(2002) 06 MAD CK 0030

In the Madras High Court

Case No : S.A. No. 1549 of 1990

S. Prakashchand APPELLANT

Vs

Sha Harakchand Misrimull rep. by its Partner M. Oatmul Jain, G. Ghawarchand, M. Lalithkumar Jain and Prakash Kumar Jain RESPONDENT

Date of Decision : 04-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 2002 Mad 372 : (2003) 2 LW 740 : (2002) 2 MLJ 580 : (2002) 4 RCR(Civil) 429

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : S. Raghavan, for the Appellant; G. Ashokapathy, for the Respondent

Final Decision : Dismissed

Judgement

A. Kulasekaran, J.—The defendant is the appellant. The Plaintiff has filed a suit for recovery of amount in O.S. No. 7968 of 1986 before

the VII Asst Judge, City Civil Court, Madras, which was dismissed. As against the same, the plaintiffs have filed an appeal in A.S. No. 155 of

1989 before the VIII Additional City Civil Judge, Madras which was allowed. Aggrieved by the judgment and decree passed by the first appellate

court, this second appeal has been filed.

2. At the time of admission of this second appeal, the below mentioned substantial questions of law are framed:-

i) Whether the incorporation of the names of some of the partners of the plaintiffs firm in the Register of Firms after the institution of the suit, when

the names did not find a place at the time of institution of the suit, could cure the defect and save it from dismissal u/s 69(2) of the Indian

Partnership Act, 1952 as amended?

ii) Whether the court below is not bound by the unreported judgment of this Honourable Court dated 27-09-1983 in C.S. Nos. 20 and 21 of

1982 and the decision of the Supreme Court in Shreeram Finance Corporation Vs. Yasin Khan and Others, :

iii) Whether the court below was right in applying the ration reported in (1989) I MLW 405 to the present case?

iv) Whether the lower appellate court is right in putting the case of surrender pleaded by the plaintiffs against the defendant?

3. The trial court, though dismissed the suit, unequivocally found that the defendant is liable to pay the suit amount of Rs.20,000/- to the plaintiff, as

against the same, the defendant has not filed any appeal, hence the fourth substantial question of law does not arise and answered accordingly. The

trial however dismissed the suit on the ground that the names of the plaintiffs 3 and 4, who are partners of the 1st plaintiff firm did not find place in

the register of firms on the date of institution of the suit and the incorporation of the names of the said two partners in the register of firms pending

suit would not cure the defect. The First Appellate Court, after scrutiny of Ex.A9 and other documentary and oral evidence allowed the appeal by

holding that the said two partners joined the firm as early as 22-10-1979, pending suit, their names were incorporated in the Register of Firms

which would not invalidate the suit.

4. Mr. Raghavan, learned counsel for the appellant argued that the subsequent incorporation of the names of the 3rd and 4th plaintiffs would not

cure the defect as such the suit was not maintainable u/s 69(2) of the Indian Partnership Act.

5. Mr. Ashokapathy, learned counsel for the respondents argued that the plaintiffs 1 and 2 were already partners and their names were found in

the register of Registrar of Firms, the plaintiffs 3 and 4 became partners as early as on 22-10-1979; whereas the suit was filed on 28-02-1986 and

pending suit the names of plaintiffs 3 and 4 were duly intimated to the Registrar, who has also issued a certificate with retrospective effect, hence,

the suit was maintainable.

6. The learned counsel for the appellant relied on the following decisions in support of his case:-

I) T. Savariraj Pillai Vs. M/s. R.S.S. vastrad and Company, wherein in Para-6 it was held thus:-

6. In the matter of In Re: Abani Kanta Pal, a Division Bench in dealing with the scope of the Section held that if a Firm is not registered, excepting

in a suit as contemplated under S. 69(3) of the Act, the Court will have no jurisdiction to entertain a suit inviolation of S. 69(1). It further added:

....In other words, the plaint that has been filed by the plaintiff will be considered a void plaint, if it contravenes the provisions of sub-secs. (1) and

(2) of S. 69 of the Partnership Act.....

