
(2009) 08 BOM CK 0026

In the Bombay High Court

Case No : Second Appeal No. 18 of 2009

Sadashiv Pandurang Chavan

APPELLANT

Vs

Ramakant Mahadeo Manerkar

RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Partnership Act, 1932 — Section 69, 69(1), 69(2)(a)

Citation : (2010) 1 CivCC 244 : (2010) 7 RCR(Civil) 655

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : C.G. Gavnekar, for the Appellant; Surel S. Shah, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—Appeal is admitted on following substantial question of law:

Whether the First Appellate Court was right in allowing the appeal and dismissing the suit on the ground that the suit filed by the plaintiff/respondent for recovery of amount on the basis of an agreement entered into between the plaintiff and the defendant, who were partners in a firm was not tenable under the law in view of Section 69(2)(a) as applicable to the State of Maharashtra?

2. With consent of the Learned Counsel for the parties, matter is taken up for final hearing immediately. Perused the judgments of both the Courts below as well as the relevant oral and documentary evidence.

3. To state in brief, it is the case of the plaintiff/appellant that the defendant/respondent was already carrying on business as proprietor in the name and style of "Manerkar Traders" at C.S. No. 1259, "C" Ward, Laxmipuri, Kolhapur. There were cordial relations between the plaintiff and the defendant. In January, 1996, the defendant offered to admit the plaintiff as a partner in his business and this offer was accepted. As per the agreement, plaintiff paid some amounts to the defendant towards the capital in the business. Plaintiff was admitted to partnership firm with half share in the same. Remaining half share was to

continue with the defendant. Plaintiff also started looking after the affairs of the business in the capacity of the partner. His name was also recorded as partner in different registers including records maintained by Agriculture Produce Market Committee (In short " A.P.M.C). According to the plaintiff, the defendant had assured him to get the partnership firm registered. However, shortly differences and disputes occurred between them on account of business debts and liabilities. In view of the disputes, it was agreed that the plaintiff would quit the partnership firm and receive an amount of Rs. 1,55,000/- towards his share in the business. Accordingly, agreement or Memorandum of Understanding (MOU) was entered into between the plaintiff and the defendant in presence of the witnesses on 7th February, 1997. Defendant issued a postdated cheque bearing number 025275 dated 31.12.1997 against his account with Ravivar Peth Co-operative Bank, Kolhapur. According to the plaintiff, the cheque was presented to the bank for encashment and on 04.02.1998 cheque was returned to the plaintiff with endorsement "Drawer stopped the payment". In view of the cheque being dishonored, plaintiff filed Special Civil Suit No. 257/98 for recovery of 1,64,800/- including principal amount of Rs. 1,55,000/- as per the cheque and the interest thereon.

4. Defendant denied the claim of the plaintiff. He denied that plaintiff was ever admitted as partner in his business and that the plaintiff had supplied funds to him from time to time as a capital for business and that the plaintiff was also looking after the business of the firm as partner. According to him, record of the A.P.M.C. was forged with the assistance of the officials of the Committee to include the name of the plaintiff as partner of Manerkar Traders. According to him, no settlement had taken place nor he had issued a cheque to the plaintiff. According to him, on 2nd February, 1997 cheque was lost from his bag, which he was carrying and, therefore, he had informed the bank at appropriate time to stop the payment. It was further contended that the suit was not tenable for non registration of the firm.

5. Several issues were framed by the trial Court and after hearing the Learned Counsel for both the parties, the trial Court gave findings in favour of the plaintiff and against the defendant. The trial Court also held that the suit is not hit for non registration of the firm because suit was based on an agreement dated 7th February, 1997 and also on the cheque dated 31st December, 1997, which was dishonored. In the result, suit was decree to the extent of Rs. 1,61,393/- inclusive of principal amount and interest thereon. The judgment and decree were challenged by the defendant in Regular Civil Appeal No. 361/03. The Appellate Court found that the plaintiff had proved that he was admitted as partner, that the defendant had entered into an agreement dated 07.02.1997 Exhibit 55, that the cheque of Rs. 1,55,000/- was issued by the defendant to the plaintiff and that the cheque was dishonored. However, it came to conclusion that suit is not maintainable in view of the provisions of Section 69 of the Indian Partnership Act and particularly Subsection 2-A, which was inserted by the Maharashtra Amendment of 1984 which completely prohibited even filing of the

suit for dissolution of partnership firm or for settlement of the accounts by a partner if the partnership firm was not registered. In view of this finding, appeal was allowed and suit came to be dismissed.

