In Re: Abani Kanta Pal

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Court : Kolkata

Decided On : Aug-06-1985

Reported in : AIR1986Cal143,89CWN1158

Judge : M.M. Dutt and ;J.N. Chaudhuri, JJ.

Acts : Partnership Act, 1932 - Section 69(1), 69(2) and 69(3); ;Code of Civil Procedure (CPC) , 1908 - Order 6, Rule 17

Appellant : In Re: Abani Kanta Pal

Advocate for Def. : Saktinath Mukherjee and ;Sephali Mukherjee, Advs.

Advocate for Pet/Ap. : Shyama Prasanna Roy Chowdhury and ;Tapas Middya, Advs.

Judgement :

M.M. Dutt, J.

1. This application under Section 115 of the Civil P.C. filed at the instance of the plaintiff is directed against Order No. 108 dt Nov. 19, 1984 of the learned Assistant District Judge, Bankura passed by him in Title Suit No. 34 of 1973.

2. The said suit has been filed by the plaintiff for a declaration that he is a partner of a partnership firm having one-fourth share therein and carrying on business of the husking mill in question. He has also prayed for appointment of a

Commissioner for accounts and for other incidental reliefs.

3. The defendants opposite parties entered appearance in the suit and contested the same by filing a written statement. It was inter alia contended by them that the husking mill in question was owned and possessed by the opposite party 1 and the petitioner and the opposite parties 2 and 3 had no right, title and interest in the said husking mill business.

4. While arguments were being advanced by the parties at the first hearing of the suit, the defendant opposite party 1 filed an application under Order 6, Rule 17 of the Civil P.C. praying for amendment of the written statement for incorporating therein a statement to the effect that the so-called firm not having been registered, the suit was not maintainable at all and was liable to be dismissed under the provision of Section 69(1) of the Partnership Act. The said application of the opposite party No. 1 was allowed by the learned Assistant District Judge.

5. Thereafter, the petitioner also filed an application under Order 6, Rule 17 of Civil P.C. praying for amendment of the plaint for the deletion of the prayer for declaration and for inclusion of a prayer for dissolution of the alleged partnership firm The learned Assistant District Judge disallowed the said prayer for amendment of the plaint as the alleged firm was not registered as required under Section 69(1) of the Partnership Act Hence this revisional application.

6. The only question involved in this application is whether the learned Assistant District Judge was justified in refusing amendment of the plaint, as prayed for by the plaintiff petitioner. Mr. Section P. Roy Chowdhury, learned Advocate appearing on behalf of the petitioner submits that Section 69(1) of the Partnership Act does not stand in the way of the Court in allowing the amendment, as prayed for by the petitioner. It is contended that the amendment should have been allowed in view of Sub-section (3) of Section 69 of the said Act. At this stage, we may refer to the provisions of Sub-sections (1), (2) and (3) of Section 69 of the Partnership Act, which provide as follows :

'69(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 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-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.'

7. The contention of the learned Advocate for the petitioner is that Sub-section (1) of Section 69 of the Act puts an embargo on the party and not on the Court and, as such, there was no impediment for the Court to grant amendment, as prayed for by the petitioner, even though the firm is not registered. It is submitted that as the prayer for declaration that the petitioner is a partner of the alleged firm has been sought to be deleted and, in its place, a prayer for dissolution of the firm is sought to be incorporated, such prayer along with the prayer for accounts is quite maintainable under Sub- Section (3) of Section 69 which specifically provides that the provisions of Sub-sections (1) and (2) shall not affect the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm etc. If the amendment is allowed, in that case, it would be a suit for dissolution of the firm and for accounts. Such prayers are not hit by the provisions of Sub-sections (1) and (2) of Section 69 of the Partnership Act.

