

(2011) 03 AHC CK 0373

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 5879 of 2001

Firm Kanhaiya Singh Jagan Singh
and Another

APPELLANT

Vs

Ist A.D.J., Bijnor and Others

RESPONDENT

Date of Decision: March 31, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 30 Rule 1, Order 30 Rule 1(2), Order 30 Rule 4(2), 146
- Contract Act, 1872 - Section 45
- Partnership Act, 1932 - Section 69

Citation: (2011) 9 ADJ 359 : (2011) 6 AWC 6086 : (2011) 4 CivCC 597

Hon'ble Judges: S.U. Khan, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Hon'ble S.U. Khan, J.

Inspite of sufficient service no one has appeared on behalf of contesting respondents.

2. Heard Learned Counsel for the petitioner.

3. O.S. No. 180 of 1981 was instituted by following plaintiff.

4. "Firm Kanhaiya Singh Jagan Singh, Dhampur, District Bijnor, through Jagan Singh s/o Kanahayya Singh r/o Mandi Markamganj, Qasba Dhampur, District Bijnor" (copy of plaint is Annexure-I to this writ petition).

5. Defendants in the suit were 1 (Chandra Prakash and Sons and 2) Chandra Prakash. Chandra Prakash died and was substituted by respondent Nos. 3 to 7 in this writ petition. Plaintiff Firm Kanhaiya Singh Jagan Singh is a registered firm. The suit was dismissed in default on 4.8.1993. Prior to that Jagan Singh had died on

14.1.1991 but no application for necessary amendment in the plaint or for substitution had been filed. The restoration application which was registered as Misc. case No. 57 of 1993 was filed on 3.9.1993 by the following applicant:

6. "Firm Kanhaiya Singh Jagan Singh, Mandi Dhampur, District Bijnor through Daljeet Singh son of Jagan resident of Mandi Markamganj, Qasba Dhampur, District Bijnor" (copy of restoration application Annexure IV to writ petition).

7. The said applicant is petitioner No. 1 in this writ petition and Daljeet Singh is petitioner No. 2.

8. Second Additional Civil Judge (S.D.) Bijnor allowed the restoration application through order dated 28.11.1996. Against the said order defendant filed civil revision No. 11 of 1997. A.D.J. Court No. 1 Bijnor allowed the revision through judgment and order dated 23.10.2000 which has been challenged through this writ petition.

9. Revisional Court set aside the order of the trial Court dated 28.11.1996, rejected the restoration application of the petitioners and ordered that the suit stood dismissed. The revisional Court held that in view of provisions of Order 30 Rule 1 to 4 C.P.C. restoration application was not maintainable. Reliance was also placed upon Section 69 of partnership Act. The trial Court had mainly placed reliance upon an authority of Patna High Court reported in Jaichand Lal v. Gopal Prasad, AIR 1973 Pat 411.

10. u/s 146 C.P.C. it is provided that any proceedings which could be taken up by an aggrieved person can also be taken by his legal representative. Accordingly, when suit is dismissed in default in ignorance of death of the plaintiff, legal representative of the plaintiff can file restoration application. The suit as instituted was quite maintainable. Even the lower revisional Court did not hold otherwise.

11. The main reason given by the lower revisional Court is that "Daljeet Singh who has moved application under Order IX Rule 9 C.P.C. for setting aside the dismissal of the suit and restoring to its original number, has not proved that he was a partner on the date of the accrual of the cause of action. He should have brought on the record the certified copy of the list of the partners of the plaintiff firm".

12. In view of Order 30 Rule 1 and 2 C.P.C. such a duty is cast only when such a demand is made by the defendant.

Order 30 Rule 1 and 4 C.P.C. are quoted below:

ORDER XXX. SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

1. Suing of partners in name of firm

(1) Any two or more persons claiming or being liable as partners and carrying on business, in India may sue or be sued in the name of the firm (if any) of which such

persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

4. Rights of suit on death of partner

(1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have-

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors."

13. A partnership firm cannot be constituted unless there are at least two persons who agree to be partners. A firm has got no legal entity and it is merely for the sake of convenience that a name is given to all the partners. It has repeatedly been held that "a firm is a compendious collective name for the individual members who constituted the firm". In normal course a suit can be filed by or against all the partners and that is also the requirement of Section 45 Contract Act. However, Order XXX Rule 1 C.P.C. is an exception and by virtue of it suit may also be filed only in the name of firm or against firm and in such contingency it is not at all necessary to state in the title of the plaint that the firm/partnership is suing or being sued through a partner. Under Appendix A given at the end of the C.P.C. under the heading "(2) Description of parties in particular cases" it is mentioned at serial No. 12 as follows:

A.B., the firm carrying on business in partnership at.....

