

(2000) 01 MP CK 0008
In the Madhya Pradesh High Court
Case No : F.A. No. 47 of 1995 (G)

Smt. Shanti Devi Sharma and One Or.	APPELLANT
Vs	
Radhey Shyam Palod and One Or.	RESPONDENT

Date of Decision : 13-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2000) 1 MPJR 553

Hon'ble Judges : R.B. Dixit, J

Bench : Single Bench

Advocate : R.D. Jain, for the Appellant; M.M. Kaushik, for the Respondent

Final Decision : Allowed

Judgement

R.B. Dixit, J.

FEELING aggrieved by judgment and order dated 13.01.95 passed by Third Additional Judge to District Judge, Vidisha, in Civil Suit No. 18/94, the Plaintiffs/Appellants have come up in appeal to this Court and prayed for hearing of the suit on merits.

Appellants / Plaintiffs had filed a suit before District Judge, Vidisha for declaration and mandatory injunction in respect of a partnership firm styled as "M/s Vidisha Auto Service" to declare that it is an exclusive dealership of the Plaintiffs. According to the Plaintiffs, Defendant No. 2 Indian Oil Corporation granted agency of kerosene oil in Vidisha District to the Plaintiffs in the name of Vidisha Auto Service for petrol, diesel and mobioil. Subsequently another retail outlet was opened in Dholkhedi which business was done in the sub-partnership with the name of Vidisha Auto Sales and Service. Initially, the partnership was constituted of two partners, namely; Ramswaroop Sharma, predecessor in title of the present Plaintiffs, and Defendant No. 1 i. e. Defendant / Respondent No. 1.

After about 14/15 years, there was some dispute Limited. Ramswaroop Sharma died on 6.12.1989 and this thing was utilised by Defendant No. 1 for raising

objection and claiming the share in the business of kerosene. The Defendant No. 2 in collusion with Defendant No. 1 also raised objection on the ground that Defendant No. 1 alone remains the sole surviving partner of Vidisha Auto Service after the death of Ramswaroop Sharma.

On 27.6.1989, Respondent/Defendant No. 1 voluntarily agreed to keep himself away from the partnership firm Vidisha Auto Service and consented Ramswaroop Sharma to carry on the business of this firm in his exclusive rights. Ramswaroop Sharma thereafter reconstructed the said firm Vidisha Auto Service by naming his son Plaintiff Ramsahay Sharma in place of Respondent-Defendant No. 1. Before Ramswaroop Sharma could have completed the formalities to get normal kerosene supply from Indian Oil Corporation, he expired on 6.12.1989 and thereafter Ram Sahay Sharma inducted his mother Shanti Devi as a partner in the said firm, however, no formal recognition could be obtained because of the objections raised on behalf of Respondent/ Defendants which necessitated the filing of the suit as referred hereinabove.

Respondent / Defendant No. 1. Radhey Shyam Palod in his written statement before the trial court contended that his partnership with Ram Swaroop Sharma was not dissolved and, therefore, either Ramswaroop Sharma or his successor in interest, had no right to create any between the partners and they mutually agreed to distribute assets of partnership and the deceased Ramswaroop Sharma was given the right of running the business in Vidisha and Defendant No. 1. agreed to look after the business in Dholkhedi. This agreement did not subsist for long and again on 12.10.94, another arrangement was made and Defendant No. 1. started business at Vidisha in the name of "Palod Auto Service". The deceased Ram Swaroop started business in the name name "Dholkhedi Auto Service" and the business at Basoda was done in the name of "Basoda Auto Service". So far as the dealership of petrol, diesel and mobi oil is concerned, the matter was settled mutually as above. However, in relation to business of Kerosene Oil, Defendant No. 1 renounced his rights in the kerosene business after taking consideration as agreed and the kerosene business was entrusted solely to deceased Ramswaroop Sharma. The agreement in relation to kerosene business was adopted in 1980 and the same continued upto November, 1983.

