

CASE NO.:
Appeal (civil) 1786 of 2000

PETITIONER:
HALDIRAM BHUJIAWALA AND ANR.

RESPONDENT:
ANAND KUMAR DEEPAK KUMAR AND ANR.

DATE OF JUDGMENT: 28/02/2000

BENCH:
M. JAGANNADHA RAO & A.P. MISRA

JUDGMENT:
JUDGMENT

2000 (1) SCR 1247

The Judgment of the Court was delivered by M. JAGANNADHA RAO, J. Leave granted

This appeal has been preferred by the two defendants, M/s. Hal-diram Bhujiawala and Sri Ashok Kumar against the judgment of the Delhi High Court in FAO 365 of 1999 dated 30.11.1999. By that order the High Court summarily dismissed the appellants' appeal against the order of the learned Single Judge dated 2.11.1999 in IA 5996/99 in Suit No. 635/92. The IA was filed under Order 7 Rule 11 CPC by the appellants for rejection of the plaint filed by two plaintiffs, Anand Kumar Deepak Kumar trading as Haldiram Bhujiawala and Shiv Kishan Agarwal, - on the ground that the 1st plaintiff was a partnership not registered with the Registrar of Firms on the date of suit i.e. on 10.12.91 and that the subsequent registration of the firm on 29.5.92 would not cure the initial defect.

The suit was filed by the plaintiff (1) for permanent injunction restraining the defendants - appellants, their partners, servants etc. from infringing the trade-mark No. 285062 and from using the trademark/name 'HALDIRAM BHUJIA WALA' or any identical name/mark deceptively similar thereto (2) for damages in a sum of Rs. 6 lakhs and (3) for destruction of the material etc.

As we are dealing with a matter arising under Order 7 Rule 11 CPC, it will be necessary to refer to the plaint allegations. One Ganga Ram alias Haldiram, carried on business in the name Maldiram Bhujia Wala, since 1941. In 1965, he constituted a partnership with his two sons Moolchand, Shiv Kishan and his daughter-in-law Kamla Devi, (wife of another son R.L. Aggarwal) to carry on business under the same name. In December 1972, the said firm applied for registration before the Registrar of Trade Marks for registration of the name Haldiram Bhujia Wala - Chand Mal - Ganga Bishan Bhujiawala, Bikaner. The Registrar of Trade Marks granted registration with the No. 285062. On 16.11.1974, the partnership was dissolved and under the terms of the dissolution deed the above trade mark fell exclusively to the share of Mool Chand, son of Ganga Bishan and father of plaintiffs, for the whole country (except West Bengal). Thus Sri Mool Chand became sole proprietor of the trade-mark in the said area while Smt. Kamla Devi was given ownership of the trade-mark rights for West Bengal. It is stated that Sri Lala Ganga Bishan Haldiram executed his last will dated 3.4.1979 and also reiterated the rights conferred by the dissolution deed on the respective parties. Ganga Bishan died in 1980. His will was later acted upon. Later, the testator's son, Sri Moolchand too died in 1985 leaving behind his four sons, Shiv Kishan, Shiv Kishan, Manohar Lal and Madhusoodan. All of them got their names recorded as subsequent -joint proprietors. The latter three formed a partnership in 1983 and were running a shop in Chandni Chowk, New Delhi selling various goods under the abovesaid trade mark of Haldiram Bhujia Wala. In the meantime, on 10.10.77, Mool Chand's

brother Sri R.L. Aggarwal (husband of Kamla Devi) and his son Prabhu Shankar, Calcutta applied for registration in this very name at Calcutta claiming to be full owners of the said trade mark without disclosing the dissolution deed dated 16.11.74. When the Registrar objected on 14.4.78, they replied on 18.7.78 that they alone were trading in this name in Calcutta. The defendants have no right to use the said trade beyond Calcutta. The plaintiff's registered trade mark was, in the usual course, renewed on 29.12.86 till 28.12.93. The plaintiffs have also acquired a right on account of prior adoption and long user. The 1st plaintiff firm, consisting of three sons of Moolchand and the 2nd plaintiff (the fourth son of Moolchand) are joint owners of the trade mark (except in West Bengal). The 1st defendant firm is a namely constituted firm intending to start its business and has been formed by Ashok Kumar, son of Kamla Devi. The 2nd defendant is Ashok Kumar himself in his individual capacity. They have no right to use this trade mark outside West Bengal. The plaintiffs came to know of the violation of trade mark by defendants 1 and 2 in December 1991 when defendants opened a shop at Arya Samaj Road, Karol Bagh, New Delhi. The cause of action for the suit is the fact that defendant acted :

'in violation of the common law and contractual rights of the plaintiff.

On these grounds, defendants are to be restrained by permanent injunction from using the trade mark and a sum of Rs. 6 lakhs is payable as damages.

