
**Gurushiddayya Kalkayya Selimath and Others Vs Shah Hirachand
Vanechand and Co. and Others**

First Appeal No. 36 of 1967

Court: Mysore High Court

Date of Decision: Oct. 15, 1971

Acts Referred:

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

Citation: AIR 1972 Kar 209 : (1972) 1 MysLJ 291

Hon'ble Judges: K. Jagannatha Shetty, J; G.K. Govinda Bhat, J

Bench: Division Bench

Advocate: J.M. Riazuddin, for the Appellant; N.T. Raghunathan, for K.S. Sathyamurthy, for the
Respondent

Final Decision: Dismissed

Judgement

1. This is an appeal brought by defendants 1, 3, 6 and 7 in forma pauperis against the judgment and decree dated 30-11-1965 passed by the Civil

Judge, Hubli, in Special Suit No. 15 of 1963 decreeing the suit for sale on the basis of a mortgage executed by the defendants in favour of the

plaintiff "Shah Hirachand Vanechand and Company" which is a registered Partnership firm carrying on business at Hubli. Defendants 2 to 7 are the

sons of Defendant No. 1 and they are members of a Joint Hindu Family. The family of the defendants was carrying on business in Hubli; in respect

of the dealings carried on with the plaintiff firm, a sum of Rs. 33,197/6/0 was found due according to the accounts. As the defendants were unable

to pay the said amount, they executed on 20-10-1959 a mortgage of the suit properties in favour of the plaintiff firm for Rs. 34,000/-. The

consideration for the mortgage was the sum of Rs. 33,197/6/0 due on accounts and a further sum of Rs. 802/10/0 paid in cash before the Sub

Registrar at the time of the registration of the document. Under the terms of the mortgage, the mortgagee was to remain in possession of the

mortgaged properties and allowed to appropriate the rents and profits in lieu of interest. The mortgagors agreed to redeem the mortgage by paying

Rs. 34,000/- within two years of the date of the mortgage. It was also provided in the deed that if the mortgagors failed to redeem the mortgage

within the time stipulated the mortgagee shall be at liberty to recover the mortgage money.

2. On the date of the mortgage, one Vanechand was a partner of the plaintiff firm. He died on 12-7-1962 leaving his wife Mittubai, On 13-7-1962

the plaintiff firm was reconstituted by taking Mittubai as a partner in place of her deceased husband Vanechand. Mittubai's name was entered in

the Register of Firms as a partner on 24-7-1963. The suit was instituted on 4-1-1963 in the name of the firm "Shah Hirachand Vanechand and

Co." as plaintiff for recovery of Rs. 34,000/- by sale of the mortgage property.

3. The defendants contested the suit raising various contentions. Briefly stated, their contentions were :

(1) That Vanechand who was a partner of the firm died on 12-7-1962 with the result that the firm was dissolved and the plaintiff cannot file a suit

on behalf of the dissolved firm;

(2) that on the date of the mortgage, there was an attachment of the mortgage properties by one Siddaramappa Shivappa Walli in L. C. No. 146

of 1956 and therefore the mortgage is not according to law;

(3) that the defendants are only "wahiwatdars" of the properties and that one Sattawwa Kom Godgaya Salimath is the owner;

(4) that the plaintiff has recovered Rs. 32,000/- by way of rent from the mortgaged properties and therefore it is liable to account for the said sum;

(5) that the real consideration for the mortgage is only Rs. 802/10/0 and that the rest of the amount shown as debt due by the defendants

comprises of compound interest and therefore an account should be taken of the actual amount due to the plaintiff; and

(6) that the mortgage was taken by misrepresentation.

4. On the pleadings the learned trial judge settled the following issues :

1. Whether the plaintiff is registered firm and has the right to sue on the suit mortgage bond ?

2. Whether the plaintiff firm is dissolved after the death of Vanechand ?

3. If, so whether the present partners of the plaintiff firm have the right to sue on the suit mortgage bond ?

4. Do defendants prove want of consideration for the mortgage bond ?

5. Do defendants prove that the mortgage has not been executed through their consent?

6. Is Sathawwa Salimath a necessary party to the suit?

7. Whether it is for the default of the defendants that the plaintiff has not been able to realise the rent from the tenant and some of the mortgage

properties?

8. If so, is plaintiff entitled to claim damages from the defendants ?

9. To what damage is plaintiff entitled in this behalf?

10. What is due to the plaintiff on the suit mortgage bond?

11. What decree?

5. The first contention was given up by the defendants and consequently issues 1, 2 and 3 were not pressed. But on the application of the

defendants the following additional issues were raised:

(1) Whether the widow Mittubai was included as partner of the firm after the death of Vanechand? If so, whether her name was entered in the

register at the time of suit?

