

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.NPD.No.2878 of 2015

and

MP.No.1 of 2015

India Meters Ltd.,
(Now amalgamated as Samrakshana Electricals Ltd.,
Rep. by its Authorised Signatory Mr.Shivakumar,
No.127, Hydernagar, Hyderabad - 500 072
vide Amalgamation order dated 22.02.2010
in CP.No.275 of 2009 ..Petitioner

Vs.

Press Equipments and Products Company,
Rep. by its Managing Partner,
No.811/B G.N.T.Road,
Redhills,
Chennai - 600 035
..Respondent

PRAYER:

The Civil Revision Petition is filed under Section 115 of CPC against the order dated 18.04.2015 in EA.No.4856 of 2010 in EP.No.419 of 2009 in OS.No.4866 of 2003 by the learned IX Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.Mahesh Kumar.S

For Respondent : Mr.K.Chakarapani

ORDER

The Civil Revision Petition is arising out of order dated 18.04.2015 passed in EA.No.4856 of 2010 in EP.No.419 of 2009 in OS.No.4866 of 2003 by the learned IX Assistant Judge, City Civil Court, Chennai thereby dismissing the petition filed by the petitioner under Section 47 of CPC.

2. The respondent is the plaintiff. They filed suit for recovery of money as against the petitioner. Though the petitioner filed written statement and did not examine any of the witness on the side of the defendant as well as did not mark any document to defend their case. The suit was decreed in favour of the respondent herein. Thereafter the petitioner did not file any appeal suit and the respondent filed execution petition in EP.No.419 of 2009. In the said petition, the petitioner filed application under Section 47 of CPC. In the said petition, the petitioner was examined as PW1. In his deposition he categorically stated that the respondent is not a registered partnership firm in terms of Section 69 of Indian Partnership Act. Therefore, no suit to enforce a right, rising 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 or have

been shown in the Register of Firms. Though the respondent annexed document of registration of their firm as partnership firm, the respondent failed to mark registration of firm certificate before the trial court. That apart, the petitioner did not raise the said plea in their application whereas he categorically deposed before the execution court. But the court below did not consider the said deposition and without even discussing the same simply dismissed the petition. Though, the petitioner raised various ground to set aside the order passed under Section 47 of CPC, this Court finds no irregularity or infirmity in the order passed by the court below in respect of the grounds raised by the petitioner.

3. The only ground raised by the petitioner is that the court below did not consider the deposition of PW1 that the respondent firm whether registered or not. In support of their contention, they marked Ex.P5 and P6 which were received from the Registrar of Companies and confirmed and stated that the respondent firm is not a registered one. In this regard, the learned counsel for the petitioner relied upon the judgment in the case of **Sunderlal & Sons Vs. Yagendra Nath Singh & Anr** reported in **1976 SCC Online Cal 28**, wherein it is held as follows:

4. The second point in opposition to this application

for execution was that the firm which was seeking execution being not a registered firm execution could not be directed. That the application is by a firm is apparent from the petition. From the application and the decree and the cause papers it does not appear that the firm is a registered one. A point therefore was taken that the firm was not registered. In answer to this contention a document purported to be a certified copy of registration of the firm was produced. The said document does not indicate that this firm of Sunderlal & Sons was itself registered as such. It is true that in respect of the firm Santi Swarup Gupta the address of Sunderlal & Sons at 7/1A, Clive Row, Calcutta, is indicated as the address but that does not indicate that this applicant firm is registered under the Partnership Act. In the aforesaid view of the matter I must proceed on the basis that the firm is unregistered. If that is so, the question is whether such an unregistered firm is entitled to maintain this application for execution. On this context counsel on behalf of the respondent drew my attention to the provisions of S. 69 of the partnership Act. The said provision provides as follows:

—

"69. Effect of non-registration.

(1) No Suit 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 registered and the person suing is or has been shown in the Register of Firms as a partner 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 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-ss. (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 effect—

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

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner."

5. *In this case the decree has been passed. If the decree is a nullity then of course this point can be taken. But the question is whether a decree passed without this point having been taken is nullity or not. In view of the language of the section, in my opinion, a plaint filed by an un-registered firm would not be a plaint at all. If that be so, all*

proceedings thereunder will be proceedings without jurisdiction. Support for this proposition can be had from the observations of the Division Bench of Madras High Court in the case of K.K.A. Ponnuchami Goundar v. Mathusami Goundar AIR 1942 Mad. 252. Similar view was taken in the case of A.T. Ponnappa Chettiar v. Bodappa Chettiar AIR 1945 Mad. 146, Shriram Sardarmal Didwani v. Gourishankar, AIR 1961 Bom. 136, Firm Laduram Sagarmal v. Jamuna Prosad Chaudhuri A.I.R. 1939 Pat. 239 and Dwijendra Nath Singh v. Gobinda Chandra, AIR 1953 Cal. 497. This contention, in my opinion, can also be taken at this stage. Reliance in this connection may be placed on the observations of the Judicial Committee in the case of Surajmall Nargoremull v. Triton Insurance Co. Ltd., 52 I.A. 126 and in the case of Gopinath Motilal v. Ramdas AIR 1936 Cal. 133. In the aforesaid view of the matter I am of the opinion that the firm not being registered the decree was a nullity and as such cannot be executed.

