IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.1438 of 2008 and
M.P.Nos.1 of 2008 & 4 of 2013

1.Asoka Service,
Rep. by Partner,
R.Muthukrishnan,
A Regd. Partnership Firm No.278/1975,
No.29, Sriwari Garden,
644, V.K.K.Menon Road,
Coimbatore – 44.

Now at:
No.170, Subramaniya Udayar Street,
Telungupalayam,
Coimbatore – 641 039.

2.Mirsath Begum

3.Saburath Begum

4.R.Muthukrishnan

5.T.V.Subramaniam (died)

6.S.Vijayalakshmi

7.T.S.Senthil Kumar

8.T.S.Sukanya

9.T.S.Seetha Lakshmi .. Appellants

(Appellants 6 to 9 are brought on record as LRS of the deceased 5th appellant vide order of this Court dated 03.02.2014 made in M.P.Nos.1 to 3 of 2013 in S.A.No.1438 of 2008)

Vs.

1.K.Palaniappan

2.P.Chandramohan .. Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C. against the judgment and decree dated 04.12.2007 made in A.S.No.99 of 2007 on the file of the I Additional Sub Court, Coimbatore confirming the judgment and decree dated 04.06.2007 made in I.A.No.110 of 2006 in O.S.No.2449 of 2004 on the file of the II Additional District Munsif Court, Coimbatore.

For Appellants : Mr.M.Sriram

For Respondents : Mr.G.Ponnambala Thiyagarajan

J U D G M E N T

This Second Appeal is filed against the judgment and decree dated 04.12.2007 made in A.S.No.99 of 2007 on the file of the I Additional Sub Court, Coimbatore, confirming the judgment and decree dated 04.06.2007 made in I.A.No.110 of 2006 in O.S.No.2449 of 2004 on the file of the II Additional District Munsif Court, Coimbatore.

2.This appeal raises an interesting question of law. The point being, if a person seeks for declaration that he is a partner of a Firm and that Firm is unregistered, whether the suit is hit by virtue of Section 69(1) of the Partnership Act, 1932.

<u>The short facts leading to this appeal are</u>:

3.On 12.05.1975, a firm was commenced bearing Registration No.278 / 1975, under the name and style of Asoka Service. The purpose of the firm was to run the business of buses. At the time of formation, the firm consisted of two partners, namely the 2nd plaintiff Mirsath Begum and one Ponnusamy. This firm was dissolved in and by way of a Deed of Dissolution dated 27.01.1978, with effect from 31.12.1977.

4.It is the case of the plaintiffs that on 02.02.1978, the aforesaid Mirsath Begum and one M.Saburath Begum formed a partnership under the same name. The firm continued and it was re-constituted on 19.08.1989. On that day, R.Muthukrishnan and T.V.Subramaniam, who are the 4th and 5th plaintiffs became partners of the firm.

5.It is the plaintiffs case that in order to get finance for the purpose of running the business, they approached the defendants. Prior to this event, the plaintiffs have pleaded that the partnership firm, on the strength of the permits granted by the State of Tamil Nadu, has not only changed the route bus, but also substituted the said bus with other one. The plaintiffs pleaded that the 1st defendant has arranged finance from one Vinayagar Finance at Vellur. The amount borrowed was Rs.3,00,000/-. According to the plaintiffs, they had been servicing the interest on regular basis. On 28.11.1998, they received a Telegram from the financier by name Velusamy, calling upon them to settle the amounts fully and finally. The plaint proceeds to read, when the plaintiffs approached the financier to make the payment and it was then to their shock and surprise, they came to know that the 1st defendant had paid a sum of Rs.2,00,000/-, leaving a balance of Rs.1,00,000/-. The plaintiffs expressed surprise that while the loan was taken from the aforesaid Vinayagar Finance by the partners, the payment had been made by the 1st defendant to the financier. Be that as it may, with only Rs.1,00,000/- remaining with Vinayagar Finance, she paid the same and settled the amount in full quit with the said financial entity.

6.On 23.12.1998, the two plaintiffs approached the 1st defendant to make the payment of Rs.2,00,000/- [total loan is Rs.3,00,000/- less Rs.1,00,000/- paid by the plaintiffs to Vinayagar Finance] being the amount paid by the 1st defendant. The latter refused to receive the payment and demanded that the bus should be left in his custody. On verification of the records, she came to understand from the blank papers given to the 1st defendant, at the time of receipt of the loan, he had created a fraudulent partnership deed, showing as if the 1st defendant had joined the partnership on 01.07.1998 along with plaintiffs 2 & 3 and had created yet another document dated 30.01.1999, under which the plaintiffs 2 & 3 are said to have retired from the firm.