The defendants, as already stated, have filed the application under Order 7, Rule 11, CPC pleading Section 69(2) of the Partnership Act, 1932 as a bar to maintainability of the suit. The learned Single Judge dismissed the application after referring to M/s. Virendra Dressers Delhi v. M/v. Varinder Garments, AIR (1982) Delhi 482 and to M/s. Bestochem For-malities v. M/s. Dinesh Ayurvedic Agencies and Ors., RFA (OS) 17/99 dated 12.7.99 rendered by the Division Bench of the Delhi High Court on the ground that the right to injunct the defendants in respect of the plaintiffs' Trade Mark was based on principles applicable to a passing off action and the said right was a common law right and did not arise under any contract. The learned Judge also relied upon a judgment to this Court in M/s. Raptakos Brett & Co. Ltd. v. Ganesh Property, [1998] 7 SCC 184. The application under Order 7, Rule 11, CPC was dismissed by an order dated 2.11.99. This order was confirmed by a Division Bench of the Delhi High Court on 30.11.99, as already stated.

In this appeal, learned senior counsel for appellants, Sri Ashok Desai and Sri R.F. Nariman contended that the 1st plaintiff firm was not registered with the Registrar of Firms on the date of suit, that the plaint repeatedly referred to the proprietary right of late Moolchand as having arisen out of the dissolution deed dated 16.11.1974 and that without reference to the said document - which was a contract - the plaintiffs could not prove their right to the trade mark through Moolchand and the suit was barred since Section 69(2) referred to a right 'arising from a contract'. The plaintiffs' right was based on the contract dated 16.11.74. The words 'arising from a contract' were akin to the words 'arising out of a contract' used in Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar and Anr, [1952] SCR 501 wherein while construing those words in relation to an arbitration clause, this Court held that the said words held to be construed widely. The learned counsel contended that, on the facts of this case and as stated in the plaint at several places, the 1st plaintiff was compelled to rely on the contract of dissolution dated 16.11.74 to prove title to the trade mark and thereby for an injunction and hence it was not a right claimed under Common Law or under any statute, like the Trade Marks Act.

On the other hand, learned senior counsel for the respondents - plaintiffs, Sri Copal Subramaniam supported the view of the High Court by contending that the suit for injunction was based upon two rights, one being statutory under the Trade Marks Act arising out of prior registration of trade mark and alternatively, the suit was also based on Common Law right available in a passing-off action. The suit was not based on any contract between

plaintiffs and defendants. The provision in Section 69(2) did not apply if the right sought to be enforced did not arise out of a contract between the plaintiffs' firm and the defendants. The reference in the plaint to the dissolution deed dated 16.11.74 was merely a reference to a historical fact that that was the source of the right of Moolchand and on his death, the said right to the trade mark devolved on his sons, three of whom are joined in a firm (i.e. 1st plaintiff) and the fourth son is the second plaintiff. The plaintiffs were not parties to (the deed of dissolution. The defendants too were not parties to the dissolution deed though their mother was. Hence, the bar under Section 69(2) did not apply.

The points that arise for consideration are :

(i) whether Section 69(2) bars a suit by a firm not registered on the date of suit where permanent injunction and damages are claimed in respect of a trade marks as a statutory right or by invoking Common Law principles applicable to a passing-off action?

(ii) whether the words 'arising from a contract' in Section 69(2) refer only to a situation where an unregistered firm is enforcing a right arising from a contract entered into by the firm with the defendant during the course of its business or whether the bar under Section 69(2) can be extended to any contract referred to in the plaint unconnected with the defendant, as the source of title to the suit property?

Point 1 :

The question whether Section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a Common Law right is being enforced came up directly for consideration in this Court in *M/s. Raptokas Brett Co. Ltd. v. Ganesh Property*, [1998] 7 SCC 184. In that case, Majmudar, J. speaking for the Bench clearly expressed the view that Section 69(2) cannot bar the enforcement by way of suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right 'arising from a contract' but was a common law right or a statutory right under the Transfer of Property Act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference. Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

The next question is as to the nature of the right that is being enforced in this suit. It is well settled that a passing off action is a common law action based on tort (vide) *Bengal Waterproof Ltd. v. Bombay Waterproof Manufacturing Company and Anr.*, [1997] 1 SCC99. Therefore, in our opinion, a suit for perpetual injunction to restrain the defendant not to pass-off the defendant's goods as those of plaintiffs by using the plaintiffs' trade mark and for damages is an action at common law and is not barred by Section 69(2). The decision in *M/s. Virendra Dresses Delhi v. M/s. Varinder Garments*, AIR (1983) Delhi 482 and the decision of the Division Bench of the Delhi High Court in *M/s. Bestochem Formulation v. M/s. Dinesh Ayurvedic Agencies and Ors.*, RFA (OS) 17/99 dt. 12.7.99) state that Section 69(2) does not apply to a passing-off action as the suit is based on tort and not on contract. In our opinion, the above decisions were correctly decided. (The special leave petition No. 18418 of 1999 against the latter was in fact dismissed by this Court on 28.1.2000.) The learned senior counsel for the appellants no doubt relied upon *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar and Anr.*, [1952] SCR 501. That was an arbitration case in which the words "arising out of a contract" were widely interpreted but that decision, in our view, has no relevance in interpreting the words "arising from a contract" in section 69(2) of the Partnership Act.

