
(2006) 01 CAL CK 0008

Calcutta High Court

Case No: C.S. No. 544 of 2001 and G.A. No's. 3525 of 2004 and 320 of 2005

Soorajmull Nagarmull

APPELLANT

Vs

Dalhousie Properties
Ltd. and Others

RESPONDENT

Date of Decision: Jan. 13, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Partnership Act, 1932 - Section 69, 69(1), 69(2)
- Presidency Small Cause Courts Act, 1882 - Section 19
- Transfer of Property Act, 1882 - Section 116

Citation: (2006) 2 CALLT 1

Hon'ble Judges: Soumitra Sen, J

Bench: Single Bench

Advocate: Bimal Kumar Chatterjee and David Mantosh, for the Appellant; Ranjan Deb Joyjit Ganguly and Reetabrata Mitra, for Defendant Nos. 2 to 14, for the Respondent

Judgement

Soumitra Sen, J.

This instant application has been filed on behalf of the defendant No. 1 for dismissal of the suit.

2. The application filed by the defendant/petitioner for the above relief is in the nature of an application under Order 7, Rule 11 of the Code of Civil Procedure. It has been submitted on behalf of the defendant/petitioner that the plaintiff/respondent, being an unregistered partnership firm, is not entitled to file the suit in its own name by reason of the specific statutory bar contained in Section 69(2) of the Partnership Act, 1932. It is also submitted on behalf of the defendant/petitioner that the reliefs as claimed in the suit arise out of a contract and are necessarily for the enforcement of a right arising out of a contract, therefore, the bar of Section 69(2) of the Partnership Act squarely applies in the instant case.

3. In order to appreciate the respective contentions made on behalf of the parties, it would be proper at this stage to examine the reliefs as claimed in the suit. For the sake of convenience, the prayers claimed in the suit are set out as under:

(a) A decree for delivery up and cancellation of all documents on the strength whereof the Defendant Nos. 2 to 14 are holding themselves not to be occupants and/or Sub-tenants under the plaintiff but as direct tenants under the Defendant No. 1;

(b) A decree for a declaration that the Plaintiff still continues to be the tenant in respect of the suit Premises described in the Schedule written hereunder, under the Defendant No. 1;

(c) A decree for a declaration that the Plaintiff is entitled to receive payment of the monthly rentals and compensations in respect of the suit Premises from the Defendant Nos. 2 to 14 as the immediate landlord of the said Defendants in respect of the suit Premises;

(d) A decree for a declaration that the surrender of portions of the suit premises by the Defendant Nos. 2 to 14 illegal and null and void;

(e) A decree for recovery of possession by the Plaintiff from the Defendant No. 1 of portions of the suit premises wrongfully surrendered by the Defendant Nos. 2 to 14.

(f) A decree for a permanent injunction restraining the Defendant Nos. 2 to 14 from holding themselves out as direct tenants and/or taking any step or further steps as direct tenants in respect of the Suit Premises under the Defendant No. 1:

(g) A decree for a mandatory injunction compelling the Defendant Nos. 2 to 14 to make payments of all monthly rentals payable for the Suit Premises and/or portion thereof to the Plaintiff;

(h) A decree for a permanent injunction restraining the Defendant Nos. 2 to 14 from surrendering or handing over possession of any portion of the Suit Premises under their occupation to the Defendant No. 1;

(i) A decree for a sum of Rs. 47,28,636/- as pleaded in paragraph 43 hereinabove against the Defendant Nos. 2 to 14 jointly and/or severally;

(j) A decree for a sum of Rs. 42,19,671.76 towards interest as pleaded in paragraph 45 hereinabove against the Defendant Nos. 2 to 14 jointly and/or severally;

(k) Interim interest and interest upon judgements;

(1) A decree for a sum of Rs. 70,00,000/- towards damages as pleaded in paragraph 48 hereinabove jointly and/or severally against the Defendants;

(m) Attachments;

(n) Receiver;

(o) Injunction;

(p) Costs;

(q) Such further or other reliefs;

4. It is the case of the plaintiff/respondent that it is still the tenant under defendant No. 1 and defendant Nos. 2 to 14 are sub-tenants of the plaintiff. Therefore, the defendant Nos. 2 to 14 cannot claim any direct relationship of tenant under the defendant No. 1 and for that reason, various prayers have been prayed, which are mentioned as above.

5. On behalf of the plaintiff/petitioner, it has been submitted that the reliefs as claimed do not arise out of a contract. The cause of action in this suit is for enforcement of a common law right. It is submitted that the defendant Nos. 2 to 14 being its sub-tenants, the plaintiff is entitled to restrain them from claiming otherwise.

6. It was further submitted that since the application filed by the defendant No. 1 is in the nature of a demurrer application, the statements made in the plaint are to be taken as correct and, therefore, unless from a plain reading of the plaint, it does not appear that any part of the cause of action is barred by law, no application for rejection of the plaint can be maintained.