7.On the basis of the aforesaid documents, it is the case of the plaintiffs that forcible possession of the bus was taken by defendants on 24.02.1999. Immediately, the plaintiffs lodged a Police complaint on 25.02.1999. Since no action was taken by the Police on the said complaint, they proceeded to file a private complaint before the V Judicial Magistrate, Coimbatore, who issued a search warrant against the defendants. Based on the search warrant, the Police had recovered the blank signed papers of the plaintiffs in the hands of the defendants.

8.Subsequently, the defendants had challenged the proceedings before this Court by way of a petition under Section 482 of the Criminal Procedure Code, 1973 and the proceedings were quashed. This Court had also directed the parties to approach the jurisdictional Civil Court for the purpose of working out their remedies against each other. In the mean time, the petitioners also filed Writ Petition seeking for a relief that the District Collector cum Regional Transport Authority should not consider any application for transfer of permit, if any filed by the defendants. This Court passed an order in W.P.No.17642 of 1999 on 27.10.1999, giving appropriate directions to the Regional Transport Authority. Taking into consideration the interest of public, the Regional Transport Officer has passed an order granting temporary permit to the new entity, which stands in the name of the defendants.

9.It is the case of the plaintiffs that as per the partnership deed dated 19.08.1989, no partner could have alienated or transferred his interest in the partnership firm to any third party. According to the plaintiffs, since there is a specific bar, (contract to the contrary as contemplated under the Partnership Act), the so called new entity could not have been created. On the basis of these pleadings, the plaintiffs sought for the following reliefs.

a.declaring that the plaintiffs 2 to 5 alone are the partners of the 1st plaintiff firm;

b.declaring that the partnership deed in between the plaintiffs 2 and 3 and the defendants executed on 01.07.1998 is Null and Void;

c.directing the defendants to re-deliver the vehicle TDI 8484 now replaced by the vehicle TN 38 A 2727 to the plaintiffs;

d.granting permanent injunction restraining the defendants from operating the vehicle TN 38 A 2727 in any name of the firm Asoka Service;

e.directing the defendants to pay the past mesne profits from 24.02.1999 till date of filing this suit as Rs.1,000/- per month i.e., Rs.36,000/- and for future mesne profits;

f.directing the defendants to pay the cost of the suit;

g.for such further or other orders as may deed fit and proper.

10.The plaint was presented in February 2002. A detailed written statement was filed on 06.10.2002. Nearly four years after the filing of the written statement, an application was taken on 16.02.2006 for rejection of the plaint. The only point urged in the application filed under Order VII Rule 11 was that under Section 69 of the Indian Partnership Act, 1932, a firm being unregistered firm, the suit is not maintainable. The said plea was accepted by the Trial Court and the plaint suit was rejected. The appeal preferred therefrom ended in its dismissal. Being aggrieved by the rejection of the plaint, the present Second Appeal has been filed.

11.This Court had ordered notice regarding admission on 21.11.2008.

12.I heard Mr.M.Sriram, learned counsel appearing for appellants and Mr.G.Ponnambala Thiyagarajan, learned counsel appearing for the respondents.

13.Though the learned counsel appearing for the appellants suggested several substantial questions of law, the only substantial question of law that is to be considered is whether the Courts below were justified in rejecting the plaint on the ground that the firm created on 02.02.1978, being an unregistered one, any suit claiming the aforesaid reliefs, is barred by the said provision?

14.Mr.M.Sriram, learned counsel appearing for the appellants would submit that the present suit is not a suit claiming any of the reliefs which would come within the teeth of Section 69. According to him, Section 69(1) will apply only when the suit seeks to enforce a right arising from a contract or conferred by the Partnership Act or on behalf of a person suing of a partner of a firm against the firm itself, or any person alleged to be or have been a partner of the firm. According to him, the relief sought for in the suit is that the plaintiffs continued to be partners of the firm and such a relief is not founded on the contract. He would rely upon the judgment of the Supreme Court in the case of ***Mukund Balkrishna Kulkarni Vs. Kulkarni Powder Metallurgical Industries and another*** reported in ***[(2004) 13 SCC 750]*** and ***Sumer Singh Galundia & Another Vs. Jeevan Singh (since deceased through LRS) and others*** reported in ***[MANU/SCOR/129093/2022]***.

