

(2016) 07 DEL CK 0188

In the Delhi High Court

Case No : RFA No. 144 of 2016 and CM No. 9284 of 2016

Anil Kumar

APPELLANT

Vs

Anuradha Singh

RESPONDENT

Date of Decision : 22-07-2016

Acts Referred:

Limitation Act, 1963 — Article 3
Partnership Act, 1932 — Section 69

Citation : (2016) 9 ADDelhi 213 : (2016) 167 AIC 726 : (2016) 232 DLT 150

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Mr. Vijay K. Gupta and Mr. Mehul Gupta, Advocates, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—;This first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the judgment and decree dated 9th September, 2013 of the Court of Additional District Judge (ADJ)-1 (South), Saket Courts, New Delhi of dismissal of Suit No.232/2013 filed by the appellant/plaintiff on 23rd May, 2011 for recovery of Rs.18,28,957.70 paise from the respondent/defendant.

2. It is the case of the appellant/plaintiff (i) that he is the partner of the firm known under the name and style of M/s Home Concepts; (ii) that the said firm M/s Home Concepts has been doing the business of manufacturing and exporting the home furnishings and made ups; (iii) that a copy of the Partnership Deed is filed along with the plaint; (iv) that in the year 2003, the respondent/defendant approached the appellant/plaintiff at the business place with foreign buyers; (v) that the respondent/defendant is the commission agent between the appellant/plaintiff and his buyers; (vi) that it was decided between the appellant/plaintiff and the respondent/defendant that the respondent/defendant will provide buyers to the appellant/plaintiff and the respondent/defendant will charge commission @

5% on total sale from the appellant/plaintiff; (vii) that the respondent/defendant started charging 5% commission on total sale and the appellant/plaintiff used to pay 5% commission on total sale to the respondent/defendant from time to time; (viii) that as such relationship grew, the appellant/plaintiff also issued cheques in advance; (ix) that during the business period of 2004-2008, as per the statement of account maintained by the appellant/plaintiff, the total business/sale of approximately Rs.12,02,89,642.97 paise was done with the buyers provided by the respondent/defendant and 5% commission of the respondent/defendant thereon amounts to Rs.60,14,482.13 paise including TDS which was to be paid by the appellant/plaintiff to the respondent/defendant; (x) that as per the said account, a sum of Rs.18,28,957.70 paise inclusive of interest upto 11th May, 2011 is due from the respondent/defendant to the appellant/plaintiff; (xi) that in the year 2007-2008, the respondent/defendant's buyers stopped business with the respondent/defendant and thereafter the respondent/defendant did not give any order to the appellant/plaintiff; (xii) that though the appellant/plaintiff asked the respondent/defendant several times to settle the money matters and to return the excess amount received but the respondent/defendant "did not return the said cheques" of advance payment and did not settle the account; (xiii) that on the contrary the respondent/defendant misused the cheques and filed false complaint under Section 138 of the Negotiable Instruments Act, 1881 to cause harassment to the appellant/plaintiff; (xiv) that during the cross-examination on 27th July, 2009 in one of such cases bearing No.651-652/2008, the authorised representative of the respondent/defendant admitted that Rs.55,09,846.50 paise had been received by the respondent/defendant from the appellant/plaintiff.

3. This appeal came up first before this Court on 14th March, 2016, when the following order was passing:

"3. The appeal impugns a judgment and decree of dismissal of a suit for recovery of money filed by the appellant consequent to rejection of the plaint in view of Section 69 of the Indian Partnership Act, 1932.

4. Though the appellant/plaintiff has also appealed against the subsequent order of dismissal of an application for review filed by the appellant/plaintiff but as per Order 47, Rule 7 of the Civil Procedure Code, 1908 (CPC), no appeal lies against an order rejecting an application for review.

5. The appeal insofar as against the judgment of dismissal consequent to rejection of plaint is concerned, is accompanied with an application for condonation of 838 days delay in filing thereof.

6. The appellant instituted the suit:

(i) as a partner of M/s Home Concepts;

(ii) pleadings that the respondent/defendant was working as a buying agent of the partnership firm M/s Home Concepts;

(iii) that during the business period of 2004 to 2008 commission of Rs.60,14,482.13 paise was due to the respondent/defendant but payments were made to the respondent/defendant in excess and the suit filed was for recovery of the excess amount.

