

(1992) 04 DEL CK 0012
In the Delhi High Court
Case No : Suit No. 1116 of 1978

Patodia and Co.

APPELLANT

Vs

The Bombay Woollen Mills Ltd.

RESPONDENT

Date of Decision : 22-04-1992

Acts Referred:

Citation : (1992) 22 DRJ 611

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : P.K. Seth and A.K. Mata, for the Appellant;

Judgement

Anil Dev Singh, J.

(1) This is plaintiff's suit for recovery of Rs. 2,33,249.00. The facts alleged in the plaint are that the plaintiff is a partnership firm registered under the Indian Partnership Act, 1932. It is further averred that in July, 1976 the defendant appointed the plaintiff as its agent for sale of knitting yam manufactured by the former on consignment basis. According to the plaintiff the arrangement between the parties was that the defendant was to pay to the plaintiff commission at the rate of 2% and brokerage @ 1/2% on the sale price of the goods. The plaintiff maintains that it was entitled to be reimbursed by the defendant on account of the expense's incurred for taking delivery of the goods including their transport and storage, besides amounts spent on traveling undertaken in connection with the agency business. plaintiff asserts that pursuant to the arrangement the defendant was sending goods through rail/road transport and the plaintiff had been taking delivery of the same. It is further alleged by the said party that sometimes it was sending advance payment to the defendant in anticipation of the arrival of the goods sent by the latter. It is also averred that the plaintiff was maintaining regular books of account in the course of its agency business. It is claimed that as a result of the transactions between the parties a sum of Rs.2,21,089.00 as on June 30,1978 became due and payable to the plaintiff by the defendant. In this regard a written notice is also alleged to have been given

by the plaintiff to the defendant but to no effect, with the result that the plaintiff instituted the present suit for recovery of Rs.2,33,249.00 which included interest up to the date of filing of the suit together with pendente l

(2) Whether the plaintiff firm is registered under the Indian Partnership Act and Shri Moti Lal Patodia is shown as a partner in the register of firms?

(3) What were the terms of appointment of the plaintiff as agent of the defendant for sale of defendant's goods?

(4) Whether the plaintiff has failed to make the payment of Rs.89,100.00 to the defendant as pleaded in paragraph 4 of the written statement? If so, to what effect?

(5) To what amount is the plaintiff entitled to received from the defendant on account of principal and interest and on what rate?

(6) Whether the plaintiff is liable to pay a sum of Rs.1,39,013.84 to the defendant? If so, to what effect?

(7) RELIEF." The view which I am inclined to take does not require any discussion on the aforesaid issues for the present. As stated above the stand taken in the plaint is that in July, 1976 the defendant had appointed the plaintiff Firm as its agent for sale of the goods, viz knitting yarn, manufactured by the defendant, on consignment basis. But from the statement of Shri Moti Lal Patodia, one of the partners of the firm, it is revealed that the plaintiff firm was registered with the Registrar of Firms only in April or May 1977 and prior to that he was the sole proprietor of the business carried on under the name and style of M/s.Patodia & Co. In his statement he has further admitted that he entered into an agreement with the defendant company in July, 1976 when he was the sole proprietor of the firm. Therefore the stand taken in the plaint that in July,1976 the defendant had appointed the plaintiff firm as its agent is not correct. In July 1976 the plaintiff Firm was not even in existence and before its constitution as a partnership Firm defendant was dealing with Shri Moti Lal Patodia who was also carrying on the business under the name and style of Patodia & Co. From a bare perusal of the statement of accounts filed by the plaintiff, it is manifest that the plaintiff partnership concern is claiming the amount which is alleged to be due from the defendant to the sole proprietary firm of Shri Moti Lal Patodia. The said statement of account shows that the alleged liability of the defendant in March 1977 was Rs.3,33,132.36 which was more than the amount claimed in the plaint. It is further evident from the statement of accounts that for the transactions which took place between the parties from April 1977 and onwards i.e. after the plaintiff was registered with the Registrar of firm as a partnership concern, no amount is outstanding from the defendant to the plaintiff rather some amount has been paid in excess by the defendant which appears to have been adjusted by the plaintiff against the alleged amount payable to Patodia & Co. which at the relevant time was in sole proprietorship of Shri Moti Lal Patodia,who is now one of the partners of the plaintiff. It seems that it is due to this adjustment that the

