

(2016) 01 AHC CK 0019
In the Allahabad High Court
Case No : Second Appeal No. 1178 of 2008

M/s Sambhal Gun House and others	Vs	APPELLANT
Shiv Raj Saran Agarwal And Another		RESPONDENT

Date of Decision : 22-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, 100

Citation : (2016) 4 ADJ 290 : (2016) 3 AllWC 2737 : (2016) 116 ALR 257 :
(2016) 2 ARC 583 : (2016) 2 CivillJ 4

Hon'ble Judges : Pramod Kumar Srivastava, J.

Bench : Single Bench

Advocate : A.K. Gupta, Advocate, for the Appellant; Ayub Khan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Pramod Kumar Srivastava, J. - Original Suit No. 710/1986 (Shivraj Saran Agrawal v. Shambhal Gun House and 2 others), was filed by one partner of the dissolved firm (defendant no.-1) against other partners of the said firm (defendant nos. 2 and 3) for relief of accounting and permanent injunction. The said suit was decreed by the judgement dated 24.05.1997 of the Court of Additional Civil Judge (/J.S.C.C), Moradabad, by which it was directed that decree for 3/10th share of firm defendant no.-1 be prepared in favour of plaintiff Shivraj Saran Agrawal, and the defendants are directed to hand over the possession of the disputed property to plaintiff and pay an amount of damages at the rate of Rs. 50/- per day till handing over of the possession.

2. Against the judgement of the trial court, defendant no.-1 - firm and defendant no.-2 Sri Krishna Avatar Agrawal had preferred Civil Appeal No. 80/1997 (M/s Shambhal Gun House and another v. Shivraj Saran Agrawal and another), which was heard and dismissed by the judgement dated 06.11.2008 of Additional District Judge, Court no.-1, Moradabad.

3. Aggrieved by the judgements of the Trial Court as well as the first appellate Court, the present second is preferred on behalf of defendant no.-1 (dissolved partnership Firm) and defendant no.-2 of the original suit .

4. Heard learned counsel for the parties on point of admission of Second Appeal and perused the records.

5. Learned counsel for the appellants contented that first appellate court had framed issue no.-21 which was to the effect that whether the defendant no.-1 is legal entity as alleged in para-27 of the written statement; if so, it's effect. But this issue was not decided. He pleaded that once an issue is framed, then it must be decided. He further contended that original suit had been filed against the dissolve unregistered firm, which is not maintainable. He further contended that in partnership-deed of the firm it was mentioned that after dissolution of the firm the plaintiff will not have any right regarding to firm, except the furniture and building of the firm. Since this fact was ignored by the lower court, therefore the judgements are erroneous and perverse, and second appeal may be admitted and allowed.

6. Learned counsel for the respondents refuted the contentions of the appellants' side and contended that although an issue relating to non-legal entity of defendant no.-1 was framed by the first appellate court, but it was "not pressed" during the hearing of appeal by appellants themselves, because appeal itself was filed by and on behalf already dissolved Firm (Appellant no.-1) and had said issue been pressed, the appeal would have been liable to be dismissed on this ground alone. So said issue was not decided in first appeal. He also contended that although original suit was filed on behalf of unregistered firm but the said firm was only formally made party in the litigation, and the real dispute was between plaintiff and defendant partners and the cause of action arose to plaintiff against the other partners (defendants no. 2 and 3); therefore all the partners of the said Firm were made party in the original suit. Since it was not possible to decide the original suit without formally making the dissolved firm as party, therefore it was made party. He contended that there is no error in the judgement of the Lower Courts. The dispute between the parties relating to the relief was concerning accounts and share in income of firm which has been decided by a concurrent finding of the two courts below on the basis of proper appreciation of evidences, therefore the appeal should not be admitted and is liable to be dismissed in limine.

