

Om Prakash Vs. Usha Rani and ors.

Om Prakash Vs. Usha Rani and ors.

SooperKanoon Citation : sooperkanoon.com/705672

Court : Delhi

Decided On : Oct-17-2001

Reported in : 96(2002)DLT35; 2002(61)DRJ745

Judge : V.S. Aggarwal, J.

Acts : [Partnership Act, 1932](#) - Sections 69, 69(1), 69(2) and 69(3); Presidency-towns Insolvency Act, 1909; [Provincial Insolvency Act, 1920](#); [Presidency Small Cause Courts Act, 1882](#) - Sections 19; [Provincial Small Cause Courts Act, 1887](#); [Arbitration Act, 1940](#) - Sections 8, 20, 29 and 34

Appeal No. : IA 5826/93 in Suit No. 1037/93

Appellant : Om Prakash

Respondent : Usha Rani and ors.

Advocate for Def. : K.S. Sidhu, Sr. Adv. and ; Maldeep Sidhu, Adv.

Advocate for Pet/Ap. : V.K. Makhija, Sr. Adv. and; Akshay Makhija, Adv

Disposition : IA dismissed

Judgement :

V.S. Aggarwal, J.

1. The report of the Special Committee on basis of which the [Partnership Act, 1932](#) was passed later in paragraph 17 noticed:

'The outlines of the scheme are briefly as follows. The English precedent in so far as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small or ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claim against third parties in the civil Court; and any partner who is not registered will be unable to enforce his claims either against third parties or against fellow partners'.

2. The above extract refers to the English precedent which is partly followed and partly not enacted in Section 69 of the Indian Partnership act. Section 69 of the Partnership Act unfolds in the following words:-

'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 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 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 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-town 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 1(the territories to, which this Act extends), or whose places of business in 2(the said Territories), are situated in areas to which, by notification under 3(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 of 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.'

3. The provisions are clear and unambiguous. Sub-section (1) to Section 69 of the Partnership Act in so many words state that no suit to enforce a right arising from a contract or conferred by Partnership act can be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm unless the same is registered and the person suing is shown as one of the partners in the said register. Sub-section (2) to Section 69 further prescribes that no suit to enforce a right arising from a contract can be instituted in any court by or on behalf of the firm against any third person unless the firm is registered. Sub-section (3) to Section 69 also cannot be ignored and in so many words state that provisions of Sub-section (1) and (2) shall also apply to a claim of set off or other proceedings to enforce a right arising from a contract but notwithstanding Sub-section (1) and (2) shall affect enforcement of any right but issue for dissolution of a firm or for accounts of a dissolved firms or any right to realise property or a dissolved firm. In this backdrop one has to consider the controversy as to whether an application under Section 20/8 of the [Arbitration Act, 1940](#) would be maintainable by a partner of a firm which is not registered.

4. This question arises as a result of the following facts.

5. Om Prakash has filed a civil suit for dissolution of partnership and rendition of accounts. Admittedly, the partnership is not registered. It is admitted in the plaint that there is no arbitration clause in the partnership but since the firm is not registered petition under Section 20 of the Arbitration Act is not maintainable and that defendants have refused to concur in the appointment of the arbitrator. In pursuance of the notice having been issued the defendant Brij Bhushan filed is 5826/93. invoking Section 34 of the Arbitration Act seeking stay of the proceedings. It has been pleaded that written statement as yet has not been filed. There is an arbitration agreement between the parties to refer the disputes to the arbitrator and in any case even assuming that Section 69 of the Partnership Act appears institution of an application under Section 20 of the Arbitration Act there is no bar for arbitration without the intervention of the court. It was accordingly prayed that proceedings may be stayed. Needless to state that in the reply filed the application as such has been contested. It is reiterated that there is an arbitration agreement but since it is an unregistered partnership firm application under Section 20 of the Arbitration Act is not maintainable and that the applicant/respondent has not agreed to the appointment of an arbitrator. It is in these circumstances that it was prayed that it was prayed that there is no ground to stay the proceedings and further that even the disputes have not been mentioned in the application.

6. As has already been mentioned above and re-mentioned at the risk of repetition, the sole question that craves for an answer is as to if when there is an unregistered partnership concern, an application under Section 29 of the Arbitration Act could be filed or not. During the course of submissions it had not been disputed that for purposes of the present controversy application under Section 20 of the Arbitration Act can be taken to be a suit.

