(1935) 08 CAL CK 0002

Calcutta High Court

Case No: None

Gopinath Motilal		APPELLANT
	Vs	
Ramdas and Others		RESPONDENT

Date of Decision: Aug. 16, 1935

Acts Referred:

- Partnership Act, 1932 - Section 58

Citation: AIR 1936 Cal 133

Hon'ble Judges: McNair, J

Bench: Division Bench

Judgement

McNair, J.

This is a suit for the recovery of a sum of Rs. 18,000 odd stated in the concise statement to be due from the defendants to the plaintiff firm on the khotor patta account and for costs. The defendants are said to be members of a joint Mitakshara Hindu family who carried on business under the name of Ramdas Bhagwan Das. There were various loans and adjustments alleged and the sum which is claimed is the sum which is said to be due after giving credit for moneys received. The plaint was filed on 21st November 1934. A written statement was put in on behalf of defendants 2, 4, 5, 10, 11 and 12. Another written statement was put in on behalf of defendants 1, 3 and 9, both on 4th April 1935. There was also a written statemant "on behalf of certain minor defendants. About 20th May the plaintiff firm applied to amend their plaint by adding details of certain transactions and by referring to the defendants as a Mitakshara joint family and not as a firm. The order was made and it was further ordered that the adult defendants should be at liberty within 7 days from date of their receiving a copy of the amended plaint to file such additional written statement in the suit as may be rendered necessary in consequence of the aforesaid amendment. A copy of the amended plaint was sent to the defendants" attorney on 9th May, and thereafter the attorneys for the plaintiff firm reminded the defendants on more than one occasion that the time to file other additional written statements had expired. No written statement was in fact filed until the suit came on for

hearing today. Mr. Suhrawardy then on behalf of the defendants asked for leave to file the additional written statements, and Mr. Bose on behalf of the plaintiff firm stated that he objected to their being filed but that he was not willing to take an adjournment if I felt disposed to admit the additional written statements. In those additional written statements the plea was taken that the suit as framed is not maintainable and that the business of Ramdas Bhagwan Das was a joint family business and not a contractual partnership.

2. On the defendant being called upon to propose issues, the first issue suggested by Mr. Suhrawardy was that the suit was not maintainable inasmuch as it was a partnership firm and had not been registered u/s 58, Partnership Act. This section provides how registration may be effected and Section 69 (2) provides:

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. There is nothing to show that the plaintiff firm is a partnership firm, but that has not been denied before me and it is clear that the plaint refers throughout to the plaintiff as "the plaintiff firm." Section 4, Partnership Act, defines a partnership firm and says that persons who have entered into partnership with one another are called individually partners and collectively a firm, and there is no doubt that the plaintiffs have referred to themselves as a firm, and it must be presumed, even in the absence of evidence, that they are persons who have entered into partnership with one another and are a partnership firm. It was contended that Section 69 was not applicable inasmuch as the transactions which were the subject matter of this suit had all taken place prior to 1st October 1933. The materiality of that date is by reason of Section 1 (3), Partnership Act 9 of 1932 which provides that:

The act shall come into force on the first day of October 1932, except Section 69, which shall come into force on the 1st day of October 1933.

4. The meaning of that provision seems to me perfectly clear, namely that after 1st October 1933 Section 69 will become operative and that a firm which is not registered and which sues to enforce a right arising from a contract shall be non-suited. Now, this view has already been taken by a Division Bench of this Court in Surendra Nath De v. Manohar De 1934 Cal 754. It is further contended that the additional written statements should not be admitted to raise a question of this nature which was never foreshadowed either in the original written statement or in the amended written statement; and reliance is placed on the order made by Ameer Mi, J., granting leave to file an additional written statement, and limiting such additional pleas to those which may be rendered necessary in consequence of the amendment of the plaint. It is contended with justice that the amendment of the plaint did not necessitate a plea that the suit as framed is not maintainable. Mr. Suhrawardy for the defendants however contends that the additional written statement has been admitted, and that even if it had not been admitted, this is a

question which goes to the root of the suit and it is a question of which the Court must take cognizance when brought to its notice. He further contends that it is a matter which he has the power to raise at any time, and in support of this contention he relies on the decision of the Privy Council in Surajmall Nagarmall v. Triton Insurance Co. 1925 P C 83. At page 128, Lord Sumner, delivering the judgment of the Board, states that their attention had been drawn to a provision of the Stamp Act. "This section," he says,

had not been pleaded by the defendants in the suit, for their general plea No. 10. "Lastly the defendant company submits that the suit of the plaintiff firm is not maintainable" cannot be read as raising a specific statutory answer. Their Lordships were informed that the point was not discussed in either Court below, ... and the result has been that the effect of this section was not considered until the case came before their Lordship"s Board.

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment athing from which a Court can be dispensed by the consent of parties, or by a failure to plead or to argue the point at the outset:

5. and reference is made to Nixen v. Albion Insurance Co. (1867) 2 Ex 338:

The enactment is prohibitory. It is not confined to affording a, party a protection of which he may avail himself or not as he pleased.

6. His Lordship concludes:

To allow the suit to proceed in defiance of Section 7 would defeat the provisions of the law laid down therein.

7. The reasoning and the decision which was come to by the Board in regard to the provisions of the Stamp Act in that appeal appear to me entirely applicable to the argument which has now been raised with regard to the provisions of the Partnership Act. In the circumstances, I am deciding on this preliminary issue that the suit is not maintainable in its present form. I adjourn the further hearing to enable the plaintiffs to consider their position.