(1997) 11 BOM CK 0039

In the Bombay High Court

Case No : Notice of Motion No. 3159 of 1995 in Suit No. 2851 of 1995

Kishore Kumar B. Zaveri and another — APPELLANT

Vs

Navinchandra H. Somaiya and others — RESPONDENT

Date of Decision : 17-11-1997

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Partnership Act, 1932 — Section 69(2), 69(2A)

Citation : AIR 1998 Bom 153 : (1998) 1 ALLMR 579 : (1998) 4 BomCR 75 : (1998) 2 BOMLR 82

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

Bench : Single Bench

Advocate : Ravi Kadam, instructed by M/s. N.N. Vaishnava and Co, for the Appellant; H.V. Gala and Ms. Zena Daruwalla, instructed by . Wadia Gandhi, for the Respondent

Judgement

S.S. Nijjar, J.—This suit has been filed by the plaintiffs for recovery of a sum of Rs. 4,83,480/- as per the particulars of claim Ex. 1 to the plaint; with further interest @ 24% p.a. from the defendant No. 1. An injunction is also sought against the defendants No. 1 and 2 restraining them from collecting rent payable to the plaintiffs by the defendant No, 3. A permanent injunction is sought restraining the defendant No. 3 from paying the rent payable by them to the plaintiffs in their respective share of 97% to the defendants No. 1 and 2.

2. The Notice of Motion No. 2112 of 1995 was taken out by the plaintiffs for interim injunction restraining the defendants No. 1 and 2 from collecting the rent payable to the plaintiffs by the defendant No. 3. An order of injunction was also sought against the defendant No. 3 restraining him from paying the rent by them to the plaintiffs in respect of the share of the plaintiffs. This Notice of Motion came up for hearing on 3rd August, 1995. Ad interim relief in terms of prayer clause (a) of the Notice of Motion was granted. The aforesaid order was clarified by the order dated 9th October, 1995 enabling the Bank to pay the rent separately according to their share, as done by the Bank in the past. The present

Notice of Motion has been taken out by the defendants with a prayer that the suit be dismissed as being barred u/s 69(2-A) of the Indian Partnership Act. In the event of prayer (a) not being granted, it is prayed that the plaint be returned to the plaintiffs for presentation to the proper Court, as the suit is between a landlord and a tenant, relates to recovery of rent and raises claims and questions arising under the Bombay Rent Act. It is also prayed that the aforesaid issue be decided as a preliminary issue.

3. An affidavit in support of the Notice of Motion has been filed. It is stated that the suit is filed on contractual rights between the plaintiffs and the defendants No. 1 and 2 on the one hand constituting the partnership firm M/s. Navinchandra H. Somaiya and the third defendant on the other hand. The suit claim by the plaintiffs against the defendants No. 1 and 2 is to enforce an alleged power to realise the property of the dissolved partnership firm. The said firm is admittedly not registered. The suit is instituted by the plaintiffs suing as partners of the dissolved firm against the defendants No. 1 and 2, who had been partners in the said firm. The names of the plaintiffs have not been shown in the Register of Firms as partners. In the affidavit, the averments made in paras 3, 4, 9 and 11 of the plaint have been reproduced. It is staled that the aforesaid pleadings make it abundantly clear that the suit is barred in view of a the provisions of section 69(2-A) of the Indian Partnership Act, 1932.

4. Mr. Gala has submitted that the suit is liable to be dismissed on account of the operation of the bar as contained u/s 69(2-A) of the Partnership Act. It is also submitted that since the claim against the defendants is about the recovery of rent, the suit is also not maintainable as the issue arises u/s 28 of the Bombay Rent Act. It is submitted by Mr. Gala appearing for the defendants No. 1 and 2 that the provisions of section 69(2-A) raise a mandatory bar against the filing of such suits. It is submitted that the suit is in fact barred u/s 69(2) also. It is submitted that the present suit has been filed by the firm against the defendants No. 1 and 2, who were the partners in the dissolved firm. The suit is also filed against third party, the defendant No. 3. This suit would only be maintainable if the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. Since admittedly, the aforesaid firm was never registered, clearly then the section 69 sub-section (2) raises bar to the maintainability of the said suit. So far as bar u/s 69(2-A) is concerned, it is submitted that the prayer made for the recovery of Rs. 4,83,480/- is on account of the receipt of the rent by the defendants No. 1 and 2 from the defendant No. 3. This rent was being paid and is being paid by the defendant No. 3 as tenant of the property which belonged to the dissolved partnership firm. In fact, until passing of the order of this Court, the amount was being paid to the two plaintiffs and to defendant No. 1 and 2 through the defendants No. 1. The rent was never claimed by any of the parties on the ground that the said property is held by the parties as co-owners. It is further submitted that after the dissolution of the partnership, the parties would necessarily have to be co-owners. Merely because the parties find themselves as co-owners, will not change the nature of

