

CASE NO.:
Appeal (civil) 4092 of 1998

PETITIONER:
Purushottam & Anr

RESPONDENT:
Shivraj Fine Art Litho Works & Ors

DATE OF JUDGMENT: 07/11/2006

BENCH:
B.P. Singh & Altamas Kabir

JUDGMENT:
J U D G M E N T

B.P. Singh, J

In this appeal by special leave the plaintiffs are the appellants. Their suit against original defendant nos. 1 to 9 was decreed for the sum of Rs.8,92,815.14 by the Third Joint Civil Judge (Senior Division), Nagpur in Civil Suit No.52 of 1980. On appeal by original defendants 1 to 3, the High Court in First Appeal No.35 of 1988 by its impugned judgment and order of April 10, 1992 allowed the appeal and dismissed the suit holding that in view of the provisions of Section 69(2) of the Indian Partnership Act (hereinafter referred to as the 'Act'), the suit was not maintainable, the plaintiff being an unregistered firm.

The facts of the case are not in dispute and they will be briefly noticed. Plaintiff No.1, Pursushottam, carried on business as whole-sale paper merchant in the name and style of "Dinesh Paper Mart" as the sole proprietor of the concern. During this period he supplied goods to the defendant firm namely \026 Shivraj Fine Arts Litho Works, a firm registered under the Partnership Act. Defendants 2 to 9 were the partners of the said firm. In the year 1974, Special Civil Suit No.9 of 1974 was filed for dissolution of the defendant partnership firm and for rendering of accounts. During the pendency of the suit a receiver was appointed initially to take possession of the properties of the firm and to run the business of the firm. Later joint receivers were appointed, and it is not in dispute that at the relevant time defendant No.2 and defendant No.12 were in management of the aforesaid registered firm \026 respondent No.1 herein as joint receivers.

The aforesaid Purushottam had business dealings with the respondent No.1 \026 firm. Goods were supplied and payments made from time to time. It is not in dispute that the amounts due and payable to the plaintiff No.1, Purushottam were fully paid up as on March 20, 1974, that is, before the date of appointment of Receiver. Even after appointment of the Receiver, successive Receivers purchased goods from Plaintiff No.1, Purushottam, herein for the business of respondent No.1 \026 firm. A khata was maintained by plaintiff No.1 \026 Purushottam in which payments made were duly entered, and at the end of the year the amount outstanding as on December 31, was carried forward to the next year. The defendant firm acknowledged their liability to pay the amount entered in the khata by making an endorsement in the khata. As at the end of the financial year 1979 a sum of Rs.6,22,713.06 was the balance due from the defendant firm to plaintiff Purushottam. The plaintiff was also entitled to interest at the agreed rate of 18% per annum on the balance outstanding for more than seven days.

With effect from January 1, 1980 the proprietary \026 firm of Purushottam (Plaintiff No.1) was taken over by a partnership of which plaintiff Purushottam was also a partner. The said partnership firm took over all the assets and liabilities of "Dinesh Paper Mart" and continued their business in the same name. Though the said partnership firm came into existence on January 1, 1980, an application for registration of the firm under the Act was made on January 14, 1980. While the said application was pending, the instant suit was filed on March 31, 1980. Later, on November 29, 1980, the Plaintiff No.2 \026 firm was granted registration under the Act. It would thus appear that though the newly constituted partnership firm had applied for registration on January 14, 1980, on the date on which the suit was filed, that is on March 31, 1980, it was an unregistered firm and registration was granted later on November 29, 1980. This therefore, gave rise to the objection urged on behalf of the defendants relying on Section 69(2) of the Act that the suit by an unregistered firm was not maintainable to enforce a right arising from a contract.

The High Court took the view relying upon authorities that the suit was barred by Section 69(2) of the Act, and even if registration was subsequently granted, that would not cure the defect. Repelling the argument that in any event Plaintiff No.1, the erstwhile proprietor may be entitled to enforce his claim, the Court held that once he had transferred his rights to the partnership which took over all the rights and liabilities of the proprietary concern, he lost his exclusive right to recover the amount since that had become an asset of the partnership firm over which he as a partner had no exclusive right. He, therefore, did not have any enforceable subsisting claim after the partnership came into existence, and, therefore, no relief could be granted to him in his personal capacity as erstwhile proprietor of the concern.

Shri V.A. Mohta, Sr. Advocate, appearing on behalf of the appellants before us advanced three main submissions. Firstly, he submitted that once registration is granted, even though after the filing of the suit, the suit should be held to be maintainable as from the date on which registration is granted subject to the law of limitation. Secondly, he submitted that Plaintiff No.1, Purushottam in his personal capacity could sue the respondent firm for the amount in question, if the firm of which he was a partner was for reason of non-registration unable to maintain a suit. Lastly, he submitted that Section 69(2) of the Act is not attracted to a case where the contract in question is not with the unregistered firm and for this he relied on the judgment of this Court in Haldiram Bhujawala and Anr. Vs. Anand Kumar Deepak Kumar and Anr. : (2000) 3 SCC 250.