(2) If her name is not entered then whether the suit is maintainable?

6. On additional issue No. 1, the trial Judge recorded a finding to the effect that on 13-7-1962 Mittubai became a partner of the reconstituted firm

and that her name was not entered in the Register of Firms on the date of the institution of the suit. On Additional issue No. 2, relying on the

decision in Chairman Lal and Another Vs. Firm New India Traders Mica Merchants and Others, , he held that the fact that the name of Mittubai

did not appear in the certificate of the registration of the firm on the date of the suit is no bar u/s 69(2) of the Indian Partnership Act, 1932

(hereinafter called "the Act") for the maintainability of the suit by the registered firm.

7. The bar of Section 69(2) was the most serious contention urged in the trial court and also in this Court. The rest of the contentions on the basis

of which issues 4, 5, 6 and 10 and additional issue No. 3 were framed were found against the defendants, with the result that the plaintiff's suit for

recovery of the mortgage money by sale of the mortgage properties was decreed. The main question that arises for determination in this appeal is

whether the suit is not maintainable because the name of Mittubai was not shown in the Register of Firms as a partner on the date of the institution

of the suit.

8. Sri Riazuddin, learned counsel for the appellants, urged that when the suit has been brought in the name of the partnership firm, Mittubai should

be deemed as one of the partners suing and since her name was not shown in the Register of Firms as a partner, on the date of the institution of the

suit, Section 69(2) constitutes a clear bar to the maintainability of the suit. In support of his contention, the learned counsel relied on the following

decisions of the High Courts of Dr. V.S. Bahal Vs. S.L. Kapur and Co., (b) Kesrimal and Another Vs. Dalichand and Others, (d) Firm Alwar

Iron Syndicate Vs. Union of India (UOI), and (e) Badrimal v. Paul & Sons AIR 1971 J & K 109.

9. Sri N. T. Raghunathan, learned counsel for the plaintiff (respondent No. 1) contended that Section 69(2) has to be read with Section 45 of the

Contract Act and Order XXX, Rule 1 of the CPC and when so read the expression "persons suing" in Section 69(2) has to be construed to mean

all the partners constituting the firm at the time of the accrual of the cause of action; that in the instant case, the names of all the partners constituting

the firm, on the date of the execution of the suit mortgage deed and when the mortgage money became due on 21-10-1961, have been shown in

the Register of Firms and therefore, the requirements of Section 69(2) of the Act have been satisfied. In support of his contention the learned

counsel relied on the decision of the *Bharat Sarvodaya Mills Co. Ltd. Vs. Mohatta Brothers*,

10. The learned counsel raised an alternate contention that Section 69(2) has no application to a suit brought to enforce a mortgage as a suit on a

mortgage is not a suit to enforce a right arising from a contract. Section 69(2) of the Act reads thus:--

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".

While under the English Law, registration of firms is compulsory and it imposes a penalty for non-registration, the Indian Partnership Act has made

registration entirely optional within the discretion of the partners concerned. Following English precedents, any firm which is not registered will be

unable to enforce its claims against third parties in the civil courts. The object of the Act is not merely that firms should be induced to register

themselves but the changes occurring in the constitution of the firm should also be registered. In order to achieve that object which the legislature

had in view. Section 69 has imposed two conditions for the maintainability of a suit to enforce a right arising from a contract. The said conditions

are:--

(i) the firm should be registered, and

(ii) the persons suing are or have been shown in the register of Firms as partners in the firm.

11. The question is, who are the "persons suing" in a suit which is instituted by or on behalf of a firm against any third party. For answering the said

question, we have to turn to the provisions of Section 4 of the Act, Section 45 of the Contract Act and Order XXX, Rule 1 of the Code of Civil

Procedure. Persons who have entered into partnership with one another are called individually partners and collectively a firm and the name under

which their business is carried on is called the "firm name". (vide Section 4 of the Act). Order XXX, Rule 1 of the CPC enables two or more

persons claiming or being liable as partners and carrying on business in India to sue or be sued in the name of the firm of which they were partners

at the time of the accrual of the cause of action. Rule 1 shows that the individual partners sue or are sued in their collective firm name. Rule 2

provides that on disclosure of the names of the partners of the plaintiff firm, the suit proceeds as if they are named as plaintiffs in the plaint. A suit

by or in the name of a firm is thus really a suit by or in the name of all its partners.