7. The plaintiff has categorically stated in paragraph 1 of the plaint that it is a registered partnership firm. In the present application, the defendant No. 1 has categorically stated that the plaintiff is not registered. Surprisingly, the plaintiff does not meet the challenge by introducing documents and /or records showing actual registration, but merely contends that this statement contained in the plaint is to be taken as correct and on the basis of the said statement, the plaintiff is entitled to go to trial and prove its case by leading cogent evidence.

8. It is true that in an application in the nature of a demurrer, the statements contained in the plaint to be taken as correct, but, however, if a direct challenge is thrown on a specific question of fact on the determination of which would depend whether the suit is maintainable or not, in my opinion, to contend that the plaintiff would be entitled to go to trial without meeting the challenge at this stage is not the proper proposition of law. If any statement of fact on the face of it can be proved to be incorrect, in my opinion, it would not entitle the plaintiff to go to a long drawn legal battle and prove its case when it can prove it at this stage when the challenge is thrown.

9. The language of Section 69 is clear in its terms. For the sake of convenience, Section 69 is set out as under :

69. Effect of non-registration.-(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 Firm 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 Firm as partners in the firm.

(3) The provisions of Sub-section (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 realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency Towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920), to realize the property of an insolvent partner.

(4) This section shall not apply -

(a) to firms or to partners in firms which have no place of business in [the territories to which this Act extends], or whole places of business in [the said territories] are situated in areas to which, by notification under [section 56] this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882, {5 of 1882) or, outside the Presidency-towns, is not of a kind specified in the Schedule II to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

10. From the above, it is clear that no suit can be filed to enforce a right arising from a contract 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 Firm as partners in the firm.

11. Therefore, two conditions will have to be satisfied before a partnership firm can file a suit; one, that it has to be registered and the other that the person suing has to be shown in the Register of Firm as partner of the firm.

12. The language is such that it makes the provision mandatory in its application. Once it is established that the firm is not registered or the partners suing are not shown to be partners at the time of filing of the suit, no suit can be filed by or on behalf of the

partnership firm.

13. The language of Section 69(2) of the Partnership Act also makes it clear that the subsequent registration of a partnership firm will not cure the initial defect. Therefore, at the time of institution of the suit, the mandatory requirements of Section 69(2) are required to be fulfilled.

14. In the instant case, though the plaintiff has stated that it is a registered partnership firm, the defendant No. 1 in the instant application has categorically stated that the plaintiff is not registered. In view of such specific challenge being thrown, the plaintiff is not entitled to shy away from such challenge and contend that it must be given an opportunity to go to trial and prove its case. An apparent mis-statement or an incorrect statement of fact need not be proved at a trial if it can be established otherwise by affidavit evidence. In fact, in order to prove that the plaintiff is registered, oral evidence is not necessary at all. Mere production of the certificate of registration is enough. I do not see any reason why the plaintiff would be entitled to go to trial and prove its case when it is required for the plaintiff to establish its legal competence to maintain the suit in view of the specific statutory bar contained in Section 69(2) of the Partnership Act.

15. With regard to the contention of the plaintiff that the suit is not one for establishment of a right arising from a contract, in my opinion, the contention is misconceived. In order to establish the plaintiff's contention that the defendant Nos. 2 to 14 are its sub-tenants, the plaintiff/respondent at first will have to establish that it is a tenant under the defendant No. 1. The right of tenancy is obviously a right arising out of the contract of tenancy. Unless the plaintiff/respondent gets a decree in terms of prayer (b) as mentioned above, independently it may not be able to get the other reliefs.

On behalf of the petitioners, the following decisions were relied upon :

- (1) [Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, .](#)
- (2) [Jagdish Chander Gupta Vs. Kajaria Traders \(India\) Ltd., .](#)
- (3) [In Re: Abani Kanta Pal, .](#)
- (4) [Shreeram Finance Corporation Vs. Yasin Khan and Others, .](#)
- (5) AIR 2977 SC 336 (Loonkaran Sethia Etc. v. Mr. Juan E. John and Ors.).

16. The case of Sopan Sukhdeo (supra) has been relied upon for the proposition that in order to arrive at a conclusion, the plaint in its entirety must be considered and on the basis thereof it was submitted that having regard to the reliefs claimed in the suit, in the instant case, there is no manner of doubt that the suit is one for enforcement of a contract.