7. The learned Additional District Judge (ADJ) after issuing summons of the suit, on the application of the respondent/defendant under Order 7, Rule 11 of the CPC rejected the plaint observing that "it is admitted by the learned counsel for plaintiff that the suit has been filed by a partner on behalf of a firm which was unregistered at the time of filing of the suit. Although the firm has been registered subsequently, the present plaint is liable to be rejected in view of Section 69 of Indian Partnership Act and is accordingly rejected."

8. It is the contention of the counsel for the appellant/plaintiff that the order of rejection of the plaint is bad because the claim in the suit being for amount paid to the respondent/defendant in excess, cannot be said to be a suit to enforce a right arising from a contract within the meaning of Section 69(1) & (2) of the Act. It is argued that the appellant/plaintiff was not enforcing any right arising from a contract but a right under the common law to recover excess payment made to the respondent/defendant.

9. The counsel for the appellant/plaintiff however admits that to determine whether that any excess payment has been made, the contract will have to be necessarily gone into to determine what was the payment due thereunder. He however still contends that since the money sought to be recover is de hors the contract, Section 69 of the Act was not required to be complied with. Reliance in this regard is placed on my judgment in State Bank of India v. Rajesh Chandra 227 (2016) DLT 110 where in para 19 it has been held that the bar on Section 69 does not apply to enforcement of statutory and common law rights.

10. I am however of the view that if it were to be held that even for filing suit against third party with whom the partnership firm has a contractual relationship, registration of the firm under Section 69 of the Act is not to be insisted upon if as per the averments in the plaint the claim though arising out of a contractual relationship is with respect to something done or not done by the third party in terms of the agreement, the same would negate Section 69 of the Act, considerably reducing the legislative intent. I am further of the view that as long as the matter is arising out of contractual relationship as is pleaded in the plaint in the present case, the bar of Section 69 of the Act would operate.

11. As far as reference to Rajesh Chandra supra is concerned, the claim therein was found to have been made not by a partnership and to be for enforcement of a right to realise the property of a dissolved firm.

12. Though it is the contention of the appellant herein also that the partnership of M/s Home Concepts stood dissolved and the registration obtained subsequently was another firm in the same firm (sic for name) but admittedly there is no pleading of the firm having been dissolved.

13. It is settled principles that the application under Order 7, Rule 11 CPC has to be adjudicated on the averments as contained in the plaint alone.

14. The counsel for the appellant seeks adjournment to consider.

15. List on 1st April, 2016."

4. Thereafter on 1st April, 2016, the following order was passing:

"1. This order is in continuation of the earlier order dated 14th March, 2016.

2. The counsel for the appellant instead of pursuing the argument which was raise on the last date of hearing has today with reference to M/s Raptakos Brett & Co. Ltd. v. Ganesh Property (1998) 7 SCC 184 contended that the subsequent registration of the partnership firm would make the suit, which was not maintainable on the date of institution, maintainable. Reference is particularly invited to para 32 of the judgment.

3. However a complete reading of the said paragraph shows that though the Supreme Court found some merit in a similar contention raise before it and observed that the earlier decision of the Supreme Court in Shreeram Finance Corporation v. Yasin Khan (1989) 3 SCR 484 holding the same to be not possible or may require a relook but neither proceeded to express any final opinion on the matter nor deemed it proper to refer the matter to a larger bench.

4. As far as this Court is concerned, will remain bound by the dicta of the Supreme Court in Shreeram Finance Corporation supra.

5. The counsel for the appellant seeks further time to research.

6. List on 10th May, 2016."

5. On 10th May, 2016, on the request of the counsel for the appellant/plaintiff, the matter was adjourned to 31st May, 2016 when the counsel for the appellant/plaintiff was further heard and order reserved.

6. On 31st May, 2016, the counsel for the appellant/plaintiff drew attention to M/s. Haldiram Bhujawala v. M/s Anand Kumar Deepak Kumar (2000) 3 SCC 250 where it was held that Section 69(2) of the Partnership Act, 1932 is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm and if the reference to such contract is only as a historical fact and the relief claimed does not arise from any contract with the defendant entered into in the course of the plaintiff firm's business with the defendant but is based on something else, such a suit would be maintainable and Section 69(2) would not be a bar thereto.

