

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA NO.41 OF 2008

Shri Shib Sankar Pal,
son of late Labani Mohan Pal,
resident of Amtali, P.S. Amtali,
District : West Tripura

..... Defendant-appellant

Vs.

1. M/S. Chakraborty Auto Industries,
a partnership firm, the partners being
 - (i) Sri Deu Lal Sharma,
son of Shri Ram Janam Sharma
 - (ii) Shri Chakraborty Sharma
son of Shri Debnath Sharma,
situated on A.B. Road. Amtali,
P.S. Amtali, District : West Tripura

.....Plaintiff-respondent

2. The Branch Manager,
State Bank of India,
Amtali Branch, P.O & P.S. Amtali
District : West Tripura.
3. The State Bank of India,
Local head Officer, Barelimukh,
Guwahati, Assam.

.....Defendant-respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant : Mr. H.K. Bhowmik, Advocate

For the respondents : Mr. R. Debnath, Advocate
Mr. A. Roy Barman, Advocate

Date of hearing & order : 08.06.2015

Whether fit for reporting :	Yes	No
		√

JUDGMENT & ORDER (ORAL)

Heard Mr. H.K. Bhowmik, learned counsel appearing for the appellant, namely Shib Sankar Pal as well as Mr. R. Debnath, learned counsel appearing for the respondent No.1, namely M/S Chakraborty Auto Industries as well as Mr. A. Roy Barman, learned counsel appearing for the respondents No. 2 and 3, State Bank of India and its officer.

2. This is an appeal under Section 100 of the CPC, questioning the legality of the judgment dated 21.05.2008, delivered in Money Appeal No.01 of 2001 by the Additional District Judge, West Tripura, Agartala, Court No.4 on decreeing the suit filed by the respondent No.1 herein. A money suit was instituted initially by one Deu Lal Sharma, being Money Suit No. 87/1998, as “the proprietor of M/s Chakraborty Auto Industries”, pleading that he had agreed to construct the body on the chassis of the truck that the defendant No.1, the appellant herein, on an estimated cost of ₹92,000, for which he raised the invoice. Against such invoice, the appellant herein applied for a loan to the extent of ₹92,000 from the defendant Nos. 2 and 3. The defendant Nos. 2 and 3 had earlier also accorded

loan for purchasing chassis of the said truck vehicle. The said defendants permitted the appellant herein to have the loan to the extent of ₹68,202 i.e. 75% of the amount that was claimed as loan, on 20.10.1995.

3. There is no dispute that the defendant No.1 paid a sum of Rs. 46,000, but according to the plaintiff (the respondent No.1 herein), he was also entitled to get another sum of ₹46,000 in terms of the agreement for constructing the body on the chassis of the truck vehicle. Despite notice, neither the defendant No 1 (the appellant herein) nor the respondents Nos. 2 and 3 (the defendant Nos. 2 and 3 in the suit) paid the remainder of the same as stated. The respondent No.1, the plaintiff in the suit, has stated that the defendant No.1 gave due instruction to the respondents No. 2 and 3, the banker for giving the plaintiff, the respondent No.1 herein, a further sum of ₹30,000. Despite such specific instruction to the banker, the said sum was not credited in the account of the plaintiff. According to the plaintiff, had the said amount been credited in the account of the plaintiff, the plaintiff had been entitled to a further sum of ₹16,000. As the defendant No.2 defied the instruction of the plaintiff, the plaintiff is entitled to get a total sum of ₹46,000 with interest for not making the payment in time. The defendant Nos. 2 and 3 strangely have not filed the written statement, but from para 14 of the plaint, it appears that the defendant No. 2 sent a reply dated 14.09.1998 against the plaintiff's notice dated 12.08.1998,

refuting the untrue and false allegations'. The bank had asserted that they were ready to make payment provided the defendant No.1 gave his consent. The defendant No.1 had given his consent in writing to the defendant No.2, yet the defendant No.1 withheld the payment illegally. Therefore, even though the defendant Nos. 2 and 3 did not file the written statement, but by the reply dated 14.09.1998, they have categorically made their position clear that if the defendant No.1 gave a categorical instruction to the bank, they would have no difficulty in making payment in the account of the plaintiff.

