

(2007) 11 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 264 of 2002

Surjansingh	Vs	APPELLANT
Smt. Jasbir Kaur, Jaspalsingh Nagra and Gurupalsingh Nagra		RESPONDENT

Date of Decision : 27-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 1(4), Order 41 Rule 22
Maharashtra Partnership Act, 1932 — Section 69(2A)
Partnership Act, 1932 — Section 69, 69(2)

Citation : (2008) 2 ALLMR 454 : (2008) 2 BomCR 207 : (2008) 2 MhLj 763 : (2009) 5 RCR(Civil) 489

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.V. Sirpurkar, for the Appellant; A.M. Ghare, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This Second Appeal has been admitted by treating questions at Sr. Nos. I, II, VI, IX & X of para 5 of memo of Second Appeal as substantial questions of law on 14.10.2002.

2. I have heard Shri Sirpurkar, learned Counsel for the appellant original plaintiff and Shri Ghare, learned Counsel for the respondents original defendants. The questions mentioned above read as under:

I. Whether, the finding which is recorded adversely against the respondents, can be challenged by the respondents without filing cross objection under Order 41, Rule 22 of the CPC after the amendment of CPC in 1976 ?

II. Whether the question regarding maintainability of the suit under Order 23, Rule 1(4) of the CPC could be tried as a preliminary issue; as the same required the examination of facts and the causes of action in the previous suit as well as in subsequent suit and also the subsequent events which led to the filing of the

second suit ?

VI. Whether the Appellate Court was justified in holding that there was a partnership without deciding the factual aspect in absence of any evidence recorded by the Court ?

IX. Whether the defendants were estopped from taking the plea u/s 69 of the Partnership Act, in view of their pleadings ?

X. Whether the question of limitation which was a mixed question of law and facts could be decided by the Courts below as a preliminary issue ?

3. Shri Sirpurkar, learned Counsel for the appellant, after narrating the facts, has contended that basically four questions need to be answered in this Second Appeal and if these questions are answered in favour of the appellant, the suit needs to be taken up again. He contends that objection to the maintainability of suit raised under Order 23, Rule 1 sub-rule (iv) of CPC was totally misconceived because the earlier suit filed by present appellant was for injunction to restrain the respondents from obstructing him in participating in the business of partnership. He further points out that apart from restraining order, an order was also sought to prohibit the respondents from carrying on any business in the name of partnership firm. He contends that later on said suit was withdrawn and second suit came to be filed in which prayer was made for dissolution of partnership and for rendition of accounts. He contends that thus a suit for exercising the rights as a partner and suit for obtaining retirement from such firm cannot be treated as dealing with same subject matter. In support of his contention, he has also pointed out the judgment of the Hon'ble Apex Court in the case of Vallabh Das Vs. Madan Lal and Others, . He further states that though the trial Court and the appellate Court are against him on this aspect, the appellate Court has in appeal filed by the appellant enlarged the scope of appeal and answered two additional points against the appellant. He points out that second suit filed by present appellant was challenged on the ground of limitation and also on the ground of bar u/s 69 of the Indian Partnership Act, 1932. Both these issues were answered by the trial Court in favour of appellant and the appellate Court has reversed said findings of trial Court. He contends that in the absence of appeal from such an order of trial Court by present respondents or at least a cross objection by them before the appellate Court, the appellate Court could not have undertaken such an exercise. He argues that provisions of Order 41, Rule 22 and Order 41, Rule 33, do not confer such jurisdiction upon the appellate Court. He has also pointed out as to how earlier there were conflicting judgments in this respect and he relies upon observations of Mulla in his 14th Edition of CPC at page 2236. He also relies upon the judgment in the case of Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, , to support his contention. He further states that the limitation of three years applied by the appellate Court for the purposes of such suit is totally misconceived because the appellant continued as partner till he was legally removed and hence when he found that it was not possible for the appellant to continue together with respondents as partner, he

decided to withdraw and filed suit for rendition of accounts and for dissolution of firm. He, therefore, states that as the appellant was continuing as partner even after withdrawal of his first suit, the limitation of three years had not begun to run and counting of limitation of three years from 8.10.1977 is totally misconceived and erroneous.

4. Insofar as bar u/s 69 of Partnership Act is concerned, he argues that the said provision was not applicable at all and trial Court has given valid reasons thereof. He states that the appellant was not exercising his rights under any partnership deed but the rights claimed were as per agreement dated 8.8.1977 between the parties. He, therefore, states that Section 69 of the Act has been erroneously looked into by the appellate Court.

