

(1976) 04 CAL CK 0020

Calcutta High Court

Case No: None

Ram Kumar Shew Chandrai

APPELLANT

Vs

The Dominion of India now
Union of India

RESPONDENT

Date of Decision: April 9, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80
- Partnership Act, 1932 - Section 69, 69(2)

Citation: AIR 1977 Cal 37 : 80 CWN 633 : (1976) 2 ILR (Cal) 366 : (1976) 1 ILR (Cal) 372

Hon'ble Judges: Sharma, J; M.M. Dutt, J

Bench: Division Bench

Advocate: Janendra Coomer Dutt, for the Appellant; Ajay Kumar Basu, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal is at the instance of the plaintiff and it arises out of a suit for recovery of the price of goods.

2. On June 29, 1948, the appellant alleged to be a dissolved partnership firm, booked 150 bales of piecegoods at Wadi Bander on the G.I.P. Railway for carriage by the said railway and also by the B.N. Railway and for delivery of the same to the appellant at Shalimar. It was alleged that on July 17, 1948, the B. N. Railway delivered 140 bales of piecegoods and failed and neglected to deliver the remaining 10 bales and/or lost the same and thereby caused loss and damage to the appellant. The appellant accordingly, claimed Rs. 10,183-4-6 on account of the value of 10 bales and Rs. 1,018-6-3 for loss of commission at the rate of 10% of the value of the goods. The total amount claimed by the appellant is Rs. 11,202-4-9. It was alleged that the statutory notices under S. 77 of the Indian Railways Act and S. 80 of the CPC were duly served.

3. Initially, the appellant instituted the suit claiming the said amount in the Original Side of this Court being Suit No. 3934 of 1949. On September 16, 1957, Lachminarayan Poddar, one of the partners of the appellant-firm died. On January 4, 1957, the High Court dismissed the suit for want of jurisdiction. On January 7, 1957, the present suit was filed in the third Court of the Subordinate Judge, Howrah. It was contended that the period during which the High Court suit was pending should be excluded in computing the period of limitation of the present suit.

4. The respondent Union of India representing the B.N. Railway contested the suit by filing a written statement. The claim of the appellant in respect of two bales only was admitted and the remaining claim was denied by the respondent. The receipt of the notices under S. 77 of the Indian Railways Act and S. 80 of the CPC and the legality and validity thereof were denied. It was also denied that the appellant was entitled to claim the benefit of S. 14 of the Indian Limitation Act, 1908 as the plaintiff did not prosecute the High Court suit bona fide and with due diligence.

5. The Subordinate Judge came to the findings that the notice under S. 80 of the CPC was duly served and that the suit was not barred by limitation. Regarding the notice under S. 77 of the Indian Railways Act, he held that no copy of the alleged notice had been filed and that, if the correspondence between M/s. Santa Singh & Company and the claims of the respondent-Railway be construed as constituting a notice under S. 77, it was illegal and invalid. Further, he took the view that as the G.I.P. Railway which was the contracting railway was not made a party to the suit, the onus lay on the appellant to prove loss during carriage by the respondent-Railway, and appellant failed to discharge the said onus. He held that the appellant-firm having been dissolved on the death of the said Lachminarayan Poddar was not entitled to sue. Upon the said findings, he dismissed the suit. Hence, this appeal.

6. We may first of all consider the maintainability of the suit. On behalf of the respondent, the maintainability of the suit has been challenged on two grounds, namely, (1) the appellant firm is a dissolved firm and (2) the name of Durga Poddar who became a partner of the appellant-firm in 1956 before the institution of the present suit is not shown in the Register of Firms. The relevant provision is S. 69 of the Indian Partnership Act, 1932. Sub-section (1) and (2) and clause (a) of sub-s. (3) are as follows:-

69(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 Firms 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 Firms as partners in the

firm.

