(2009) 04 J&K CK 0011

In the Jammu And Kashmir High Court

Mukhtar Ahmed Wani and Another — APPELLANT

Vs

Mohd. Ramzan Wani and Others — RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:
Partnership Act, 1932 — Section 69

Citation : (2009) 2 JKJ 402

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Judgement

Sunil Hali, J.—Dealership and distribution of Kersone Oil for Shopian district Pulwama was allotted to one Lassa Wani by the Indian Oil

Corporation Limited. Respondent-1 claims to be partner for running Kerosene Oil Depot at Shopian al-ongwith one Lassa Wani. It is stated that

Lassa Wani has died and petitioner -1 has applied for renewal of licence as legal heir of late Lassa Wani to the Indian Oil Corporation. It is further

stated that Indian Oil Corporation in its communication dated 17-5-2007 has approved reconstitution of dealership with petitioner-1 as proprietor.

Memorandum of agreement has also been executed in terms of the aforementioned communication by the Indian Oil Corporation with petitioner-1.

Petitioner-1 has applied to Deputy Commissioner, Shopian for installation of Kerosene Oil Storage Tank in Khasra No. 484/3 at Ray Kaprin

Shopian. The Deputy Commissioner has issued No Objection Certificate (NOC) in favour of Mukhtar Ahmed Wani on 21-7-2007. This

communication has been challenged by respondent-1 before Sub-Judge, Shopian by filing a civil suit seeking declaration that No Objection

certificate issued by the Deputy Commissioner, Shopian is null and void alongwith prayer for restraining the present petitioners not to act upon the said No Objection Certificate. An application for temporary injunction has also been filed. The trial court has vide its order dated 29-12-2008,

after hearing the parties, directed that till the rights of the parties are determined, status quo with respect to No Objection Certificate issued in

favour of non-applicantpetitioner, be maintained. It is this order, which is the subject matter of challenge in the present revision petition.

2. I have heard the Learned Counsel for the parties and perused the record.

Before adverting to the controversy involved in the present suit, it is important to note that respondent-1 has filed a suit before District Judge,

Pulwama seeking dissolution of partnership and rendition of accounts. The premises on the basis of which the suit has been filed is that respondent-

1 is partner in the firm called Shopian Oil Agency with late Lassa Wani. It is stated that he has made investment in running of the aforementioned

business and has sought rendition of accounts. In essence, it is a suit for dissolution. It is important to note that one of the prayers sought by

respondent-1 is that Indian Oil Corporation should not transfer dealership in the name of petitioner-1, which stood in the name of late Lassa Wani.

3. That District Judge had also passed an interim ex parte order on 17-10-05 cancelling the licence issued in favour of non-applicant-15

(petitioner-1 herein). In pursuant to the direction issued by the District Judge, respondent-7 had cancelled the licence of petitioner and diverted

supply of the Kerosene to the Kerosene Oil Dealers of the valley. This order came to be challenged by the petitioners in the High Court. Writ was

allowed and direction was issued to the respondents to hear the petitioners in the matter before any order is passed. It was observed that in case

any licence is issued in favour of petitioners, same shall be subject to any order that may be passed by the civil court.

4. One more writ petition has been filed by respondent-1 seeking writ of mandamus directing the Indian Oil Corporation to reconsider the matter

regarding issuance of licence in favour of petitioner. The Hon'ble Court has issued notice in the case on 5-9-2008.

5. Another writ petition has been filed by the petitioner for quashing order dated 7-10-06 whereby respondent has allotted quota of kerosene to

some other dealers of the valley. Further prayer sought is that respondents 2 and 3 in the said writ petition be directed forthwith to renew licence

No. 24 KDL dated 10-11 -2001 already issued to the petitioner therein.

6. The contentions raised in the aforementioned writ petitions relate only to the renewal of licence by the Indian Oil Corporation and diversion of

supply of kerosene oil to other dealers instead of petitioner. The controversy in the present case involves the question as to whether Ramzan Wani

was partner of Late Lassa Wani for running the kerosene oil distribution business at Shopian. The suit filed by respondent-1 before Sub Judge,

Shopian as already stated hereinabove, relates to issuance of NOC in favour of petitioner by the Deputy Commissioner for the purpose of

installation of Kerosene Oil Depot. The challenge is that this depot has been allowed to be opened on agricultural land and the same is not

permissible under the Agrarian Reforms Act and other provisions of law.