5. As against this, Shri Ghare, learned Counsel for the respondents has contended that the trial Court upheld the objection only in relation to order 23 Rule 1 sub-rule (iv) of CPC and dismissed the suit and as such there was no operating decree in the matter. He contends that the findings of the trial Court in relation to bar u/s 69 of the Act or of bar under Limitation Act, therefore, could have been assailed even at the stage of oral arguments by present respondents and that has been rightly done by invoking Order 41, Rule 22 read with Order 41, Rule 33 of Civil Procedure Code. He argues that the arguments were considered by the learned Appellate Court on merits after giving due opportunity to present appellant even in this respect and the appellate court has found that these respondents could have challenged the findings recorded by the trial Court against them without filing cross objection. He states that the commentary in CPC by Mulla on which reliance has been placed by the appellant is not at all relevant for deciding this controversy. He further states that the agreement dated 8.8.1977 was subject matter of first suit and also of second suit. He contends that legality and validity of said agreement, its performance or its breach were the issues involved in both suits and as such the second suit was also for very same subject matter. According to him, after considering the relevant material, the appellate Court as also the trial Court have rightly concluded that the earlier suit having been withdrawn unconditionally, later suit in relation to very same subject matter was barred by Order 23 Rule 1 sub-rule (iv) of Civil Procedure Code.

6. In relation to Limitation Act, Shri Ghare, learned Counsel for the respondents contends that the agreement dated 8.8.1977 is not a document which brings into existence a partnership as required by the Indian Partnership Act, 1932. He, therefore, contends that suit to be filed by present appellant ought to have been for specific performance of agreement dated 8.8.1977 and said suit should have been filed within three years from 8.8.1977 or in any case within three years of its violation i.e. from 8.10.1977. He points out that suit has been filed initially in 1994 before a wrong forum and thereafter in 1999 at Akola and as such the suit is hopelessly barred. He relies heavily on the observations of the appellate Court to contend that suit of "any nature" arising out of agreement dated 8.8.1977

should have been filed within three years. He also relies upon Section 69 Rule (2A) of the Indian Partnership Act, 1932 as added by Maharashtra Amendment, to state that suit for dissolution of partnership could not have been filed as partnership was not registered. He further states that if reasoning given by the trial Court are upheld, the provisions of Section 69 itself would be rendered infructuous.

7. In these circumstances, the first question to be answered is whether the appellate Court could have looked into the objections raised orally at the stage of final hearing of appeal before it that finding of trial Court on the issue of registration of partnership as also on the issue of limitation ought to have been in their favour. The language of Order 41, Rule 22 of C.P.C. itself is very clear and in its Sub-clause (1) or even explanation, the Legislature has used the word "may". It is to be noticed that the confusion prevailing earlier was in relation to entitlement of a respondent to challenge the finding on a particular issue delivered by the lower Court against him though ultimately decision/decreed of lower Court was in his favour. By adding said explanation, the controversy has been put beyond doubt by the legislature. Mulla in his commentary mentioned above has only clarified this position. The substantive part of Sub-clause (1) of Rule 22 also clearly states that such respondent may at the stage of arguments state that finding against him in lower Court in respect of any issue ought to have been in his favour. It is to be seen that the legislature has used the semi-colon after this part and later part which reads: and may also take any cross objection to the decree specifically contemplates the case in which a decree has been passed which such respondent could have assailed. It is apparent that in the facts of present case, there is no decree against the present respondents who were also respondents before the first appellate Court. A cross objection to the decree would be necessary if the respondents want any particular relief in their favour from appellate court. As the suit was already dismissed by the trial Court, the respondents before the appellate Court could not have prayed for any better relief and they were only challenging the adverse finding on remaining two issues against them by trial Court. The judgment of the Hon'ble Apex Court in the case of Choudhary Sahu v. State of Bihar (supra) is delivered in totally different set of facts. There, acting under the provisions of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1962, the Collector allowed certain units to various land holders who feeling aggrieved went in appeal before the Commissioner of the Division but the State of Bihar submitted to the order and did not go up in appeal nor did it file cross-objection. The Commissioner as well as High Court thereafter reversed the finding regarding allotment of units to various landholders (appellants before the Hon'ble Apex Court) though there was no appeal by the State of Bihar and said allotment had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross objection within the period of limitation. Thus, it is apparent that there the substantive rights were created in favour of land holders and the observations in relation to Order 41 Rule 22 are made only in