7. *I am therefore, of the opinion that where execution is in respect of a claim arising out of a suit based on a contract, the prohibition indicated by S. 69 would apply. Furthermore, the fact that in sub-clause (b) of sub-s. (4) of S. 69 of the Act proceedings in execution or other proceedings incidental to the execution of certain specified suit as indicated in that sub-clause have been excluded and no other proceeding of execution has been excluded, in my*

opinion, is clearly indicative of the fact that the proceedings in execution which are to enforce rights arising from contracts would be covered by S. 69 of the Indian Partnership Act. In that view of the matter I am unable to accept the contention that execution proceedings are not covered by the prohibition of S. 69 of the Indian Partnership Act. Counsel for the decree-holder contended, further, that prohibition was against the institution of the suit and the prohibition was not against the consideration of the suit by the court. In aid of this submission he relied on the observations of the Patna High Court in the case of Kuldip Thakur v. Sheomangal Prasad Thakur, AIR 1957 Patna 4 and also on the Bench decision of the Madras High Court in the case of Jalal Mahammad v. Kakka Mohammad, AIR 1972 Mad. 86. In the view I have taken of the nature of prohibition, with great respect, I am unable to accept this conclusion of the aforesaid two decisions. Jurisdiction as observed by Lord Reid in the case of Anisminic Ltd. v. Foreign Compensation Commission, 1969 (2) Appeal Cases 147, at page 171 of the report is the entitlement of the tribunal to enter upon the inquiry in question. That entitlement in my opinion can only arise from a competent plaint instituted by a plaintiff. If the plaint was incompetent, there was no plaint. There was no suit. Ex facie and without any dispute there was no valid suit. A decree based on such a patent and indisputable error would be an error of

jurisdiction and decree passed on such error would be nullity. If, however, the error depends upon adjudication of disputes, either of fact or law different considerations would apply. After all as the Supreme Court has observed that the question whether there was an error within the jurisdiction or an error of jurisdiction depends upon the nature of the error. In view of the express provision and public policy indicated in S. 69 of the Partnership Act, in my opinion, entertaining a suit in derogation of that mandatory provision would defeat the purpose of the statute and such an error would amount to an error of jurisdiction and a decree passed on such an error would be a nullity. In aforesaid view of the matter, in my opinion, on this ground also this decree cannot be executed. In the premises, this application must fail. However, in view of the thoroughness with which this application was argued I direct that the parties should pay and bear their own costs. Interim ordea, if any, is vacated. Certified for counsel.

4. He also relied upon the judgment in the case of **M/s.Konark Cylinders and Containers Pvt Ltd Vs. Suresh Gangadas Bhai Patel and Others** reported in **2012 SCC Online Ori 34**, wherein it is held as follows:

16. In view of the aforesaid documents which have been submitted along with the plaint and relied upon by the

plaintiffs in support of their contention, this Court is of the view that no further evidence is needed to prove/establish that the transaction in question in respect of which Summery Suit No. 25 of 2009 was instituted in the Court below was entered into between the partnership firm Super Impex and the petitioner-Company and the said firm admittedly is an unregistered firm. Hence, if any suit for recovery of money with regard to transaction of purchase and sale entered into between Super Impex and petitioner-Company is to be filed the same should be filed by Super Impex and not by the present plaintiffs in their individual capacity. Since Super Impex is an unregistered firm, the suit cannot be maintained as it is hit by Section 69(2) of the Indian Partnership Act. Therefore, since the above three plaintiffs are carrying on business in partnership in the name and style of "Super Impex", they cannot maintain a suit against the petitioner-Company for recovery of money due from petitioner-company in view of bar under Section 69(2) of the Indian Partnership Act.

