
(2012) 03 KL CK 0011
In the High Court Of Kerala
Case No : O.P. (C) No. 631 of 2012

Kerala State Civil Supplies Corporation	APPELLANT
Vs	
A.V.K. Traders	RESPONDENT

Date of Decision : 29-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 30, Order 30 Rule 30, Order 30 Rule 4, Order 30 Rule 4(1)
Constitution of India, 1950 — Article 227
Contract Act, 1872 — Section 45
Partnership Act, 1932 — Section 4, 69(2)

Citation : (2013) 1 RCR(Civil) 406

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : Molly Jacob, for the Appellant; N.M. Madhu, for the Respondent

Judgement

S.S. Satheesachandran, J.—Original Petition has been filed seeking the following reliefs:

- (a) To call for the records leading to Ext. P-11, P11(a), P-11(b) and P-12 and set aside the same.
- (b) To declare that the respondent/plaintiff is not entitled to continue the suit as a Proprietary concern.
- (c) To direct the court below to frame additional issues as prayed for in Ext. P-4.
- (d) To issue any other appropriate order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

Petitioner is the defendant in O.S. No. 39/08 on the file of the Sub Court, Ernakulam, Ext. P-1 is the copy of the plaint in the above suit. Suit is for money for various claims stated in Ext. P-1 plaint, allegedly, arising from the business transactions of the plaintiff, a registered firm with the defendant, a statutory Corporation over the supply of goods to the latter. The defendant resisted the

suit claim filing Ext. P-2 written statement. The trial of the case is in progress with one among the partners of the plaintiff firm examined as PW. 1. After the examination of the aforesaid partner of the firm, the plaintiff moved two applications, Exts. P-5 and P-6, the former for amendment of the plaint and the latter for recalling the witness (PW. 1) for further examination. The plaintiff firm consisted of two partners and its Managing Partner, father of the other partner, has passed away during the pendency of the suit and the only other legal heir of that deceased partner, sister of the remaining partner, is not interested to be a partner of the firm, and, as per the terms of the deed of partnership, and also under law, the firm is dissolved, was the case canvassed for amendment of the plaint, altering its cause title to bring about changes that the plaintiff is a proprietary concern and, in the body of the plaint to incorporate a statement as to the dissolution of the firm on the death of its Managing Partner. Ext. P-6 application, was moved for recalling and further examining PW. 1 stating that certain documents produced require to be let in evidence by further examination of that witness. Another application was moved by the surviving partner of the erstwhile firm, Ext. P-8, to grant leave to him to continue with the prosecution of the above suit on behalf of the plaintiff as its proprietor. The defendant filed objection to all the above three applications. Ext. P-9 is the counter affidavit filed to the amendment application, Ext. P-10, the objection to the petition for recalling PW. 1 and Ext. P-10(a), the objection to the leave applied for by the remaining partner to prosecute the suit on behalf of the plaintiff after altering it as a proprietary concern.

2. The petitioner/defendant also moved another application, Ext. P-7 for framing additional issues in the suit contending that such additional issues suggested arise on the pleadings, but they have been omitted to be framed by the court. To the above application of the defendant Ext. P-10(b) objections were filed by the plaintiff contending that framing of additional issues, as canvassed for, does not arise for consideration.

3. The learned Sub Judge vide Ext. P11 common order allowed Exts. P-5, P-6 and P-8 applications moved by the plaintiff. Ext. P-7 application filed by the defendant for framing additional issues was turned down vide Ext. P-12 order. Though a common order has been passed over the three applications (Exts. P-5, P-6 and P-8) moved by the plaintiff, it is produced, separately, marking them as Exts. P-11, P-11(a) and P-11(b) in the original petition. Propriety, correctness and legality of Ext. P11 order allowing the three applications moved by the plaintiff and also dismissal of the application moved by the defendant for framing additional issues in the suit vide Ext. P-12 order are assailed in this Original Petition invoking the visitorial jurisdiction vested with this court under Art. 227 of the Constitution of India.

4. After hearing the counsel on both sides at length, who have canvassed their respective case, I find, the question to be considered in this Original Petition with respect to the challenges made against Exts. P-11 and P-12 lie within a very