Likewise, if the reliefs of permanent injunction or damages are being claimed on the basis of a registered trade mark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is, in our view, not barred by Section 69(2).

For the aforesaid reasons. In both these situations, the unregistered partnership in the case before us cannot be said to be enforcing any right "arising from a contract". Point 1 is therefore decided in favour of the plaintiffs-respondents.

Point 2 :

Question however arises as to what is the scope of the words 'enforcing a right arising under the contract' used in Section 69(2)? Learned senior counsel for the appellants repeatedly drew our attention to the allegation in the plaint at various places that it was only under the deed of dissolution dated 16.11.1974 that Moolchand, - the father of the partners of the 1st plaintiff firm and the 2nd plaintiff - became proprietor of the trade mark for the whole of India (except West Bengal). That right developed on the plaintiffs on the death of Moolchand. Therefore, it was contended that the 1st plaintiff firm was definitely seeking to enforce a right "arising from a contract", namely, the contract of dissolution dated 16.11.74. It was argued that the 1st plaintiff could not claim any injunction or damages unless reliance was placed on the said contract and hence the suit was barred by Section 69(2).

For the purpose of deciding this point, it is necessary to go into the question as to what the legislature meant when it used the words 'arising from a contract' in Section 69(2).

In our view, it will be useful in this context to refer to the Report of the Special Committee (1930 -31) which examined the draft Bill and made recommendations to the legislature.

Before going into the above Report of the Special Committee which preceded the Partnership Act, 1932, it will be necessary to refer to the case in Commissioner of Income Tax, AP v. Jayalakshmi Rice and Oil Mills Contractor Co., [1971] 1 SCC 280, where this Court refused to refer to this very Report for construing Section 59 of the Partnership Act. But, in our view, that decision is no longer good law as it was clearly dissented on this aspect in the judgment of the Constitution Bench in R.S. Nayak v. A.R. Antulay, [1984] 2 SCC 183. In number of later judgments, this Court has referred to the Reports of similar Committees or Commissions (vide G.P. Singh's Interpretation of Statute, 7th Ed, pp. 196-197). In the latest case in Hyderabad Industries Ltd. v. Union of India, [1995] 5 SCC 15 para 15, notes on clauses were relied upon by the Constitution Bench for understanding the legislative intent. The English Law has changed completely after Pepper v. Hart, (1993) 1 All ER 42 (HL) in favour of admissibility of such material. A restricted view was no doubt expressed in P.V. Narasimharao v. State, in [1998] 4 SCC 626 (at. 691-692) that such Reports can be looked into for the purpose of knowing the historical basis or mischief sought to be remedied, but not for construing the provision unless there is ambiguity. Even going by this restricted view, we find that there is considerable ambiguity in Section 69(2) (unlike the English Statute of 1916 and 1985) as to what is meant by the words 'arising out of a contract' inasmuch as the provision does not say whether the contract in Section 69(2) is one entered into by the firm with the defendant or with somebody else who is not a defendant, nor to whether it is a contract entered into with the defendant in business or unconnected with business. Hence, in our view, it is permissible to look into the Report even for purpose of construing Section 69(2).

We may state that it was on the basis of the Report of the Special Committee that the Partnership Act, 1932 was later passed by the Legisla-

ture. The Committee consisted of Sir Brojendra Lal Mitter, Sir Dinshah F. Mulla, Sir Alladi Krishnaswamy Iyer and Mr. Arthur Eggar. Para 16 of the Report states that the 'Bill seeks to overcome this class of difficulty by making registration optional, and by creating inducements to register which will only bear upon firms in a substantial and fairly permanent way of business. Paras 17, 18 and 19 of the Report are important. (See Mulla, Partnership Act, 1st Ed. 1934, p. 167 at PP.176-177). Para 17 reads :

"17. The outlines of the scheme are briefly as follows. The English precedent, in so far as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small or ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claim against third parties in the civil Court; and by partner who is not registered will be unable to enforce his claims either against third parties or against fellow partners".

It will be noticed that the above extract refers to the English precedent which is partly not followed and which is partly followed. We shall be referring to the said English precedent shortly but before we do so, we have also to refer to paras 18 and 19 of the said Report.