A Division Bench of the same Court in an earlier decisions in Ram Kumar Shew Chandrai Vs. Dominion of India now The Union of India (UOI),

held that if the name of one person who was a partner on date of suit is not shown in the Register then the suit as filed is not maintainable. A

Division Bench in Bank of Koothattukulam V. Thomas AIR 1955 TC 155 held:

It is necessary not only that the firm should be registered, but the person suing must be shown as a partner in the firm. And when it is found that on

the date when the plaint is filed the second part of this condition has not been carried out when S. 69(2) is not complied with........ The registration

after the institution of the suit cannot cure the defect of non-registration before the date of suit"".

In this case, the plaintiff firm filed a suit through one of its partners, whose name was registered with registrar of firms after cross-examination of the

plaintiff and the court held that the suit was void. This Judgment is not applicable to the facts and the circumstances of the case on hand.

II) AIR 1989 Mad 405 (Sugesan Finance Investment rep. by its Partner Manoj K. Sheth at Park Town, Madras - 3 Vs. Mulji Mehta & Sons,

rep. by its Partners No.140-B, Shamaldas Gandhi Marg, Bombay) wherein in Para-14 it was held thus:

14. The second charge levelled against the respondent is that this suit has been filed by Surgesan Finance Investment, a registered firm,

represented by one Manoj K. Sheth, calling himself falsely a partner, though in fact he was not shown as a partner in the Register of firms, and

thereby violating S. 69(2) of the Partnership Act. But the counsel for the respondent argued that the said Manoj K. Sheth had already become a

partner from 20-11-1980 by deed of partnership dated 20-11-1980 and the same fact is also supported by entries in certain income tax accounts.

The copies of the said deed and the entries were shown to me. The learned counsel also showed me the copy of a letter dated 18-10-1988

written by the plaintiff firm to the Registrar of Firms stating that the respondents had intimated to the said registrar about the admission of Manoj K.

Sheth into the partnership, that by oversight his name might have been left out in the Register and that hence fresh form No.5 in lieu of one already

submitted was sent, requesting to incorporate his name with retrospective effect.

In this case, the learned Judge, while dealing with a criminal case has held that the suit filed by the registered firm represented by one of the

partners, whose name was not shown as a partner in the register of firms, who became a partner under a deed of partnership dated 20-11-1980,

and certain entries in the income tax accounts, justified that he was a partner as such suit maintainable. This case indeed support the case of the

plaintiffs/respondents.

III) Shreeram Finance Corporation Vs. Yasin Khan and Others, wherein in Para No. 6 it was held thus:-

6. In the present case the suit filed by the appellants is clearly hit by the provisions of Sub-sec. (2) of S. 69 of the said Partnership Act, as on the

date when the suit was filed two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact, partners,

one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was given to the

Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of

Firms. The result is that the suit was not maintainable in view of the provisions of sub-sec (2) of S. 69 of the said Partnership Act and the view

taken by the trial court and confirmed by the High Court in this connection is correct. Although the plaint was amended on a later date that cannot

save the suit. Reference has been made to some decisions in the judgment of the trial court, however, we do not find it necessary to refer to any of

them as the position in law, in our opinion, is clear on a plain reading of Sub-sec (2) of S. 69 of the said Partnership Act.

In the above case, on the date of filing the suit, two persons were shown as partners as per the relevant entries in the register of firms were not, in fact, partners, one new partner had come in and two minor had been admitted to the benefit of the partnership firm regarding which no notice was

given to the registrar of firms. The persons suing namely the current partners, as on the date of suit were not shown as partners in the Registrar of

Firms with the result the apex Court held that the suit was not maintainable. This Judgment is also not applicable to the facts and circumstances of

the case on hand.

IV) Ram Kumar Shew Chandrai Vs. Dominion of India now The Union of India (UOI), wherein in Para Nos. 8 & 9 it was held thus:-

8. ....The second condition under Sec. 69(2) is that the persons suing are or have been shown in the Register of Firms as partners in the firm. The

entries in the Register of Firms do not, however, include the name of Durga Prasad as one of the partners of the firm. It is argued on behalf of the

appellant that as the cause of action for the suit arose before Durga Prasad was taken in as a partner it is quite immaterial whether or not his name

appears in the Register of firms and the second condition is fulfilled as the names of the partners who were at the time of the accruing of the cause

of action have been shown as partners in the Register of Firms.....