the property which belonged to the dissolved partnership firm. In essence, it is submitted by Mr. Gala that the suit is for the recovery of property which belonged to the dissolved partnership firm. That being so, the suit is clearly barred u/s 69(2-A). On the basis of the prayers made in Clause (b) and (c) of the prayer Clauses, it is submitted that the plaint has to be returned under Rule 283 of the High Court Rules, Original Side, for presentation to the appropriate Court. In support of his submissions, Mr. Gala has relied upon a Division Bench judgment of this Court in 1997 (V) LL.J. 69, Ramniklal Mohanlal Chawda v. Sharad Vasant Kotak & others. Particular reference has been made to the observations In para 4 which are as under :

"4. Section 69(2-A) bars a suit to enforce right for the dissolution of a firm or for accounts of a dissolved firm or to realise the property of a dissolved firm unless two requirements are met viz. (i) that the firm must be a registered firm and (ii) The person suing is or has been shown in the Register of Firms as a partner in the firm. As the section creates a bar to the suit, the requisite conditions will have to be treated as mandatory conditions. Unless these two conditions are fulfilled, there would be a fatal bar to the entire suit and it would be wholly incompetent in a Court of law,"

For the second proposition, the learned Counsel Mr. Gala has relied upon a Single Bench judgment of this Court reported in P.R. Sukeshwala and another Vs. Dr. Devadatta V.S. Kerkar and another, , wherein it is categorically held that this power of returning the plaint can be exercised by the Court at any stage of the proceedings.

5. Mr. Kadam appearing for the plaintiffs has submitted that for the purpose of deciding the preliminary issues, the Court has to take into account only the averments made in the plaint. What is relevant for the determination of the issues for the Court at this stage is to see the frame of the suit. Nothing can be added or subtracted from the plaint. On the basis of the above, it is submitted that neither the bar u/s 69(2) nor section 69(2-A) would be applicable. It is also submitted that the dispute not being a landlord and a tenant dispute, or a dispute about the rent between the landlord and tenant, the provisions of section 28 of the Bombay Rent Act will not apply. It is submitted by Mr. Kadam that a perusal of the various averments in the plaint would clearly show that the suit has been filed on the basis that the plaintiffs No. 1 and 2 on the one hand and the defendants No. 1 and 2 on the other hand, are co-owners of the premises described in para one of the plaint. Relying on the averments made in the plaint, it is submitted that in para 2, it is stated that the parties are co-owners in the said premises to the following extent :

1) Plaintiff No. 1 - 90%

2) Plaintiff No. 2 - 7%

3) Defendant No. 1 - 1%

4) Defendant No. 2 - 1%

5) Late Hariram Narayan Somaiya - 1%

In para 3 it is stated that by a Deed of Dissolution dated 16th June, 1983, unregistered partnership firm was dissolved. The shares in the premises were held as co-owners, in view of the shares specified in the Deed of Dissolution. The fact that the parties are co-owners is reiterated time and again through the plaint. In para 10, it is stated as follows :

"However, after the dissolution of the partnership firm, the mode of payment is bound to be changed, according to the respective shares of the co-owners. The Defendant No. 1 has no right to collect the rent for and on behalf of the plaintiffs. No authority had been given to the defendant No. 1 to collect the rent from the defendant No. 3 for and on behalf of the plaintiffs. Any receipt given the defendant No. 1 to the defendant No. 3 is, therefore, invalid, illegal and not binding on the plaintiffs. Hereto annexed and marked Exhibit ''H'' is a copy of the said letter dated 21st June, 1995 of the Advocate of the defendant No. 1."