15.Attempting to put down the case of the appellants, Mr.G.Ponnambala Thiyagarajan, learned counsel appearing for the respondents would submit that the suit is not maintainable, because the firm is unregistered. According to him, this is his specific stand taken by him in the rejection of plaint. He would further submit that the firm, for which a declaration is sought for, had already dissolved on 27.01.1978, with effect from 31.12.1977 and since the persons are partners of the firm, the suit is not maintainable. He would further point out from the judgment of this Court in ***P.M.S.M.Mohammed Abdul Samad and others Vs. P.M.S.C.Madarsa Rowther and others*** reported in ***[AIR 1959 Madras 440]***, that the suit is not maintainable. He would also rely upon the judgment of this Court in ***M/s.K.R.M.Money Lenders rep. by its Power Agent Karuppiah Vs. A.Manoharan @ Doss*** reported in ***[1999 (II) CTC 540]***, ***Erach F.D.Mehta Vs. Minoo F.D.Mehta*** reported in ***[AIR 1971 SC 1653]***, ***M/s.Shreeram Finance Corporation Vs. Yasin Khan and others*** reported in ***[AIR 1989 SC 1769]***, ***V.K.Amalran Vs. K.John Britto @ Peter*** reported in ***[(2023) 1 MLJ 252]*** and finally ***Saleem Bhai and others Vs. State of Maharashtra and others*** reported in ***[2003 (1) CTC 186]***.

16.I have carefully considered the arguments of either side.

17.I have to make myself clear that appeal on hand is an appeal against rejection of plaint. It has been presented as a Second Appeal by the plaintiffs that rejection of plaint is barred under Section 2(2) of the Civil Procedure Code, 1908. It is not a regular appeal in that sense, but it is circumscribed by scope of application under Order VII Rule 11 of the Civil Procedure Code, 1908. Order VII Rule 11 applies, if the plaint taken as it is, does not disclose cause of action or is barred by any provision of law. In this case, I have to consider whether the suit is barred by virtue of Section 69(1) of the Partnership Act, 1932.

18.Being a plea in demurrer, the averments made in the plaint have to be taken as truth. On that basis, I have to decide whether the suit is barred or not. I am surprised at the procedure that has been followed in the Trial Court as well as in the Lower Appellate Court. They have permitted the parties to make documents in the proceeding. In the present case under Order VII Rule 11, the Court cannot look beyond the plaint and documents filed by the plaintiffs.

19.To look into the defence or the written statement is specifically barred, the plea taken by the defendants in the written statement are absolutely irrelevant for the case. The averments made in the plaint alone are enough for deciding the application. This position of law has enunciated by the Supreme Court in ***Saleem Bhai and others Vs. State of Maharashtra and others*** reported in ***[2003 (1) CTC 186]***. Applying the principles laid down by the Supreme Court in the aforesaid decision, I proceed to discuss the matter on Section 69.

20.Mr.G.Ponnambala Thiyagarajan, would specifically argue that Section 69(2) applies to the facts of this case and therefore, the suit is barred. Section 69(2) of the Partnership Act, 1932 is extracted for ready reference.

> *"**Section 69:***
>
> ***EFFECT OF NON-REGISTRATION**.*
>
> *...*
>
> *(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."

21.The relevant portion is that the defendant must be a "third party" to the partnership firm and the firm / partner must make a claim against said third party. Here is the case, where the plaintiffs have come to the Court stating they are the partners of the firm from 02.02.1978 till date and that the defendants 1 & 2 are claiming to be partners on the basis of fabricated documents. In other words, it is not a suit against third party, as defined under Section 2(d) of the Partnership Act, 1932 to the partnership firm. It is a suit where the person is seeking for a declaration that the defendants are not partners to the firm. There is a ocean of difference between a third party to a firm and a person claiming to be a partner of a firm, when he is not. The judgment of this Court in ***M/s.K.R.M.Money Lenders rep. by its Power Agent Karuppiah Vs. A.Manoharan @ Doss*** reported in ***[1999 (II) CTC 540]***, is one such instance. That was a suit presented by unregistered firm seeking for a declaration of title and for possession against the third party. It was not a case where the defendants claim to be ostensible partners to the firm, but they were rank strangers to the firm itself. It was in such an event, the Court held any claim made against strangers to the firm, is not maintainable unless the firm is registered.