9. ....Both the conditions u/s 69(2) are mandatory. In our opinion, the second condition will be fulfilled only when the names of the persons suing

are or have been shown in the Register of Firms as partners in the firm. In the instant case, as the second condition of Section 69(2) has not been

fulfilled, it must be held that the suit is barred by that section.

In this case, out of two partners, one died, firm has been dissolved, the suit was filed after new partner was taken in, the name of one person, who

was a partner on the date of filing of the suit was not shown in the register, held that the suit was not maintainable. The said Division Bench also

referred the below mentioned Judgment, but only in the nature of ""obiter dicta"".

V) Purushottam Umedbhai and Co. Vs. Manilal and Sons, wherein in Para 9 (3), it was held thus:-

9 (3) Where the names of the partners are described in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the

same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

9 (3) ....Rule 1 of O.XXX is a general provision. Rule 2, however, is confined to a suit instituted by partners in the name of the firm. It is clear

from this rule that although the suit is filed in the name of the firm a disclosure has to be made, on demand in writing by or on behalf of any

defendant, of names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. The provisions of Rule 2

would indicate that although the suit is filed in the name of a firm, it is none the less a suit by all the partners of the firm because if a disclosure of the

names of the partners is asked for by any defendant, on such disclosure, the suit shall proceed as if the partners had been named as plaintiffs in the

suit, even though the proceedings shall nevertheless be continued in the name of the firm. It is clear, therefore, that the provisions of O.XXX, Rule

1 and 2 are enabling provisions to permit several persons who are doing business as partners to sue or be sued in the name of the firm. Rule 2

would not have been in the form it is if the suit instituted in the name of the firm was not regarded as, in fact, a suit by the partners of the firm. The

provisions of these rules of O.XXX being enabling provisions, do not prevent the partners of a firm from suing or being sued in their individual

names.

In this case the Hon''ble Apex Court held that the provisions of Order XXX Rule 1 and 2 of CPC are enabling provisions to permit several

persons who are doing business as partners to sue or be sued in the name of the firm; do not prohibit partners of the firms from suing or being sued

in their individual names. Hence the judgments mentioned above and unreported judgment of learned Single Judge in C.S. Nos. 20 and 21 of 1982

are not applicable to the case on hand.

7. The learned counsel for the respondent relied on the following decisions in support of his case.

I) Gwalior Oil Mills Vs. Supreme Industries, wherein in Para-9 it was held thus:-

9. The implication of the registration so granted clearly was that the reconstituted partnership firm came into existence w.e.f. 1-1-1976. In any

case, the firm of M/s. Gwalior Oil Mills never ceased to be a registered partnership firm. The suit was filed by the firm in 1977 and the partner,

who filed the plaint, namely, Arvind Naranji Patel was admittedly a partner in the firm in his individual capacity and then as a karta of his Hindu

undivided family. Even if the reconstitution of the firm is ignored, it cannot be said that on 26-5-1977, the registered firm was not in existence.

In this case, the apex Court held that the suit filed through one of itts partners, who prior to re-constitution was partner in his individual capacity

and thereafter as Karta of HUF - later, Registrar recording the changes with retrospective effect fromthe date of actual re-constitution of the firm.

In such circumstances, apart from the fact that due to retrospective recording of changes by Registrar, the reconstituted firm came into existence

w.e.f. the date of its actual reconstitution, held that the firm never ceased to be a registered firm and the suit is maintainable.