As per the arrangement entered in the year 1980, the kerosene was received from Defendant No. 2 on the basis of an indent signed by the deceased Ramswaroop Sharma and Defendant No. 1. However, Defendant No. 1 did not abide by this arrangement and he started raising objection. Ultimately, the Collector suspended the kerosene licence and as from 27.9.87, late Ramswaroop Sharma was accepted sole owner of the business run in the name of Vidisha Auto Service and it was also agreed that Ramswaroop Sharma will be fully entitled for doing the business of kerosene. This arrangement was also agreed by the Defendant No. 2 Indian Oil Corporation other firm in the same name and style. By way of preliminary objection, it was further pleaded that the suit is not tenable without the firm being made a party in the case. A legal plea was further

raised under order 2 Rule 2 Code of CPC to the effect that Ramswaroop Sharma had filed Civil Suits Nos. 10-B/90 and 152A/87 wherein the same relief was claimed and the decision of the Civil Suit No. 152-A/87 on 30.3.90 operates as res judicata in the present suit. Payment of deficient court-fee as well as point of jurisdiction of the Court were also raised on behalf of Respondent No. 1.

The resume of the written statement of Respondent-Defendant No. 2 was that It had no agreement with the Plaintiffs about supply of kerosene oil and, therefore, the Plaintiffs cannot claim dealership by way of right for their newly constituted partnership firm. Instead, Respondent/Defendant No. 1 being the sole surviving partner of Vidisha Auto Service had a proper claim for supply of kerosene oil.

In M. A. No. 165/90 by order dated 11.12.90 of this Court, Respondents were allowed an opportunity for adducing evidence in rebuttal and the trial Court was directed to decide the application under Order 39 Rules 1 and 2 C. P. C. afresh. It was directed that till then the supply of kerosene oil shall continue in the name of the Firm Vidisha Auto Service.

In another M. A. No. 126/91 vide order dated 5.8.91 of this Court, it has been made clear that the licence of kerosene dealership issued by Collector, Vidisha in exercise of his powers under the M. P. Kerosene Dealers Licensing Order, 1979 made under the provisions of the Essential Commodities Act, 1955 is in the name of Vidisha Auto Service and additionally the names appear along with the firm's name are Ram Sahai and Shanti Devi, the Plaintiffs. It was conceded on behalf of the Plaintiffs and also on behalf of Indian Oil Corporation that they are bound by that licence. It was further pointed out by the learned Single Judge of this Court that dealership right is a statutory right and is not a private property of any individual firm or company. Even by act of parties, that right cannot be conferred, transferred or abandoned if any sanction in that regard existed in law for such an action. The Court, therefore, directed that it shall be open to the Plaintiffs to amend their plaint and if that is done within two weeks, the Defendants shall also amend their written statements. The Plaintiffs thereafter may file a fresh application for injunction. On the basis of fresh pleadings, a fresh decision shall be rendered.

The Plaintiffs moved an amendment in the plaint as directed in M. A. No. 126/91 by the order dated 5.8.91 of this Court and also moved another application under Order 39 rules 1 and 2 read with Section 151 C. P. C. The Defendants also amended their written statements by giving suitable reply to the amendment made by the Plaintiffs. After rejection of the application under Order 39 rules 1 & 2 C. P. C. by the trial Court. Plaintiffs again came up in M. A. No. 251/91 to this Court, but at this time, the High Court in its order dated 18.11.91 did nothing except making a direction for early disposal of the matter. The learned trial Court thereafter framed following preliminary issues and dismissed the suit of the Plaintiffs by the impugned order, which is the subject matter of this appeal.

Issues

Findings

Whether the suit is not maintainable in view of Civil Suits Nos. 10-B/90 and 152A /87 order dated 30.3.90 under Order 2 Rule 2 C. P. C. for not impleading firm a party as well as in reference to the order passed by the High Court on 11.12.90?

Suit is not maintainable in view of order dated 11.12.90 of the High Court and for not impleading firm as a party, rest of the facts are not proved.