22.The present suit is not one such. As pointed out above, it is a suit where the defendants 1 & 2 claim to be partners of the suit, when they are not. This decision is covered by the judgment of the Supreme Court in the case of ***Mukund Balkrishna Kulkarni Vs. Kulkarni Powder Metallurgical Industries and another*** reported in **[*(2004) 13 SCC 750]***. That too was a case where a similar prayer for declaration was made. The declaration being about the existence of a partnership and shares between the partners. The Supreme Court held in paragraph No.9 that the impact under Section 69 will apply when the suit has been filed by a person suing as partner of a firm and the suit must be to enforce a right arising from a contract. The prayer for a declaration on the existence of a firm and for the share between the parties and for a declaration that the person is a partner of the firm, is not the one covered under Section 69 (1) and (2) of Act IX of 1932. I respectfully follow the said judgment.

23.It will be useful to refer Section 34 of Specific Relief Act, 1963. This provision permits a person to approach the Court to seek for a declaration of his status. His status / legal character should also be with respect to the properties connected therewith. Here, the plaintiffs claim the status of being a partner and also for restoration of the property and permit for running the bus to the partnership firm. If there is a conflict between two Sections of a statute, it is the duty of the Court to ensure that one provision does not defeat the effect of other provision. It is the duty of the Court to read both the Sections harmoniously. Here too the plaintiffs' relief is that they are the partners of Asoka Service firm and the negative declaration that is sought for is that the defendants are not the partners of the said firm. One relates to the legal character, i.e., when the plaintiffs are partners of the firm and other relates to denial of the status of the defendants. It is pertinent to point out that the suit is not sought for mere declaration, but has sought for further relief and therefore, bar under proviso to Section 34 does not apply. I am reading the plaint in this effect in order to give effect to both Section 34 of the Specific Relief Act, 1963 and Section 69 (1) and (2) of the Partnership Act, 1932.

24.Now, turning to the other decision cited by Mr.G.Ponnambala Thiyagarajan, the judgment of ***Erach F.D.Mehta Vs. Minoo F.D.Mehta***, reported in ***[AIR 1971 SC 1653]***, was a case where the parties attempted to argue that a firm continued after its dissolution. This comes within the teeth of Section 40 of the Partnership Act, 1932. In that light, the Supreme Court did not accept the case pleaded. The judgment of ***M/s.Shreeram Finance Corporation Vs. Yasin Khan and others*** reported in ***[AIR 1989 SC 1769]***, was a suit filed by a firm against a third party. It was the case where the third party took money from a partnership firm and did not re-pay the same. Therefore, a suit for recovery of money was presented. The partnership firm was unregistered and hence, the Supreme Court held that suit is hit by Section 69(2) of The Partnership Act, 1932. This does not apply to the facts of this case.

25.The other judgment cited by Mr.G.Ponnambala Thiyagarajan is ***V.K.Amalran Vs. K.John Britto @ Peter***, reported in ***[(2023) 1 MLJ 252]***. This lays down the principles as to what a Court must do while dealing with an application under Order VII Rule 11 of Civil Procedure Code. I have already informed myself about the principles on the touch stone of the judgment of the Supreme Court in ***Saleem Bhai and others Vs. State of Maharashtra and others*** reported in ***[2003 (1) CTC 186]***. The view of the Division Bench of the Madras High Court is mere reiteration of the principles laid down and therefore, need not be considered here separately.

26.The judgment relied on by Mr.M.Sriram in ***Sumer Singh Galundia & Another Vs. Jeevan Singh (since deceased through LRS) and others*** reported in ***[MANU/SCOR/129093/2022]***, is irrelevant to the facts of this case. The Supreme Court had dealt with to the scope of Order XXII of the Civil Procedure Code. It had held that on the death of a partner, the suit does not abate, but the legal heirs of the deceased partner can be brought on record. I am not able to understand how it affects the case of the appellants. I am satisfied by the view given by the Supreme Court on Section 69 in ***Mukund Balkrishna Kulkarni Vs. Kulkarni Powder Metallurgical Industries and another***, reported in ***[(2004) 13 SCC 750]***.

27.Entire reading of the plaint gives me an impression, the plaintiffs are not claiming any contractual right, which is based on the alleged partnership agreement dated 01.07.1998 or the dissolution deed dated 30.01.1999. What they seek to enforce is their statutory right under Section 34 of the Specific Relief Act, 1963. Section 34 recognises the power of the Court to grant declaratory reliefs. The right, which had been available to English Courts, to grant such declaration was incorporated statutorily under

Specific Relief Act, 1877 and carried forward in the Specific Relief Act of 1963.