narrow campus, for which a detailed narration as to the rival case presented by the parties to the suit or other connected legal issues advanced to sustain or oppose such orders is not called for. Suffice to state that the suit was filed by a firm, which admittedly had business transactions with the defendant, for realisation of the various claims over such transactions. The firm consisted of two partners, and the Managing Partner passed away during the pendency of the suit. Advancing a case that the only remaining other legal heir of the deceased Managing Partner has not expressed any interest to join the firm and as such, on the death of the Managing Partner, the firm was dissolved, the remaining partner has moved the applications Exts. P-5, P-6 and P-8 for the reliefs aforementioned. In fact, by moving such applications the suit filed by the firm was sought to be amended as one by a proprietary concern by the same name of the plaintiff. The fact that even on the admitted case of the parties, the transactions were between the firm and the defendant, and not with any proprietary concern by the same name or otherwise was not taken note of by the learned Sub Judge to examine whether the character of the suit could be drastically altered by allowing the amendment applied for, passing Ext. P-11 common order. That question, in the given facts of the case, is beside the point, as it is well settled that on the death of one of the partners, even if the firm consisted of only two members, the suit already instituted and pending on the file of the court does not warrant impleadment of the legal heirs of the deceased partner for its continuation and there is no question of any abatement on account of the death of such deceased partner. O. XXX R. 4 of the CPC (for short "the Code") insulates and in fact shields a suit by a firm and the death of a partner thereof during its pendency would not cause impediment to its prosecution as S. 45 of the Contract Act has no impact in the prosecution of such suit claim.

5. Section 45 of the Indian Contract Act, 1872 reads thus:

Devolution of joint rights:- When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

But the rigour imposed under the aforesaid Section is diluted so far as a firm, is concerned when it sue or be sued in its firm name to which a different procedure as covered under O. XXX R. 4(1) of the Code is applicable. That Rule reads thus:

Right of suit on death of partner:- (1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(sub-rule (2) not relevant, and hence omitted.)

The term partnership is defined in S. 4 of Indian Partnership Act, 1932 thus:

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm" and the name under which their business is carried on is called the "firm name".

As distinct from partnership, which is meant the abstract relationship existing between several partners the word "firm" means concrete legal entity composed of the several members. True, the "firm" is not a juridical person and it is impossible to visualise it apart from the members constituting it. Though it cannot be recognised as an entity, it is often regarded as a "convenient symbol" or shorthand form for collectively designating all the partners regarded as joint creditors or debtors. O. XXX of the Code permits a firm to sue or be sued in its name. Though the law refuses to regard a "firm" as a distinct legal persona, it, for all practical purposes of contracting suing and being sued, the firm is regarded as a quasi independent entity. There was conflict of judicial opinion as to what would happen when one among the partners of the firm died whether before the institution or during the pendency of any suit, when the firm is the party suing or it is being sued in its name. Having regard to S. 45 of the Indian Contract Act, 1872, one view was that such a suit is not maintainable and the other view held that the right to be enforced being that of the firm, the members constituting it can sue or be sued either in their own name or in the firm name. S. 45 of the Contract Act interdicts one of the two joint promises from suing alone, without the juncture of the other promises. Order XXX of the Code provides a modification of that Section, so far as the right to sue and be sued in the case of joint promises, provided such joint promises are partners and the suit is in the name of the partnership firm. The Bombay High Court in *Godavari Pravara Canal Co-operative Purchase and Sale Union Ltd. Vs. Krishnarao and Another*, , relying on the Supreme Court decision in *Purushottam Umedbhai and Co. Vs. Manilal and Sons*, and also two decisions rendered by the High Court of Rajasthan in *Dharamdas Gokaldas v. Krishan Chand*, (AIR 1966 Punjab 40) and *Mohamed Valli Patel Vs. Western Indian Oil Distributing Co. Ltd.*, reviewing the conflicting decisions rendered by the various High Courts, has reached the conclusion that Order XXX of the Code is by itself a procedural enactment dealing with suit by or against a firm carrying on business in its name. In the above decision, it has been observed thus:

The rules and sub-rules under Order 30 are indicative that it is well-known that the provisions of this Order were introduced to avoid the consequences and conflicts raised at the behest of S. 45 of the Contract Act. Though a firm is not a juridical person like a body corporate, it is enabled by virtue of this Order to sue and defend suits in the manner provided. Once it is shown that the suit is

brought by the firm, it follows that it is brought in the name of all the partners constituting the firm "X" with the sort of relationship among the partners available under the Indian Partnership Act. A partnership cannot be equated with the case of some joint promises as contemplated by S. 45 of the Indian Contract Act. Every partner of the firm is capable of representing the entire collocation called the firm. He has a right, subject to any agreement between them, not only to represent the business of the firm, but to enforce the promises for and on behalf of the firm. That is on the footing that he acts for all and is an agent as such. Therefore, a surviving partner need not for the enforcement of the rights arising out of the firm-business seek the aid of the representatives of the deceased partner for he represents the business of the firm as such.

