it in the manner prescribed by Order XXX, Rule 3, C.P.C. against another person who is alleged to be a partner by the plaintiff. A decree against the defendant firm so obtained may with leave under Order 20, Rule 50(2) be executed against the firm and also against the person who had been initially served as a partner and who had appeared under protest denying that he was a partner. The plaintiff, however, is not obliged to obtain a fresh summons; he may request the Court to adjudicate upon the plea of denial raised by the person served and appearing under protest. The Court will then proceed to determine the issue raised by that plea, if the Court

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<sup>1</sup> AIR 1964 SC 581

finds evidence that the person served was not a partner at the material time, the suit cannot proceed unless summon is served afresh under Rule 3. If the Court holds that he was a partner, service on him will be regarded as a good service on the firm and the suit will proceed against the firm. The whole of Order XXX in the Code of Civil Procedure has been newly incorporated in the Code. In the old Code on account of the provisions contained in Section 45 of the Contract Act, in suits by or against firms, all the members composing the firm were necessary parties. Order XXX was introduced in the present Code so as to provide exception to the provisions contained in Section 45 of the Contract Act and thus if the promisees are partners it enables one to sue alone, but only if he sued in the name of the partnership. A firm as such had no existence in law. It is not a legal entity like a corporation. It is a mere abbreviated name for the partner of which it consists. The effect of the using the name of the firm is simply to bring all the partners before the Court. A decree against a firm in the name of the firm has the effect as a decree against all partners. Appendix A to the Code dealing with the description of parties in particular cases shows that in suits by or against a firm, the description of the plaintiff or the defendant should be "AB", a firm carrying on business in partnership. The plaint should therefore name only the firm as the plaintiff or the defendant. The words "two or more persons" in Rule 1 of Order XXX are merely descriptive of a partnership as introductory to the enacting part of the Rule that they are entitled to sue in the firm name. Therefore, it is not necessary that two partners of the firm should be named in the cause title. One partner can institute a

suit in the name of the firm. Order XXX Rule 1 of the Code inter alia provides that two or more persons being liable as partners may be sued in the name of the firm (if any) of which such persons were partners, at the time of the arising the cause of action. The pleadings or other documents can be signed, verified or certified by any of the persons liable as partner. Rule 3 of Order XL of the Code deals with service of summons on the firm. Where persons are sued as partners in the name of their firm, the summons should be served either upon any one or more of the partners or at the principal place at which the partnership business is carried on within India upon any person having, at the time of service, the control or management of partnership business there, as the Court may direct and such service shall be deemed to be good service upon the firm so sued. If the service of summons is affected upon any one or more of the partners, it is good service upon the firm as well as upon that partner personally, but it is no service upon any other member of the firm so as to make such a member a person who has been individually served as a partner. There is a proviso to Rule 3 saying that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon other person within India whom it is sought to make liable. This proviso applies when the dissolution of the firm was in the knowledge of the plaintiff, Order 6 of Rule 30 deals with appearance of partners. Though all proceedings in a suit against a firm in the firm name must be conducted in the firm name, the partners should, so far as appearance is concerned, appear individually in their own names. The only persons entitled to appeal

in a suit against a firm are (i) a persons who alleged that they were partners of the firm sued or were partners at the time the cause of action arose; and (ii) persons who are served as partners but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued.

In **Rana Harkishandas Lallubhai v. Rana Gulabdas Kalyandas**<sup>2</sup>, the Bombay High Court observed as follows:

“Before dealing with this question, it would be relevant to refer to the material provisions of Order 21, This Order deals with suits by or against firms and persons carrying on business in names other than their own. Rule 1 Sub-rule (1) of this Order allows suits to be filed by or against firms in the names of the firms, and Sub-rule (2) of Rule 1 authorises any one of the partners of the firm to sign, verify or certify pleadings or other documents in such suits.

Rule 2 requires the disclosure of partners' names to be made on demand and Sub-rules (2) and (3) of this rule provide for the passing of orders consequent upon the disclosure of the names or its absence. Rule 3 provides for the manner in which notice can be served in actions against firms. If a firm is sued, the summons shall be served either upon any one or more of its partners, or at the principal place at which the partnership business is earned on within India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct.

This rule provides that service, when thus made, shall be deemed good service upon the firm so sued, whether alt the partners are within or without India. The proviso to this rule may be noticed. It deals with the cases of partnership which have been dissolved to the Knowledge of the plaintiffs before the institution of suits and it requires that in such cases the summons shall be served upon every person within India whom it is sought to make liable.