17. The case of Jagdish Chandra Gupta (supra) has been relied upon for the proposition that Section 69(2) applies to all proceedings including the proceeding arising out of the Arbitration Act.
18. The decision of Abani Kainta Pal (supra) has been relied upon for the proposition that if a firm is not registered, the Court will not have any jurisdiction to entertain a suit filed in violation of the provisions of Section 69(2) of the Partnership Act, and the plaint is to be treated as void.
19. The decision of Shreeram Finance (supra) has been relied upon in support of the proposition that the provisions of Section 69(2) of the Partnership Act are required to be fulfilled at the time of Institution of the suit, and its subsequent fulfillment will not make the initial institution of the suit valid unless the mandatory requirements were fulfilled at the time of the institution of the suit. In the said case, there was no dispute that the firm was registered, but, however, at the time of institution of the suit, there was a change in the constitution of the partner, but the Register of Firm did not show the necessary changes in the constitution of the firm at the time of filing of the suit, therefore, the mandatory provisions of Section 69(2) were not complied with and the suit was held to be barred in law.
20. In the instant case, the plaintiff has not been able to cross the basic hurdle i.e., whether it is a registered firm or not. In the absence of any proof that it is registered, there is no option for me but to hold that the plaintiff has no right to file the suit by reason of the specific bar contained in Section 69(2) of the Partnership Act.
21. The decision of Loonkaran Sethia (supra) has been relied upon for the proposition that the provision of Section 69 is mandatory in character. In the said decision also the Hon"ble Supreme Court has held that 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.
22. In answer to the point raised on behalf of the plaintiff that the instant application has been filed belatedly, the defendant/petitioner has contended that the point of jurisdiction can be raised at any point of time and the objection with regard to the registration of the partnership firm is even permissible to be raised for the first time in appeal.
23. The above contention of the defendant/petitioner is well settled. And in support of the same, the decision reported in AIR 1939 Sind 206 (Lokramdas Chatomal, Firm and Ors. v. Tharumal Shewaram and Ors.) and the decision reported in [Gopinath Motilal Vs. Ramdas and Others](#), has been relied upon on behalf of the petitioner/ defendant. On behalf of the plaintiff/respondent, it was submitted that the decisions, which the petitioner/defendant relied upon, all arise out of the final adjudication of the dispute between the parties and not out of an application filed under Order 7, Rule 11. In my

opinion, the said fact is immaterial as far as the case in hand is concerned. It cannot be an absolute proposition of law that irrespective of an apparent mis-statement contained in the plaint, the plaintiff/respondent is entitled to go to trial. When an issue with regard to the jurisdiction of the Court has been raised, the adjudication of which in favour of the petitioner, would render the suit as void, there is certainly a degree of responsibility and/or obligation cast upon the plaintiff/respondent to establish that it has a right to maintain the suit, particularly, when the issue does not require leading of any oral evidence as such. At least the prima facie right to maintain the suit must be shown to the Court when a specific challenge is thrown. Not having discharged such an obligation, in my opinion, the plaintiff/respondent cannot be permitted to go to trial.

24. On behalf of the plaintiff/respondent, a very strong reliance was placed in the decision reported in [M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property](#). It was submitted on the basis of the said decision that if reliefs are clubbed together and a part of the relief claimed is based on the law of the land, the bar of Section 69(2) of the Partnership Act does not apply.

25. In the case of Raptakos (supra), the premises in question was rented to the appellant under a registered Deed of Lease for a period of 21 years, which expired by efflux of time. On its expiry, the respondent filed a suit for eviction. The appellant took a defence that after the expiry of the period of lease it had continued to be a tenant by acceptance of rent by defendant/landlord and hence it had become a tenant by holding over u/s 116 of the Transfer of Property Act, 1882. A further defence was taken by the appellant/defendant by way of a separate application seeking dismissal of the suit under Order 7, Rule 11(d) of the CPC on the ground that the suit for possession filed by the plaintiff/respondent was not maintainable as it was an unregistered partnership firm. On the facts of the said case, the Hon"ble Supreme Court was pleased to hold that since a part of the plaint was based on the enforcement of right arising out of common law, the bar of Section 69(2) would not apply. The Hon"ble Supreme Court was alive with the situation that even after expiry of a lease of 21 years the appellant contended that it became a tenant by holding over in view of the provisions of Section 116 of the Transfer of Property Act and such claim was not based on a contract as between the parties.

26. The facts of the instant case are altogether different. From the averment contained in the plaint, it is apparent that the plaintiff at first will have to establish that it is a tenant under the defendant No. 1 before it can claim that the defendant Nos. 2 to 14 are its sub-tenants. Therefore, the plaintiff's right to claim tenancy under the defendant No. 1 is obviously a claim arising out of a contract, i.e., contract of tenancy.

27. For the reasons as aforesaid, I am of the opinion that the suit filed by the plaintiff/respondent is not maintainable as it is barred in law. In view of the provision of Order 7, Rule 11(d) is, therefore, liable to be rejected. The application filed by the defendant/petitioner is hereby allowed. The suit filed by the plaintiff/respondent in C.S. No. 544 of 2001 is hereby dismissed.

28. In view of the decision as aforesaid, no order need be passed in the application filed by the defendant/petitioner being G.A. No. 3525 of 2004, the same is accordingly disposed of.

There will, however, be no order as to costs.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties on usual undertaking.

Later:

Stay of operation of this Judgment is prayed for and the same is refused.