

**M. Muthukumaraswami Vs. Kumar Textiles**

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**Court :** Chennai

**Decided On :** Feb-19-1996

**Reported in :** AIR1996Mad433

**Judge :** Govardhan, J.

**Acts :** Partnership Act, 1932 - Sections 69(2); Indian Companies Act

**Appeal No. :** App. No. 627 of 1983

**Appellant :** M. Muthukumaraswami

**Respondent :** Kumar Textiles

**Advocate for Def. :** Mrs. Hema Sampath, Adv.

**Advocate for Pet/Ap. :** V. Raghavachari and;Mr. G. Seetharaman, Advs.

**Judgement :**

ORDER

1. A. S. 627/1983 is an appeal arising out of the judgment passed by the learned Sub-Judge, Cuddalore in O.S. No. 57/1974 granting a decree in favour of the plaintiff.

2. The said suit was filed by the plaintiff Kumar Textiles by its partner P. M. Muthukumaraswamy Mudaliar against the defendant, among other grounds, the defendant has raised a plea in the written statement to the effect that he does not

admit that the plaintiff is a registered Firm under the Indian Partnership Act or under the Indian Companies Act.

3. The learned Sub-Judge has framed an issue to whether the suit Firm is a registered one under the Indian Partnership Act and has given a finding on this issue as follows :--

Though in the written Statement the defendant denies the allegation that the plaintiff is a registered company, this plea has not been pursued further by the defendant. No questions were put to P.W. 1 disputing the statement made in the plaint on this aspect. Hence, I hold that the plaintiff-firm is a registered one. This issue is therefore answered accordingly'.

On the merits of the case in which the plaintiff has prayed for a decree for Rs. 16,990/- and costs, the learned Sub-Judge has granted a decree with proportionable costs for Rs. 323-42.

4. It is against this judgment of the learned Sub-Judge, the appeal has been filed.

5. In pursuance of the decree in their favour, the plaintiff has filed E.P. No. 142 of 1979. One Masilamani Mudaliar has filed a claim application in the said E. P., viz., in E.A. No. 643/1970 for raising the attachment effected by the decree-holder against the properties of the judgment-debtor. The claim application was ordered raising the attachment in some of the properties with an Observation that the properties attached were joint family properties, against which the decree-holder cannot proceed on the ground that his share is also there.

6. Against the said order, a Civil Miscellaneous Appeal was preferred to the District Court, Cuddalore in which, the learned District Judge has allowed the appeal and attachment over 1/3rd share in the petition-mentioned properties has been confirmed.

7. Against this judgment in C. M. A. No. 66/1983, C.M.S.A.-No. 54/1985 has been preferred to this Court.

8. The learned counsel appearing for the appellants has argued that the suit itself is not maintainable in view of Section 69(2) of the Indian Partnership Act and it is not as if the defendant has given up his defence with regard to the maintainability of the suit under Section 69(2) of the Indian Partnership Act and the judgment of the trial Court is liable to be set aside on the basis that it is in contravention of the statutory bar under Section 69(2) of the Indian Partnership Act. The learned Counsel appearing for the respondent would on the other hand argue that in the written statement, the defendant has not taken a defence on the ground under Section 69(2) of the Partnership Act the Suit is not maintainable and the defendant has submitted to a decree partially and prayed for a decree being passed for the admitted amount only and therefore there is nothing improper or illegal in the trial Court holding that the plaintiff firm is a registered one and granting a decree on the merits of the case.

9. Even at the outset, I wish to make it clear that both the appeal and the Civil Miscellaneous Second Appeals were not argued on merits except the ground regarding the maintainability of the suit under Section 69(2) of the Partnership Act. Both the learned Advocates have cited a number of decisions in support of their respective contentions. I also perused the evidence of P.W. 1 as well as D.W. 1 and it is not stated by P.W. 1 that the plaintiff is a registered firm under the Partnership Act and that on the date of filing, the suit was filed by one of the partners of the firm. No question with regard to the constitution of the Firm has been put during cross examination of P.W.1. Similarly, D.W. 1 has also not stated that the plaintiff is not a Registered Firm and therefore, the suit is not maintainable. It is in this background, we have to decide the appeal and the suit according to the decisions cited by the learned counsel.

10. In the decision reported in Lokram-das v. Tharumal AIR 1939 Sind 206 it is held that Section 69 of Partnership Act, prevents a Court from taking cognizance of a suit brought by an unregistered firm, in the same way a Court shall not take cognizance of a suit barred by limitation and to hold that because as the result of ignorance or mistake, objection was not taken by the defendant in the suit, so the provisions of the law could be flouted, would be to frustrate the intention of the Legislature clearly expressed. From the above decision, we have to infer that

Section 69 of Partnership Act prevents a Court from taking cognizance of a suit brought by an unregistered firm and objection regarding registration can be allowed to be taken for the first time even in the Appeal.