18. Law is also well settled that when the statute provides for a particular procedure, the authority has to follow the same and is not permitted to act in contravention of the prescribed provisions. Other methods or modes of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris", meaning thereby that

if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (See Taylor v. Taylor, (1876) 1 Ch.D. 426, Nazir Ahmed v. King Emperor, AIR 1936 PC 253, Ram Phal Kundu v. Kamal Sharma; and Indian Banks Association v. Devkala Consultancy Service, AIR 2004 SC 2615)

19. *If decree is a nullity such stand can be taken/raised at any stage. The Allahabad High Court in the case of Ram Adhar v. Ram Kirat Tiwari (supra) held that where two plaintiffs carrying out business of manufacturing bricks in partnership, filed a suit to recover the amount due to the partnership from the defendant for the purchase of bricks by him, the suit would not be maintainable on account of the bar under Section 69(2) because their partnership was not a registered one.*

22. *In the petition filed under Section 47, CPC though the petitioner has raised a point that the decree passed is a nullity, it has not taken specific stand, which has been taken in the present revision petition and the same goes to root of the case. Therefore, in the interest of justice, the matter is remitted back to the Executing Court with liberty to the petitioner-Company as well as the opposite parties to raise all the points before the Executing Court in support of their contentions and the Executing Court is directed to consider*

the same and pass appropriate orders keeping in view the observations made in the preceding paragraphs.

5. In the above judgment, it is held that where execution is in respect of a claim arising out of a suit based on a contract, the prohibition indicated by Section 69 of the Indian Partnership Act would apply. Further held that the proceedings in execution which are to enforce rights arising from contracts would be covered by Section 69 of Indian Partnership Act. Therefore, the execution court failed to consider the contentions of the petitioner in respect of the registration of respondent's firm.

6. In view of the above discussion, the civil revision petition is allowed and the order dated 18.04.2015 passed in EA.No.4856 of 2010 in EP.No.419 of 2009 in OS.No.4866 of 2003 by the learned IX Assistant Judge, City Civil Court, Chennai is set aside. The matter is remanded back to execution court for fresh disposal. It is made clear that both the parties are permitted to let in fresh evidence with proper documents in respect of registration of firm alone. Consequently, connected miscellaneous petition is closed. No order as to costs.

05.02.2021

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
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G.K.ILANTHIRAIYAN,J.

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To

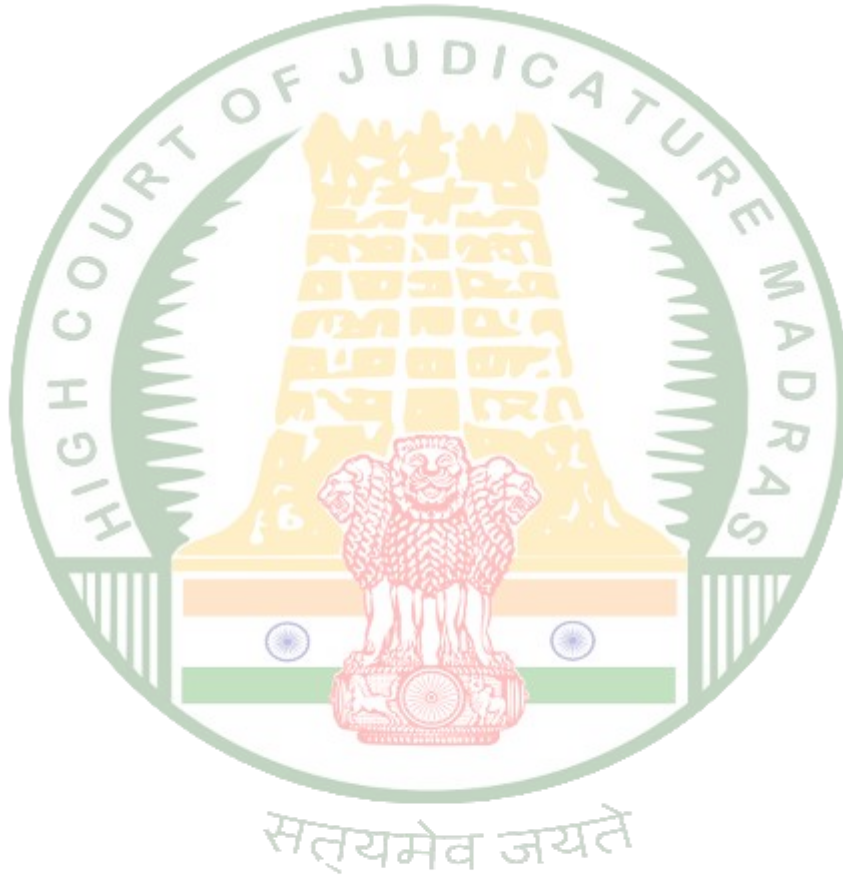
The IX Assistant Judge,
City Civil Court, Chennai.



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