

(1997) 05 BOM CK 0023

In the Bombay High Court

Case No : Chamber Summons No. 301 of 1997 in Suit No. 5016 of 1994

Ramniklal Mohanlal Chawda

APPELLANT

Vs

Sharad Vasant Kotak and others

RESPONDENT

Date of Decision : 06-05-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
Partnership Act, 1932 — Section 4, 69, 69(1), 69(2), 69(2A)

Citation : (1997) 05 BOM CK 0023

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Shailesh Shah, for the Appellant; M.H. Shah, with R.C. Shah, for the Respondent

Judgement

R.M. Lodha, J.—By means of this chamber summons taken out by plaintiff Ramniklal Mohanlal Chawda, it is prayed that plaintiff be allowed to carry out amendment to the plaint and proceedings as per the Schedule of amendment annexed hereto and marked with letter "A."

2. Proposed amendment reads thus :

"A"

SCHEDULE OF AMENDMENT

1. Add at the end of para 23 following para as para 23-A.

"23-A. The plaintiff submits that the partnership firm of M/s Paramount Builders is duly registered with the Registrar of Firms, Bombay under No. 158675 by Entry No. 1 on 11th December 1980. The plaintiff submits that subsequent changes and/or modifications in the partnership of M/s Paramount Builders under the Deed of Partnership dated 20th October 1986 and Deed of Partnership dated 3rd November 1992 are in the nature of changes and/or modifications which do not affect the registration of the said firm of M/s Paramount Builders as

required under Indian Partnership Act, 1932 for entitling a partner to institute suit for reliefs against the partners on dissolution of the Firm. The plaintiff submits that recording of changes and/or modifications under subsequent Deeds of Partnership dated 20th October 1986 and 3rd November 1992 are in the nature of ministerial acts required to be done and which does not affect the original registration of the firm of M/s Paramount Builders. The Plaintiff submits that the subsequent modifications and/or changes in the partnership firm of M/s Paramount Builders are not carried out, however the same does not affect the validity of the registration of the partnership firm of M/s Paramount Builders in law. Without prejudice to what is stated hereinabove and to each other, and in alternative the plaintiff submits that amendment to Indian Partnership Act, 1932 by State of Maharashtra and inserting sub-section (2-A) in Section 69 of the Indian Partnership Act, 1932 is not constitutionally valid and the said amendment is violative of Article 14 and Article 19(1)(g) of the Constitution of India and therefore, the same is invalid and not applicable to the case of the Plaintiff before this Hon"ble Court. The Plaintiff submits that the plaintiff is entitled to declaration that the provisions of sub-Section (2-A) of Section 69 of the Indian partnership Act, 1932 is violative of Constitution of India and therefore not valid and not applicable to the case of the Plaintiff before this Hon"ble Court."

2. Add in the prayers the following prayer (aa) after prayer (a), as follows :

"(aa) that it be declared that provisions of sub-section 2-A of Section 69 to the Indian Partnership Act, 1932 as introduced by the State of Maharashtra is constitutionally not valid and not applicable to the case of the Plaintiff."

3. Consequential changes."

3. The crux of the proposed amendment is challenge to the validity and constitutionality of sub-section (2A) of section 69 of Indian Partnership Act, 1932 inserted by State of Maharashtra by way of amendment being violative of Articles 14 and 19(1)(g) of the Constitution of India.

4. Mr. Shailesh Shah, the learned counsel appearing for Plaintiff submits that the proposed amendment is necessary to decide real controversy between the parties. According to him till date written statement has not been filed and, therefore, no prejudice would be caused to the Defendants if amendment in the plaint is allowed.

5. Mr. Mahendra Shah, the learned Sr. counsel appearing for Defendants opposed the chamber summons and vehemently contended that suit filed by the plaintiff right from its inception is incompetent and could not have been entertained because admittedly the firm Paramount Builders which came into existence pursuant to the partnership deed dated 28th October 1986 is not registered. The learned Sr. counsel submits that when the suit at the threshold could not have been entertained in view of the provisions contained in section 69(2A) of Indian Partnership Act question of allowing the plaintiff to amend such suit does not arise nor the law permits such amendment to be made. In support of his

contentions Mr. Mahendra Shah relied upon the judgment of the Apex Court in Shreeram Finance Corporation vs. Yasin Khan and others, 1989 Mh.L.J. 849, Division Bench judgment of this Court in Gandhi and Co. Vs. Krishnan Glass Pvt. Ltd., , Swiss Bank Corporation vs. Jai Hind Oil Mills Co. and another, 1994 (I) BCR 371 and the judgment of the Calcutta High Court in Sunderlal and Sons Vs. Yagendra Nath Singh and Another, .

6. Confronted with the objection raised by learned counsel appearing for Defendants, on the other hand the learned counsel for Plaintiff submitted that the firm Paramount Builders came into existence on 29th November 1979 under the deed of partnership and the said firm was registered and thereafter there were only few changes in the partners and, therefore, it cannot be said that the said firm is not registered and the suit is affected and hit by provisions of section 69(2A). The learned counsel for the Plaintiff would also urge that even if it be assumed that at the time of filing of the plaint, the suit suffered from some defect of jurisdiction, by way of amendment, such defect of jurisdiction can be cured. In support of his contentions he relied upon Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation, Division Bench judgment of this Court. The crucial question which requires consideration is whether the plaint filed by the Plaintiff Ramniklal Mohanlal Chawda is incompetent and hit by section 69(2A) of the Indian Partnership Act and if so whether such incompetent plaint can be allowed to be amended?