7. Discussing to the facts of the case, the learned counsel for the appellants had discussed the contends of partnership-deed of appellant's firm and argued that according to its terms the plaintiff had only right over the furniture and building, therefore he could not claim the relief of accounting for recovery of his share of accrued income of the firm. This contention is apparently unacceptable. Admittedly the appellant no.-1 Firm was created by its partners on contract that from the accrued income of the firm, plaintiff Shivraj Saran Agrawal will get 30% of share, defendant no.-2 (appellant no.-2) will get 50% share and the defendant

no 3 (respondent no.-2) will get 20% share. If it was a contract between the parties that during existence and continuation of the appellant Firm and before its dissolution, the plaintiff (/respondent no.-1) had right of accounting and receiving the benefit of 30% amount in income, then he has right to receive the details of accounting and his share of said benefit even after dissolution of firm, which arose after disputed between it's partners. The right accrued to plaintiff-respondent no.-1 during the continuation of their business of the Firm its existence cannot come to an end immediately after the dissolution of the Firm. Therefore, the arguments of learned counsel for the appellants on this point cannot sustain. The trial court as well as the first appellate court had discussed this point after appreciation facts and evidences and their judgments are well reasoned and based upon proper appreciation of the entire evidences on record and their findings in this regard are apparently correct and acceptable.

8. So far the argument for non-maintainability of suit against unregistered Firm (Appellant No.-1) is concerned, this argument is also found unacceptable. In the circumstances of this case the real cause of action for the suit arose to plaintiff Shivraj Saran Agrawal and defendants no. 2 and 3 after dissolution of Firm (plaintiff no.-1). Admittedly plaintiff no.-1 Firm had been dissolved before institution of the suit and it was not legal entity. Even then it was made party in the original suit. But such impleadment of defendant no.-1 Firm was merely formal because the dispute in fact was between the plaintiff no.-2 and the defendants no. 2 and 3; and they being necessary party, were properly impleaded in the suit. At the most the plaintiff no.-1 (present appellant no.-1 Firm) can be said to as unnecessary party or improper party as being non legal entity, and its impleadment in original suit may be treated only the mis-joinder of party. In this regard there is specific provisions of Order I, Rule 9 C.P.C, which reads as under:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

"Provided that nothing in this rule shall apply to non-joinder of a necessary party".

9. In present matter, since there is no non-joinder of necessary party, therefore in spite of impleadment of non legal entity plaintiff no.-1 (/appellant no.-1) being a mis-joinder of party in this case, such mis-joinder of a party cannot be a ground for vitiating the proceedings of suit or the judgments by trial court or first appellate court.

10. The argument of non-disposal of framed issue appeal is concerned, it is also regarding defendant no.-1/appellant no.-1 being non-legal entity is concerned. For the reasons discussed above mere impleadment defendant no.-1 cannot defeat the suit. Although it was irregularity on the part of first appellate court not to decide specifically the issues framed during the appeal, but it's first reason

was given by respondents" side that since defendant no.-1 Firm was not necessary party, but since appeal was also filed by contesting appellant on behalf of defendant no.-1 the Firm, therefore any declaration to the effect that appellant no.-1 was not competent to prefer appeal might have adversely affected the appeal itself. It is clear that it is not material as to whether such issue was not-pressed by the appellants" side during hearing of the first appeal or not, but, as held earlier there is no effect of defendant no.-1 unregistered Firm being non-legal entity, because it was unnecessary party. The suit was to be contested between the contesting parties between plaintiff and defendants no. 2 and 3 between the dispute and cause of action actually arose. In fact plaintiff could not get any relief from defendant no.-1/appellant no.-1 Firm, who was neither legal person nor had any existence after dissolution. No relief could be granted against person not in existence. Therefore suit was to be contested by the natural parties, namely plaintiff and defendants no. 2 and 3. No prejudice was caused to appellants from said mis-joinder. Therefore, the contentions of learned counsel for the appellants are found unacceptable.

11. The real dispute between the contesting parties are as to whether the plaintiff of was entitled for the relief of accounting and injunction against the partners (defendants no. 2 and 3) of dissolved Firm in question the original suit. This was a question of fact that can be decided on the basis of evidences, as has been done by the lower courts. There is no question of law involved in this matter relating to actual dispute between the parties.

12. On examination of the reasoning recorded by the trial court, which are affirmed by the learned first appellate court in first appeal, I am of the view that the judgments of the trial court as well as the first appellate court are well reasoned and are based upon proper appreciation of the entire evidence on record. No perversity or infirmity is found in the concurrent findings of fact recorded by the trial court that has been affirmed by the first appellate court to warrant interference in this appeal. No question of law, much less a substantial question of law was involved in the case before the High Court. None of the contentions of the learned counsel for the appellant-plaintiffs can be sustained.

13. In view of the above, this Court finds that no substantial question of law arises in this appeal. The second appeal is dismissed.