7. Learned counsel for the applicant/respondent strongly relied upon the decision of this court in the case of Jagat Mittar Saigal v. Kailash Chander Saigal and Anr. : AIR1983 Delhi134 to urge that such an application has been held to be maintainable. To appreciate the true ratio decidendi of the decision in the case of

Jagat Mittar the facts can be taken note of. The parties thereto were brothers and sisters. They had entered into a partnership agreement to carry on the business. The agreement had been reduced into writing to be called a partnership deed and it contained an arbitration clause, according to which the disputes had to be referred between the parties. Certain disputes arose between the parties in carrying on the business of the firm and its accounting. One of the partners challenged action of the other and demand maintenance of true and proper accounts of the partnership. On failure of the other partner to do so disputes arose between them which one of the partners claimed should be referred to arbitration. A petition under Section 20 of the Arbitration Act was filed for directing the arbitration agreement to be filed and for appointment of an arbitrator. It is interesting to mention that petition was allowed on 12th August, 1977. A former Judge of this court was appointed as the sole arbitrator. After some time the arbitrator had not wished to proceed further in the matter. An application was filed for appointment of an arbitrator. It is in the second application for appointment of the arbitrator that objection was taken that the partnership was not registered and therefore petition was not maintainable. This court held that the partner was asking for rendition of accounts in accordance with the arbitration agreement and most important fact was that arbitration agreement was directed to be filed earlier when reference had been made to a former Judge of this court as the sole arbitrator. At that time no objection to the non-registration of the firm was taken. This prompted this court to record that the application was maintainable. These facts cajoled from the judgment rendered by this court clearly reveal that it was based on the peculiar facts that were relevant for decision of that matter and therefore decision is distinguishable. In fact the ratio decidendi and other part of the discussion certainly does not support the plea of the applicant/respondent. It was held:

'.....In other words, although a partner of unregistered firm has no right to bring a suit for enforcement of a right arising out of the contract, yet, after the dissolution of such a firm, a suit or arbitration proceedings for the relief of the rendition of accounts is maintainable as it is expressly saved by Clause (a) of Sub-section (3) of Section 69. The words 'to sue for accounts of a dissolved firm' are used in the widest sense and would inevitably include the proceedings under Section 20 of the

Act for the enforcement of the right of accounting of a dissolved firm.'

8. In fact the controversy in the present matter is more clearly to the decision rendered by this court in the case of *Paras Ram Darshan Lal v. Union of India and Anr.* : AIR1979 Delhi135 . It was held that a petition under Section 8 and 20 of the Arbitration Act is a proceeding to enforce a right arising out of the contract and therefore rigour of Section 69 of the Partnership Act would apply. This court held:

'.....The words other proceeding' used in Sub-section (3) mean proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in Sub-sections (3) and (4). The petition under Sections 8 and 20 of the Arbitration Act is a proceedings to enforce filing of Arbitration Agreement and appointment of Arbitration; a right arising out of the contract. The petition under the Arbitration Act is thus a proceeding to enforce right arising out of contract within the meaning of Sub-section (3) of Section 69 of the Act.....'

9. Not only that reference can well be made to the decision of the Supreme Court in the case of *J.C.Gupta v. Kajaria Traders India Ltd.* : [1964]8SCR50 . It was held that proceedings under Section 8 of the Arbitration Act are covered by Sub-section 3 to Section 69 of the Partnership Act.

10. Similar is the ratio decidendi of various precedents on the subject. The Calcutta High Court in the case of *Patrambull Rameshwar v. Fulchand Kanhiyalal & Co.* : AIR1964 Cal452 . The Calcutta High Court was concerned with the question as to what is meant by right arising from a contract and the expression 'other proceeding' occurring in Sub-section (3) to Section 69 of the Partnership Act. It was held that expressions are not unrestricted but is restricted to if there is a right that is being enforced arising out of a contract necessarily refers to section 69 would not apply. In other words, the Calcutta High Court felt that such an application would not be barred. This view gets support from the decision of the Bombay High Court in the case of *Kajaria Traders (India) Ltd. v. Foreign Import and Export Association* : AIR1961 Bom65 . However it has been over ruled by the Supreme Court in the case of *J.C.Gupta (supra)*. But the consistent view otherwise as already referred to above is to the contrary. The Allahabad High Court

considered this controversy in the case of Syed Wahid Hussain v. Maharajkumar Mahmud Hasan Khan and Ors. : AIR1961 All409 . Therein an application under Section 20 of the Arbitration Act had been filed to enforce the right arising from a contract. The firm was unregistered. It was held that the same would be barred because of Section 69 of the Partnership Act. The findings of the court in this regard are:

'The argument that if the Legislature had intended that a 'proceedings to enforce a right arising from a contract' was barred then the words, 'other proceedings' should have found a mention immediately after the words 'no suit', in Sub-sections (1) and (2) of section 69 does not appeal to us; for had that been so, the exceptions in Clauses (a) and (b) would have applied also to suits and not only to 'other proceeding'. It appears to us that the intention clearly was that the exceptions in clauses (a) and (b) of Sub-section (3) will not apply to suits but will apply only to other proceeding'.