4. The defendant No.1 by filing a written statement, has categorically denied that he ever instructed the defendant Nos. 2 and 3 to make payment of ₹30,000. The defendant No.1 has taken a stand specifically that he had asked the banker not to release the remaining amount as the body-work was of inferior quality and unacceptable to him. He has denied all the allegations as levelled by the plaintiff in his plaint. What is to be noticed in the plaint is that the identity of the plaintiff, namely Deu Lal Sharma has been challenged by the defendant No.1 by stating that the present plaintiff never entered with any agreement with the answering defendant as proprietor of M/S Chakraborty Auto Industries regarding the body building of the truck of the said defendant. The answering defendant also did not collect any quotation from the plaintiff on 28.06.1995, as stated by the plaintiff in his plaint. For the first time, the plaintiff

came to know him when he filed a complaint against the defendant before the District Consumers Forum, West Tripura.

5. After filing of the written statement, the plaintiff sought for amending the plaint in terms of the schedule which is reproduced hereunder:

"1. That title head of the plaint mentioning "Shri Deolal Sharma, proprietor of Chakraborty Auto Industries, A.B. Road, Amtali, P.S. Amtali, District- West Tripura needs to be deleted and substituted as follows:

**"M/S Chakraborty Auto Industries,
a partnership Firm (Partners being
(i) Shri Deolal Sharma,
son of Sri Ram Janam Sharma;
(ii) Shri Chakraborty Sharma,
son of Shri Debnath Sharma)
situated on A.B. Road, Amtali,
P.S. Amtali, District- West Tripura"**

2. That after para-1 of the plaint the followings are to be added:

"1A. That M/S Chakraborty Auto Industries, the plaintiff of this suit is a partnership firm. The partners are- (i) Shri Deolal Sharma, son of Shri Ram Janam Sharma, (ii) Shri Chakraborty Sharma, son of Shri Debnath Sharma, both residing presently on A.B. Road, Amtali, P.S. Amtali, District- West Tripura.

1B. That Shri Deolal Sharma is practically the managing partner. He has been managing the works of the firm."

6. It appears that the said petition was filed on 02.06.2000 in the trial court, being the court of the Civil Judge, Senior Division Court No.1, Agartala, West Tripura. That amendment was allowed by the order dated 17.05.2000 with the observation as under:

"Both the sides raised no objection to amend the plaint and the written statement.

So both the prayers are allowed."

After such amendment was allowed to be carried out in the plaint, the defendants were allowed opportunity to file the additional written statement. It appears that the defendant No.1 filed the additional written statement, where it has been asserted that :

"That, the statements made in para 1 of the application that M/s. Chakraborty Auto Industries is a partnership firm constituted with two partners namely (1) Deolal Sharma and (2) Shri Chakraborty Sharma or that at the time of preparation of the plaint there has been a bonafide mistake due to misunderstand of the instruction given by the plaintiff regarding status of the firm M/s. Chakraborty Auto Industries or that due to bonafide mistake the status of the firm has been stated as proprietary firm although in fact, it is a partnership firm or that under this bonafide mistake the suit has been instituted in the name of the firm stating its wrong status, are all false fabricated and misleading and therefore vehemently denied and disputed by the answering defendant."