14. It is therefore not at all required to add after the description of the partnership that the partnership is suing or being sued through X, Y a partner.

15. Atypical situation arises where the plaintiffs are partnership firm as well as all the partners. In such a situation this High Court in [M.S. Pearl Sound Engineer Vs. Pooran Chand and Others](#), has held that the suit will be treated to be on behalf of

the partners and, in such a situation it is unnecessary to add the name of partnership and if it is done then partnership firm will be a surplus-age hence such a suit cannot be treated to be suit filed in accordance with Order XXX Rule 1 CPC and to such a suit applicability of Order XXII CPC is not excluded. A contrary view has been taken by Rajasthan High Court in [Shambhu Dayal Vs. Chunnilal Devkinandan and Others](#). However, the above controversy is not relevant for the purposes of this writ petition. In the plaint (Annexure 1 to the writ petition) no partner of the firm was impleaded as plaintiff only firm/partnership was impleaded and it was shown to be suing through one of the partners. It was not at all necessary to mention in the description of the parties that the firm was suing through a particular partner. That portion was redundant. Accordingly, the suit could be continued even after the death of Jagan Singh.

16. By virtue of Order XXX Rule 1(2) C.P.C. (supra) restoration application could be signed by any of the persons who was partner at the time of accruing of the cause of action.

17. The lower revisional Court held that provisions of Order XXX CPC could apply only if suit had been filed by two partners of the firm, however, the suit in question had been filed only by one partner of the firm, hence, provisions were not attracted. The lower revisional Court completely misread Order XXX Rule 1. It does not say that suit must be filed by at least two persons. The words "two or more persons" relate to a partnership in which there are two or more persons as partners.

18. The second reason given by the Lower Revisional Court is that Daljeet Singh did not show that he was a partner of the plaintiff firm on the date of accrual of the cause of action and that he should have brought on record certified copy of the list of the partners of the plaintiff firm. This requirement is there only when it is demanded by the other side.

19. By virtue of the provisions of Order XXX suit may be filed even in the name of dissolved firm if cause of action accrued when firm was in existence. In the 17th edition of C.P.C. commentary by Mulla Volume- III Note -8 Order XXX Rule 1 C.P.C. it is provided as under:

The words at the time of the accruing of the cause of action show that a suit may be brought by or against a firm in the firm name though the firm may have been dissolved before the date of the suit, provided the cause of action arose before dissolution.

20. However, it is correct that pleading application etc., shall be signed by a person who was partner of the firm when cause of action accrued. On the other hand, under Order XXX Rule 4(2) the right of a legal representative of a deceased partner of the firm to seek impleadment/substitution is recognized.

21. It is also a settled principle of law that pleadings and applications (particularly applications) shall not be construed too rigidly. If Daljeet Singh was not partner of the firm when the cause of action accrued, he could apply for setting aside the order of dismissal in default of the suit and for his substitution at the place of his deceased father Jagan Singh, who was undisputedly partner of the plaintiff firm at the time of accrual cause of action. Delhi High Court in Jagatjit Industrial Corporation v. Union of India, AIR 1981 Del 34 has held that in the case of a suit having been filed in the name of the firm by partners, if pending the suit all the partners die one after the other and there is, thus, no one who can represent the interests of the firm, the only cause available to save the suit from abatement is for the legal representatives of the deceased partners to apply under Order I Rule 10 C.P.C. to be brought on record as plaintiffs (as summarised in the aforesaid commentary by Mulla under Note-1 of Order XXX Rule 4).

22. Accordingly, writ petition is allowed impugned order passed by the revisional Court is set aside and the order passed by the trial Court is restored.

23. However, Daljeet Singh petitioner No. 2 in this writ petition shall clarify before the Trial Court through affidavit as to whether he will conduct the suit as partner of the plaintiff firm at the time of accrual cause of action or as legal representative of his father Daljeet Singh and in the latter contingency he shall seek his substitution / impleadment.

24. As no one appeared in this case on behalf of the defendants respondents hence the trial Court before proceeding further shall issue notice to the defendants.