

(1959) 08 KL CK 0021
In the High Court Of Kerala
Case No : A.S. No. 99 of 1955 (M)

Chunilal Bhagwandas Gandhi

APPELLANT

Vs

Ahamed Rowther

RESPONDENT

Date of Decision : 07-08-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1, Order 6 Rule 17
Partnership Act, 1932 — Section 4 , 42

Citation : AIR 1960 Ker 156

Hon'ble Judges : S. Velu Pillai, J;M.S. Menon, J

Bench : Division Bench

Advocate : K. Kuttikrishna Menon, V. Balakrishna Eradi and P. Ramamoorthy, for the Appellant; D.A. Krishna Warriar, for the Respondent

Final Decision : Allowed

Judgement

Velu Pillai, J.—The suit out of which this appeal arises, was for the recovery of damages for breach of contract, to supply 1,000 bags of cotton seeds, and was instituted ostensibly on behalf of a partnership, described in the cause title in the plaint, as "M.A. Ahamed Rowther and Brother, by partner M.A. Noor Row ther". The defendant was described as a firm, represented by two partners whose names were set out. The defendant contended inter alia, that the partnership being unregistered, the suit is not maintainable by reason of Section 69(2) of the Partnership Act, 1932.

2. The partnership aforesaid, originally consisted of M.A. Ahamed Rowther and his brother Noor Rowther. After the death of the former in the year 1937, his eldest son Mohamad Moideen Rowther, was admitted to the partnership in December 1940. The partnership was registered under certificate Ext. A 24 dated 8-12-1941. During the pendency of the suit, Noor Rowther died in the year 1953, and Abdul Rahiman Rowther, another son of deceased M.A. Ahmed Rowther, applied for his name being entered on the record as the partner of "M.A. Ahamed Rowther and Brother" and he supported his application by on affidavit, in which

he affirmed, that not only then, but also on the date of the suit, he was the other partner in the firm.

The application was ordered and his name was brought on record in the place of deceased Noor Rowther. At the trial P.W. 1, a brother of Ahamed Rowther, and the manager of the firm, gave evidence, that after the death of Ahamed Rowther, his son presumably Mohamed Moideen Rowther and Noor Rowther constituted the partnership, and that after Noor Rowther's death in July, 1953, his son and Ahamed Rowther's son were the partners.

It was never his case then, that there was an interregnum as seems to be the case of the plaintiff now, when there was no partnership, and Noot Rowther was the sole proprietor. In dealing with issue I relating to the maintainability of the suit, the learned Subordinate Judge also seemed to think, on the arguments addressed to him, that the partnership was subsisting at the date of the suit, but he did not enter a decisive finding on the issue as "the defen dant did not press this issue".

A decree was ultimately passed against the assets of the defendant firm, and against its two partners personally. This appeal was preferred by the defendant firm represented by the two partners, named specifically and as described in the plaint.

3. When this appeal came on for hearing before another Bench of this court, it was noticed, that the objection raised u/s 69 (2) of the Partnership Act had not been disposed of by the Subordinate Judge; it was then felt, that in law, the point ought not to be left undecided, whether the defendant pressed the contention or not. The plaintiff's counsel then wanted an opportunity to adduce further evidence to prove the fact of registration; accordingly, in calling for a finding, both Parties were allowed an opportunity to adduce their evidence.

4. After the case came on again before the Subordinate Judge, the plaintiff was called upon to disclose the names and particulars of the partners, when a statement was filed, explaining that in May, 1948, when the cause of action for the suit arose, and in August, 1948, when the suit was instituted, Noor Rowdier was the sole proprietor of the business called "M.A. Ahantcd Rowther and Brother"; in effect, the stand then taken was, that at the time the suit was instituted there was no firm. The learned Subordinate Judge also considered the evidence adduced before him, and came to the conclusion which he formulated in these terms :

"Thus, in 1948 there was no registered partnership firm as contemplated in the Indian Partnership Act and the person suing was not shown in the Register of Firms as a partner in the firm. I accordingly find that the plaintiff's firm was not registered, according to the Indian Partnership Act in 1948".

5. After the above finding was returned, the plaintiff preferred C.M.P. 3402 of 1958 in this court for an amendment of the plaint, to substitute the word

"proprietor" for the word "partner" in the cause title, and the word "plaintiff" for the word "plaintiffs" wherever it occurred, in the plaint. The case now presented before us by counsel on behalf of the plaintiff was that after Mohamed Moideen Rowther was admitted to the partnership in December, 1940, as stated above he retired from the partnership on 22-3-1945, and thereafter there was no partnership as such till 14-1-1949.

It may be remembered, that the suit was filed in August, 1948. After the written statement was filed in December, 1948, objecting to the maintainability of the suit u/s 69 (2) of the Partnership Act, Abdul Rahiman Rowther referred to above, was admitted to the partnership with Noor Rowther on 14-1-1949. It is not necessary to relate the vicissitudes through which the partnership passed in later years, the crucial date being that on which the suit was instituted.