In M/s.Shreeram Finance Corporation Vs. Yasin Khan and Ors. (1989) 3 SCC 476; it was held by this Court that a suit filed by the existing partners of the firm after reconstitution was not maintainable if the newly added partners were not shown as partners in the Register of Firms under the Act. In that case the suit was filed in the name of the current partners as on the date of the suit, whose names were not shown as partners in the Register of Firms maintained under the Act. It is no doubt true that in the aforesaid decision the bar was attracted not on account of non-registration of a partnership firm but on account of the fact that the persons suing had not been shown in the Register of Firms as partners of the firm. Counsel for the respondent submitted that Section 69(2) of the Act is mandatory and unless the conditions specified therein are fulfilled, a suit by a partnership Firm will be hit by the bar contained in that provision.

The question as to whether the subsequent registration of the firm would cure the initial defect in the filing of the suit arose for consideration in D.D.A. Vs. Kochhar Construction Work and Anr. (1998) 8 SCC 559. This Court held that in view of the clear provision of the Act it was not possible to subscribe to the view that subsequent

registration of the firm may cure the initial defect, because the proceedings were ab initio defective as they could not have been instituted since the firm in whose name the proceedings were instituted was not a registered firm on the date of the institution of the proceedings. This Court also noticed the difference of opinion amongst the High Courts and concluded thus:-

"Counsel for the respondents, however, invited our attention to two decisions which take a view that subsequent registration of the firm can cure the initial defect provided the registration is before the period of limitation has run out. Our attention was drawn to M.S.A. Subramania Mudaliar Vs. East Asiatic Co. Ltd. and Atmuri Mahalakshmi Vs. Jagadeesh Traders. However, the High Court of Patna in Laduram Sagarmal Vs. Jamuna Prasad Chaudhuri and the High Court of Madras in T. Savariraj Pillai Vs. R.S.S. Vastrad & Co. take a contrary view and hold that the suit is incompetent ab initio. We have considered these decisions, but in the light of the plain language of Section 69 of the Partnership Act read with Section 20 of the Arbitration Act and in view of the decision of this Court reported in Shreeram Finance Corpn. We are clearly of the opinion that proceedings under Section 20 of the Arbitration Act were ab initio defective since the firm was not registered and the subsequent registration of the firm cannot cure that defect".

The same view was also reiterated in U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. And Anr. (2004) 7 SCC 332.

These decisions squarely answer the first submission of Shri V.A. Mohta. The submission must therefore be rejected.

The second submission urged on behalf of the appellants is also squarely answered by a judgment of this Court reported in Addanki Narayanappa and Anr. Vs. Bhaskara Krishnappa (D) & Ors., (1966) 3 SCR 400. This Court held:

"It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise this right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges."

The High Court has, therefore, rightly held that the partnership

having come into existence of which Plaintiff No.1 was a partner, and he having transferred to the said partnership all his assets and liabilities of his proprietary concern, he had no subsisting exclusive right to enforce the liability against the defendants since such rights as he had as the proprietor vested in the partnership. He could not therefore either file a suit or claim any relief in the suit filed by the partnership asserting his right as the erstwhile proprietor. The second submission also fails.

This brings us to a consideration of the third submission that the bar in Section 69(2) of the Act is not attracted to a suit in which the contract in question is not with the unregistered firm which is the plaintiff. Counsel placed considerable reliance on the judgment of this Court in Haldiram Bhujawala and Anr. (supra), and submitted that the principles laid down therein applied to his case with full force. On the other hand, the respondents insist that the case is clearly distinguishable on facts, and in any case the observations relied upon by the appellants do not constitute the ratio, as it was wholly unnecessary to go into the question which did not fall for consideration after the first question was answered in favour of the appellants.

It therefore becomes necessary for us to notice the relevant facts of the case, the questions that fell for consideration, and the principles laid down therein.

The plaintiffs in the suit were the sons of Moolchand, the first plaintiff being the partnership firm of which three of his sons were partners, and the second plaintiff being his fourth son. Their case was that the partnership of which their late father Moolchand was a partner was the duly registered proprietor of the trademark Haldiram Bhujawala. On dissolution of the firm on 16.11.1974 in terms of the deed of dissolution, Moolchand became the sole proprietor of the trademark for the whole country except State of West Bengal. Smt. Kamla Devi, another partner, who was the wife of R.L. Aggarwal a brother of Moolchand, was given ownership of the trademark rights for West Bengal. Upon the death of Moolchand in 1985 his four sons got themselves recorded as joint proprietors of the trademark. Three of them formed a partnership in the year 1983 and were running a shop in Chandni Chowk, Delhi.