II) Sharad Vasant Kotak and Others Vs. Ramniklal Mohanlal Chawda and Another, wherein in Para 32 it was held thus:-

32. We are also not impressed by the arguments of the learned counsel for the appellants that if the definition of Section 4 is applied to Section

69(2-A) then unless the names of all the partners find a place in the Register of Firms, the suit filed but he plaintiff cannot be sustained. The fact that

the firm was registered and the plaintiff''s name finds a place in the Register of Firms are not in dispute. The name of the newly introduced partner,

of course, does not find a place in the Register of Firms. That means the person whose name does not find a place in the Register of Firms may

incur certain disabilities and that will not disable the plaintiff to press the suit against the firm, which was registered against the persons whose

names find a place in the Register of Firms. We are not called upon to decide what are the disabilities of the person, whose name does not find a

place in the Register of firms. For the purpose of Sec. 69(2-A), the partnership firm will mean the firm as found in the certificate of registration and

the partners as found in the Register of Firms maintained as per rule in Form ""G"". The present suit being one for dissolution and accounts by one of

the partners, whose name admittedly finds a place in the Register of Firms along with the names of all the appellants, the requirements of Sec.

69(2-A) are satisfied. Section 4 of the Act is also complied with for this limited purpose.

In this case, it is held that the firm was registered, the name of the newly introduced partner, of course, does not find a place in the Register of

Firms. In view of the new partner the existing firm only shall be reconstituted and therefore there is no necessity to get a fresh registration as such

the suit is valid.

III) Chairman Lal and Another Vs. Firm New India Traders Mica Merchants and Others, wherein in Para 16 it was held thus:-

16. The next point urged by Mr. Mukherji was that the firm was not properly registered. Exhibit 12 is the registration certificate of the firm and it

shows, that the firm was registered on 10th April 1948 with two partners namely Chandmull and Satyanarain Sarda only. According to the plaint,

there are three other partners besides Chandmull and Satyanarain Sarda. It is obvious that these new partners became partners of the firm

subsequent to the registration of the firm and they did not care to get their names entered subsequently in the registration certificate as partners.

But, there is nothing in the partnership Act to indicate that in such a contingency the suit shall fail. Section 69(2) of the Act lays down that no suit to

enforce a right arising from a contract shall be instituted 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. This has, however, to be read with Order 30 Rule 1 of CPC. These

provisions, read together apparently, mean that when a suit is instituted in the name of a registered firm, only those persons who are registered as

partners of the firm can get the benefit of a decree in favour of the firm or shall be liable for a decree against the firm. Subject to these conditions,

the suit is maintainable and for purposes of this suit only Chand Mull and Satya Narain Sarda, who are registered in the registration Certificate shall

be deemed to be partners of the plaintiff firm.

In this case, the Division Bench of Patna High Court held that in the certificate two partners name alone appear out of five partners. Section 69 of

the Act has to be read with to be read with Order 30 Rule 1 of CPC. These provisions, read together apparently, mean that when a suit is

instituted in the name of a registered firm, only those persons who are registered as partners of the firm can get the benefit of a decree in favour of

the firm or shall be liable for a decree against the firm. Subject to these conditions, the suit is maintainable

V) Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd.

and Others, wherein in Para No.7 it was held thus:-

7. The above illustrations show that a suit may be brought under the provisions of O.30 of the CPC against a firm of which a partner is not

capable of being sued or being adjudged a debtor and in such a suit a decree enforceable against the other partners and the partnership assets may

be passed. Now, in the instant case, respondent No.1 sued the firm of Jagatsons International Corporation under the provisions of O.30 of the

Code of Civil Procedure. The assets of the firm as also all its partners jointly and severally are liable to satisfy the debts of the firm; only the

institution of a suit against him without the consent of the Central Government is barred by S. 86 read with S. 87-B of the Code of Civil

Procedure. As the suit was instituted without the requisite consent of the Central Government, no decree could be passed in the suit against the

Maharaja of Sirmur. But the suit against the firm other than the Maharaja of Sirmur was competent and a decree could be passed against the firm

other than the Maharaja of Sirmur and as such a decree could be executed against the partnership property and against the other partners by

following the procedure of O.21, R.50 of the Code of Civil Procedure. It is true that respondent No.1 obtained a decree against the firm of

Jagatsons International Corporation other than the Maharaja of Sirmur, and the decree so read is a valid decree which may be executed against

the partnership property and the other partners of the firm by recourse of the machinery of O.21, R.50 of the Code of Civil Procedure. The

application of respondent No.1 under O.21 R.50 (2) for leave to execute the decree against the other partners, is, therefore, maintainable. The

second contention of Mr.Mukherjee must, therefore, be rejected.

