

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: July 12, 2021

Pronounced on: July 15, 2021

+ **CM (M) 396/2021, CM APPL.18045/2021 (by the petitioner u/S 151 CPC for stay)**

M/S. SHANTI NATH ENTERPRISESPetitioner

Through: Mr. Anuj Jain, Advocate

Versus

M/S. AA ENTERPRISESRespondent

Through: None

**CORAM:
HON'BLE MS. JUSTICE ASHA MENON**

J U D G M E N T

[VIA VIDEO CONFERENCING]

1. This petition has been filed with the following prayers:

“ a) Set aside the order dated 08.02.2021 passed by the Hon'ble Court of Sh. Gurdeep Singh Saini, District Judge (Commercial Court)-02, Tis Hazari Court, New Delhi in CS(Comm.) No. 278/2019 titled M/S A.A. Enterprises Versus M/S Shanti Nath Enterprises

b) To remand back the case to the Hon'ble Court of Sh. Gurdeep Singh, District Judge (Commercial Court), Tis Hazari Court, New Delhi to decide

afresh on the statement recorded by the counsel for respondent plaintiff on dated 08.02.2021 or to decide the application filed by the petitioner under Order 7 Rule 11;

c) Pass such orders as may deem fit and proper and in favor of the Petitioner.”

2. The facts as are relevant for the disposal of the present petition can be briefly stated. The respondent/plaintiff had instituted a commercial suit against the petitioner/defendant for recovery of Rs.3,84,398/-. The petitioner/defendant filed its written statement along with an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, “CPC”) and prayed that since the suit had been filed by the respondent/plaintiff, which was an unregistered Partnership Firm, it was liable to be rejected as being barred under law. At the time of filing of the suit i.e., on 24th July, 2019, the respondent/plaintiff Firm was not registered and therefore, the suit was barred under Section 69(2) of the Partnership Act, 1932 (for short, “the Act”).

3. According to the learned counsel for the petitioner/defendant, Mr. Anuj Jain, the matter was repeatedly adjourned for the reply of the respondent/plaintiff and finally, on 23rd January, 2021, the reply was filed along with an application under Section 151 CPC to take on record additional documents. The additional documents so filed included documents to show that the respondent/plaintiff had got the Partnership Firm registered on 28th July, 2020 i.e., subsequent to the filing of the suit.

4. Learned counsel for the petitioner/defendant submitted that on 8th

February, 2021, the case was listed for arguments on the application under Order VII Rule 11 CPC and it was at that stage that the respondent/plaintiff, through counsel, informed the court that they wished to withdraw the suit, with liberty to file a fresh suit.

5. The grievance of the petitioner/defendant is that the learned Trial Court recorded the statement of learned counsel for the respondent/plaintiff without mentioning the reason for withdrawal and yet, recorded in the order that the respondent/plaintiff had been permitted to withdraw the suit on account of 'defect'. Neither the counsel for the respondent/plaintiff nor the court in its order described the said defect. Learned counsel for the petitioner/defendant contended that it was clear that the court had granted an unfair opportunity for withdrawing a suit, which was liable to be rejected.

6. Relying on the judgment in *Shreeram Finance Corporation v. Yasin Khan and Ors.* (1989) 3 SCC 476, learned counsel for the petitioner/defendant further submitted that the defect in the suit was a material defect inasmuch as the court had held that even an amendment would not cure the initial defect when a suit had been filed by an unregistered Partnership Firm. Therefore, the learned Trial Court had erred in granting permission to the respondent/plaintiff to file the second suit on the same cause of action.

7. Incidentally, such a suit has been filed by the respondent/plaintiff on 8th April, 2021 and summons have been issued to the petitioner/defendant and proceedings are pending before the learned Trial

Court, as informed by the learned counsel for the petitioner/defendant.

8. It appears that the present petition has been filed on account of the receipt of summons in the subsequent suit. The petitioner/defendant does not seem to have been aggrieved by the order dated 8th February, 2021, till the suit was filed, as no steps were taken by it to either seek a review of the impugned order or to approach this court in revision.