7. By filing the additional written statement, it has been denied that M/S Chakraborty Auto Industries is a partnership firm. For purpose of the reference, para 5 of the additional written statement is reproduced:

"That, the statements made in para 1 of the application that M/s. Chakraborty Auto Industries is a partnership firm constituted with two partners namely (1) Deolal Sharma and (2) Shri Chakraborty Sharma or that at the time of preparation of the plaint there has been a bonafide mistake due to misunderstand of the instruction given by the plaintiff regarding status of the firm M/s. Chakraborty Auto

Industries or that due to bonafide mistake the status of the firm has been stated as proprietary firm although in fact, it is a partnership firm or that under this bonafide mistake the suit has been instituted in the name of the firm stating its wrong status, are all false fabricated and misleading and therefore vehemently denied and disputed by the answering defendant."

8. Since the issues were framed before the amendments were carried out, an additional issue was framed by the trial court by the order dated 26.09.2000, which reads as under:

"Is the suit maintainable in view of the provisions of Partnership Act?"

9. There cannot be any dispute that after recording the evidence of the plaintiff, the plaintiff carried out the said amendment. After framing the additional issue as stated, both the plaintiffs and the defendants were allowed to adduce their respective evidence and the plaintiff, in terms of that order adduced three witnesses on 12.07.2000, when those witnesses alongwith the defendants' witnesses were examined and cross examined. The defendants, however on 16.08.2000 prayed for adjournment for adducing the witnesses. Finally on 30.08.2000, the defendant No.1 was examined as DW.1, when the learned counsel appearing for the defendants No. 2 and 3 has submitted that they would not adduce any witness in the suit. Thereafter, the suit was dismissed by the judgment dated 26.09.2000. However, on 12.09.2000, the defendants No. 2 and 3 were allowed to examine one person as

DW.2. That witness was also cross-examined. While deciding the additional issue with the regular issue 'A' which reads :

"Is the suit maintainable and is the suit barred by limitation?"

the trial Court has elaborately returned the finding as under:

"For the sake of convenient of decision both the issues are taken together as the issues are similar in nature and framed about the maintainability of the suit. Both the sets of defendants challenged the maintainability of the suit on different grounds. The defendant No. 1 challenged that the plaintiff Deolal Sharma, i.e., who signed the plaint is not the proprietor of M/s. Chakraborty Auto Industries. The defendant Nos. 2 and 3 stated that there is no agreement with the plaintiff in respect of sanction of the loan of the defendant No. 1 and the plaintiff has no relation with the defendants No. 2 and 3 in respect of sanction of the loan for purchasing truck of the defendant No. 1. From the contentions of the plaintiff in his plaint and the contention of the defendants in their respective written statements and also the oral evidence of the P.W.-1, D.W.-1 and D.W.-2 and also the documentary evidence Exbt.A reveals that the plaintiff is not related with the defendant Nos. 2 and 3 in respect of sanction of the loan, but from the Exbt.B (series) and C (series) and also Exbt.1 reveals that the defendants Nos. 2 and 3 have no contractual obligation with the plaintiff. The defendant No.1 in his written statement specifically and categorically stated that as per his advice the defendant No.2 made some payment to the plaintiff and as per his subsequent advise the plaintiff has not taken the payment from defendant No.2 for an amount of Rs. 30,000/-. The District consumer's Forum, West Tripura, Agartala vide their judgment (Exbt.1) also expressed the similar view of having no relation of the plaintiff with the defendant No.2 in connection with the body building of the truck.

It further appears that the plaintiff filed the suit on 26.10.1998, and the delivery of the truck after body building from the plaintiff was taken on 27.01.1996. So, it appears that the plaintiff has filed the suit within the period of three years from the date of completion of the body building and delivery of the