7. I am afraid the said judgment does not advance the case of the appellant/plaintiff any further. The claim in the suit filed by the appellant/plaintiff, and against rejection of plaint wherein this appeal has been filed, as per averments in the plaint clearly arises from the contract claimed by the appellant/plaintiff with the respondent/defendant and the claim in the suit is for refund of payment

made in excess under the contract.

8. Mention may also be made of the latter judgment in *Purushottam v. Shivraj Fine Art Litho Works* (2007) 15 SCC 58 reiterating that in view of the clear provision of Section 69 it is not possible to subscribe to the view that subsequent registration of the firm may cure the initial defect, because the proceedings were ab initio defective as they could not have been instituted since the firm was not a registered firm on the date of institution of the proceedings. It was further held that the bar of Section 69(2) must apply to a suit for enforcement of a right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party.

9. Mention may also be made of *Sai Nath Enterprises v. North Delhi Municipal Corporation* to the same effect.

10. I am therefore of the view that there is no error in the order of the learned ADJ of rejection of the plaint.

11. Not only so, though owing to the plaint having been rejected under Section 69(2) of the Partnership Act, the learned ADJ did not consider the aspect of limitation but from a reading of the plaint, it also appears that the suit claim was barred by time.

12. As per the averments in the plaint filed on 23rd May, 2011, "in year 2007-2008, the defendant's buyers stopped business with the defendant and thereafter the defendant did not give any order to the plaintiff". Though the appellant/plaintiff did not plead the date of the last order or the date of the last payment but the reference to "2007-2008" would ordinarily indicate 1st April, 2007 to 31st March, 2008. The suit filed on 23rd May, 2011 for excess amount paid prior to 31st March, 2008, would be barred by time.

13. The appellant/plaintiff in the cause of action paragraph has however pleaded that the suit was within limitation as the last transaction between the appellant/plaintiff and the respondent/defendant in the current account was continued till 11th June, 2008. However, the appellant/plaintiff has not pleaded the particulars of such transaction. I also do not find any plea in the plaint of the account between the appellant/plaintiff and the respondent/defendant been a mutual, open and current account having reciprocal demands within the meaning of Article 1 of the Schedule to the Limitation Act, 1963. Else, the limitation for a suit for recovery of excess payment made by the appellant/plaintiff as principal, against the respondent/defendant as agent, under Article 3 of the Schedule to the Limitation Act is three years commencing from the date when the account is, during the continuance of the agency, demanded, refused or where no such demand is made, when the agency terminates. It prima facie appears that the suit from which this appeal arises was filed merely as a counter-blast to the complaints of the offence under the Negotiable Instruments Act filed by the respondent/defendant against the appellant/plaintiff.

14. Thus though it also appears that the suit was also barred by time but I refrain from giving final opinion thereon. Suffice it is to state that the suit appears to be deadwood and of which there is no possibility of success.

15. Not only so, yet further, as aforesaid, the appeal is accompanied with an application for condonation of delay of 838 days in filing thereof. The reason given for condonation of delay is that the appellant/plaintiff was pursuing a review petition under a bona fide belief that the order of rejection of plaint would be recalled but which review petition was dismissed on 6th February, 2016.

16. A perusal of the order dated 6th February, 2016 of the learned ADJ however shows that the review petition itself was filed with an application for condonation of delay of 124 days in filing thereof. The learned ADJ, by a detailed order, did not find any sufficient cause for the delay of 124 days in filing the review petition and consequently dismissed the application for condonation of delay and the review petition.

17. The aforesaid also shows extreme laxity on the part of the appellant/plaintiff. I have perused the order dated 6th February, 2016 also and I do not also find any reason for interference in the order of the learned ADJ refusing to condone the delay. Rather, the appellant/plaintiff ought not to have taken a risk, particularly when the review petition was also delayed and has thus not disclosed any sufficient cause for condonation of long delay of 838 days in filing this appeal.

18. For all the aforesaid reasons, no merit is found in the appeal which is dismissed.

19. No costs.

20. Decree sheet be drawn up.