

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.384/2014**

Decided on : 15th May, 2015

M/S ARORA ENTERPRISES Appellant
Through: Mr. C.S.S. Tomar, Advocate.

Versus

M/S VIJAY POWER GENERATOR LTD. Respondent
Through: Mr. B.K. Pandey, Advocate.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

C.M. No.20356/2014 (for delay)

1. This is an application seeking condonation of one day delay in filing the appeal.
2. For the reasons stated in the application, the same is allowed and delay of one day in filing the appeal is condoned as 'sufficient cause' is shown.
3. The application stands disposed of.

R.S.A. No.384/2014

1. This is a regular second appeal filed by the appellant against the judgment dated 30.8.2014 passed by the learned Additional District

Judge-04 (SE), Saket Courts Complex in case titled *M/s. Vijay Power Generators Ltd. vs. M/s. Arora Enterprises*.

2. The learned counsel for the appellant has contended that the substantial question of law which arises from the present appeal is ‘as to whether the appellate judge could have decided the appeal on a point with regard to which issue has not been framed.’ In this regard, the learned counsel for the appellant has placed reliance on case titled *Kalyan Singh Chouhan vs. C.P. Joshi; 2011 (2) CCC 001 (SC)*. It has also been contended by the learned counsel that in *United Bank of India vs. Naresh Kumar and Others* reported in AIR 1997 SC 3, any action of the official who had signed, verified and instituted the suit could be ratified subsequent to filing of the suit by a party. In the said case, the suit for recovery was filed by a person who was not authorized. During the pendency of the suit, the United Bank of India has testified before the court that the action of their employee was ratified and therefore, that ratification was held to be a valid ratification of signing, verifying and instituting the suit. Both these judgments which are relied upon by the appellant are not applicable to the facts of the instant case.

3. In the present case, the appellant had filed a suit bearing CS No.207/13 for recovery of Rs.1,77,539/- along with *pendente lite* and future interest @ 24 per cent per annum with effect from 27.9.2009 against the respondent/defendant. The aforesaid suit was contested by the respondent/defendant. Apart from merits, preliminary objections were taken with regard to maintainability of the suit on the ground that the appellant was a proprietary concern and hence not a legal entity and the suit could not have been filed in the firm's name. The frame of the suit was also contested. The learned trial court framed two issues (i) as to whether the appellant was entitled to decree of recovery; and (ii) relief.

4. The appellant in support of its case examined one Rohit Arora through whom the suit was filed by the appellant. In the cross-examination, Rohit Arora had admitted that the appellant, M/s. Arora Enterprises was a proprietary concern of his father one H.C. Arora; however, no power of attorney or authorization in favour of Rohit Arora was filed by him. On the contrary, in the plaint, it had been stated that the appellant is a company. In the absence of authorization, the learned trial court dismissed the suit for recovery.

5. The appellant, feeling aggrieved, preferred the first appeal bearing RCA No.3/2014 and during the pendency of the first appeal, it was again urged that the suit could not have been dismissed because no issue was formulated with regard to the competence of the person, namely, Rohit Arora. The first appellate court has dealt with this aspect of the matter in detail from paragraph 15 to 20 which reads as under :-

“15. Hence, a corporation being a juristic person can file a suit in its own name and such suit may be signed or verified by the secretary or director or any other principal officer of the corporation. As per Order 30, Rule 1 & 2 CPC, a partnership firm may sue or be sued through its partner and pleadings on behalf of a partnership firm may be signed and verified by any such partner.

16. In the case in hand, admittedly Mr. Rohit Arora through whom the suit has been filed is not the proprietor of plaintiff concern. As per PW1 himself, one Sh. H.C. Arora is the sole proprietor of plaintiff firm. There is no averments in the plaint as to who is the proprietor of the firm. Proprietorship firm is not a legal entity and therefore, cannot sue in its own name; whereas in the instant case, the memo of parties does not find mention of either the proprietor's name or even of the alleged authorized representative of the plaintiff firm. Although, as per PW1, plaintiff is a registered proprietorship firm of which Sh. H.C. Arora is said to be the sole proprietor. But, no certificate of registration has been placed on record.