In para 11, it is stated as follows :

The plaintiffs state that, as stated hereinabove, the partnership firm was dissolved with effect from 16th June, 1983. After the dissolution, the plaintiffs, the defendants Nos. 1 and 2 and late Shri. Hariram Narayan Somaiya hold the said premises as co-owners thereof, as provided in the Deed of Dissolution in the shares mentioned therein. The plaintiffs state that, after the dissolution of the said partnership firm, no party has a right to collect the rent, for and on behalf of the other co-owners, as they do not have the right of agency, as provided in the Indian Partnership Act. The defendant No. 1 has, therefore, wrongly collected the rent for the months of July, August, September, November, December 1994, January 1995, February, March, April, May and June 1995. The defendant No. 1 has collected a total sum of Rs. 4,40,640/- for and on behalf of the plaintiff No. 1 @ Rs. 44,064/- per month and a sum of Rs. 42,840/- for anil on behalf of the plaintiff No. 2 @ Rs. 4,284/- per month, for the said respective months. The plaintiffs state that the defendant No. 1 has no right to withhold the said amount for any reasons whatsoever."

6. It is submitted by Mr. Kadam that the aforesaid averments make it quite clear that the suit has not been filed by the plaintiffs in the capacity of partners of the dissolved firm. The suit has also not been filed for recovery of property of the dissolved firm. Consequently, it is submitted that the Notice of Motion taken out by the defendants is liable to be dismissed being wholly without merit. Mr. Kadam has also relied on a letter written by the defendant No. 1 on 11th July, 1994. It is mentioned by the defendant No. 1 that the tenanted premises are owned by 5 persons. Their names and percentage of co-ownership are as under :

S.No Amount (Rs.) Date

1. 48.00 7-6-1977

2. 50.00 16-11-1977

3. 126.00 15-4-1978

4. 6.00 21-9-1978

5. 10.00 6-1-1979

6. 15.00 26-2-1979

7. 20.00 25-6-1979

8. 35.00 18-9-1979

9. 20:00 -12-79

10. 20.00 29-4-1980

11. 40.00 25-9-1980

12. 66.00 5-12-1980

13. 28.00

24-3-1981

Total- 484.00

It is also stated that the said premises are owned by the above mentioned parties. The defendant No. 3 was requested to deduct tax u/s 194-I in the case of Shri. K.B. Zaveri only as the amount of rent paid to him exceed Rs. 10,000/-. Relying on the aforesaid letter, it is submitted by Mr. Kadam that clearly the defendant No. 1 cannot now put forward a plea that the property was being treated as property of the dissolved partnership firm. If that was so, then there was no question of splitting up the tax liability of Mr. Zaveri from the others. In any event, it is submitted by Mr. Kadam, that this admission by the defendants is prima facie proof of the fact that the averments made in the plaint have not been made merely to avoid the bar u/s 69(2) and (2-A) of the Act or to bye pass the provisions of section 28 of the Bombay Rent Act.

7. I have considered the submissions made by the Counsel. In order to resolve the controversy, it would be necessary to reproduce the provisions of section 69(2) and (2-A) of the Indian Partnership Act, 1932, which are as under :

"(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

"(2-A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as" a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner of the firm :

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm."