Rule 6 of Order XXX provides that, where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but even so all subsequent proceedings will continue in the name of the firm. According to Rule 7, where a summons is served in the manner provided by Rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

In other words, where a decree has been passed against a firm, it can be executed against the property of the partnership without the decree-holder taking any further step by way of obtaining leave from the Court. Similarly, it can be executed against persons mentioned in Clauses (b) and (c) of Sub-rule (1) of Rule 50. So long as the decree-holder is content to execute the decree either against the property of the partnership or against the persons mentioned in these two clauses, he is not required to ask for any leave and the execution application is entertained by the executing Court and

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<sup>2</sup> AIR 1956 Bomb 513

further steps in execution are ordered to be taken in the ordinary course.”

*(Emphasis supplied)*

In **International Continental Caoutchone Compagnie v. Mehta & Co**<sup>3</sup>, it was contended before the Apex Court that when the appellants had been served as partners of the firm M/s. Oswal Metal Industries, Nagaur under Order XXX, Rule 3, C.P.C., they had appeared under protest stating that they had retired and as such the service on them as service on the partnership firm was a nullity. In the above decision appearance has been put by an attorney on behalf of the defendant Bhagat Ram Vadra. That appearance was made under protest as the defendant denied that he was a partner of the firm. On 12<sup>th</sup> April a written statement was filed on behalf of Bhagat Ram Vadra in which he only said that he had no knowledge of the allegations in the plaint and he denied that he was a partner. Referring to Order XXX, Rule 6, C.P.C., his Lordship Buckland, J., stated that the provisions contained in Rule 6 of Order XXX, C.P.C. meant that though such persons may file different written statements, they may not do so on their own behalf but must file them on behalf of the firm. Should they file different written statement on behalf of the firm, the plaintiff will be obliged to show that not one of the defences prevents a decree being made against the firm. The learned Judge then referred to Order XXX, Rule 3(a) of the old Code which was not identical with the corresponding provisions contained in Order XXX, Rule 8 of the Code of Civil Procedure of present Code, Examining the provisions of Order XXX, Rule 3(a) of the old Code, the learned Judge said that the effect of

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<sup>3</sup> AIR 1927 Cal 758

that Rule was that where a person who had been served as a partner under Rule 3 appeared under protest, the service on him as such on the firm was a nullity and the plaintiff should therefore begin again and effect service upon the firm in accordance with Rule 3 unless the firm had already been otherwise served through some other person as a partner who had not appeared under protest. The learned Judge then examined the question as to what should happen of the defendant who had entered appearance under protest denying that he was a partner of the firm. He referred to the decision of the Bombay High Court in **Ramanujachary v. Pohomal Bros**<sup>4</sup>. In the Bombay case, the learned Chief Justice had said that in such event after the plaintiff had obtained the judgment, he may apply under Order 21, Rule 50 for leave to issue execution against the person who had appeared under protest when if the liability is still disputed, the Court may order the liability of such person to be tried and determined in any manner in which any issue in a suit may be tried or determined. The other alternative was also referred in that case by stating that the plaintiff may wish to challenge at once the denial of the persons served as a partner that he was a partner. If so, he should take out a summons to strike out the appearance entered on the ground that the party appearing was a partner in the firm or was a partners at the time the cause of action accrued, or in the alternative to strike out of such appearance the denial of partnership. An order may then be made directing an issue to be tried to determine the question of partnership. In another case of **Vithaldas v. Hansraj**<sup>5</sup>, the same Chief Justice suggested a third

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<sup>4</sup> AIR 1926 Bom 585

<sup>5</sup> AIR 1921 Bom 48(2)

alternative, namely, that the person who had entered appearance under protest had a right to ask the Court to have the question decided whether or not he is a partner in the defendant firm and get the matter decided. On the facts of the case before the Calcutta High Court, it was laid down that no such question had yet arisen in that case because no summons had been taken out by the party who desired to have the question determined. It was, therefore, observed that it was not necessary until the point came before the Court in a concrete form to express any definite opinion as to whether or not the law and practice admit of either of these courses being followed. None of the above procedure were mentioned in the provisions contained in Order XXX of the old Code, Shri Buckland, J. said that Order 21, Rule 50 of the Code provided a definite procedure whereby the issue can be determined before any execution could go against the person who had entered appearance under protest. The learned Judge referred to the observations of Atkin L.J. In **Weir & Co. v. Me Vicar & Co**<sup>6</sup>, and observed that Atkin L.J. seemed to have taken the view that the question could only be determined after judgment. The matter was left open by the learned Judge for a proper occasion in case such a question arose before him. For the purpose of disposal of the matter before him, the learned Judge said that a person who had been served as a partner under Order XXX, Rule 3 of the old Code and entered appearance under protest was not entitled to file a written statement on his own behalf denying that he was a partner. That was precisely the law laid down in the above Calcutta case on the basis of the provisions contained in Order XXX of the old Code. The written statement filed by Bhagat Ram Vadra was ordered to be

