(1993) 07 MAD CK 0054

In the Madras High Court

P. Ramaswamy APPELLANT

Vs

P.M. Agencies RESPONDENT

Date of Decision : 16-07-1993

Acts Referred:
Presidency Towns Insolvency Act, 1909 — Section 108, 99

Citation : (1994) 2 MLJ 328

Hon'ble Judges : Swamidurai, J

Bench : Division Bench

Judgement

Swamidurai, J.—The defendant/respondent in I.A. No. 482 of 1988 in O.S. No. 326 of 1985 on the file of the learned District Munsif, Ootacamund, is the petitioner. The respondent herein is the plaintiff. The plaintiff is the M/s. P.M. Agencies represented by its Managing partner Mr. P. Mugundaraj. The plaintiff is admittedly a registered partnership firm and the suit was filed by the partnership represented by its Managing Partner P. Mugundaraj. The suit is for permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the suit property or in any day creating any interest over the suit property by way of lease etc. P. Mugundaraj died on 11.2.1987 and on his death. Smt. Vanaia Sundararajan filed I.A. No. 482 of 1988 in the lower court for amendment of the plaint by deleting the name of P. Mugundaraj and substituting her name in the short and long cause titles in the suit. According to Smt. Vanaja Sundararajan she is entitled to carry on and continue the partnership business in view of the recital in the partnership deed. Her application was resisted by the defendant on the grounds, that on the death of P. Mugundaraj the partnership firm became defunct and that the firm cannot proceed with the suit. It is admitted by both parties that there were only two partners to the firm. The other objection raised by the defendant is that Order 6, Rule 17 will not apply and that any amendment if allowed, will totally change the verification of pleadings. The third objection is that the petition for amendment is not maintainable as the petitioner is shown as Messrs. P.M. Agencies by its Managing Partner P. Mugundaraj who is dead. The lower court, on a careful consideration of the rival contentions of the parties has allowed the application. Aggrieved with this order, the defendant/respondent has filed this civil revision petition. In this civil revision petition Mr. M.S. Subramanian, learned Counsel for the petitioner contended that by way of amendment of the plaint Mrs. Vanaja Sundararajan seeks to implead herself as a partner representing the firm which became defunct on the death of one partner P. Mugundaraj. According to the learned Counsel for the petitioner, the partnership is not in existence and that cannot be continued by substituting Mrs. Vanaja Sundararajan. The partnership deed in this case was not filed before the lower court and in the civil revision petition also this Court cannot take any additional evidence by receiving the abovesaid partnership deed. Therefore we have no other material to find out the relevant clauses in the partnership deed for appreciating the rival contentions of the parties. In support of his contention Mr. M.S. Subramanian, the learned Counsel for the petitioner relied upon the judgment reported in Mt. Sughra and Others Vs. Babu, , the Division Bench of the Allahabad High Court has held as follows:

(a) Partnership Act 1932, Section 42(c) : Subject to contract between the partners partner ship consisting of only to partners. When it is said that a partnership will not be dissolved by the death of one party, what is meant is that the partnership will continue between the surviving partners even after the death of a partner. It follows that in order that the exception to the general rule may apply the original partnership must consist of more than two partners. In the case of a partnership consisting of only tow partners, no partnership remains on the death of one of them and, therefore. It is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue. Nor is the position affected by bringing in the heirs of a deceased partner on the scene. One partner cannot by his own contract, impose a partnership upon his heirs or legal representatives. Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied case law discussed. Lala Ram Kumar Vs. Kishori Lal and Others, Dissent. Anno Partnership Act, Section 42 N.3.

(b) Partnership Act (1932), Section 48 : Creation of new partnership after the death of old partner rights and liabilities of new partners. Where after the death of the old partner his major heirs along with the other partner continued the old partnership business with the old partnership assets with the same rights and liabilities as before with this difference merely that in place of the old partner his heirs were substituted, the major heirs become the partners and the minor heirs became entitled to the benefits of the partnership. An agreement between the parties must be implied that rights and liabilities of the new partners will be taken to be as if the partner''s death had created no dissolution in the partnership or in other words that they were liable on the accounts being taken from the commencement of the old partnership or from the date of the last accounting, as the case my be. A distinction must, however, be drawn between the liabilities of the heirs for the period before the old partner''s death and those accruing after his death. The liability of the major heirs, for the assets of the old firm in the hands of the old partner could not be personal and must be restricted to the assets of the old partner in their hands. The liability of the minor heirs can only be to the extent of their shares in the partnership assets and can be neither personal nor extended to the assets of the old partner in their hands unless the assets of the old partner could be identified as the assets of the firm; AIR 1924 Mad. 708 and 25 Mad 26, Rel. on.