7. The genesis for filing the present suit is on the basis that the plaintiff -respondent-1 is partner in the said firm. This suit is contested by the present

petitioners on the following grounds:

a) That the present suit cannot be allowed to go, as on the same cause of action, a civil suit is already pending before District Judge, Pulwama. The

said suit has been filed by plaintiff/respondent-1 on the premises that he is partner in the said distribution of kerosene oil with late Lassa Wani and

has sought rendition of accounts and dissolution of the firm.

b) That the plaintiff has no locus to challenge NOC granted by the Deputy Commissioner.

c) That the suit is not maintainable, as the plaintiff is relying upon unregistered partnership deed, which is not registered with the Registrar of the

firms as contemplated by Section 69 of the Partnership Act.

The trial court while dealing with the application for temporary injunction has not addressed itself to these fundamental issues but has passed an

order keeping the NOC in abeyance.

8. Mr. R.A. Jan, Learned Counsel for the petitioners has raised the following contentions before the court:

a) That the present suit cannot be permitted to go, as it is barred by res-judicata in as much as on the same facts and cause of action, a civil suit is

already pending before District Judge, Pulwama.

b) That no suit can be instituted in any court to enforce a right arising from a contract or conferred by this Act by or on behalf of any person suing

as a partner in a firm against the firm unless the same is registered. In order to appreciate this controversy, Section 69 of the Partnership Act is

quoted hereinabelow:

69. Effect of non-registration

1) No suit to enforce a right arising from a contract or conferred by this Act by or on behalf of any person suing as a partner in a firm against the

firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as partner in the firm.

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.

3) The provisions of Sub-sections (1) and (2) shall apply also to claim of set off or other proceeding to enforce a right arising from a contract, but

shall not affect:

a) the enforcement of any right to sue 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, or

b) the power of an official assignee, or receiver or court under the law of insolvency to realise the property of an insolvent partner.

4)....

9. According to the petitioner, the import of Section 69 clearly envisages that no suit can be entertained in respect of right vested in the plaintiff or

acquired by him under a contract which he entertained into as partner of an unregistered firm. In other words, a partner of unregistered firm cannot

enforce a right arising out of contract falling within the ambit of Section 69. The import of this section clearly bars a suit filed by a partner against

the firm or against any third person in the course of its business dealings. It is not in dispute that relationship of partnership arises from a contract

and not from status. To say it clearly that if any suit is filed by a partner against the firm or any other partner on the basis of firm, which is not

registered u/s 59 of the Partnership Act. No suit can be entertained in absence of such registration. The exception to this provision is that if right sought to be enforced does not arise from a contract to which unregistered firm is a party or is not entered into in connection with the business of

unregistered firm with third party, bar of Section 69 Sub-Clause 2 will not apply.

10. The trial court was required to examine only following two questions, which arose in the suit:

a) Whether the respondent had locus to contest the present suit.

b) Whether shifting of kerosene oil storage to some other place, was permissible under law.

c) Whether suit of the plaintiff was maintainable in terms of Section 69(3) of the Partnership Act.

Even though all these pleas were taken up by the petitioners, the trial court while dealing with the case under Order 39 Rules 1 and 2 has failed to

take into consideration the pleas raised therein. As a matter of fact, the trial court has not addressed itself to these (sic) but instead has made a

roving enquiry while passing the order impugned. For the purpose of grant of temporary injunction, the courts are required to examine pleadings

and find out as to whether a prima facie case exists in favour of the parties seeking such injunction. It is only after discussing the pleadings, the

courts can find out as to whether prima facie case exists in favour of the parties. The trial court has without discussing the right of plaintiff

respondent to seek with holding of NOC in favour of present petitioners, directed that NOC granted should be kept in abeyance. While passing

this order, the trial court had not discussed the right of the plaintiff to seek such direction but instead it has relied upon the material which was not

part of the pleadings. The only visible ground which is taken in the plaint is that it is an agriculture land and as such cannot be allowed to be used as

Oil Storage. Even this assertion of the plaintiff that the land is agricultural, is belied by the revenue department, which states that it is Banjri

Qadeem. The trial court has not its judgment discussed as to whether the land is agriculture or Banjri Qadeem. It seems that there has been total

lack of application of mind shown by the trial court in this regard.