The Report states in para 18, 19 and follows :

"18. Once registration has been effected the statement recorded in the register regarding the constitution of the firm will be conclusive proof of the facts therein contained against the partners making them and no partner whose name is on the register will be permitted to deny that he is a partner - with certain natural and proper exceptions which will be indicated later. This should afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm".

19.....On the other hand, a third party who deals with a firm

and knows that a new partner has been introduced can either make registration of the new partner a condition for further dealings, or content himself with the certain security of the other partners and the chance of proving by other evidence, the partnership of the new but unregistered partner. A third party who deals with a firm without knowing of the addition of a new partner courts on the credit of the old partners only and will not be prejudiced by the failure of the new partners to register"

Similarly, para 23 also refers to those who deal with the firm.

The English precedent referred to in para 17, which has been not followed in part but followed in part in drafting Section 69(2) is the one contained by the Registration of Business Names Act. 1916. Section 7 of that Act refers to penalties for default in registration. As stated in the Report, the penalty part of that Act has not been introduced in India but the provisions of Section 8 creating disabilities in the way of the firm in default is adopted. Section 5 of the above English Act is relevant and it speaks of:

"the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished" (See Halsbury Statutes, 3rd Ed. Vol.37, p.867).

The above provision clearly signifies that the right that is sought to be enforced by the unregistered firm and which is barred must be a right

arising out of a contract with a third party - defendant in respect of the firm's business transactions.

Business Names Act, 1985 has replaced the above Act of 1916 and Section 4 of the new Act refers to the "Civil Remedies for breach of Section 4". It provides for dismissal of the action "to enforce a right arising out of a contract made in the course of a business" if the firm is not registered. (see Halsbury, Statutes, 4th Ed, Vol. 48 at p.101).

The above Report and provisions of the English Acts, in our view, make it clear that the purpose behind Section 69(2) was to impose a disability on the unregistered firm or its partners to enforce rights arising out of contracts entered into by the plaintiff firm with third party - defendant in the course of the firm's business transactions.

In Raptokas Brett and Co., [1998] 7 SCC 184 it was clarified that the contractual rights which are sought to be enforced by plaintiff firm and which are barred under section 69(2) are "rights arising out of the contract" and that it must be a contract entered into by the firm with the third party defendants. Majmudar, J. stated (at p.191) as follows :

"A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred....."

From the above passage it is firstly clear that contract must be a contract by the plaintiff firm not with anybody else but with the third party defendant.

The further and additional but equally important aspect which has to be made clear is that - the contract 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 of the plaintiffs firm with such third party - defendant.

It will also be seen that the present defendants who are sued by the plaintiff - firm are third parties to the 1st plaintiff firm. Section 2(d) of the Act defines 'third parties' as persons who are not partners of the firm. The defendants in the present case are also third parties to the contract of dissolution dated 16.11.74. Their mother, Kamla Devi was no doubt a party to the contract of dissolution. The defendants are only claiming a right said to have accrued to their mother under the said contract dated 16.11.74 and then to the defendants. In fact, the said contract of dissolution is not a contract to which even the present 1st plaintiff firm or its partners or the 2nd plaintiff were parties. Their father Moolchand was a party and his right to the trade mark devolved in plaintiffs. The real crux of the question is that the legislature when it used the word "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 third parties who deal with the partners ought to be enabled to know what the names of the firm are before they deal with them in business.

Further Section 69(2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could only be as a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a Motor Car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, it is clear that the relief for possession against defendant in the suit does not arise from any contract with

defendant entered into in the course of plaintiff firm's business with defendants but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a suit would be maintainable and Section 69(2) would not be a bar, even if the firm is unregistered on the date of suit. The position in the present case is not different.

In fact, the Act has not prescribed that the transactions or contracts entered into by a firm with a third party are bad in law if the firm is an unregistered firm. On the other hand, if the firm is not registered on date of suit and the suit is to enforce a right arising out of a contract with the third party- defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm subject of course to the law of limitation and subject to the provisions of the Limitation Act. This is so even if the suit is dismissed for a formal defect. Section 14 of the Limitation Act will be available inasmuch as the suit has failed because the defect of non-registration falls within the words "other cause of like nature" in section 14 of the Limitation Act, 1963. See *Surajmal Dagduramji Shop v. M/s. Srikishan Ram Kishan*, AIR (1973) Bom. 313.

For all the reasons given above, it is clear that the suit is based on infringement of statutory rights under the Trade Marks Act. It is also based upon the common law principle of tort applicable to passing-off actions. The suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the unregistered firm with third parties in the course of the firm's business transactions. The suit is therefore not barred by section 69(2).

For the aforesaid reasons, the appeal fails and is dismissed without costs. We should not be understood as having said anything on the merits of the case for we have confined ourselves to the allegations in the plaint as we are here only dealing with an application filed by the appellants under Order 7 Rule 11 CPC.