9. The contention of the learned counsel for the petitioner/defendant that the defect, namely, the status of the respondent/plaintiff as an unregistered Partnership Firm at the time of filing the first suit, was an ‘incurable defect’, does not seem to be correct position. In ***Haldiram Bhujiawala and Another vs. Anand Kumar Deepak Kumar and Another*** (2000) 3 SCC 250, the Supreme Court was dealing with the question of maintainability of a suit filed by a Partnership Firm, which was unregistered on the date of the filing of the suit, in view of Section 69(2) of the Act. The Supreme Court observed that it would be open for the plaintiff to seek withdrawal of such a plaint and file a fresh suit after registration of the Firm, subject to the law of limitation. Para 26 of the said judgment is reproduced hereinbelow for ready reference:

*“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.)” **(Emphasis added)**

10. In other words, the absence of registration at the time of filing of a suit by a Partnership Firm would make such a suit defective. But this defect can be overcome, not in the same suit by way of amendment [See *Shreeram Finance Corporation (supra)*], but by withdrawing the suit as having a ‘formal defect’ and seeking permission to file a fresh suit on the same cause of action. It is not possible to accept the argument of the learned counsel that if a Partnership Firm once files a suit at the time it is not registered, then, irrespective of limitation, it would be barred forever from filing a suit on the same cause of action.

11. As noticed above, what was before the learned Trial Court on 8th February, 2021 was the application under Order VII Rule 11 CPC filed by the petitioner/defendant pointing out that the suit was barred by law i.e. under Section 69(2) of the Act. It was at that time that an oral request was made by the learned counsel for the respondent/plaintiff to the court that permission be granted to withdraw the suit with permission to file afresh. A Co-ordinate Bench of this court in CM (M) No.1150/2017,

titled *Kanta and Ors vs. Maya Chauhan and Ors*, decided on 16th October, 2017, while dealing with a similar situation of an oral prayer for withdrawal, being entertained and allowed, rejected the contention that the court could not do so, observed as below:

“7. No merit is found in the said contention. The Court is certainly entitled to act on the basis of an oral request which can be entertained and request for withdrawal of the suit with liberty to sue afresh may fall in such category, depending upon the facts of the case.”

12. No doubt, therefore, there is no written application disclosing the grounds for withdrawal and grant of permission for fresh filing. Nevertheless, there is no force in the contention of the learned counsel for the petitioner/defendant that the learned Trial Court had not applied its mind to be satisfied that the requirements of Order XXIII CPC were complied with or not. It is recorded in the impugned order that the learned counsel for the petitioner/defendant had objected to the withdrawal of the suit and had also submitted that the *“plaintiff could have filed the document for which objection was raised.”* The objection raised was spelt out in the application under Order VII Rule 11 CPC, namely, the absence of the registration of the Partnership Firm. The learned Trial Court was considering the request for withdrawal in this background. It found that the suit suffered from this defect and recorded it in the impugned order. Merely because the statement did not mention the defect, would not make it any less so.

13. The learned counsel for the petitioner/defendant appears to be

blowing hot and cold at the same time as, on the one hand, he has argued before this Court that even if such a document had been filed and an amendment is sought, the suit would not have been maintainable as held in *Shreeram Finance Corporation (supra)*, while contending before the learned Trial Court that, “*plaintiff could have filed the document for which objection was raised.*”, in other words, seek a cure for the defect in the same suit.

14. The facts in *K.S. Bhoopathy and others v. Kokila and Others* (2000) 5 SCC 458 were very different from the present case. The Supreme Court was dealing with a matter where after the learned Trial Court had decreed the suit, in appeal, the first Appellate Court had modified part of the decree and a Second Appeal had been filed and the High Court had allowed the application under Order XXIII Rule 1(3) CPC seeking permission to withdraw the suit even before the Second Appeal had been entertained. The Supreme Court held that rights had accrued to the appellant before it when the First Appellate Court had decided in his favour. Therefore, the court was required to satisfy itself on the existence of a ‘formal defect’ or other ‘sufficient cause’ before allowing the withdrawal of a suit with permission to file a fresh suit on the same cause of action.

15. In the instant case, it is clear that the suit was withdrawn at the initial stage itself. No vested rights have accrued in favour of the petitioner/defendant.

16. In *V. Rajendran and another v. Annasamy Pandian (Dead) thr.*

LRs Karthyayani Natchiar (2017) 5 SCC 63, the Supreme Court reiterated what was held in *K.S. Bhoopathy (supra)*, that while granting liberty to file a fresh suit on the same cause of action, the Court must be satisfied about the existence of a 'formal defect' or 'sufficient ground'. As noticed hereinabove, the Supreme Court had occasion to consider the consequence of non-registration under Section 69 of the Act and was willing to treat it as only a 'formal defect' [see *Haldiram Bhujawala (supra)*].

17. In the circumstances, no infirmity or perversity is found in the impugned order whereby the filing of the first suit was treated as suffering from a 'defect' on account of non-registration of the Partnership Firm at the time of filing of the said suit and permission was granted to the respondent/plaintiff to file a fresh suit on the same cause of action.

18. There is no merit in the present petition, which is accordingly dismissed along with the pending application.

19. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

JULY 15, 2021
pkb/s