same to the defendant o. 1. So, the suit is not bared by limitation. The defendants, after amendment of the plaint changing the plea of the plaintiff that Sri Deolal Sharma is not the proprietor of Chakraborty Auto Industries, but the Chakraborty Auto Industries is a partnership firm and Deolal Sharma and Chakraborty Sharma are its partners, taken the plea that the suit of the plaintiff is not maintainable in view of the provision of Partnership Act. The plaintiff has not stated in his plaint whether the Partnership firm M/s Chakraborty Auto Industries is a registered firm or not and how it was formed, i.e., whether by virtue of Partnership Deed or not. But during the cross-examination of the P.W.-1, he stated that Chakraborty Industries is a partnership firm. He also stated their firm is a registered firm, but prior to that he has submitted papers to prove that he was a owner of Chakraborty Auto Industries during the relevant time of quotation and during the time of body building of the vehicle. From the side of the plaintiff no document produced and proved to show that M/s. Chakraborty Auto Industries is a partnership firm and it was a registered firm. As per provision of Section 69 of the Partnership Act, no suit to enforce a right arising from a contract or conferred by this Act shall be instituted in ay court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is a registered and the person suing is or has been shown in the register of firm as a partner in the firm. Section 69(2) provided that no suits to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as a partners in the firm. In this respect from the side of the defendant cited the case law reported in AIR 1977 SC 336 (Loonkaran Sethia etc. Vs. Mr. Ivan E John and others) where their Lordships in the Apex Court held that Section 69 is mandatory in character and its effect is to render a suit by plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce right arising out of a contract falling within the ambit of Section 69.

So, considering the fact and circumstances of this suit and also the principles laid down by their Lordships in

the Apex Court, as discussed above, it appears that the present suit of the plaintiff is not maintainable against the defendant Nos. 2 and 3, but the suit of the plaintiff is not barred by limitation and it also appears that the suit of the plaintiff is not maintainable in view of the provision of Partnership Act, 1932. Accordingly, the Issue No. 'A' is partly decided in favour of the plaintiff and partly decided against the plaintiff as well as in favour of the defendants. Addl. Issue No. 'G' is decided against the plaintiff and in favour of the defendants."

10. While deciding the other issues, it has been observed by the trial court that the defendant No.1 is liable to pay the sum i.e. ₹46,000 with interest @ 11% per annum from the date of filing of the suit i.e. 26.10.1988. But, later on it has been observed that in view of the decision of issue No.'A' and additional issue No. 'G' against the plaintiff, he is not entitled to get decree in the suit and accordingly, in view of the decision of Issue No. 'A' and additional Issue No.'G', the Issue No.'E' is decided in the negative and against the plaintiff, but Issue No.'F' is decided partly in favour of the plaintiff and partly in favour of the defendants as the parties should bear their respective cost. Finally the suit has been dismissed.

11. Against the said judgment dated 26.09.2000 as delivered in Money Suit No.87 of 1998, the respondent No.1 herein, M/S Chakraborty Auto Industries preferred an appeal under Section 96 of the CPC, being Money Appeal No. 01 of 2001. While deciding the appeal, the first appellate Court has observed, inter alia as under:

"On careful scrutiny of the LC records it appears to me neither party had raised any question relating to

the firm of the Appellant. I can not make out how the Learned Court below had framed the additional issues. He made a third party case which was not the plea of any of the parties to the appeal."

12. Thereafter, the first appellate court, on the basis of the observation made by the trial court that the respondent No.1, the plaintiff in the suit was entitled to recover a sum of ₹46,000 with interest, has decreed the suit declaring that the plaintiff is entitled to have ₹46,000 from the respondents Nos. 1 and 2 and secondly, to have an interest @ 12% per annum with effect from 26.10.1996 i.e. from the date of the institution of the Money Suit No.87 of 1998 till realisation of the decretal amount. Being aggrieved by that judgment dated 21.05.2008 delivered in Money Appeal No.01 of 2001, this appeal has been filed.

13. At the time of admitting this appeal, the following substantial questions of law were formulated by the order dated 26.09.2008 :

- "1. Whether an unregistered partnership firm can file a suit in its own name contrary to the provisions of Section 69 of the Indian Partnership Act, 1932?**
- 2. Whether a sole partner of an unregistered partnership firm can sue in the name of partnership firm?"**

14. Mr. H.K. Bhowmik learned counsel appearing for the appellant has submitted that the first appellate court failed to persuade itself to find out the basis of the additional issue. On

reading of the additional written statement, it will be crystal clear that the status of the plaintiff either as the partnership firm or as the individual having caused to institute the suit was seriously challenged by the defendant No.1 and hence the basis of reversing the judgment of the trial court emanates from the misreading of the records.