28.In ***M/s.Raptakos Brett and Co. Ltd., Vs. Ganesh Property***, reported in ***[1998 (7) SCC 184]***, the Supreme Court has held that the bar under Section 69 will not apply to parties who seek to enforce their common law right or right conferred by the statute.

29.The view taken by me gets fortified by the judgment of the Bombay High Court in ***Valji Shamji Chheda and others Vs. Bhuderbhai Bajidas Patel and others*** reported in ***[2013 (1) Mh.L.J. 650]***. A learned Single Judge of the Bombay High Court, in that case, had held that when the plaintiffs seek for a declaration as to when a partnership claimed in the plaint, has come into existence and does exist and that the plaintiffs and defendants 1 to 3 are the partners there of, is not a suit for enforcement of any right attributable to contract. He had further held that the prayer for declaration which had been sought for, does not come within the teeth of Section 69 (1) or 69 (2) of the Partnership Act, 1932 and that the same is maintainable. This view has also been followed in the judgment of ***Rupchand S/o Tukaram Giripunje Vs.***

Laxman S/o Tejram Hattimare reported in ***[2018 (2) Mh.L.J 356]***. I adopt the said views and hold that suit is maintainable.

30.Now turning to the point of Mr.G.Ponnambala Thiyagarajan that the long and short cause title would refer to a registered partnership firm of a year 1975 and therefore, the suit has to be rejected. The plaint has to be read in full and the cause of action has to be understood accordingly. In the case at hand, the claim of the plaintiffs is that they have been fraudulently deceived by the defendants 1 & 2. It is their case that taking advantage of the blank papers signed by them at the time of availing of loan, the defendants have created the partnership and dissolution deeds. It is a plea of fraud and therefore, the matter necessarily has to be proved at the time of trial. The factum that long cause title and short cause title refer to partnership firm of a year 1975 is irrelevant, because the pleading and prayer refers to two deeds allegedly executed on 01.07.1998 and 30.01.1999. If these two partnership deeds or any one of them is set aside, the plaintiffs would be entitled to succeed. The prayer in the suit is not for a relief that the registered firm No.278/1975 continues to exist. A meaningful reading of the plaint would give me an impression that the relief sought for is that the firm, which was constituted on 02.02.1978 and re-constituted on 19.08.1989 continues to exist. Therefore, I am not in agreement with Mr.G.Ponnambala Thiyagarajan that on the basis of the short and long cause title, the plaint has to be rejected.

31.I further have to point out that Section 69 of the Partnership Act is not meant to punish the litigant for non-registration. This is clear from the line of authorities cited above as well as to the law commission reports on the Partnership Act, namely, the 7th and 178th reports. Therefore, I am constrained to allow the appeal.

32.In the light of the above, I am of the view that the rejection of the plaint that the suit is barred by Section 69 is not proper. Further, the facts in the plaint show several causes of action which necessarily push the parties to trial. Therefore, the judgment and decree of the Court of the I Additional Sub Court, Coimbatore in A.S.No.99 of 2007 dated 04.12.2007 in confirming the fair and decreetal order of the II Additional District Munsif, Coimbatore in I.A.No.110 of 2006 in O.S.No.2449 of 2004 dated 04.06.2007 is set aside. The suit is restored on the file of the II Additional District Munsif, Coimbatore, who shall proceed from the stage when the plaint was rejected and dispose of the suit in accordance with law. The suit being of the year 2002, the II Additional District Munsif, Coimbatore is requested to give priority to the same and enter upon a judgment on or before 22.12.2023, after giving reasonable opportunity for both sides to let in evidence. If the Trial Court feels that any of the parties is trying to drag on the proceedings, it is in its absolute discretion to reject the same and proceed the suit in accordance with law.

33.With the above observations, the Second Appeal stands allowed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

20.04.2023

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Index	:	Yes / No
Internet	:	Yes / No
Neutral Citation	:	Yes / No

To

1.The I Additional Subordinate Judge, Court,
I Additional Sub Court,
Coimbatore.

2.TheII Additional District Munsif,
II Additional District Munsif Court,
Coimbatore.

V.LAKSHMINARAYANAN, J.
krk

3.The Record Keeper,
VR Section, High Court of Madras,
Chennai.

S.A.No.1438 of 2008

20.04.2023