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<sup>6</sup> (1925) 2 KB 127

taken off the file which amounted to this that there was no written statement in the suit and which consequently was undefended.

Thus, in view of the law declared by the Apex Court and Bombay High Court in the judgments referred supra, when a decree was obtained by filing suit in the name of the firm, its partners are liable for the debt due by the firm. In the present case, though, a notice was served on the partnership firm, none of its partners appeared and raised any protest as mandated under Order XXX Rule (6) C.P.C. When no such objection was raised, the decree is binding on its partners.

The general principle is that, when a decree was obtained against the judgment debtor in the Trial Court, the Executing Court cannot go beyond the decree for realization of the fruits of the decree. But, there is an exception to it. Order XXI Rule 50 C.P.C carved out an exception to such rule that, the Executing Court cannot go beyond the decree. Order XXI Rule 50 C.P.C deals with execution of decrees against the firm and it is extracted hereunder for better appreciation of the case:

**“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 affect 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 lease, 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 provision of Rule 10 of Order XXX.”

Clause (2) is relevant for the purpose of deciding the present controversy, which permits the decree-holder to proceed and 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.

In view of this exception carved out to the general rule, a person who obtained a decree is not only entitled to proceed against the judgment debtors firm, but also against the partners of the firm, when first judgment debtor is the partnership firm. This special rule enables the Court to grant leave in a routine manner, if the liability of that partner is not in dispute. If, for any reason, such liability is disputed, the Court has to try such an issue as if it is a suit and recorded a finding in E.A.No.585 of 2011 in E.P.No.43 of 2010 in O.S.No.77 of 2004.

When an application under Order XXI Rule 50(2) C.P.C is filed, seeking leave of the Court, the original judgment debtors/Respondent Nos. 2 and 3 herein filed counter affidavit in E.A.No.585 of 2011 contending that the property is not liable to be proceeded for realization of the decretal amount. But, the partners against whom the first respondent herein/deGREE holder intended to proceed did not dispute their liability. However, the Court below by way of abundant caution recorded a specific finding that the petitioners before this Court are also liable, being the partners of the firm/first judgment debtor and the same is now assailed on the ground that, leave cannot be granted against a person who is not a judgment debtor. But, this contention can be rejected on the sole ground that, if the Court finds that these petitioners are liable being the partners of the firm and granted leave, permitting the decree holder to proceed against the property of the partners, the contention of the petitioners before this Court holds no substance and it is liable to be rejected.

The other contention as per the evidence on record is that, the petitioners herein/Respondent Nos. 3 to 5 before the Trial Court have retired as partners from the firm subsequent to March, 2004. However, the decree holder obtained a decree for the value of the paddy supplied by the decree holder to the firm on 06.07.2002, 07.07.2002, 20.02.2003 and 23.02.2003. Consequently, the retirement of the petitioners before this Court subsequent to March, 2004 has no relevance for the reason that, these debts were incurred prior to retirement of petitioners herein from the firm as partners and they are liable to discharge the debt. Consequently, the

petitioners herein/Respondent Nos. 3 to 5, being the partners of the firm cannot avoid their liability to avoid their liability to pay debt due to the decree holder.

Coming to the liability of the partners, Section 25 of the Indian Partnership Act, 1932, deals with liability of the firm, which reads as follows:

“Liability of a partner for acts of the firm, every partners is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.”

Similar question came up before Apex Court in **Addanki Narayanappa v. Bhaskara Krishnappa**<sup>7</sup> and **Malabar Fisheries Company v. Commissioner of Income Tax, Kerala**<sup>8</sup>, the Court discussed the nature and character of the Partnership under the Indian Law and held that, "a partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest". In particular, the Court held that Indian law in this respect is akin to English Law - and different from the Scottish law -and quoted several passage from Lindley on Partnership [12<sup>th</sup> Edition] to indicate the relationship between the firm and the partners. The following passage from one of the extracts is relevant. It reads:

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<sup>7</sup> 1966 (3) S.C.R 400

<sup>8</sup> (1979) 120 I.T.R 49

"The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, courts have to some extent adopted the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; but, speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer."