15. While refuting such submission of Mr. Bhowmik, learned counsel appearing for the defendant No.1, the appellant herein, Mr. R. Debnath, learned counsel appearing for the respondent No.1, the plaintiff, has referred to this court the provisions of order 30 rule 1 of the CPC, which provides as under:

"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 persons 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."

Based on those provisions, Mr. Debnath, learned counsel has proceeded to build up an argument that order 30 rule 1 of the CPC does not require that an unregistered partnership firm cannot file the suit. It goes without saying, if it is held that the suit is not maintainable, the trial court had no business to give the decision on other issues. What appears is that the substantial question, whether a sole partner of an unregistered partnership firm can be sued in the

name of a partnership firm is entirely irrelevant as the unregistered partnership firm has been represented by the two partners, namely Sri Deu Lal Sharma and Sri Chakraborty Sharma. As such, this court is of the opinion that there is any necessity to consider that substantial question of law. What is required to be assessed is that, whether an unregistered partnership firm can file a suit in its own name or whether in the name of an unregistered firm a suit can be instituted in view of section 69 of the Indian Partnership Act, 1932, which provides as under:

“Effect of non-registration-(1) No suits to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is a registered and the persons suing is or has been shown the persons suing are or have been shown in the register of firms as a partners in the firm. Section 69(2) provided that no suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as a partners in the firm.”

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency

Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This Section shall not apply,-

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

16. The apex court in **Loonkaran Sethia Vs. Mr. Ivan E John**, reported in **AIR 1977 SC 336**, has categorically enunciated the law holding that Section 69 is mandatory in character and its effect is to render a suit in respect of a right vested in the plaintiff under a contract which he entered into as a partner of an unregistered firm void. Even a suit by an unregistered firm could not be validated by the subsequent registration of the firm. In this regard a decision of the apex court in **Commissioner of Income Tax, AP Vs Jayalakshmi Rice & Oil Mills Contractor Co.**, reported in **AIR 1971 SC 1015** may be referred. In a later decision, namely **Premlata Vs. Ishar Dass Chaman Lal**, reported in **AIR 1995 SC 714**, it has been held by the apex court that, "having excluded from the embargo created by the main part of sub-section

(3) or sub-sections (1) and (2) of sections 69, the right to sue would not again be construed to engulf the exceptions carved out by sub-section (3) or sub-section (4) of section 69. The object appears to be that the partnership having been dissolved or has come to a terminus, the right of the parties are to be worked out in terms of the contract of the partnership entered by and between the partners and the rights engrafted therein. So it clearly appears that sub-section (2) of Section 69 of the Partnership Act bars a suit in order to enforce a right arising from a contract by or on behalf of a firm against any third party if the firm is not registered under the Act.

17. There cannot be any dispute further that the original plaintiff at his own risk had attempted to convert the suit as if filed by a partnership firm and the said amendment was allowed by the court. Only then the defendant No.1 raised the jurisprudential objections as to the maintainability of the suit. Though that objection was not direct, but from a wholesome reading of paragraph 5 of the additional statement, that objection can be well gathered. Even there were no such objection, the civil court was not barred to scrutinize whether the suit is barred by any law in terms of Section 9 of the CPC and hence, the finding of the first appellate court is entirely misplaced and cannot be sustained.

18. Having held thus, this appeal is bound to be allowed and accordingly the impugned judgment and decree is set aside. In the effect, the suit is dismissed. However having regard to the

circumstances of the case, there shall be no order as to costs in the suit.

Send the LCRs forthwith.

JUDGE

ROY/Dipesh