11. The other aspect of the matter is that the jurisdiction of the court to entertain a suit has been questioned by the petitioners. It is specifically

stated that the suit cannot be instituted in violation of Section 69 Sub-sections 1 and 2 of the Partnership Act. The court was required to address itself to this question, which it has failed to do. Unless the court has the jurisdiction to entertain the suit, it cannot proceed to grant an order of

injunction. The suit of the plaintiff was based upon the fact that he is partner in the firm. The trial court has not taken note of the fact that the plaintiff

has already filed suit on similar cause of action before the District Judge, Pulwama. He had specifically prayed that the dealership of kerosene oil

should not be allotted to the petitioner herein but to the firm. It was obligatory on part of the court to see as to whether the suit could proceed in

view of the fact that on similar cause, the matter was already pending before the District Judge.

12. The trial court in my opinion, has misled itself in granting an order of injunction by staying the No objection Certificate granted in favour of the

petitioners. I, therefore, set aside the order of the trial court dated 29-12-2008 and direct that before proceeding in the matter, the trial court

should frame preliminary issues and deal with all the preliminary objections relating to the maintainability of the suit before proceeding with the trial.

The order of status quo passed by the trial court shall stand vacated.

13. The trial Court while directing the parties to maintain status quo, has given direction to respondents-2 and 8 to make alternate arrangement for

supply of kerosene oil, as the area is highly snow bound and to ensure that the kerosene oil should reach to the common man. CMP No. 52/09

came to be filed by respondents 7 and 8 for modification/clarification of the order passed by this Court. In the said application, it has been, stated

that the trial court had directed the applicants herein to make alternate arrangement for supply of kerosene oil. The order of stay passed by this

Court was sought to be modified. The trial court has without taking note of the fact that order dated 7-10-06 was stayed by this Court on 21-2-

2007 in OWP No. 82/07, passed the order impugned. Following order was passed by the court on 21-2-2007:

Issue notice to the respondents returnable within four weeks for which steps be taken within one week.

Notice in the CMP also. In the meanwhile, subject to objections of other side and till next date of hearing before the bench, the operation of the

impugned order dated 7-10-06, so for it relates to the petitioner shall stay.

It is important to note that initially respondent-7 had vide his order dated

17.10.05 diverted kerosene oil allotment in favour of petitioner's firm to

M/s Apex Oil Agency in equal share. This order was challenged by the petitioner in OWP No. 574/05. The court had vide order dated 21-9-06,

set aside the order dated 17-10-05. The present position as it emerges from the aforementioned facts is, that even after the death of Lassa Wani,

the supply of kerosene was consistently made to the petitioner's firm. The said supply has been stopped initially by order dated 17-10-05, which

order was set aside. After setting aside the order, another order dated 17-10-06 was passed, which again has been stayed by this Court. It is to

be noted that anxiety has been shown by respondent-7 both before the trial court and this Court that till the dispute between the parties is resolved,

they be permitted to make an alternate arrangement for smooth supply of kerosene. Inherent in such a plea is the fact that respondent-7 was

conscious that there is no legal impediment in directing the supply of kerosene oil to the petitioner till the issues are resolved.

14. I accordingly direct that respondent-7 shall restore supply of kerosene to the petitioner till the disposal of civil suit. This direction is being

issued in view of the fact that an application was filed before the trial court for the purpose of making alternate arrangement and trial court has

passed direction in this respect. Since the direction of the trial court has been set aside, it will be just and proper to allow supply of kerosene oil to

the petitioner. This order will be subject to any direction which may bfe passed by the writ court or till the civil court decides the controversy.

15. Revision petition along with CMP No. 52/09 is allowed. Parties are directed to appear before the court below on 11-5-09.

OWP Nos. 622/08, 82/07, 574/05 and 194/08 are detached from this Revision Petition.