alleged liability of the defendant ,when it was dealing with the single owner trading concern of Moti Lal Palodia, has been scaled down from Rs.3,33,132,26 to Rs. 2 lakhs(approximately). Though (here is no doubt that the defendant was dealing with the plaintiff partnership firm after the proprietary concern of Shri Patodia ceased to exist, that fact by itself does not bestow any right on the plaintiff partnership to claim from the defendant the dues, if any, of the erstwhile proprietary firm. In the plaint it has not been explained as to how and under what right the plaintiff is claiming the suit amount which was allegedly due to the enterprise of Shri Moti Lal Palodia. The plaintiff's suit appears to be not maintainable in law. In the first place it may be pointed out that a single person trading under a firm name cannot sue in that name. Under Order 31 rule. 1 CPC it is a partnership which can sue or be sued in the name of the firm. Order 30 rule 10 Cpc permits a plaintiff to sue a person carrying on business in the name and style other than his own name i.e. under any assumed name. This rule,however,does not permit a sole proprietor of a firm to file a suit in the assumed trade name under which he carries on business. This proposition of law is well settled. In Samrathrai Khetsidas Vs.Kasturbhai Jagabhai it was held that a firm consisting of a sole proprietor cannot bring a suit in the name of the firm but may sue in his own name as the proprietor of the firm. Again in Bhagvan Manaji Marwadi and others Vs. Hiraji Premuji Marwadi Air 1932 Bom 516 it was laid down that a single person cannot constitute a firm and a person trading as a firm under an assumed trading name may only be sued in his trade name but he cannot sue in that name. It is not necessary to refer to other decisions on this aspect as the legal position is unexceptional and admits of no doubt whatsoever. As a principle of law it can be safely stated that rules 1 and 10 of Order 30 of the CPC do not envisage filing of a suit by a sole proprietor of a firm in the trade name under which he carries on business though they permit the business of a sole proprietary firm to be treated as an artificial person for the limited purpose of suing it. Beyond this a sole proprietary concern has no existence at all in the eye of law. Therefore it will be of no use to treat the present suit to be one filed by the sole proprietary concern of Shri Moti Lal Palodia as the same will not be maintainable. The next question that arises for consideration is could the partnership firm which was constituted in April/May 1977 file a suit in respect of the amount which may be due to the proprietary firm of Moti Lal Patodia? In this connection it is relevant to recall that the plaint does not disclose as to how the alleged dues of the sole proprietary firm of Shri Moti Lal Patodia can be recovered by the partnership, which did not exist when the alleged liability of the defendant arose towards the proprietary concern. Having regard to the facts, as appear from the material on the record, the cause of action, if any, accrued only to Moti Lal Patodia before coming into existence of the partnership firm. Let us take a situation where cause of action arises after the dissolution of a firm. Whether in such a case, a suit can be filed in the name of the partnership? The answer lies in Rule 1 of Order 30 of the Code of Civil Procedure. The said provision postulates that a suit can be filed by the partners in the name of their firm provided the cause of action for the suit arises during the existence,

continuance and life of the partnership. If the cause of action arises after the dissolution of the partnership, the partners cannot sue in the name of the firm and the suit filed by them is liable to be dismissed. In the case Of Mohammed Siddiq Vs. Mohamed Akbar and Others, , cause of action arose after dissolution of the partnership. There a hundi was endorsed in favor of the plaintiff, who was one of the two partners of the firm by the other partner on November 13,1933 before the firm had been dissolved. The hundi was payable 56 days after date. The cause of action of the plaintiff did not arise till January 8,1934 when the firm stood dissolved. On filing of the suit by the plaintiff against the partnership and the other partner for recovery of the amount due under the hundi, the Calcutta High Court held as follows: "Under Order 30,rule 1 CPC a suit can be filed against two or more persons carrying on business as partners in the firm name, only if the cause of action for the suit arose during the continuance of the firm. If the cause of action arises after dissolution of the firm the partners cannot be sued in the firm name. In this particular case the cause of action arose after the dissolution of the firm and this suit against the firm in the firm name is incompetent". The aforesaid principle of law laid down by the Calcutta High Court with which I respectfully agree will apply to the case in hand as well. in the present case the plaintiff partnership firm is seeking to enforce the claim with reference to a cause of action which arose before its birth. On the present state of pleadings and evidence which has come on record it cannot be said that the liability, if any, incurred by the defendant towards the sole proprietary concern of Moti Lal Patodia, would ipso facto be a liability towards the the partnership concern. It has not been shown in the pleadings of the plaintiff or in the evidence adduced by it as to how the cause of action for recovery of the amount, which was alleged to be due from the defendant to the proprietary concern, would be available to the plaintiff. In the instant case the alleged liability of the defendant towards the sole proprietorship concern arose before April-May, 1977 when the partnership was not in existence .I would have in the normal circumstances dismissed the suit of the plaintiff but having regard to the fact that the above points were not taken by the defendant in the pleadings but have been taken for the first time in the arguments advanced on its behalf, I will give an opportunity to the plaintiff to take appropriate steps which may be permissible under law to salvage the suit. List the matter for further proceedings on May 14,1992.