In the meantime on 10.10.1977 R.L. Aggarwal and his son applied in Calcutta for registration of the same trademark in their name claiming to be full owners of the trademark, without disclosing the dissolution deed of 16.11.1974. In these circumstances a suit was filed by the partnership firm with three of the sons of Moolchand as partners thereof being the first plaintiff. The second plaintiff in the suit was the fourth son of Moolchand. They claimed the relief of injunction restraining the defendants from using the said trademark, damages, and for destruction of the material etc. The defendants filed an application under Order 7, Rule 11, CPC for summary dismissal of the suit since Plaintiff No.1 partnership firm was not a registered partnership firm on the date of the filing of the suit. The Trial Court dismissed the application and so did the appellate bench of the High Court of Delhi. The defendants appealed to this Court by Special Leave.

Two questions were framed which arose for consideration.

"(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 trademark 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?"

The first question was answered relying upon the law laid down by this Court in *Raptakos Brett & Co. Ltd. Vs. Ganesh Property* (1998) 7 SCC 184 that the bar in Section 69(2) of the Act did not operate to bar a suit by an unregistered firm seeking enforcement of a statutory right or a common law right. It was held that a passing off action being a common law action based on tort, and not on contract, Section 69(2) did not apply. The reliefs of permanent injunction and damages were claimed on the basis of infringement of registered trademark. Thus the suit was held to be one based on statutory right under the Trade Marks Act, and therefore not barred by Section 69(2).

Counsel for the respondents contended before us that having answered the first question in favour of the plaintiffs, it was wholly unnecessary for the disposal of the appeal to consider the second question formulated by this Court. Therefore, any observation made or principle enunciated, in relation to the second question was at best obiter, and not a binding precedent.

We shall assume in favour of the respondents that the observations made and principles laid down are obiter and therefore not a bind precedent. Even so that does not preclude this Court from appreciating the reasons given for the principles laid down, and if the reasoning appears to this Court to be cogent, and merit acceptance, the same may be accepted by this Court as its own and applied to the case before it.

In *Haldiram Bhujawala and Anr.* (supra) this Court noticed the recommendations made by the Special Committee in its report which was considered by the legislature while enacting the Partnership Act, 1932. The Committee recommended that registration of firms be made optional as it considered making registration compulsory too drastic for a beginning in India. It was proposed that registration should lie entirely with the discretion of the firm or partner concerned, but any firm which was not registered will be unable to enforce its claim against third parties in the civil court; and any partner who is not registered will be unable to enforce his claims either against third parties or against fellow partners. Paragraphs 18 and 19 of the Report reads as 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 \026 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. \005\0050n 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 counts on the credit of the old partners only and will not be prejudiced by the failure of the new partner to register".

It would thus appear that registration of a firm was conceived as a protection to third parties dealing with a partnership firm. Registration ensured the certainty of existence of the firm and its membership, so that later an unsuspecting third party contracting with the firm may not run the risk of being defeated on discovery that neither the partnership firm nor its partners existed in fact. On the other hand, an unregistered firm could not bring a suit for enforcing its right arising from a contract.

In Raptakos Brett & Co. Ltd. (Supra) this court after noticing Section 69 of the Act observed :

"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 at its very inception. To attract the aforesaid bar to the suit, the following conditions must be satisfied:

(i) That the plaintiff-partnership firm on the date of the suit must not be registered under the provisions of the Partnership Act and consequently or even otherwise, the persons suing are not shown in the Register of Firms as partners of the firm, on the date of the suit.

(ii) Such unregistered firm or the partners mentioned in the sub-section must be suing the defendant-third party.

(iii) Such a suit must be for enforcement of a right arising from a contract of the firm with such a third party".

Relying upon the aforesaid analysis this Court in Haldiram Bhujawala and Anr. (supra) held that the contract contemplated by Section 69 of the Act is the contract entered into by the firm with the third party defendant. The contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with a third party defendant, but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third party defendant.

With respect, we find ourselves in complete agreement with the principles enunciated in Haldiram Bhujawala and Anr. (supra). Having regard to the purpose Section 69(2) seeks to achieve and the interest sought to be protected, the bar must apply to a suit for enforcement of right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered firm with a third party, the bar of Section 69(2) will not apply.

In the instant case the contract was entered into with the

respondent firm by the erstwhile proprietor of the concern namely Purushottam. The partnership firm came into existence later. The amount claimed in the suit were due to the proprietor Purushottam who carried on his proprietary business in the name and style of "Dinesh Paper Mart". When he entered into partnership with others, he contributed to the partnership by way of his contribution to the capital, all the assets and liabilities of his erstwhile proprietary concern. Thus, though the partnership firm, which was unregistered, became entitled to enforce the contractual obligation of the defendant firm which it owed to Purushottam, the contract was not one entered into by the unregistered firm with a third party, nor was it one entered into by the unregistered firm in the course of its business dealings with the defendants. So viewed, the bar of Section 69(2) cannot apply to the suit filed by the Plaintiff & appellants.

We, therefore, allow this appeal with costs and set aside the impugned judgment and decree of the High Court and restore that of the Third Joint Civil Judge (Senior Division) Nagpur, in Civil Suit No.52 of 1980 dated 29.4.1987.