**(2008) 02 P&H CK 0090**

**In the Punjab And Haryana At Chandigarh**

Sat Pal and Another — APPELLANT

Vs

Puran Singh and Others (LRS of Kashmir Singh (deft)) — RESPONDENT

**Date of Decision :** 27-02-2008

**Acts Referred:**
Partnership Act, 1932 — Section 42, 69

**Citation :** (2008) 2 PLR 651 : (2008) 3 RCR(Civil) 433

**Hon'ble Judges :** Rakesh Kumar Jain, J

**Bench :** Single Bench

## Judgement

Rakesh Kumar Jain, J.—The plaintiffs/appellants are in second appeal against the judgment and decree dated November 04, 1996 passed by the trial Court dismissing their suit for recovery of Rs. 27,000/-, which was affirmed in appeal by the first Appellate Court vide its judgment and decree dated March 01, 2001.

2. In brief, facts of the case are that the plaintiffs filed a suit for recovery of Rs. 27,000/- on February 01, 1988 alleging therein that plaintiff No. 2 is carrying business of commission agent under the name and style of plaintiff No. 1. In order to attract customers, the plaintiffs had been advancing money to them which was adjustable against prices of goods sold to the plaintiffs or through their agents. It is further averred that the defendant (Kashmir Singh) availed following facilities from the plaintiff:

Date of advance Amount 4.5.1987 Rs. 22,000/- 15.7.1987 1,200/- 17.10.1987 300/- 30.10.1987 20/-

3. It is further averred that the aforesaid entries in the books of account have been thumb marked by the defendant and according to the custom prevalent in the local market at Kaithal, he was liable to pay interest @ 1.5% per mensum from the date of advance. The plaintiffs, thus, claimed an amount of Rs. 23,520/- on account of principal and Rs. 3,480/- on account of interest, total amounting to Rs. 27,000/- from the defendant.

4. In the written statement, the defendant alleged that plaintiff No. 1 was

unregistered firm; one of the partners i.e. Amar Nath had died in the month of August, 1987; plaintiff No. 2 is not the sole owner of plaintiff No. 1 because Amar Nath was survived by sons and daughters who have not been impleaded as parties, therefore, the suit is incompetent.

5. On merits, the averments made in para 3 of the plaint were denied.

6. The plaintiffs filed replication and admitted that Amar Nath had died but it was alleged that the firm is registered at serial No. 1450, with the Registrar of Firms, Haryana, on February 20, 1979. It was also alleged that plaintiff No. 2 is the sole owner of plaintiff No. 1.

7. On the pleadings of the parties, the trial Court framed the following issues:

1. Whether the plaintiff No. 2 is also sole proprietor of plaintiff No. 1 as alleged? OPP

2. Whether the plaintiff No. 1 is a registered firm as alleged? OPP

3. Whether the plaintiff is entitled to recover an amount of Rs. 27,000/- from the defendant as alleged? OPP

4. Whether the suit is incompetent for want of necessary parties? OPD

5. Whether the plaintiff firm is a money lender, if so its effect? OPD

6. Relief.

Besides the above issues, vide order dated April 10, 1996, an additional issue was also framed, which is reproduced as under:

5-A. Whether Sh. Kashmir Singh is a debtor as defined under Haryana Agriculture and Indebtness Act. If so to what effect? OPD

8. Both the plaintiffs and the defendant led their oral as well as documentary evidence in support of their respective pleas.

9. The trial Court decided Issue Nos. 1 and 2 against the plaintiffs issue No. 3 in favour of the plaintiffs and issue Nos. 4, 5 and 5-A against the defendant. However, while returning findings on issue No. 3, the trial Court found that the defendant had borrowed an amoun4 ?f R?. 22,000/- and Rs. 1,200/- on May 04, 1987 and July 15, 1987 respectively and also thumb marked the entries. Similarly, on October 17, 1987 and October 30, 1987, the defendant Kashmir Singh borrowed amounts of Rs. 300/- and Rs. 20/- respectively and signed the entries which are from Ex.P-3 to P-6 on the record and these findings were recorded on the basis of statement of PW-1 Sat Pal, PW-2 Mohinder and Yash Pal Chand Jain, Handwriting and finger print expert, and it was held that the plaintiffs are entitled to recover an amount of Rs. 27,000/- from the defendant @ 18% p.a. However, in view of the findings recorded on issue Nos. 1 and 2, the suit of the plaintiffs was dismissed holding that neither plaintiff No. 1''s firm is a registered partnership firm nor plaintiff No. 2, Sat Pal is its sole proprietor.