2. Mr. M.S. Subramanian, the learned Counsel for the petitioner submitted that the legal heirs of the Mugundaraj have to be impleaded if at all necessary since Mrs. Vanaja Sundararajan cannot represent the legal heirs of the deceased partner P. Mugundaraj. According to him, the respondent in the civil revision petition is not willing to bring on record the legal heirs of late Mugundaraj, the deceased partner which this Court shall not countenance such attitude on the part of the respondent herein. Mr. M.S. Subramanian brought to my notice a decision of this Court reported in J. Prasama Chandrasekaran v. Mohan Steel Corporation by its Partner, Kailash Chand Gagoria and three Ors. 1987 T.N.L.J. 74, in support of his contention that a petition for amendment of cause title to substitute the names of other partners is not maintainable. The Division Bench of our High Court has observed as follows:

I.P. No. 45 of 1984 was filed by three different creditors u/s 108 of the Presidency Towns Insolvency Act, praying for an order for administration of the estate of the one deceased Ramalingam. The first petitioner is a partnership firm, the second petitioner is a private limited company and the third petitioner is again a partner ship firm. The respondent is stated to be the grandson of the late Ramalingam in respect of whose estate the order of administration is prayed for. The first petitioner partnership is described as M/s. Mohan Steel Corporation by its partner Kailash Chand Gagoria, No. 4, Ellaya Mudali Street, Madras-600 081. In the first paragraph of the petition itself it is stated that Mohan Steel Corporation is a registered partnership concern and the firm is carrying on as dealers in old iron and steel scrap. It is further stated that Kailash Chand Gagoria was a partner and the other partners of the firm are, (1) Baburam Gagoria, (2) Memochand Gagoria and (3) Subash Chand Gagoria, all sons of N. Gagoria when the matter was pending a Kailash Chand Gagoria the partner who was shown as representing the partnership who is also the son of N. Gagoria, died. On the assumption that the other partners whose names had already been disclosed in the petition, should be brought in as representing the first petitioner partnership firm, Application No. 240 of 1986 was filed for permitting to amend the cause title by substituting to amend the cause title by substituting the names of the three other partners, referred to above, as representing Mohan Steel Corporation, in the place of Kailash Chand Gagoria. A counter-affidavit was filed by the respondent-appellant herein contending that the application was not maintainable u/s 99 of the Presidency Towns Insolvency Act. This contention was overruled by the learned Judge and the application was ordered. It is against this Order of the learned single Judge, the present appeal has been filed. Order 30, Rule 1, Ref. (Omitted).

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It was next contended by the learned Counsel for the petitioner that when a partner dies the partnership itself will get dissolved. Unless there is a provision to the contrary in the agreement between the partners and in this case since there is no evidence of any agreement between the partners that the partnership will continue in spite of the death of a partner, the other partners could not be permitted to bring themselves on record and in any case the first petitioner becomes a dissolved partnership firm and could not pursue this petition. We are unable to agree with the connection of the learned Counsel. We have already referred to Rule 4 of Order 30 of the Code of Civil Procedure. There is no dispute and there could be no dispute that the provision of Order 30 do apply to the proceedings initiated under the provisions of the Presidency Towns Insolvency Act and Rule 4 provides that on the death of a partner it shall not be necessary to join the legal representative of the deceased as a party to the suit. The ratio of this provision itself shows that the fact that the death brings in a dissolution of the partnership itself will not affect the already instituted proceedings in all the name of the firm. It will be only considered as a partnership firm if at all dissolved and represented by the erstwhile partners. The debt is not wiped out and the liability of the debtor does not get extinguished by death of a partner and dissolution of the firm as such. In the circumstances, on this ground also we could not say that the petition is not maintainable. For the foregoing reasons, the appeal fails and it is accordingly dismissed.

I am bound to follow the view taken by the Division Bench of this High Court.

In view of the above decision, I am of the view that the order of the lower court cannot be assailed. It is open to the petitioner herein to file an application for bringing on record the legal representatives of late P. Mugundaraj as parties in the suit or it is open to the legal heirs of the late P. Mugundaraj to file such an application for bringing them on record in this suit. If such an application is filed either by the petitioner herein or by the legal representatives of the deceased partner, the trial court after hearing the objections of the parties, pass suitable orders accordingly. I do not find any irregularity or illegality in the order of the lower court and accordingly, the civil revision petition is dismissed without cost.