1. Section 69(1) and (2A) as amended by Maharashtra Act of 1984 reads thus :

Section 69(1)_____

Section 69(2)_____

Section 69(2A) - 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 in 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.

Section 69(3)_____

Section 69(4)_____ "

8. A perusal of sub-section(1) of section 69 would reveal that no suit to enforce a right arising from a contract or conferred by Indian Partnership Act shall be instituted in any court by or on behalf of any person suing as a partner of the firm against the firm or any person who claims himself to be partner or has been

partner in the firm unless the firm is registered and the person suing is or has been shown in the register of partners in the firm. Of course there is proviso appended to subsection (1) that relates to the suit or proceedings instituted by heirs and legal representatives of the deceased partners of the firm to which present controversy is not concerned. Sub-section (2A) of section 69 also provides that 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 firm against the firm or any person who claims himself as a partner of the firm or has been partner in the firm unless firm is registered and the person suing is or has been shown in the register of firm as a partner in the firm. A proviso is appended to this subsection as well regarding the institution of suit by legal heirs of a partner. Thus, it would be clear that unless the firm is registered with the registrar of firms and its partners have been shown in the register of firms as a partner in the firm, no suit to enforce any right for the dissolution of firm or for accounts of the dissolved firm or any right or power to realise the property of the dissolved firm shall be instituted in any Court. In other words, if the firm is not registered and the person suing is not shown as partner in the firm in the register of firm no suit will lie to enforce any right in the dissolution of firm or for the accounts of the dissolved firm or any right to realise the property of the dissolved firm. Partnership is relation between persons who have agreed to share profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individual partners, and, collectively a firm and the name under which their business is carried on is called firm name as defined u/s 4 of the Partnership Act.

9. In *Shriram Finance Co.* (supra), the Supreme Court was dealing with section 69(2) of Partnership Act and held that when the suit filed on behalf of partnership, current partners on the date of suit were not shown in the register of firms, such suit was not maintainable in view of provisions of section 69(2).

10. In *Gandhi and Co.*, Division Bench of this Court again while referring to section 69(2) observed that said provisions are substantive and created a bar at the threshold of the filing of the suit by or on behalf of a firm if the conditions mentioned therein are not fulfilled. For the self same reasons provisions contained in section 69(1) as well as u/s 69(2A) are also substantive in my view and create a bar at the threshold of the filing of the suit which are governed u/s 69(1) and 69(2A). If for the reliefs covered u/s 69(1) or 69(2A) of Partnership Act, if the firm is not registered and the partners names are not shown in the register of firms, the filing of the suit itself is barred since the said provision create a bar at the threshold of the filing of such suit.

11. In *Swiss Bank* (supra) Division Bench of this Court with reference to section 69(2) held that if one partner is not shown as partner on date of institution of suit in register of firm, bar of section 69(2) is clearly attracted.

12. In the present case according to Plaintiff's own case as averred in the plaint

and the documents placed on record in support of averments in the plaint, it would be seen that the firm M/s Paramount Builders had six partners under the deed of partnership dated 29-11-1979. The said partnership was duly registered. However, it appears that one of the partners Shri Mohanlal Chawda expired on 6-5-1986 and the remaining partners agreed to admit the widow of said deceased ex partner upon demise of Mohanlal Chawda. A fresh deed of partnership was executed on 7-5-1986 and the said partnership business commenced from 7th May 1986. However, admittedly the said partnership is not registered nor the name of newly added partner has been shown in the register of firms. By the subsequent deed of partnership dated 3rd November 1992 certain terms and conditions of the partnership firm were amended and altered.

13. In the suit filed by the plaintiff, the principal relief claimed is dissolution of the firm with effect from date of notice dated 15th December 1994 and certain alternative reliefs. Firstly, the new partnership came in existence on 7th May 1986 and the deed of partnership was executed on 20th October 1986 and the said firm is not registered admittedly. Even if it be assumed that the old partnership of 1979 continued and by the deed of partnership dated 29th October 1986 there were only changes in the partners still some of the partners are not entered in the register of firms and, therefore, the reliefs claimed in the suit are directly hit by provisions of section 69(2A) of Indian Partnership Act. As already observed section 69(2A) of partnership Act creates a bar at the threshold of the filing of the suit for the relief covered therein and in the present case, therefore, the very suit filed by the Plaintiff is incompetent. When the plaint itself could not have been entertained because of the bar of section 69(2A), obviously amendment in such plaint cannot be permitted, It would not be out of place to mention here that plaintiff is conscious of the fact that suit is hit by section 69(2A) and the bar of section 69(2A) is attracted in the suit and that is the reason by way of amendment the plaintiff seeks to. challenge the constitutional validity of section 69(2A) of Partnership Act. Gagan Mal Ramchand's case (supra) in the facts herein has no application.

14. In my view, therefore, when the present suit is hit and affected by section 69(2A) and is incompetent, such incompetent suit cannot be allowed to be amended. When the suit is barred in view of section 69(2A) and it could not have been entertained, no amendment of such suit even by way of challenge to section 69(2A) can be permitted.

15. Amendment sought for by the plaintiff, therefore, is liable to be rejected.

16. Consequently, chamber summons has no merit and is dismissed accordingly.