Whether there is defect of non joinder of parties. If so its effect ?

Yes, the suit is liable to be dismissed for non-joinder of parties.

Whether the Court has jurisdiction to try the suit ?

Yes.

Whether the plaintiffs had rightly valued the suit and paid proper court fees ?

Valuation is correct but sufficient Court-fee has not been paid.

10 A. In so far as issues 1 and 2 above are concerned, the learned trial Court has held that the filing of the Suits Nos. 10-B/90 and 152-A/87 had no adverse affect on the present suit on the ground that the subject-matter and agreement to supply the kerosene etc. were different in above mentioned cases, and, therefore, the principle of res judicata is not applicable to the instant suit. Although without filing any cross-objections, the learned Counsel appearing for Respondents-Defendants had tried to assail the findings of the trial Court. However, after going through the record of the lower court, I am of the considered opinion that there is no evidence or ground brought on record to challenge the finding of the trial Court on this point, as the subject-matter and the order of agreement etc. were not similar to that of the present case. Now, the only question remains to be considered in respect of issues nos 1 and 2 referred hereinabove, is whether the suit is maintainable without adding Firm Vidisha Auto Service.

10 B, From the bare reading of the plaint allegations, it is amply clear that before the death of Ram-Swaroop Sharma, some disputes about the firm had started between both the partners. This led to creation of an agreement dated 12.10.79 between the two as the opening sentence of this agreement indicates that both the partners had agreed to dissolve the partnership and further to make a division of its assets and liabilities between them. Further undated agreement, copy of which appears on the record of the lower Court, Respondent/Defendant No. 1. Radheyshyam Palod had agreed to separate himself from the said Vidisha Auto Service and recognised Ram Swaroop Sharma as a sole partner of the said firm. It seems that after separation of Radhey Shyam Palod from the firm, deceased Ramswaroop Sharma had inducted his son as a partner and after his death, his wife Shanti Devi was made partner in the said firm. It means that now after dissolution of the original partnership between Ramswaroop Sharma and

Defendant No. 1 respectively, firm had been dissolved and what remains is only the name of the firm under the name and style of which the business is carried out by the Plaintiffs.

It has been contended by the learned Counsel of the Plaintiffs/ Appellants that in view of the provisions envisaged under Rule 9 Order 1 Code of CPC no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The proviso to rule provides that nothing in this rule shall apply to non-joinder of a necessary party. On the basis of this proviso, it has been submitted on behalf of the contesting Defendants/ Respondents that the partnership firm for which dealership of kersosene oil is claimed by way of right is a necessary party even if it is assumed that after the death of one of the partners i. e. Ramswaroop Sharma, when Defendant No. 1, who is the sole surviving partner of the said firm, is contesting the suit, the remaining heirs of the deceased-partner are necessary parties. In the circumstances the suit cannot proceed without joining the necessary parties in the case.

Rule 1 Order 30 C. P. C. further provides that where any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the person who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

Rule 4 of Order 30 is material for the purpose of this case, which reads

Right of suit on death of partner -(1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such person dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in Sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have -

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

It has been submitted by the learned Senior Counsel, Shri R. D. Jain, appearing for Appellants-Plaintiffs that since the original partnership entered into between deceased Ramswaroop Sharma and Defendant Radheyshyam Palod was virtually dissolved and no longer exists, the question of its making a party has become altogether redundant in facts and circumstances of this case and further, since Defendant Radheyshyam Palod had already left the firm and authorised

Ramswaroop Sharma to be recognised as a sole partner of the said firm, the question of its addition as a party is although more not necessary when the assets and liabilities of the said firm devolve by succession upon the Plaintiffs. However, when no suit has been brought by the said firm or against the firm but when the Plaintiffs in their individual capacity claiming themselves to be recognised for getting dealership of the firm, the question of adding other heirs of Ramswaroop as a party, does not arise.