11. In the decision reported in Ponnu-chami Goundar v. Muthusami Goundar : AIR1942 Mad252 it has been held that Section 69 of the Partnership Act is mandatory and registration of the firm is a condition precedent to its right to institute a suit. In the decision reported in Lookaran Sethia v. Ivan E. John : [1977]1SCR853 it is held that Section 69 is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In the decision reported in M/s. Shriram Finance Corporation v. Yasin Khan AIR 1977 SC 1969 it has been held that suit filed by a firm after change in Constitution but before change was notified to Registrar is not maintainable as Current partners as on date of suit were not shown ;n register of firms. As per the decision reported in Gandhi & Co. v. Krishna Glass Pvt. Ltd., AIR 1987 Bom 348 in order to hold that a suit is validly instituted by or on behalf of the firm against any third party two conditions must be fulfilled viz., (1) the firm is registered and (2) persons suing are of having shown in the Register of Firms as partners in the Firm. In the above decision, the suit by a Firm has been held as not maintainable when the name of one of the partners was not shown in the Register of Firms on the date of filing of the suit. Similarly in the decision reported in Chandrabhan Bansilal v. Bikaner Municipality it has been held that when a suit is filed by a Firm and names of some of the persons suing as partners are not included in the Register of Firms, the suit is not maintainable. During the course of the judgment, it has been quoted in the above judgment, the observations of Lindley, L.J., in Scolt v. Brown which is as follows :--

'It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.'

In the decision reported in Annapoorna F. & C. Stores v. Arunodaya F. & G. Stoges : AIR 1994 AP157 is has been held that when the suit is for recovery of

money by a partnership firm, which is not registered on the date of institution of the suit, it is not maintainable and subsequent registration during the pendency of suit does not cure the defect. From the above Rulings relied on by the learned counsel appearing for the appellants, it is clear that no suit of the nature contemplated in the sub-section (2) of Section 69 of the Partnership Act, shall be instituted either by the Firm itself or by, or, on behalf of the Firm against any third party unless the firm is registered and the persons suing are or, even shown in the Register of Firms as partnership firm.

12. In the present case, the suit has been filed by Kumar Textiles by its partner Muthukumarasamy Mudaliar. There is no evidence that it is a registered firm and the said Muthukumarasamy Mudaliar was a partner on the date of the filing of the suit. But yet, the trial Court has held that it is a registered one only on the ground that no questions were put to P.W. 1 disputing the statement made in the plaint on this aspect. The maintainability of the suit itself being questioned; it goes to the root of the matter cannot be denied.

13. The learned counsel appearing for the respondent has relied upon the following decisions and would argue that it is only an irregularity of the firm is not registered and the defendant has also submitted to the decree partially and no specific ground has been taken in the written statement regarding Section 69(2) of the Partnership Act, and therefore, the Judgment of the trial Court has to be upheld. In the decision reported in *M. J. Velu Mudaliar v. S. V. Finance Corporation* : AIR 1971 AP63 it has been held that there the plaintiff had filed a certificate of registration of the firm and the defendant merely took the plea in the written statement that the pre-requisite condition was not observed but did not join in issue with the plaintiff, nor did they press for inclusion of it in issue, nor called upon the plaintiff to disclose the names of the partners, the Court, cannot be called upon to dismiss the suit on the ground that pre-requisite conditions of Section 69(2) were not complied with. In the present case, even though the defendant is said to have not cross-examined P.W. 1 since he has taken the plea in the written statement we cannot ignore the same. But, it has to be borne in mind that the plaintiff has not filed the certificate of registration. In the decision reported in *Jalal Mohammed v. Kakka Mohammed* : AIR1972 Mad86 , a Division Bench of our High

Court has held that a decree passed in a suit filed by an unregistered firm is not a nullity and where the plea of non-registration was not raised in the suit itself, it cannot be raised in a separate suit. The defendant has submitted to a decree for an admitted-amount and from that, it is contended that the defendant does not question the maintainability of the suit by the Firm. But, the rulings relied on by the learned counsel appearing for the appellants are to the effect that the provisions of Section 69(2) of the Partnership Act is a mandatory one and even if the defendant did not take it as an objection, the above provision of law could not be flouted since, it will frustrate the intention of the Legislature. Therefore, before considering the rival contentions of both parties in the appeal as well as the Civil Miscellaneous Second Appeal, it is expedient to find out whether the plaintiff before the trial Court is a registered firm and whether the person who has filed the suit was a partner on the date of filing of the suit, it would throw alight on the question whether the suit is maintainable or not. Only if the suit is maintainable, the decree could be executed. The question whether the decree passed on account of the admission of the defendant in respect of the admitted amount is a nullity or not can be considered at a later stage after finding out whether the suit has been filed by a registered firm or not. For all these purposes, it is necessary that a finding has to be called for from the trial Court, regarding the constitution of the plaintiff firm on the date of filing of the suit. But, for that purpose, the judgment and decree of the trial Court need not be set aside and it is sufficient if a direction is given to the trial Court to enable the plaintiff and the defendant to give evidence both oral and documentary in respect of their claim with regard to the constitution of the plaintiff firm and to submit the finding to this Court. The appeal and the Civil Miscellaneous Second Appeal will be kept pending and the judgment will be pronounced only after the receipt of the finding from the trial Court.

14. In the result, the Principal sub Judge, Cuddalore, is directed to give opportunity to the plaintiff and the defendant to let in oral and documentary evidence in respect of their contentions with regard to the constitution of the plaintiff firm on the date of filing of the suit and submit his finding on that aspect to this Court within two months from the date of receipt of this order, since the Appeal and the Civil Miscellaneous Appeal are kept pending.

15. Order accordingly.

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