If this principle is read along with Section 25 of the Indian Partnership Act, the partners are liable for payment of the debt due, though a decree was obtained against the firm, invoking Order XXI Rule 50 (2) C.P.C.

The Allahabad Court in **Sahu Rajeshwar Nath v. Income-Tax Officer C-Ward**<sup>9</sup> R.S.Pathak, J., speaking for the Bench, observed as follows:

"It is true that under the Income-tax law a firm is treated as an entity distinct from its partners, but that is so only for the purposes of assessment. The procedure relating to assessment concludes when an assessment order has been made and the tax liability consequent upon that assessment has been determined. When a notice of demand is issued requiring the payment of the tax liability, the stage of assessment has been left behind, and with it the distinction between the firm and its partners.....The liability of the partners of the firm is joint and several, and it is open to a creditor of the firm to proceed to recover a debt the firm from any one or more of the partners. In Simon's Income Tax (2nd edition), volume I page 337, paragraph 510, the law is thus stated:

The tax assessed in the firm name is a partnership debt for which all who were partners at the time when the debt was incurred, or have held themselves out to the Revenue to be such, are jointly liable, This means that any or all of the those persons may be used for the whole of the tax due (when the assessment become final) without reference to their

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<sup>9</sup> (1964) 5 I.T.R.755

respective shares under the partnership agreement':  
See also *Stevens v. Britten* [1954] 3 All. E.R.385]"

In **Income Tax Officer (III), Circle-I, Salem v. Arunagiri Chettiar**<sup>10</sup> the Apex Court reiterated the same principle.

Later, in **Gambhir Mal Pandiya v. J.K. Jote Mills Company Limited, Kanpur**<sup>11</sup>, an identical question came up for consideration before the Apex Court, and the Apex Court after considering the various provisions of Indian Partnership, Civil Procedure Code and relying on the judgments of **Ellis v. Wadeson**<sup>12</sup> concluded that, a large number of cases decided in India and England have laid down the kind of issue which may be tried under Order XXI Rule 50 (2) of the Code and the cognate provisions of the English rules. Since the English cases are first in point of time, we shall begin with them. It must be remembered in this connection that the English rules prescribe forms for recording appearance by persons summoned in actions against firms. Finally, the Apex Court held that, the widest meaning cannot be attributed to the word "liability". The proper meaning thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm, when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. It is to be remembered that the leave that is sought is in respect of execution against the personal property of such partner and the leave that is granted or refused affect only such property and not the property of the firm. Ordinarily,

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<sup>10</sup> (1996) 9 SCC 33

<sup>11</sup> 1963 AIR 243

<sup>12</sup> (1925) 2 K.B 127

when the person summoned admits that he is a partner, leave would be granted, unless he alleges collusion, fraud or the like.

If, the principles laid in the above judgments are applied to the present facts of the case, the proposed respondents against whom the Decree Holder intended to proceed did not file their counter and did not raise any objection before the Court below, before passing an order and they did not enter into the witness box atleast to deny their liability. Therefore, there is absolutely nothing to conclude that they denied their liability and they are not the partners of the firm. Hence, the Court is not required to conduct any roving enquiry into the liability of these petitioners at this stage of granting leave.

The judgment of the Supreme Court in **Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. & Ors**<sup>13</sup>, is useful for reference at this stage, to decide the issue in dispute. The two questions arose for consideration before the Court in the 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. The Apex Court was concerned only with regard to the second question. In Paragraph 18, R.C. Lahoti, J observed as follows:

"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

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<sup>13</sup> (2000) 5 SCC 694

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."

*(Emphasis supplied)*

The Apex Court again referred the principles in **Income Tax Officer (III), Circle-I, Salem v. Arunagiri Chettiar** (referred supra), **Sahu Rajeshwar Nath vs Income-Tax Officer C-Ward** (referred supra) and **Her Highness Maharani Mandalsa Devi and others v. M. Ramnaram Private Limited and others**<sup>14</sup>, while considering the scope of Order XXI Rule 50 C.P.C and 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."

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

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<sup>14</sup> AIR 1965 SC 1718

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.”