The effect of non-joinder of partnership firm as a party was considered by the Apex Court in its decision rendered in the case of Purushottam Umedbhai and Co. Vs. Manilal and Sons, wherein it was held that the provisions of Order 30 rules 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, 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 the circumstances, the Civil Court could permit, under the provisions of S. 153 of the Code an amendment of the plaint to enable a proper description of the Plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties. Strictly speaking O.1 Rule 10 (1) has no application to a case of this kind because the suit has not been instituted in the name of a wrong person, nor is it a case of there being doubt whether it has been instituted in the name of the right Plaintiffs. The provision of O.1, Rule 10 (2) also do not apply because it is not a case of any party having been improperly joined whose name has to be struck out or a case of adding a person or a party who ought to have been joined or whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

In view of the legal provision envisaged under Order 30 rules 1 and 2 C.P.C., referred hereinabove, it has been contended by the learned Counsel of the Appellants that either against the outgoing firm originally constituted as partnership firm between deceased Ramswaroop Sharma and Defendant-Respondent No. 1, or against remaining heirs of the deceased Ramswaroop Plaintiffs had not claimed any relief. They are not necessary parties to the present case and the provisions of Order 1 Rule 9 Code of CPC in so far as the Plaintiffs are concerned being enabling provisions, the suit cannot be dismissed for non-joinder of the said firm or remaining heirs of Ramswaroop Sharma, as a party.

In a decision, rendered by Kerala High Court in case of Thomas v. George and Anr. reported in AIR 1973 Kera 94 wherein reliance was placed on the decision in case of Purshotham Umed Bhai (supra), it was held that provision of Order 30 Rule 1 is only permissive and does not prevent a partner from suing or being sued in his individual name. In a Division Bench decision of this Court rendered

in case of Chaturbhuj v. Namichand reported in 1957 J LJ 1041, it was observed that a firm is not juristic person, but it is a compedious expression to describe the members constituting It. Order 30 of the CPC is an enabling provision and permits the partners to sue and be sued in the firm name. But as the individuality of the partners is not merged in that of the firm, they can still sue and be sued in their individual names. If, therefore, the partners do not choose to file a suit in the firm name, there is nothing in the Code of CPC and particularly in Order 30 thereof, which would compel them to do so. The provisions of Order 30 Rule 4 can be invoked only if the suit is filed in the firm name, but not otherwise. Another ground considered by the learned trial Court in arriving at a conclusion that the suit is not maintainable with reference to the order dated 11.12.90 of this Court. I find nothing on the point of addition or otherwise of the party in the case, but it was observed in respect of interim relief to be granted pending an application under Order 39 Rules 1 & 2 by this Court, as under:

Till then the supply of kerosene oil shall continue in the name of firm-Vidisha Auto Service.

There is nothing in this direction so as to indicate that Vidisha Auto Service is a necessary party. Since Plaintiffs are claiming themselves to be the partners of the said firm, the Court has only to examine whether Plaintiffs are entitled to claim dealership as partners of the said firm. The Plaintiffs are entitled to bring a suit of this nature as against the respondnet-Defendants for declaration that they alone are entitled to get the dealership of the kerosene oil for a firm of which they are partners. Of course, the claim is open for challenge on various grounds raised on behalf of Defendants, but the suit cannot be dismissed without examining the case of the Plaintiffs on merits at this stage and by holding that firm or remaining heirs of Ramswaroop Sharma are necessary parties to the suit. The order of the learned trial Court is, therefore, found to be vitiated in law in so far as rejecting the claim of the Plaintiffs for non-joinder of the parties.

Although the learned trial Court has not disputed territorial or pecuniary jurisdiction to try the case, but in respect of last issue No. 4, only Court-fee was found insufficient. The learned trial Court came to the conclusion that the Plaintiffs had valued suit for Rs. 50,000/- on which fixed Court-fee of Rs. 30/- was paid for declaration. However, for the purpose of injunction, the valuation was made Rs. 200/- and Court fee of Rs. 20/- was paid on that count. The Respondent-Defendant No. 1 had contended before the trial Court that so far thereis contract between him and the Plaintiffs for creation of a dealership. However, Defendant No. 1 had raised an objection that it is not open tor Plaintiffs to have arbitrarily valued the suit. The learned trial Court further came to the conclusion that although the fixed Court-fee of Rs. 30/- paid for the relief of declaration is proper. However, the valuation on the relief of injunction is undervalued and in consequence the payment of Rs. 20/- as Court fee on relief of injunction is not sufficient.