17. It is apparent that Sh. H.C. Arora who is claimed to be sole proprietor of plaintiff firm has not instituted the plaint. His name is nowhere mentioned either in the memo of parties or even in the plaint. In view of the fact that plaintiff firm is a sole proprietorship firm and is not a legal entity, it cannot sue in its own name. Furthermore, Mr. Rohit Arora, who has signed and verified the plaint is neither the proprietor nor he is even the authorized representative of the sole proprietor. Admittedly, PW1 through whom the suit has been filed, did not file any authority letter executed by Mr. H.C. Arora, the alleged sole proprietor authorizing him (Mr. Rohit Arora) to institute the suit on behalf of M/s. Arora Enterprises. Even otherwise, as already observed above, M/s. Arora Enterprises being a sole proprietorship firm cannot sue in its own name. Reliance is placed on the decisions of the Hon'ble Delhi High Court in the matter of *Miraj Marketing Corporation v. Vishaka Engineering & Ors.*; 115 (2004) DLT 471 and also in the matter of *Svapn Constructions v. IDPL Employees Co-operative Group Housing Society Ltd. & Ors.*; (2006) 127 DLT 80.

18. Considering the above position, plaintiff firm being a non-legal entity was having no right to sue in its own name for claiming any alleged dues against the defendant/appellant herein. Hence, the suit was liable to be dismissed on this very count.

19. Assuming for the sake of arguments, that present suit was filed in the correct name and was maintainable, even in that case, the deposition of PW1 is without any authority as neither he was the proprietor of the firm nor he placed any document showing his authority to depose on behalf of proprietor. Furthermore, the deposition in affidavit Ex. PW1/A is also lacking to show that PW1 was having any personal knowledge about the facts of the case being the employee of the plaintiff firm or otherwise.

20.The contention raised by learned counsel for respondent that during pendency of appeal, respondent has placed on record SPA dated 24.10.2013 executed by the proprietor of plaintiff firm in favour of PW1 is of no help to him for the simple reason that the subsequent SPA dated 23.10.2013 allegedly executed in favour of PW1 cannot ratify the previous acts of PW1 done during pendency of suit before learned Trial Court.”

6. In the light of the aforesaid analysis of the legal position, one thing is clear that so far as the proprietary concern is concerned, it does not have any legal status and in case a proprietary concern wants to file a suit, it has to be in the name of the proprietor and not in the business name. This was the first drawback of the case of the appellant. The second drawback was that in the body of the plaint, the appellant is claiming itself to be a company but no certificate of incorporation etc. has been proved in court. Rohit Arora through whom the suit has been signed, verified and instituted claims in his cross-examination that the appellant is a proprietary concern of his father; however, if that be so, he ought to have filed the authorization in his favour from his father which could have maintained the suit. No such authorization was filed before the trial court. Moreover, the father, H.C. Arora, has not testified in court either in support of authorizing his son or even with regard to the money being

due from the respondent. The son, Rohit Arora, also does not say that he had personal knowledge about the transaction. The suit was bound to fail. Both the trial court as well as the first appellate court have returned a concurrent finding with regard to non-maintainability of the suit. It is the contention of the learned counsel for the appellant that the authorization was filed before the first appellate court. Even a copy of the same has not been placed on record. Moreover, the authorization by way of ratification if at all was issued by H.C. Arora in favour of his son Rohit Arora, that ought to have been filed before the trial court passed a final order. This was not done. Now at such a belated stage, this cannot be permitted to be done to fill up a lacuna in the case.

7. There is one more aspect of the matter. Even if this question of competence of the person signing, verifying and instituting the suit is ignored, even then the suit could not have been decreed for the simple reason that H.C. Arora, the father of Rohit Kumar has at no point of time appeared in the witness box. Admittedly, the suit has been filed through authorized representative. In such an event, the proprietor, namely, the father of the appellant ought to have testified in court. This has not been done. Therefore, the trial court order as well as the first appellate court

order cannot be found fault with. The judgment passed in *United Bank of India's* case (*supra*) is also not applicable because there is no ratification done by the appellant at the stage of trial before a final order is passed. Even at the first appellate stage, the so-called ratification has not been placed on record. With regard to the other judgment that the court has to decide the matter on the basis of the issues, cannot be disputed. Issues are struck only when there is an assertion by one party and denial by the other. In the instant case, there is no dispute about the fact that the competence of the appellant to maintain the suit itself was assailed. Reference can be taken in this regard from the preliminary objections taken in the suit itself. Even if an issue with regard to maintainability has not been framed, still the plaintiff/appellant had to show that the suit, as framed, was maintainable which he has failed to do.

8. For the above mentioned reasons, I find that there is no question of law much less any substantial question of law involved in the matter. I feel that the appeal is totally misconceived and the same is dismissed.

V.K. SHALI, J.

MAY 15, 2015
‘AA’