In this case, a suit was filed against a firm in which one of the partners being Ruler of former Indian State, it was canvassed that the suit was

instituted without consent of the Central Government and hence the decree was not executable. The Apex Court held that the decree passed

against the other partners and the firm was valid and executable under Order 21 Rule 15 (2). This judgment is no way applicable to the facts and

circumstances of the case on hand.

8. Now, we look into the relevant provisions of Section 69(2) of the Indian Partnership Act, 1932.

69. Effect of Non-registration

(1) ...

(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.

9. Section 69(2) of the Act contemplates three conditions namely (i) no suit to enforce a right arising from a contract shall be instituted on behalf of

a firm against third party (ii) unless a firm is registered and (iii) and the persons suing are or have been shown in the Registrar of Firms as partners

in the firm.

10. Before analysing the first condition namely ""arising out of a contract"", we look into the other two conditions. Admittedly, the plaintiff firm was

registered with the Registrar of Firms as such the second condition is complied with.

11. The third condition namely ""persons suing are or have been shown in the Registrar of Companies as Partners in the firm"" is concerned, that the

first and second plaintiffs name were admittedly found in the Register of Firms. The Plaintiffs 3 and 4, though became partners of the company as

early as on 22-10-1979, their names did not find place in the said register. Pending suit, their names were incorporated as per Section 59 of the

Partnership Act. Section 59 contemplates that when the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he

shall record an entry of the statement in a register called the Register of Firms, and shall file the statement. Under Sec. 58 of the Act, necessary

application has been forwarded by the plaintiffs firm intimating the date when the partners namely Plaintiffs 3 and 4 joined the firm.

12. The learned counsel for the appellant vociferously argued that the said incorporation of the names pending suit cannot cure the defect. The

names newly incorporated pending the suit may incur certain disabilities and that will not disable the plaintiffs to prosecute the suit. In this case, it is

not required to decide what are the disabilities of the persons whose name do not find a place in the Register of Firms. The argument of the learned

counsel for the appellant that unless the names of all the partners find a place in the Register of Firms, the suit filed by the plaintiff cannot be sustainable is untenable. There is no provision in the Partnership Act to justify that, if the names of the partners do not appear in the Register of

Firms, the suit instituted by the firm shall fail. On joint reading of Section 69 of the Indian Partnership Act and Order 30 Rule 1 of CPC would

make it clear that when a suit is instituted in the name of the Registered firm, only those persons who are registered as partners of the firm could get

the benefit of a decree or shall be liable for a decree against the firm.

13. The first condition that ""enforcing a right arising out of a contract"" is concerned that the contract even by the unregistered firm referred to in

Section 69(2) must not only be one entered into by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in

the course of the business dealing with the plaintiffs firm with such third party defendant. The Hon''ble Supreme Court has decided in M/s.

Haldiram Bhujiawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, that the real crux of the question is that the legislature,

when it used the words ''arising out of a contract'' in Section 69(2), it is referring to a contract entered into in course of business transaction by the

unregistered plaintiff firm with its customers/defendants and the idea is to protect those in commerce, who deal with such a partnership firm in

business. Such said third parties, who deal with the partners ought to be enabled to know what the names of the partners of the firm before they

deal with them in business"". It is evident that Section 69(2) is not attracted to any and every contract.

14. Admittedly, in this case, the suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the Plaintiffs firm

with the defendant in the course of business transaction. Moreover, Section 69(2) does not bar a suit to enforce common law right even if the firm

is unregistered on the date of the suit. Hence, the suit is not barred by Section 69(2) of the Partnership Act. With the result, all the other substantial

questions of law are answered in favour of the Respondents/Plaintiffs.

For the aforesaid reasons, the second appeal fails, liable to be dismissed and accordingly dismissed, with costs.