this background. Here, as already observed above, the present appellants could not have claimed any better relief than was granted to them by the trial Court and they were only seeking dismissal of suit against them on additional grounds. The judgment of the Hon''ble Apex Court, therefore, has no application in the facts before me. With the assistance of both counsel, I have perused the impugned judgment of the Appellate Court. The appellate Court has considered the propriety of such a course in paras 20, 21 and 22 and has also relied upon two judgments of the Hon''ble Apex Court between State of Punjab v. Bakshish Singh reported at 1999 SAR (SC) 1 and Shri Ravindar Kumar Sharma v. State of Assam and Ors. reported at 1999 SAR 837. In view of those citations and application of mind by the appellate Court, I find that no substantial question of law in that respect arises in this Second Appeal. Question No. 1 therefore needs to be answered in affirmative.

8. Coming to the challenge under Order 23, Rule 1 sub-rule (4) of C.P.C. the appellate Court has at length compared the complaints filed in earlier Civil Suit No. 413 of 1978 and the latter Civil Suit i.e. Regular Civil Suit No. 1298 of 1999. It is apparent that the appellate Court has tried to find out whether same or similar questions would arise even in second Civil Suit. It found the challenge overlapping & hence concluded that both the suits were on same subject matter. However, as pointed out by Shri Sirpurkar, learned Counsel for the appellant, the Hon''ble Apex Court has in Vallabh Das v. Madanlal (supra) clarified that mere identity of some of the issues in the two suits do not bring about an identity of the subject matter in the two suits. In the case before the Hon''ble Supreme Court, a coparcener claiming himself to be an adopted son filed a suit for partition and separate possession. He withdrew that suit and then filed another suit seeking to get possession of suit properties from trespassers on the basis of title. The Hon''ble Apex Court has found that in the first suit the cause of action was division of status between Dr. Madanlal (plaintiff) and his adopted father and the relief claimed was the conversion of joint possession into separate possession. In the later suit, he was seeking possession of suit properties from trespassers. The Hon''ble Apex Court has in this background noticed that though in both suits the factum and validity of adoption of plaintiff came up for decision, the adoption was not cause of action in the first suit nor it was a cause of action in the second suit and it was merely an antecedent event which conferred certain rights on him.

9. When the controversy involved before me is considered in this background, it is apparent that first suit filed by present appellant in 1978 was for enabling him to exercise his rights and to exert powers of his status as partner of M/s. Ex-serviceman Kerosene Agency, Akola. He was doing so on the basis of agreement dated 8.8.1977 alleging that the agreement put an end to partnership between parties only upon payment of Rs. 10,000/ to him within a period of two months. As said payment was not done, he contended that partnership continued and therefore, he wanted to exercise his powers as a partner. It is an admitted position that he withdrew that suit unconditionally. Later on, he filed another suit

at his native place Jagdari in district Yamuna Nagar in Haryana and later at Akola and claimed dissolution of partnership and also rendition of accounts. It is apparent that he claimed that he continued as partner and therefore he was entitled to rendition and also for dissolution. It is, therefore, clear that the subject matter of both the suits was not identical because the reliefs claimed were entirely different though facts to support such relief may be same. He could not have claimed relief claimed by him in latter suit in his first suit. Sub-rule (4) prevents plaintiff withdrawing from the suit without permission from filing a fresh suit for the same subject matter as contemplated under sub-rule (3). The term "subject matter" envisages essentially the plaintiff's cause of action for such a suit. In other words, a suit based on a different cause of action is not barred under this rule even though the suit may be in respect of the same subject. Thus when cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, and later reliefs could not have been asked for by him in first suit, the second suit cannot be considered to have been brought in respect of the same subject matter. Such second suit is not affected by mandate of Order 2 Rules 1 or 2. I, therefore, find that in these circumstances, the trial Court as also the appellate Court have committed an error in holding that the suit filed by present appellant was barred in view of provisions of Rule 23 Rule 1 sub-rule (4) of Civil Procedure Code. In the facts of present case, I find that the issue has rightly been examined as preliminary issue and no disputed question of fact fell for consideration in said scrutiny. However, this finding in favour of appellant itself cannot put an end to controversy involved in this Appeal in view of the finding already given about the competency of appellate Court to decide the other two aspects.

