

Supreme Court of India

Ashok Transport Agency vs Awadhesh Kumar And Another on 31 March, 1998

Equivalent citations: AIR 1999 SC 1484, JT 1998 (7) SC 103, (1998) 120 PLR 810, RLW 1999 (1) SC 191, 1998 (5) SCALE 730, (1998) 5 SCC 567

Bench: S Agrawal, S Ahmad

ORDER

1. Special leave granted.

2. We have heard the learned counsel for the parties.

3. This appeal arises out of a suit for eviction filed by the respondents against three persons namely (1) Ashok Transport Agency (2) A.C. Basu, Proprietor of Ashok Transport Agency and (3) Birnath Singh, Manager of Ashok Transport Agency. The said suit was filed on 28-9-1992. Prior to the filing of the suit, A.C. Basu, Proprietor of Ashok Transport Agency had died on 6-8-1992. In the said suit, nobody appeared on behalf of the defendants and an ex parte decree was passed on 28-9-1993. The respondents thereafter moved for execution of the said decree. Before the executing court, it was submitted on behalf of the appellant that the decree was a nullity and it could not be executed for the reason that the Proprietor of Ashok Transport Agency had already died on the date of the institution of the suit and that the decree was passed against a dead person. The Munsif Sadar, Sitamarhi, by order dated 13-7-1994 upheld the said objection raised by the appellants and dismissed the execution petition on the view that the decree having been passed against a dead person was a nullity and it could not be executed. The revision filed by the respondents against the said order of the executing court has been allowed by the Patna High Court by the impugned judgment dated 23-7-1996. The High Court has proceeded on the basis that in view of Order XXX Rule 10 CPC, even though the Proprietor of the firm Ashok Transport Agency had died before the institution of the suit, the decree passed against him cannot be held to be a nullity and, therefore, it could be executed. Feeling aggrieved by the said judgment, the appellant, which is now a partnership firm has filed this appeal.

4. Shri Amarendra Sharan, the learned counsel appearing for the appellant, has urged that the High Court was in error in holding that the decree which was passed against a dead person, namely, A.C. Basu as the Proprietor of Ashok Transport Agency, was not a nullity and it could be executed. The learned counsel has submitted that there is a distinction between a partnership firm and a proprietary business and that insofar as proprietary business is concerned, the proprietor of the business is the party to the proceedings and if the proprietor is dead on the date of the filing of the suit, the suit has to be treated as having been instituted against a dead person and no decree can be validly passed in such a suit.

5. Shri Vikas Singh, the learned counsel appearing for the respondents has, however, submitted that in spite of the fact that Ashok Transport Agency was a proprietary concern owned by A.C. Basu and that A.C. Basu had died before the institution of the suit, the suit filed by the respondents cannot be held to be non-maintainable and that the decree passed in that suit cannot be regarded as a nullity. The learned counsel has submitted that by virtue of Order XXX Rule 10 CPC, the other provisions of

Order XXX would be applicable to a proprietary concern and that in view of Rule 4 of Order XXX the suit filed by the respondents without impleading the legal representatives of A.C. Basu, the Proprietor of Ashok Transport Agency was maintainable.

6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case.

7. In the present case A.C. Basu, Proprietor of Ashok Transport Agency, had died before the date of the institution of the suit and on the date of the institution of the suit, the proprietary concern was not in existence. Only the legal representatives of A.C. Basu could be sued with regard to any cause of action arising against A.C. Basu in connection with the proprietary business. We find it difficult to understand how the provisions of Rule 4 Order XXX CPC, could be extended to such a case.

8. Shri Vikas Singh has also urged that actually the rent was being paid by the Manager and, therefore, the Manager can be treated as a tenant. There is no basis for holding that the Manager was the tenant because admittedly the tenancy was taken in the name of Ashok Transport Agency and rent was also paid in the name of Ashok Transport Agency. It cannot, therefore, be said that the Manager had taken the premises in his own name and there was tenancy of the premises.

9. In the circumstances, we are unable to uphold the impugned judgment of the High Court. In our opinion, the executing court has rightly taken the view that the suit having been filed against the dead person, the decree was a nullity and could not be executed. The appeal is accordingly allowed, the impugned judgment of the High Court is set aside and the order passed by the executing court is restored. No order as to costs.