8. In support of his contention, the learned Advocate for the petitioner has strongly relied upon a Bench decision of this Court in Debabrata Mukherjee v. Kalyan Kumar Ray, : AIR1983 Cal241 . That case was under Section 13(6) of the West Bengal Premises Tenancy Act, 1956. That section provides, inter alia, that notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the grounds mentioned in Sub-section (1) shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy. It has been held that Sub-section (6) of Section 13 of the West Bengal Premises Tenancy Act puts an embargo on the plaintiff and not on the Court, so that if the plaintiff had failed to fulfil the requirement of it, he would be non-suited but the Court can non-suit him not only on that issue but even on merits, if the merits are found against the plaintiff.

9. In our opinion, it may be that Section 13(6) of the West Bengal Premises Tenancy Act puts an embargo on the plaintiff and does not oust the jurisdiction of the Court. A defendant in a suit for eviction may waive service of a notice under Section 13(6). Section 69(1) of the Partnership Act, however, stands on a different footing. The embargo that has been put on the plaintiff under Sub-sections (1) and (2) of Section 69 is not for the purpose of protecting the interest of any party, but it is based on public policy. The requirements of Sub-sections (1) and (2) of Section 69 cannot be waived by the defendant, and the Court is debarred from entertaining a suit ignoring the fulfilment of such requirements. So, if a firm is not registered, excepting a suit as contemplated by Section 69(3), the Court will have no jurisdiction to entertain a suit in violation of Section 69(1). In other words, the plaint that has been filed by the plaintiff will be considered a void plaint, if it contravenes the provisions of Sub-sections (1) and (2) of Section 69 of the Partnership Act. This view finds support from a decision of the Supreme Court in Loonkaran Sethia v. Ivan E. John, : [1977]1SCR853 . In that case, Sub-sections (1) and (2) Section 61 and69 were involved. The Supreme Court made the following observations :

'A bare glance at the section is enough to show that it 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 other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act......'

10. This Court in Sunderlal and Sons v. Yagendra Nath Singh, : AIR1976 Cal471 has held that in view of the language of Section 69 a plaint filed by an unregistered firm would riot he a plaint at all and all proceedings thereunder will be proceedings without jurisdiction.

11. Thus, there cannot be any doubt when a plaint is filed in infringement of Sub-sections (1) and (2) of Section 69, it will be treated a void plaint In other words, the Court will ignore the existence of any such plaint

12. So, if the plaint is treated a void plaint or it is considered that there was no filing of the plaint at all when such a plaint contravenes the provisions of Sub-sections (1) and 12) of Section 69, the question of amendment of such a plaint does not arise at all. If the plaint is not a void plaint, but a defective one, in that case, an amendment may be made for the purpose of curing or removing the defect. It is true that under Sub-section (3), enforcement of any right to sue for dissolution of a firm or for accounts of a dissolved firm is not hit by the provisions of Sub-sections (1) and (2) of Section 69 of the Partnership Act. But, where the plaint is void, there is no question of bringing the same within the purview of Sub-section (3) of Section 69 by way of amendment.

13. It is the definite case of the opposite party 1 that there is no existence of any partnership firm and that, in any event, the alleged firm is not a registered one. If that be a fact, then the Court has no jurisdiction to grant any amendment of the plaint. It is, however, submitted by Mr. Roy Chowdhury that the existence of the firm or whether the firm is registered or not is yet to be determined in the suit. Although there is some statement in that regard, yet there is no specific admission by the petitioner that the firm is not registered.

14. In the circumstances, we set aside the impugned order of the learned Assistant District Judge so far as the application for amendment of the plaint is

concerned and direct him to decide whether the alleged firm is in existence and, if so, whether it is registered. In case he comes to the finding that there is no existence of any such firm or that there is such existence but the firm is not registered, in either case, he will dismiss the application for amendment of the plaint. If, however, it is found by him that there is the existence of the alleged firm and it is registered, the amendment as prayed for will be allowed.

15. The application is disposed of as above.

16. There will be no order as to costs.

Jitendra Nath Chaudhuri, J.

17. I agree.