10. As already stated above, agreement dated 8.8.1977 was provided for retirement of present appellant from partnership firm subject to payment of Rs. 10,000/- to him within two months as mentioned therein. It is also an admitted position that the appellant has not been paid said amount of Rs. 10,000/- within the said period of two months. The appellant, therefore, wanted to initially exercise his powers as partner but then he thought it better to retire and therefore filed a suit for dissolution and for rendition of accounts. The question is about the propriety and legality of this agreement. The agreement is not registered and even the partnership in relation to which the suit has been filed is unregistered one i.e. it is not registered under Indian Partnership Act. The provisions of Section 69 Sub-section (2A) of Maharashtra Amendment to the Indian Partnership Act, 1932, prohibit filing of a suit to enforce any right of dissolution of a firm or for accounts of a dissolved firm 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. In these circumstances, it is also clear that in view of bar u/s 69(2A) of the Act, the suit could not have been entertained. The trial Court has considered this angle and found that the plaintiff before it was not trying to enforce any agreement of

partnership and it has recorded that agreement dated 8.8.1977 is not in respect of partnership. It recorded that by said agreement, the parties have agreed to enter into a separate agreement of partnership after some days but said agreement of partnership could not be executed. It found that because of this failure to enter into partnership, the appellant (plaintiff before it) was claiming 50% share in the profits in the dealership of Kerosene Agency. It, therefore, concluded that it was a simple contract to which Section 69 of the Indian Partnership Act, cannot be extended. The reasoning is obviously incorrect. Before entering into every partnership, there will be either written agreement or oral understanding and if the logic of trial Court is accepted, Section 69(2A) of the Partnership Act would be rendered nugatory. There cannot be any unregistered partnership and there cannot be any suit for its dissolution or for rendition of accounts. Section 69(2A) is a complete bar to such a position and also to a proposition which has been evolved by the trial Court. I, therefore, find that the suit filed by present appellant was hit by Section 69(2A) of the Act as has been rightly held by the appellate Court. As the bar operates at very threshold, there is no question of defendant in a suit waiving it or being estopped from raising that objection. Question No. IX in paragraph 2 of this judgment needs to be answered thus in favour of defendant i.e. present respondent. Language of question No. VI in said paragraph needs to be answered against this appellant as it was/is his plea that such partnership existed and hence, there was no factual dispute about it.

11. The trial Court has found that suit was for enforcement of right flowing from a contract dated 8.8.1977. In relation to Section 69(2A) of the Indian Partnership Act, 1932, it is apparent that no suit to enforce such rights could have been entertained by the Civil Court. Not only this, if any suit was to be entertained on the basis of such agreement, it ought to have been filed within three years of the last date mentioned therein. The agreement dated 8.8.1977 contemplated dissolution of partnership if amount of Rs. 10,000/- was received by present appellant in two installments as mentioned therein within two months from respondent. The said period of two months expired on 8.10.1977. If the appellant wanted to specifically enforce this contract, he ought to have filed a suit for entering into a proper partnership deed and its registration. He could not have filed a suit treating himself as a partner in view of provisions of Section 69(2A) of the Act. In any case, if he wanted to file a suit to enforce any right in his favour arising out of agreement dated 8.8.1977, the said suit ought to have been filed within a period of three years but in this case the said suit has been filed in the year 1999 before the Competent Court. Before that, suit was filed in 1994 before the Court at Jagdari in Yamuna Nagar District in State of Haryana. However, for want of territorial jurisdiction, the suit appears to have been dismissed. Appellate court in Jagdari then permitted him to present the plaint in trial court i.e. at Akola. and accordingly Civil Suit No. 1298 of 1999 then came to be filed before the Civil Judge, Senior Division, Akola. It is, therefore, apparent that suit is barred by limitation also and no objection can be taken to application

of mind by the appellate Court in this respect. In present facts appellant could not show that any investigation into facts was called for to adjudicate said issue. Question No. X in paragraph 2 of this judgment needs to be answered accordingly.

12. In view of the finding reached on various questions, I find that the judgment of Appellate Court dated 24/4/2002 in R.C.A. 183 of 2001 needs to be maintained & Second Appeal needs to be dismissed. The same is accordingly dismissed. However, in the circumstances of the case, there shall be no order as to costs.