In order to determine whether the relief of injunction as claimed in this case is a consequential relief, the averments made in the relief clause of the plaint, are to be considered first. The first relief is for the declaration to the effect that Kerosene Oil Dealership for Vidisha District between Ramswaroop Sharma and Defendant No. 2 came to an end and since Ramswaroop Sharma was left alone in the said business, but during his life, transferred his partnership to Plaintiff No. 1, who is carrying the business for Plaintiff No. 1, is entitled to claim dealership for Vidisha district.

The second relief claimed against Defendant No. 2 is for issuance of direction to recognise Plaintiffs as dealers in place of Defendant No. 1, who had already separated from the partnership of Ramswaroop Sharma. It is, therefore, clear that the reliefs claimed by the Plaintiffs are not, by way of preventive injunction.

In a decision rendered in case of Jagdish Prasad Sukhanandan (FIRM) v. M. P. Electricity Board reported in 1987 MPLJ 452 of this Court, it was held that in determining the question of Court fees, no attention has to be drawn to the written statement or even to the final decision that may be rendered on merits of the suit, there is no basis at all for the real money value. For the purpose of computation of Court-fees, recourse has to be made not to the provisions of the Suits Valuation Act, but the relevant provisions of the Court Fees Act.

In another decision of this Court rendered in case of Ram Singh Chhatriya and Another Vs. Shri Rajiv Lochan Trust, , it was observed that where the suit was filed on behalf of public trust for a declaration of the right of the trustees so that possession may be delivered to them as the possession was with the Additional Tahsildar pursuant to the proceedings u/s 145 of the Criminal Procedure Code, it was found that no payment of ad valorem Court fee is required.

In another case of Sanik Nagar Durga G.N. 5 Samiti v. Indore City Improvement Turst reported in 1983 MPWN 66 in a suit for declaration of title and preventive injunction, although the relief of injunction was not found consequential to declaration. It was held that the suit falls u/s 17 (v) read with Section 7 (iv) (d) of the Court-fees Act and, therefore, ad valorem Court fee was not payable.

In case of Smt. Sabina alias Farida Vs. Mohd. Abdul Wasit, where a person was in settled possession filed suit for declaration of title and injunction. It was held that provisions u/s 7 (iv) (c) of the Court-fees Act are not applicable. He can put any value for declaration and pay fixed Court-fees thereon. On injunction he is entitled to value the relief u/s 7 (iv) (d). It was further held that it is for determination whether or not the relief sought is consequential; depends on the fact that if the relief can be claimed independently, it is not consequential.

In so far as the present case is concerned, the relief of injunction for making the suitable direction seems to be consequential relief in respect of declaration as sought for by the Plaintiffs. In the circumstances, therefore, it cannot be held that the Plaintiffs are required to revalue their suit for claiming injunction and

then to pay Court-fee on it. However, the question of payment of Court-fee is not limited to be decided between the parties, but it is a question between the Plaintiffs and the State through Court and, therefore, such a question always remains open to be considered even after decision of the case and the Court is, therefore, to make a suitable order to realise remaining Court fee, from the Plaintiffs. However, no suit can be dismissed without affording an opportunity to pay the remaining Court fee to the Plaintiffs. Therefore, where the Plaintiffs had not been asked to make good the remaining Court-fee, if any, the rejection of the plaint on this count was bad in law.

For the reasons stated hereinabove, this appeal is allowed and the impugned order of the lower Court is set aside. The learned trial Court is directed to restore the case on its original number and proceed to decide the case of the Plaintiffs in accordance with law.