

Santosh Kumar Banerjee Vs. Sidheswar Banerjee

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Court : Kolkata

Decided On : Feb-09-1993

Reported in : (1993)1CALLT407(HC),97CWN894

Judge : Samir Kumar Mookherjee and ;Nripendra Kumar Bhattacharyya, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 94 - Order 39, Rules 1 and 2 - Order 40, Rule 1; ;[Arbitration Act, 1940](#) - Sections 8, 20 and 41; ;[Indian Partnership Act, 1932](#) - Section 69(1)(3)

Appellant : Santosh Kumar Banerjee

Respondent : Sidheswar Banerjee

Advocate for Def. : Kamalesh Bhattacharjee, Adv.

Advocate for Pet/Ap. : Bhaskar Bhattacharjee, Adv.

Disposition : Application allowed

Judgement :

1. By this revision the defendant challenged the impugned order No. 38 dated 10.7.92 passed in T.S. 52 of 1991 by the learned Assistant District Judge, Alipore, appointing a receiver.

2. Over the ancestral restaurant business under the name and style 'CAFE', the two brothers viz. the plaintiff and the defendant entered into a partnership

agreement dated 1st August, 1976. As the plaintiff worked elsewhere for gain and could not engage full time for looking after the said restaurant business and as the defendant engaged full time for management of the said restaurant business, their allegation of shares was to the extent of 45% and 55% respectively, the business ran smoothly upto January, 1991 but from February, 1991, a dispute arose regarding the management and accounts of the business. In that agreement there was a clause for arbitration. As the defendant refused to send the matter to arbitration, the plaintiff made an application under Section 20 of the Arbitration Act before the learned trial Court for filing the agreement in Court, for referring the matter to arbitration, for injunction, receiver, inspection of accounts, etc.

3. A suit was registered upon the said application. In that suit, an ad interim receiver was appointed under order No. 2 dated 6.7.91. The plaintiff also made an application for appointment of receiver in that suit under Section 41(b) read with 2nd Schedule of the [Arbitration Act, 1940](#). Objection and counter-objection and reply were filed by the plaintiff and the defendant in the suit.

4. Relying on the decisions, to Wit. Jagadish Chandra Gupta v. Kajoria Traders (India) Limited : [1964]8SCR50 , Ikbal Singh and Ors. v. Ram Narayan and Ors. (AIR 1977 Allahabad 1952) and Uma Shankar Bajaj v. Narayan Das : AIR1983 Pat329 . Mr. Bhaskar Bhattacharjee, the learned Advocate for the petitioner, contended that the suit was not maintainable and barred under sub-sections (1) and (2) of Section 69 of the Indian Partnership Act as the partnership was an unregistered one. Consequently, the order appointing Receiver is without jurisdiction.

5. Mr. Kamalesh Bhattacharjee, the learned Advocate for the opposite party, raised three-fold contentions viz. (a) the question of maintainability was not raised before the learned trial Court and no preliminary issue has been framed as yet regarding the same and as such, that question should not be decided by this Court at this stage ; (b) the order impugned is an order of appointment of receiver, so, at this stage, the question of maintainability should not be decided ; (c) the, scope and extent of Sections 8 and 20 of the Arbitration Act are quite different and distinct and without deciding the question of maintainability of the suit in the suit, it

cannot be decided at this stage. In support of the contention, reliance was placed on the decisions of the Delhi High Court and one decision of the Calcutta High Court, to Wit, Jagat Mitter Saigal v. Kailash Chandra Saigal AIR 1983 Delhi 134, Rai Bahadur Basakha Singh and Sons (Contractors) Private Limited v. Indian Drugs and Pharmaceuticals Limited : AIR1979 Delhi220 and Bimal Kumar Ghosh and Anr. v. Saikat Sarkar 0044/1987 : AIR1987 Cal208 .

6. Mr. Kamalesh Bhattacharjee did not challenge the contention of Mr. Bhaskar Bhattacharjee that a suit by 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 to enforce a right arising out of a contract is permissible and, no suit 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.

Broadly speaking in all the decisions, referred to above, that proposition of law has been established.