The application for amendment was supported by an affidavit by the plaintiff's advocate in which he explained, that at the time of drafting the plaint, he was not instructed that Noor Rowther was the sole proprietor of the business, and that he therefore mistakenly supposed, that the suit was by the partnership represented by its partner, Noor Rowther. This is to ignore what had taken place after the plaint was filed.

6. On the face of the plaint, there is no doubt, that the suit was instituted on behalf of and in the name of the firm "M.A. Ahamed Rowther and Brother" by name, the word "plaintiffs" being employed in several paragraphs of the plaint. All that transpired subsequently, from the time that Abdul Rahiman Rowther filed the affidavit till after the remand was ordered was confirmatory of this. After instituting the suit on behalf of the firm the attempt has been to maintain the stand, to over-reach the opposite party and also to mislead the court.

It was only when this attempt failed and the plaintiff was confronted with a situation from which there was no escape, that the new case was set out, supported by the advocate's affidavit, which in itself affords no valid ground. As observed, he has only sworn in the affidavit, that he was not instructed that Noor Rowther was the sole proprietor of the concern at the time; even so, Noor Rowther, who presumably must have supplied the instruction, ought to have known, if that were the fact, that he was the sole proprietor and his failure to instruct counsel on so obvious a point, cannot be of any avail.

The application for amendment has thus come before us, on the top of a series of false statements by way of false averments in the plaint and in the affidavit, and of perjured testimony, and after an opportunity for a further trial of the issue was obtained but was abandoned finally. We think, that it is too much for the plaintiff now to ask us, to shut our eyes to the antecedent history and to order the amendment, for no better reasons than that a substantial interest is involved in the suit.

To do so, we venture to think, would be to hold a premium for false affidavits and perjured testimony, and we desist from doing so. Cases were cited to us, in

which amendment applications were allowed even at a very late stage of the litigation; but, on examination, these are seen to be cases of straightforward applications for amendment, if we may say so which could be ordered in the interests of justice. We hold that the application for amendment ought not to be allowed.

7. It was then contended, that the retirement of Mohamed Moideen Rowther from the partnership on 22-3-1945, did not result in the dissolution of the partnership, under the provisions of the Indian Partnership Act, 1932. It was held, in *Maddi Sudarsanam and Others Vs. Borogu Viswanadham Brothers and Others*, that there being no provision in the Partnership Act corresponding to Section 253(7) of the Indian Contract Act which has been superseded, the retirement of a partner could not bring about its dissolution; that was a case of a partnership which consisted of five partners on the retirement of one of whom, the remaining members could still carry on as partners.

But not so here, where after the retirement of Mahamad Moideen Rowther from the partnership. Noor Rowther was left to himself. To say, that what was thus left was a "partnership" is opposed to the very concept of partnership, and to its definition in the Partnership Act. The case cited above, and relied on, has only held, that though the retirement of a partner, just as the death of a partner, is a fact, the retirement by itself has no effect upon the continued existence of the partnership, provided that, of those who continued and did not retire, a partnership could be predicated.

We therefore think, that on the retirement of Mohamad Moideen Rowther, Noor Rowther alone could not constitute a partnership and it ceased to exist; therefore at the date of the suit, there was no partnership. On the showing of the plaintiff it must be held, that the suit was instituted on behalf of a partnership which had no existence; if so apart from the application of Section 69 (2) of the Partnership Act, the suit is liable to be dismissed on that ground.

8. Lastly, it was contended on behalf of the plaintiff, that this appeal has abated so far as one of the appellants, Chunilal Bhagwandas Gandhi, who died on 15-11-1956, is concerned. His death would have no relevance so far as the right of the defendant-firm to carry on the appeal is concerned by reason of Order 30, Rule 4, C. P. C. According to the learned counsel, the decree against this partner personally, passed by the lower court would stand.

The learned counsel for the appellant Shri K. Kuttikrishna Menon replied, that this appeal was preferred by the defendant-firm, represented by the two partners specifically named in the plaint and in the appeal memorandum, and not by the partners individually. All that we have to do, therefore is to allow the appeal, by dismissing the suit against the defendant-firm. It is not necessary for us in this judgment to decide, what is the effect of the failure to implead the legal representatives of Chunilal Bhagwandas Gandhi; we also express no opinion, regarding the effect of the dismissal of the suit against the firm on the personal

decree granted by the Subordinate Judge. It is for the parties to raise these questions in appropriate proceedings.

9. The result is, that we allow the appeal in favour of the defendant-firm dismissing the suit against it, with costs in both the courts, realisable from Abdul Rahiman Rowther, recorded as the second plaintiff in the decree and the second respondent in the appeal memorandum, who has resisted this appeal.