This view has found approval by the Apex Court in *Sohan Lal and Others Vs. Amin Chand and Sons and Others*, . The Apex Court has held thus:

Order 30, R. 4 of the CPC provides that notwithstanding anything contained in S. 45 of the Indian Contract Act, 1872, two or more persons may sue or be sued in the name of a firm under the foregoing provisions and if any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

In *Upper India Cable Co. and Others Vs. Bal Kishan*, in which an appeal was preferred challenging the dismissal of the appeal filed by a firm and partners as against a decree of eviction was dismissed by the High Court as abated since the partners of the firm had passed away during the pendency of such appeal, but their legal heirs were not substituted, the Apex Court, advertent to O. XXX R. 4 held that "the question of substituting heirs and legal representatives of the two proper formal parties does not arise and the death has no impact on the proceeding". Allowing the appeal, the order of the High Court was quashed and the case was remitted for disposal of the appeal on merits. In *Anokhe Lal Vs. Radhamohan Bansal and others*, , the Apex Court has pointed out that "sub-r. (1) of R. 4 of O. 30 has been prescribed to resolve the said conflict by diluting the rigour contained in the rule embodied in S. 45 of the Contract Act in relation to a suit involving a partnership firm". That view has been reiterated in *Brij Kishore Sharma and Another Vs. Ram Singh and Sons and Others*, stating thus:

By operation of sub-r. (1) of R. 4 of O. XXX, despite the embargo under S. 45 of the Indian Contract Act, it is not necessary that the legal representative of the deceased partner who dies whether before institution of the proceedings or during the pendency of the proceedings, should be substituted as a co-nominee party plaintiff/defendant to the suit.

When the above be the settled position of law, the application for amendment moved by the surviving partner to alter the cause title to convert the suit as one by the proprietary concern with him as its "proprietor", which was instituted in the name of a firm, for the reason of the death of the Managing Partner and also

non-interested ness of the legal heirs of that partner to come on record, has no basis or merit at all, as the death of the Managing Partner in no way affects the continuance of the suit instituted in the "firm name", in view of the protection afforded under Order XXX R. 4 of the Code.

6. When such be the case, allowing of Exts. P-6 and P-8 applications by the learned Sub Judge under Ext. P-11 common order cannot at all be sustained. The remaining partner of the firm who was examined as PW. 1 in the case, even without coming on record in his own name is competent to prosecute the suit, which has been instituted in the firm name against the defendant. There is no question of altering and amending the plaintiff firm as a proprietary concern as that would alter the nature and character of the suit, which cannot be permitted. No further dilation over that aspect is called for in the present case other than pointing out that the indefeasible rights of the legal heirs of a deceased partner in a suit filed by a firm are insulated under sub-r. (2) of R. 4 of Order XXX of the Code. So far as Ext. P-6 application moved for recalling PW.-1 for further examination for the purpose of proving some documents. I find no reason to interfere with the discretion exercised by the learned Sub Judge, having regard to the facts involved in the case. Allowing of that application under Ext. P-11 order, therefore, does not call for any interference. Now, coming to the dismissal of Ext. P-7 application moved by the defendant for framing of additional issues vide Ext. P-12 order, it is seen that even in Ext. P-2 written statement, the defendant has challenged the maintainability of the suit. True, a specific plea has not been taken, which was attempted to be projected at a later point of time when evidence was let in that the firm is not a registered one and as such, the suit is not maintainable. The defendant is a statutory corporation and whether it had entered into any business transaction with an unregistered firm for the supply of goods worth lakhs of rupees, is a different matter. Still, having regard to S. 69(2) of the Partnership Act, which interdicts the entertain ability of a suit based on a contract entered with an unregistered firm, challenge raised as to maintainability of the suit, even if the basis thereof has not been specifically pleaded in the written statement cannot be brushed aside by the court as unworthy of consideration. An additional issue on that Question- Is not the suit maintainable-has necessarily to be raised for a proper adjudication and fair disposal of the suit. So much so, Ext. P-7 application of the defendant, partly, in reversal of Ext. P-12 order, to the extent of directing the court below to frame an additional issue as indicated above, has to be allowed. On raising such an additional issue, if the plaintiff apply for leading further evidence, whose evidence alone has commenced by time, the learned Sub Judge shall permit it to do so. Learned counsel for the plaintiff has urged before me that during the pendency of the suit, the firm has got itself registered and that would suffice the requirement covered by S. 69(2) of the Contract Act. If that be so, that is also a matter to be considered by the court below in determining the maintainability of the suit.

In the result, Ext. P-11 order to the extent of allowing Ext. P-8 application alone

will stand affirmed, and the order allowing Exts. P-5 and P6 applications shall stand set aside with those applications dismissed. Ext. P-7 application to the extent, as indicated, directing the framing of an additional issue on the maintainability of the suit shall stand allowed in reversal and modification of Ext. P-12 order.

Original Petition is disposed of with the above orders, directing the court below to expedite the trial of the suit and dispose it of at the earliest, in accordance with law.