6. In view of the above, it is clear that there is concurrent finding of the facts rendered by both the Courts below in favour of the plaintiff. In view of the findings, only question of law before this Court is whether in view of the provisions of Section 69 particularly sub-section 2-A as inserted by the Maharashtra Amendment Act, 1984, the suit was or was not tenable.

7. Before the question of law is dealt with, it may be noted that Mr. Shah the Learned Counsel for the defendant/respondent contended that the evidence and particularly the admissions of the plaintiff were not properly considered by both the Courts below. Particularly he wanted to point out that in the cross-examination, plaintiff had admitted that he had not made the payments of any amount to the defendant when the cheque was issued and that he had not obtained any receipts of the payments made by him to the defendant and that he has not produced any personal books of accounts in respect of the payment to the defendant from time to time. The trial Court has particularly referred to these objections in paragraph Nos.9 and 14 of its judgment and after referring to the evidence, rejected the contentions made by the defendant. On perusal of the evidence, it appears that the plaintiff had admitted that he had not made payment of the amounts at the time of issuing the cheque and that was a fact because according to him, payments were made from time to time after he was admitted as a partner in the firm and because disputes started between two, it was decided that he should quit the partnership firm. Cheque was issued towards his share in the business of the partnership firm when he quit the same. It was never his claim that he had made the payment to the defendant at the time of issuing the cheque. His agreement or MOU, Exhibit-55 was duly proved not only by the evidence of the plaintiff himself but also by the attesting witness, PW3 Yashwant and PW5, who had typed the matter of the agreement at the instance of the defendant. Signature of the defendant on that agreement was never disputed. Even signature of the defendant on the cheque is not disputed. Courts below found that at the time of settlement, defendant had issued post-dated cheque and later on, after thought, according to his own convenience, he decided to stop the payment and issue instructions to the bank accordingly. I find that the evidence led by the parties and even the objections taken by the defendant were duly considered. They hold no water.

8. Section 69 of the Indian Partnership Act, 1932 reads as follows: 69. Effect of non-registration.-

(1) No suit to enforce a right arising from a contract or conferred by this Act 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 to 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.

(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 a 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 dissolved firm, or"

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4)

9. From the language of sub-section (1), it is clear that no suit shall be instituted to enforce a right arising from a contract or conferred by the Partnership Act 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 to have been a partner in the firm unless the firm is registered. As per Sub-section 3(a), this provision is not applicable if the suit is filed for 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 the dissolved firm. Thus, even though the partnership firm was not registered, firm could carry on business subject to effects of non-registration mentioned in Section 69. However, even if the firm is not registered, any partner or erstwhile partner could file suit for dissolution or for accounts of the firm. By Maharashtra Amendment Act No. XXIX of 1984, Sub-section 2-A was inserted, which reads as follows:

(2-A) 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 to 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:

Thus, as per the Maharashtra amendment, even a suit for dissolution of the firm or for accounts of the dissolved firm could not be filed by partner or erstwhile partner if the partnership firm was not registered. This provision was in conflict with the original Sub-section 3(a) of Section 69. The Appellate Court allowed the appeal and dismissed the suit in view of sub-section 2-A as applicable to the State of Maharashtra.

10. Mr. Gavnekar the Learned Counsel for the plaintiff/appellant relied upon V. Subramaniam v. Rajesh Raghuvandra Rao 2009 (2) CCC 721 (S.C.) : 2009 (3) All

MR 418 wherein the Supreme Court held that Sub-section 2(A) is totally arbitrary, ultra vires and unconstitutional and it was struck down. Their Lordships observed in paragraph Nos.26 and 27 as follows:

26. The primary object of registration of a firm is protection of third parties who were subjected to hardship and difficulties in the matter of proving as to who were the partners. Under the earlier law, a third party obtaining a decree was often put to expenses and delay in proving that a particular person was a partner of that firm. The registration of a firm provides protection to the third parties against false denials of partnership and the evasion of liability. Once a firm is registered under the Act the statements recorded in the Register regarding the constitution of the firm are conclusive proof of the fact contained therein as against the partner. A partner whose name appears on the Register cannot deny that he is a partner except under the circumstances provided. Even then registration of a partnership firm is not made compulsory under the Act. A partnership firm can come into existence and function without being registered. However, the Maharashtra Amendment effects such stringent disabilities on a firm as in our opinion are crippling in nature. It lays down that an unregistered firm cannot enforce its claims against third parties. Similarly, a partner who is not registered is unable to enforce his claims against third parties or against his fellow partners. An exception to this disability was a suit for dissolution of a firm or a suit for accounts of a dissolved firm or a suit for recovery of property of a dissolved firm. Thus a partnership firm can come into existence, function as long as there is no problem, and disappear from existence without being registered. This is changed by the 1984 Amendment extending the bar of the proceedings to a suit for dissolution or recovery of property as well. The effect of the Amendment is that a partnership firm is allowed to come into existence and function without registration but it cannot go out of existence (with certain exceptions). This can result into a situation where in case of disputes amongst the partners the relationship of partnership cannot be put an end to by approaching a court of law. A dishonest partner, if in control of the business, or if simply stronger can successfully deprive the other partner of his dues from the partnership. It could result in extreme hardship and injustice. Might would be right. An aggrieved partner is left without any remedy whatsoever. He can neither file a suit to compel the mischievous partner to cooperate for registration, as such a suit is not maintainable, nor can he resort to arbitration if any, because the arbitration proceedings would be hit by Section 69(1) of the Act (Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd.,).

27. In our opinion the restrictions placed by sub-section 2-A of Section 69 introduced by the Maharashtra Amendment Act, for the reasons given above, are arbitrary and of excessive nature and go beyond what is in the public interest. Hence the restrictions cannot be regarded as reasonable.

Mr. Gavnekar in all fairness pointed out that judgment of the Supreme Court in Subramaniam (Supra) was rendered on 20th March, 2009 while the First

Appellate Court had delivered the judgment on 31.07.2008 and, therefore, the First Appellate Court did not have the benefit of the Supreme Court judgment on the subject. Anyhow, now legal position is clear that sub-section 2-A, as incorporated by the State of Maharashtra was unconstitutional and it has been struck out and, therefore, it must be presumed that it was never part of the law.

11. If sub-section 2-A is kept aside, the case would be governed by Section 69(1) and (3). Suit for dissolution of the firm or for accounts of the dissolved firm or any right or power to realize the property of a dissolved firm may be filed even though the partnership firm was not registered. Incidentally this was not suit either for the dissolution or for accounts or for right or powers to realize the property of the dissolved firm, therefore, Clause (a) of Sub-section (3) also could not be attracted. Now question is whether the suit was to enforce right arising out of the contract or conferred by this Act. Infact, partnership was dissolved, accounts were settled and plaintiff had quit the partnership as per the agreement dated 07.02.1997. Agreement, which has been duly proved by the plaintiff and two witnesses and which admittedly bear signature of the defendant. It was executed and signed by the defendant not as a partner but as proprietor of Manerkar Traders. This document was infact only a MOU, which was executed only by the defendant as proprietor of Manerkar Traders and whereby he has accepted that plaintiff had quit the partnership and defendant had agreed to pay Rs. 1,55,000/-, being his share in the business. Accordingly, he issued a post dated cheque. This suit Was based on the acknowledgment of the defendant about his liability to pay Rs. 1,55,000/- and secondly, the suit was based on the cheque, which was dishonored on being presented to the bank. The suit could not be covered by the provisions of Section 69(1). The trial Court had rightly discussed the legal position and had come to conclusion that suit was not barred by the provisions of Section 69(1).

12. Taking into consideration the facts and legal position and particularly the fact that sub-section 2-A has been struck down by the Supreme Court, impugned judgment rendered by the First Appellate Court has to be set aside and the judgment and the decree passed by the trial Court have to be restored.

13. For the aforesaid reasons, appeal is allowed. Impugned judgment passed by the First Appellate Court is hereby set aside and the judgment and decree passed by the trial Court in the suit are hereby restored.

14. At this stage, Mr. Shah the Learned Counsel for the defendant/respondent makes a request to stay this judgment for eight weeks. Therefore, execution of the decree shall remain stayed for further period of eight weeks from this date.