We have also not found any justification in the language used for the contention that the terms of Sub-section (3) are restricted to written statements. It is certainly a little tempting to hold that Sub-sections (1) and (2) of section 69 apply to plaints and similar applications claiming any particular relief in the nature of a decree and to restrict Sub-section (3) to written statements. We are, however, of opinion on a consideration of the language of Sub-section (3) that it is clear that it was not the intention of the Legislature to restrict the operation of Sub-section (3) only to set off or other similar claims to be made in a written statement.

11. A Division Bench of the same court in the case of Iqbal Singh and Ors. v. Ram Narain and Ors. : AIR1977 All352 expressed the same view reiterating what has already been referred to above.

12. The Punjab High Court in the case of Ramji Dass and Ors. v. Durga Dass 1979 P L R 673 while considering the same question held that in view of Sub-section (2) and Section (3) of Section 69 of the Partnership Act application under Section 20 of the arbitration Act in the case of an unregistered firm by a partner would not be maintainable. The findings recorded by the court are:-

'.....What Ch. Roop Chand relies on is some lines in para 8 which do cause some confusion while reading the same but in view of the clear verdict in paras 7 and - that application for arbitration under Sections 8 and 20 of the Arbitration Act is not competent with regard to an unregistered Partnership in view of Sub-sections (2) and (3) of section 69 of the Partnership Act, I have no option but to hold in this case as well that the application under Section 20 of the Arbitration Act filed by the respondent was not maintainable as the partnership was registered.'

13. The Lucknow Bench in the case of reported as Rampa Devi and Ors. v. Bishambhar Nath Puri and Ors. : AIR1976 All19 also held that an unregistered firm cannot under Section 20 of the Arbitration Act move the court to enforce the arbitration clause. The said court had written the following findings.

'It was next contended that the plaintiffs had filed an application under Section 20 of the Arbitration Act before instituting the present suit and as the defendants had resisted that application, it was not necessary for the plaintiffs to give another notice for arbitration before filing the preset suit. This contention, in our view, is also meritless. True it is that the plaintiffs had commenced an action under Section 20 of the Arbitration Act in which they failed mainly on the ground that the petition was barred by the provisions of Section 69 of the Partnership Act., bit it was nowhere laid down that the arbitration agreement was void. It was merely held that because of the non-registration of the partnership deed the remedy to file a petition under Section 20 of the arbitration Act to enforce the arbitration agreement was not available.....'

14. Once it is taken that it was a suit that has to be filed under Section 20 of the Arbitration Act the necessary corollary and the finding would be that strict provisions of Section 69 of the Partnership Act would always come into play. When a partner has to enforce the right against the other arising out of the contract which had been reduced into writing necessarily there is no option for the court but to state that the partnership should have been registered before any such application under Section 20 of the Arbitration Act would be maintainable. Once such an application is not maintainable, the petitioner had no option except, but to file the suit for rendition of accounts and dissolution of partnership. In that

view of the matter the export 'other proceedings to enforce a right' would include the application/suit that has to be filed. Application under Section 20 of the Arbitration Act would not be maintainable.

15. It had also been pleaded in the application under Section 34 of the Arbitration Act that still there is no bar for the enforcement of the arbitration agreement without filing any application in court. In strict sense it may be true but it has already come in the plaint and the petition that parties were not agreeable for appointment of an arbitrator by mutual agreement. Keeping in view of these assertions and counter assertions, it becomes unnecessary to ponder further with this particular argument because even during the course of submissions the suggestion for a common arbitrator to be mutually agreed could not be agreed upon.

16. As a result of these reasons it must follow that application under Section 34 (IA 5826/93) must fail and is dismissed. It is directed that written statement should be filed within four weeks with an advance copy to the plaintiff's counsel who will prefer replication, if any, within next four weeks.

Suit No. 1037/93

17. List it before the JR for admission/denial on 27th February, 2002.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com