(3). The provisions of sub-sections (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 effect -

(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 realise the property of a dissolved firm, or

7. It has been already noticed that the learned Subordinate Judge was of the view that as the appellant-firm was a dissolved firm, the suit was not maintainable. We are, however, unable to agree with him. Sub-section (1) and (2) give a clear indication that a suit at the instance of a dissolved firm is maintainable. Moreover, under sub-s. (3) a dissolved firm has the right or power to realise its property band, in that case, the provisions of sub-ss (1) and (2) will not apply. But in other cases including a case to enforce a right arising from a contract the conditions under sub-ss. (1) and (2) must be fulfilled. The learned Subordinate Judge was in error in holding that the suit was not maintainable at the instance of the appellant-firm alleged to be a dissolved firm.

8. The second ground which has been raised on behalf of the respondent was not taken in the Court below, but as it is a pure question of law and all the facts required to determine the question are on record, we propose to consider the same. Under S. 69(2), two conditions must be fulfilled before a suit can be said to be maintainable. The said conditions are : (1) the firm must be a registered one and (2) the persons suing are or have been shown in the Register of Firms as partners in the firm. There is no dispute that the first condition is satisfied, for the appellant-firm is a registered fir. There is, however, a serious dispute between the parties as to whether the second condition is fulfilled. It is now necessary to state certain facts. The appellant has examined one Durga Prosad Poddar. Durga Prosad has stated in his evidence that he became a partner of the firm 1956 after the death of his father Lachminarayan Poddar. In paragraph 12 of the plaint, it has been stated that one of the partners Shri Lachminarayan Poddar having died on September 16, 1956, the plaintiff-firm has been dissolved. The suit was instituted on January 7, 1957 and before the institution of the suit Durga Prosad Poddar was taken in as a partner. So it is not correct to say that on the date of the suit the firm stood dissolved. When a firm consists of more than two partners, it is dissolved on the death of one of the partners unless the partnership agreement provides for its continuance in spite of the death of a partner. In the instant case, no partnership agreement has been produced by the appellant. But as stated by Durga Prosad he became a partner of the firm in 1956 after the death of Lachminarayan. From this fact, it may be reasonably presumed that the firm did not dissolve, but continued to carry on its business as before. The statement in paragraph 12 of the plaint does not seem to be correct. The second condition under S. 69(2) is that the persons suing are or have been shown in the Register of Firms as partners in the firm. The entries in the

Register of Firms do not, however, include the name of Durga Prosad as one of the partners of the firm. It is argued on behalf of the appellant that as the cause-of-action for the suit arose before Durga Prosad was taken in as a partner it is quite immaterial whether or not his name appears in the Register of Firms. In support of this contention, reliance has been placed on behalf of the appellant on the provision of Order 30 of the Code of Civil Procedure. The provision of Order 30, is an enabling one which permits partners constituting a firm to sue or be sued in the name of the firm ([Purushottam Umedbhai and Co. Vs. Manilal and Sons, \).](#) Sub-rule (1) of Rule 1 of Order 30 enables two or more persons to sue or be sued in the name of the firm of which such persons were partners at the time the cause-of-action arose. A firm's name is merely a compendious mode of describing the partners constituted in the firm. When a suit is instituted in the name of the firm, it is really a suit by all the partners of the firm. In such a case, "the persons suing" within the meaning of S. 69(2) of the Partnership Act, are all the partners on the date of the suit. The partner during whose time the cause-of-action arose may also sue in the firm name, but the names of those partners must appear on the face of the plaint, so that they can be said to be "persons suing". If the firm is only shown as the plaintiff, in that case, all the partners of the firm on the date of the suit must be held to be the persons suing and not only those partners during whose time the cause-of-action arose. Under sub-rule (1) of Rule 2 of Order 30, where a suit is instituted in the name of the firm, plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant forthwith declare in writing the names and addresses of all the persons constituting the firm. In the instant case, the plaintiff is the firm, that is, all the partners of the firm as on the date of the suit. In other words, all the partners of the firm on that date were the persons suing within the meaning of S. 69(2) and, as required by the second condition of that section, their names must be shown in the Register of Firms as partners in the firm. Admittedly, Durga Prosad Poddar was a partner of the firm on the date of the suit, but his name is not or has not been shown in the Register of Firms and, accordingly, the second condition is not fulfilled.