8. A perusal of section 69 sub-section (2) would clearly show that no suit would lie to enforce a right arising from a contract instituted by or on behalf of a firm against any third party unless the persons suing have been shown in the Register of Firms as partners in the firm. I am of the considered opinion that the bar u/s 69 sub-section (2) can be raised when a suit is instituted in the name of a firm. The suit may be filed by the firm or on behalf of the firm by some other individual. If the suit is filed by some individual, then it would be necessary that the names of the persons suing are shown in the Register of Firms as partners of the firm. The bar u/s 69(2-A) would apply (i) when a suit is filed to enforce any right for the dissolution of firm; (ii) For accounts of a dissolved firm or (iii) any right or power to realise the property of a dissolved firm. The aforesaid suit shall be barred if it is instituted by or on behalf of any person suing as a partner in a firm. Such kind of a suit may be against a firm or any person alleged to be or have been a partner in the firm. In such kind of a suit, the same would not be maintainable unless the firm is registered and the persons suing have been shown in the Register of Firms as partners in the firm. Taking the aforesaid provisions of the section into account, the averments made in the plaint have to be examined. A perusal of the title of the plaint shows that the plaintiffs No. 1 and 2 are simply described as Indian inhabitants and then the address is given. Similarly, the defendants No. 1 and 2 have also been described as Indian inhabitants and the residential address is given. The defendant No. 3 of course, is the tenant. In the title, it is nowhere mentioned that the plaintiffs No. 1 and 2 were the partners of a dissolved firm. It is also not mentioned in the title that the defendants No. 1 and 2 are the partners of dissolved firm. In the plaint itself, the very first sentence states that the plaintiffs, the defendants No. 1 and 2 and one late Hariram Narayan Somaiya were the co-owners of the premises described therein. Thereafter the respective shares of the co-owners are described. A little further the value of the respective share is described. At each and every stage, the plaintiffs No. 1. and 2 and the defendants No. 1 and 2 have been referred to as the co-owners. In para 10 of the plaint, it is categorically stated that after the dissolution of the partnership firm, the mode of payment was to be in accordance with the respective shares of the co-owners. It is stated that the defendant No. 1 has illegally withheld the payments which were due to the plaintiffs. Taking the aforesaid averments at their face value, I am unable to agree with Mr. Gala that this is a suit filed either by a partner or on behalf of a partner or by a firm or on behalf of a firm. Taking the averments as they stand, it is a suit filed by the two co-owners against the other co-owners. Consequently, it would not be possible to hold that the suit is not maintainable in view of the provisions of section 69(2) or

section 69(2-A) of the Indian Partnership Act. These averments have also been fortified by the clear admissions by the defendant No. 1 himself in the letter dated 11th July, 1994. At this stage, it is sufficient to notice that the authorship of the letter is not denied. In the face of this clear admission, prima fade, I am of the view that the parties have treated themselves to be co-owners of the premises. If that is so, then bar u/s 69(2-A) could not be applied. The observations made by this Court in the case of Ramniklal Mohanlal Chawda are of no assistance to Mr. Gala. It has nowhere been held that a suit filed by an individual in his individual capacity cannot be entertained. Merely because a person happens to have been a partner of a firm which has been dissolved cannot lead to a conclusion that the suit cannot be tiled in the individual capacity of an ex-partner against an ex-partner in his individual capacity. The suit which is barred is a suit instituted by a partner or on behalf of a partner suing as a partner or an ex-partner of a firm. Merely because a person happens to have been a partner of a firm which has been dissolved cannot lead to a conclusion that suit cannot be filed in the individual capacity of an ex-partner against an ex-partner in his individual capacity. The suit which is barred is a suit instituted by a partner or on behalf of a partner suing as a partner or an ex-partner of a firm.

9. As narrated above, I am of the view that the present suit has been filed in the individual capacities by the plaintiffs No. 1 and 2. Consequently, it cannot be held that the suit is barred by the provisions of section 69(2-A) or section 69(2). So far as the objection with regard to the suit falling within the purview of section 28 of the Bombay Rent Act, it is to be noticed that the relief claimed against the defendant No. 1 is for recovery of money wrongly received by the said defendant. Against the defendant No. 3, the only relief sought is that the said defendant be restrained from paying the rent including the share of the plaintiffs to the defendants No. 1 or 2.

10. The Counsel appearing for the defendant No. 3 has stated that they are submitting to the order of this Court. In fact, by virtue of the orders passed by this Court earlier, the rent has already been paid in accordance with the shares of the parties. The defendant No. 3 is in no manner disputing the liability for payment of rent. Thus in my view, it cannot be said that there is in fact a lis under the Rent Act between the plaintiffs on the one hand and the defendant No. 3 on the other hand. In my view, the objection raised by virtue of section 28 of the Bombay Rent Act is not tenable.

11. In view of the above, I find no merit in the Notice of Motion. The same is hereby dismissed with no order as to costs.

The Notice of Motion No. 2112 of 1995 is adjourned to 15th December, 1997.

12. Order accordingly.