 

10. In the first appeal, the Appellate Court observed in para 20 of its judgment as under:

It is proved on record that M/s. Amar Nath Sat Pal was a partnership firm of which Sat Pal and Amar Nath were registered partners. Copies of requisite certificates are Ex.P-1 and P-2. There is also no dispute that Amar Nath one of the partner expired much before filing of present suit. Hence, the partnership came to an end on the death of Amar Nath by virtue of Section 42 of Indian Partnership Act. As per finding of learned trial court, the money was borrowed by Kashmir Singh deceased from the said dissolved partnership firm. There is no dispute regarding the legal proposition that even the surviving partner of dissolved partnership firm can maintain suit for recovering assets of dissolved firm without impleading L.Rs. of deceased partner as has been held in the aforementioned authorities on which reliance was placed on behalf of appellant-plaintiffs. However, the suit of the plaintiffs was dismissed on the ground that the suit was not filed to realize the debts of the dissolved firm as one of the surviving partners, rather the suit has been filed as a sole proprietor of the dissolved firm.

11. Learned Counsel for the appellants has submitted that both the Courts below have given concurrent findings in respect of issue No. 3 to the effect that the defendant had, in fact, taken an advance of Rs. 23,520/- on which interest of Rs. 3,480/- had accrued. Both the Courts have concurrently held that the plaintiffs are entitled to recover Rs. 27,000/- from the defendant as prayed for but the suit has been dismissed solely on the ground that the same has not been filed on behalf of the dissolved firm to realize its debts. Learned Counsel further urged that this finding is incorrect and erroneous which has been caused due to misreading of the pleadings because in the written statement, the defendant himself had pleaded that Amar Nath one of the partners of plaintiff No. 1 died in the month of August, 1987, whereas two items of advance i.e. Rs. 22,000/-dated May 04, 1987 and Rs. 1,200/- dated July 15, 1987 were prior to his death, which were belonging to the said undissolved firm.

12. Therefore, in view of the findings recorded by the first Appellate Court in para 20 of the judgment that the defendant had borrowed money from the firm, which was dissolved after the death of Amar Nath and it was also found that as per legal position, even a surviving partner of the dissolved firm can maintain a suit for recovering its assets without even impleading the legal representatives of deceased partner, therefore, the suit should have been decreed to the extent of an amount of Rs. 23,200/- with interest, which is a debt of the dissolved firm. In support of his this contention, learned Counsel has placed reliance upon Mirza Najm Effindi Vs. Firm Kohinoor Footwear Co., . He has further also relied upon Section 69(3) of the Indian Partnership Act, 1932. Thus, as per learned Counsel for the appellants, substantial questions of law involved in this appeal are as under:

1. Whether the Courts below have misread and misinterpreted the pleadings and evidence led by both the parties?

 

2. Whether after the dissolution of the firm due to the death of a partner, the sole surviving partner can maintain the suit for recovery of the debt/assets of the dissolved firm?

13. Repelling the arguments of learned Counsel for the appellants, learned Counsel for the respondents has submitted that the suit could not have been decreed because it is not pleaded by the plaintiffs much-less plaintiff No. 2 that the suit is for the recovery of debts of the dissolved firm. Moreover, plaintiff No. 2 had alleged in the replication that he is sole owner of plaintiff No. 1, therefore, the suit in the present form was not maintainable and has been rightly dismissed by both the Courts below.

14. I have heard counsel for both the parties and perused the record.

15. Admittedly, the findings of the, trial Court that the plaintiffs are entitled to recover Rs. 27,000/- from the defendant with interest @ 18% p.a. has become final between the parties as the same has not been challenged by the defendant either by way of cross-appeal or cross objections. It is the finding of both the Courts that the defendant had borrowed money from the dissolved partnership firm and even the first Appellate Court has held that the surviving partner can maintain a suit for recovery of debts of the dissolved firm without even impleading the legal representatives of the deceased partner, therefore, question of law (No. 2) is answered in favour of the appellants in view of the decision rendered in Mirza Najm''s Case (supra) and also in view of Section 69(3) of the aforesaid Act and it is held that the plaintiff/appellants are entitled to recover the amount of debt of dissolved firm.

16. So far the findings of the Courts below for dismissal of the suit is concerned Where it has been held that the present suit has not been filed on behalf of the dissolved firm to realize its debts as one of the surviving partners, the Courts should not have only seen the form of the plaint, but have also seen the substance therein which in my view, and even according to the plaint, pertains to the recovery of borrowed amount of the dissolved firm to the extent of two entries i.e. dated May 04, 1987 and July 15, 1987, which are prior to the death of Amar Nath, who according to the defendant, had died in August, 1987. Therefore, plaintiff No. 2, who had filed a suit also on behalf of plaintiff No. 1 can claim and recover the aforesaid amount of Rs. 22,000/- and Rs. 1,200/- pertaining to the dissolved firm. However, the plaintiffs are not entitled to the amount which was advanced after the dissolution of the firm, which had occasioned due to the death of one of its partners, namely Amar Nath.

17. Thus, the appeal is partly allowed to the extent that suit of the plaintiff for recover of Rs. 22,000/- and Rs. 1,200/- pertaining to the debts of dissolved firm is decreed with 18% interest per annum with costs and the suit pertaining to the recovery of amount of Rs. 300/- and Rs. 20/- advanced after the dissolution of firm is dismissed.