9. On behalf of the appellant, the following observation of the learned Single Judge of the Mysore High Court in *M.A. Hossain v. M/s., Panchamal*, AIR 1970 Mys., 299 has been relied on:

...persons suing may establish either that they are partners on the date of the suit or that they are persons whose names are shown in the register of firms as partners in the firm. As already observed, the second alternative, namely, the fact that the names of the persons suing have been shown in the register of firms as partners of the firm can be established either by producing relevant Register of firms or a certified copy of the same and not by adducing oral evidence. But there is no legal bar to prove the first alternative, namely, that the persons suing are partners of the firm by adducing evidence other than the register of firms or its certified copy.

10. It follows from the said observation that the second condition will be fulfilled if it is proved that he is a partner in the firm notwithstanding that his name does not appear in the Register of Firms.

With respect, we are unable to agree to this view as expressed by the learned Judge. Both the conditions under S. 69(2) are mandatory. In our opinion, the second condition will be fulfilled only when the names of the persons suing are or have been shown in the Register of Firms as partners in the firm. In the instant case, as the second condition of S. 69(2) has not been fulfilled, it must be held that the suit is barred by that section.

11. The next question that requires consideration relates to the notice under S. 77 of the Indian Railways Act. The appellant has placed reliance on a letter dated August 18, 19487, [Ext. 3(c)], and it is contended that the said letter constituted a notice under S. 77. Ext. 3(c) was written by Santa Singh & Company to the Claims Officer, B. N. Railway, claiming refund in respect of the short certificate for 10 bales granted by that railway. The receipt of this notice is not denied, and in the subsequent letters the Claims Officer has acknowledged the receipt of Ext. 3(c). On behalf of the respondent, however, it has been strenuously urged that Ext. 3(c) cannot be relied on by the appellant as a notice given on their behalf. Section 77 provides that a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway. It is clear from S. 77 that the notice must be in writing by the owner of the goods or on his behalf. Ext. 3(c) does not indicate on whose behalf it was sought to be given. It is, however, the case of the appellant that Santa Singh & Company was its clearing agent and, as such, it should be inferred that Ext. 3(c) was written on behalf of the appellant. In order to prove the same, the appellant examined P.W. 2 Audh Pathak who stated that Santa Singh & Company was a clearing agent. He did not, however, say that the said company was a clearing agent of the appellant. Moreover, the firm of Santa Singh & Company under which P.W. 2 served had been dissolved, and it was admitted by him that there was no paper to show that the company was a clearing agent. He could not also give any other particular. The learned Subordinate Judge has held that the appellant has failed to discharge the onus that Santa Singh & Co. was its clearing agent. According to respondent Santa Singh & Co. made a claim and its claim was satisfied. It appear from Ext. 3(c) that a sum of Rs. 1,063-15-6 was given to Santa Singh & Co. in full and final settlement of its claim in connection with the consignment in question. In these circumstances, it must be held that Ext. 3(c) cannot be held to be a notice given by Santa Singh & Co. on behalf of the appellant. Even assuming that Santa Singh & Co. was the clearing agent of the appellant, the claim preferred by him having been settled finally, the said notice spent its force and

the appellant cannot rely on the same. As there is not other notice given by the appellant under S. 77, the suit must fail on that ground. The learned Subordinate Judge was, therefore, right in holding that the plaintiff failed to prove service of any notice under S. 77 by or on its behalf. In these circumstances, it is not necessary to consider whether the appellant has been able to prove loss of goods on the defendant railway.

12. In the results, the judgment and decree of the learned Subordinate Judge are affirmed and this appeal is dismissed, but in view of the facts and circumstances of the case, there will be no order for costs.

Sharma, J

13. I agree.