*(Emphasis supplied)*

A similar question came up for consideration before the Apex Court in **Ashutosh v. State of Rajasthan** (referred supra), where the Apex Court while dealing with Order XXI Rule 50 C.P.C observed that 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.

Therefore, not only the property of the firm, but also personal property of the partners is also liable to be proceeded, since this Rule is an exception to the general rule and the liability of the partners is governed by the Partnership Act. In the instant case, the petitioners herein were the partners as on the date of incurring debt(s) as on 06.07.2002, 07.07.2002, 20.02.2003 and 20.03.2003 and they allegedly retired subsequent to 01.03.2004. Therefore, for the debt contracted by the firm, during the partnership business prior to retirement of these petitioners, not only the firm, but also the partners are liable to the firm debt.

Section 25 of the Indian Partnership Act, 1932, deals with liability of a partner for acts of the firm, every partners is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. Thus, it is clear from Section 25 of the Indian Partnership Act that, when the debt was contracted prior to retirement of these petitioners as partners from the firm subsequent to March, 2004, still, they are liable to pay the debt due to the decree holder, as the liability was incurred prior to their retirement. The Trial Court adverted to the decision of the Apex Court in **Ashutosh v. State of Rajasthan** (referred supra) and also provisions of Indian Partnership Act, concluded that the personal property is also liable for the debt of the firm when the debt was contracted prior to retirement of the petitioners as partners from the firm, consequently, I find no error in the under challenge warranting interference of this Court.

This civil revision petition is filed under Article 227 of the Constitution of India. But, the same is not maintainable and only revision under Section 115 of C.P.C is maintainable against such an order in execution. In any view of the matter, mere quoting of wrong provisions of law is not a ground to dismiss the petition, if the petitioner is otherwise entitled. Therefore, this petition is treated as a revision under Section 115 of C.P.C. This Court can exercise such power only in three circumstances, where the subordinate courts appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the

High Court may make such order in the case as it thinks fit. Thus, the jurisdiction of this Court is limited under Section 115 of C.P.C and such jurisdiction shall be exercised only in three circumstances enumerated in Section 115 C.P.C.

The order under challenge is not a final order, but it is only interlocutory in nature. In view of the proviso to Section 115 (2) C.P.C, only a final order is revisable under Section 115 of C.P.C. Even according to the explanation thereto, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

But, in the present case, leave is granted deciding an issue recording evidence of the parties to the execution petition and held that the decree holder is entitled to proceed against the property of the petitioners/partners of the firm. Such finding amounts to deciding an issue and thereby, revision is maintainable under Section 115 of C.P.C.

On close verification of the order under challenge, I find that the contention of these petitioners do not attract any of the three pre-conditions to entertain a revision under Section 115 C.P.C. Even assuming that the revision under Article 227 of the Constitution of India is maintainable, the jurisdiction of this Court is limited.

The powers of this Court under Article 227 are limited, this Court cannot exercise such power and the duty of this Court is to see that the Courts shall not exceed its power that is conferred on it or exercise power based on extraneous material to pass any order and to keep the subordinate courts within its bounds of jurisdiction.

This Court while exercising power under Article 227 can exercise its discretion to interfere in the following circumstances:

- a) When the inferior court assumes jurisdiction erroneously in excess of power.
- b) When refused to exercise jurisdiction.
- c) When found an error of law apparent on the face of record.
- d) Violated principles of natural justice.
- e) Arbitrary or capricious exercise of authority or discretion.
- f) Arriving at a finding which is perverse or based on no material.
- g) A patent or flagrant error in procedure.
- h) Order resulting in manifest injustice.
- i) Error both on facts and law or even otherwise.

Article 227 deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial review also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in *certiorari* jurisdiction and such power can also be exercised *suo motu*. The circumstances where the Court can exercise jurisdiction under Article 227 of the Constitution of India are only elliptic.

In view of my foregoing discussion, even if the petition is treated as revision either under Article 227 of the Constitution of India or under Section 115 of C.P.C, I find no ground warranting interference of this Court, since the order under challenge is free from any legal infirmity, warranting interference of this Court, while

exercising jurisdiction either under Section 115 C.P.C or under Article 227 of the Constitution of India. Hence, the civil revision petition is liable to be dismissed. Accordingly, the point is answered.

In the result, civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed.

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**JUSTICE M. SATYANARAYANA MURTHY**

Date:07.01.2021

Note: LR copy to be marked  
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