7. It appears from what has been stated above that we have been invited to decide, in this revisional application, the point about maintainability of the suit. No doubt this point does not appear to have been urged or canvassed before the Trial Court but indubitably the same is a pure question of law and decision thereon goes to the jurisdiction of the Trial Court as far as prayer for interim order is concerned. Mr. Bhaskar Bhattacharjee's argument that the proceeding not being maintainable is founded in the provisions of Section 69(1) and (3) of the Indian Partnership Act though Mr. Kamalesh Bhattacharjee has endeavoured to resist a decision on such a point, at an interlocutory stage, amongst others, by urging that a proceeding under Section 20 of the Arbitration Act not being a suit is not covered by sub-section (1) of Section 69 of the Indian Partnership Act. Factually there is no dispute that the partnership in question is not a registered one.

8. Upon consideration of the respective submissions on merit, we do not find any necessity for an investigation into the nature of the proceeding under Section 30 of the Arbitration Act as sub-section (3) of Section 69 of the Indian Partnership Act

clearly attracts the bar created by Section 69 to some proceedings other than a suit. This legal position has already been approved by the Supreme Court in the case of Jagdish Chandra v. Kajaria. Traders (India) Ltd. reported in : [1964]8SCR50 , the relevant extract of which is re-produced as follows: -

'The words 'other proceeding' which follow must, therefore, receive their full meaning untrammelled by the words 'a claim of set off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding*.' Such legal position would become relevant if the next question which arises in consequence of Mr. Kamallesh Bhattacharjee's argument deserves an affirmative answer. The question is whether it is necessary for the Court to record a prima facie finding about the maintainability of the suit, while considering a prayer for grant of interim order. In the case of Reserve Bank of India v. Ashis Kusum Sen and Ors., reported in 73 CWN 388, in paragraphs 10 and 11, Sabyasachi Mukherji, J. as His Lordship then was, stated the principle in the following words:-

'10.....in order to consider whether a prima facie case has been made out or not it becomes necessary to decide whether the action as framed is maintainable in law and if it is then whether the evidence and affidavits are sufficient to sustain prima facie the allegations made.'

'11, for the purpose of deciding the above question it would be necessary to examine the frame of the suit.'

9. In the law relating to injunctions in India, Pakistan and Burma by John George Woodrooffe, (TLL lectures 1897, 6th edition 1964), at page 46, the author observes:

'Not only must the matter be of a civil, as opposed to a criminal nature, and a suit be pending, but such suit (iii) must disclose a cause of action, and the Court must have general jurisdiction to entertain it; if it has not such jurisdiction it will plainly have no power to grant relief in respect of the subject-matter of such suit by way of injunction or appointment of receiver. The Court must not be barred by the Code or any other enactment from taking cognizance of the suit, (4) which must, further,

be not only a civil nature generally but within the meaning of that Code.'

10. Accepting the correctness of the above principles we have no hesitation in holding that while deciding the existencs of a prima facie case a Court must consider the maintainability of a suit or action (proceeding) for the purpose of is prima facie satisfaction. Total exclusion of such a question from the zone of consideration of the Court may result in granting relief in a proceeding, which is statutorily not maintainable. To ask the Court to shut its eyes would be a travesty of justice. In this connection, we would like to add that depending on the stage at which the Court is invited to deal with a prayer for interim order, the Court may decide whether the issue of maintainability should be taken up as a priliminary issue or not.

11. In the present case, applying the aforesaid principles, we are of the view that the impugned order ought not to be sustained and, accordingly, we set aside the same because the contention about maintainability of the suit, as argued or raised, deserves consideration, at least prima facie, before an interim order can be issued. The application of the plaintiff is remanded back to the Trial Court for a fresh consideration according to law and on merit in the light of our observations as made above. To avoid complicacations, the disposal by the Trial Court should be expedited as far as practicable, and, if possible, such disposal should be made within a period of two weeks from the date of communication of this order to the concerned Court. We keep on record that we have kept all points, including the point about maintainability of suit, open.

The revisional application is allowed to the extent indicated above. There will be no order as to cost.

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