12. In *Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others*, the Supreme Court has stated that the suit

against the firm is really a suit against all the partners who were its partners at the time of the accrual of the cause of action. In *Lindley on*

Partnership, 12th Edition, at page 301 it is stated:

Any two or more persons claiming or being liable as copartners and carrying on business within the jurisdiction may sue or be sued in the name of

the firm of which such persons were copartners at the time of the accruing of the cause of action".

13. A suit to enforce a right under a contract can be brought only by the party to the contract. A stranger to the contract cannot sue on the

contract. Where a mortgage is executed in favour of a firm, all the partners then constituting the firm become the mortgagees. If the suit on the

mortgage were to be instituted in the individual names of the partners, the persons competent to bring the suit are all the partners constituting the

firm on the date of the mortgage. If there is alteration in the constitution of the firm and a new partner is introduced subsequent to the date of the

mortgage, such a partner not being a party to the mortgage is not entitled to sue on the mortgage. The partners entitled to sue on a contract are the

partners constituting the firm at the time of the accrual of the cause of action for the suit.

14. The following propositions are settled by the decisions of the Supreme Court:--

(1) A suit by or in the name of a firm is really a suit by or in the name of all its partners. So also a suit against the firm is really a suit against all the

partners of the firm.

(2) A suit by the firm is really a suit by all the partners who were its partners at the time of the accrual of the cause of action.

The expression "persons suing" in Section 69(2), therefore means all the partners of the firm who were its partners at the time of the accrual of the

cause of action.

15. In the decisions of the High Courts of Punjab, Rajasthan and Jammu and Kashmir relied on by the learned counsel for the appellants, the view

taken is that all the persons who are the partners in the firm at the time of the institution of the suit must be or have been shown as such in the

Register of Firms. With respect, we dissent from that view. For the reasons stated above, persons who were not partners at the time of the accrual

of the cause of action, are not the "persons suing" notwithstanding the fact that they are partners of the firm on the date of the suit. In our judgment,

a suit by or in the name of a firm is a suit by or in the name of all its partners at the time of the accrual of the cause of action. Our view is supported

by the decision in *Bharat Sarvodaya Mills Co. Ltd. Vs. Mohatta Brothers*, *Mittubal* cannot be regarded as one of the "persons suing". The

"persons suing" are the partners of the firm of *Shah Hirachand Vanechand and Company*, at the time of the execution of the suit mortgage. The

name of all the partners who then constituted the firm have been shown in the Register of Firms as partners. Therefore, the conditions laid down by

Section 69(2) of the Act having been satisfied the suit as brought is maintainable. Since we have come to the conclusion that the suit is not barred

u/s 69(2) of the Act, even on assumption that the suit is one to enforce a right arising from a contract, we do not express any opinion on the

alternate contention urged by Sri N. T. Raghunathan that a suit to enforce a mortgage is not a suit arising under a contract and that Section 69(2) is

inapplicable to such a suit. The decision in Smt. Sushila Devi and Another Vs. Hari Singh and Others, lends some support to that contention.

16. Beyond the bare assertion that the findings on issue Nos. 4, 5, 6 and additional issue No. 3 are erroneous, the learned counsel for the

appellants did not show as to why they are erroneous, The suit mortgage deed contains an express covenant by the mortgagors to pay the

mortgage money within two years of the date of the mortgage. The mortgagors having committed default, the mortgagee has brought the suit for

recovery of the mortgage money. The plea that the mortgagors are not the owners of the mortgage properties and that the ownership vests in a

third party cannot be urged in a suit on a mortgage. The right, title and interest of the mortgagors alone will be sold in execution of the decree for

sale. The misrepresentation alleged is that the mortgagee had assured the mortgagors to help them in carrying on their business. There is also no

substance in the contention that the mortgage is not supported by consideration. Defendant No. 1 as D. W. 1 has admitted in his evidence that he

had dealings with the plaintiff firm since about 50 years; that in October 1957, he was to pay Rs. 25,000/- to the plaintiff firm. The mortgage deed

states that a sum of Rs. 33,197-6-0 is the amount of arrears due to the plaintiff upto the 17th October 1959 which is the amount due in respect of

khatha balance including the principal and interest. We see no reason to differ from the conclusions reached by the court below.

17. In the result, for the reasons stated above, the appeal fails and is dismissed with costs of respondent No. 1.

18. The court-fee due to the Government on the memorandum of appeal shall be recovered from the appellants.