

(2018) 01 BOM CK 0240

Bombay High Court (Nagpur Bench)

Case No: 7 of 2017

Rupchand son of
Tukaram Giripunje,

APPELLANT

Vs

Laxman son of Tejram
Hattimare,

RESPONDENT

Date of Decision: Jan. 8, 2018

Acts Referred:

- Code of Civil Procedure, 1908, Order 7 Rule 11, Section 115 - Revision
- Partnership Act, 1932, Section 69, Section 69(3), Section 69(2) - Effect of non-registration
- Effect of non-registration - Effect of non-registration

Hon'ble Judges: A.S. Chandurkar

Bench: Single Bench

Advocate: R. M. Pande, D. V. Mahajan

Final Decision: Dismissed

Judgement

1. This Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908 [for short, "the Code"] has been preferred by the original defendant in the suit for permanent mandatory injunction filed by the non-applicant-plaintiff.

2. It is the case of the plaintiff that he and the defendant were residents of the same village and were sharing cordial relations. In October, 2013, they decided to purchase a JCB Machine by investing an equal amount of money. Both of them contributed a sum of Rs. 1,75,000-00 each, after which on 21st October, 2013, said machine came to be purchased. Financial assistance was also obtained by both of them by availing a loan. The machine was registered in the name of the defendant. Thereafter, on 27th November, 2014, an agreement was entered into between them agreeing to share the profits and losses from the said machine equally. According to the plaintiff, he was having

a Driving License and was, therefore, operating the said machine. Though the plaintiff worked as an operator on that machine for a period of about two years, he was not paid anything by the defendant in that regard. In May, 2015, the plaintiff demanded his wages and also sought inspection of the records which was not permitted by the defendant. The plaintiff then learnt that all installments had duly paid and the defendant was intending to dispose of the said machine. On aforesaid basis, the plaintiff filed a suit for mandatory injunction that the defendant be directed to hand over the said machine for a period of two years in a proper condition to the plaintiff for operating the same. It was also prayed that the account books be produced and by appointing a Receiver for collection rent of the said machine, the same be distributed equally amongst the parties. An injunction restraining the defendant from alienating the said machine was also prayed for.

3. The defendant filed an application below Exh.12 under provisions of Order-VII, Rule 11 of the Code and it was averred that the suit was based on the agreement between the parties which constituted a partnership. As the partnership was unregistered, the suit was barred by provisions of Section 69 of the Indian Partnership Act, 1932 [for short, "the said Act"]. This application was opposed by the plaintiff and the trial Court by its order dated 10th November, 2015 rejected that application on the ground that there was no partnership between the plaintiff and the defendant. Being aggrieved, the defendant has challenged this order.

4. Shri R. M. Pande, learned counsel for the applicant, submitted that on a proper reading of the Agreement dated 28th November, 2014, it was clear that the plaintiff and defendant had agreed to purchase the JCB machine jointly. It was further agreed that the profits as well as losses were to be equally shared. The necessary ingredients of creating a partnership were duly satisfied. However, as the said agreement was not registered, the suit seeking enforcement of rights that had accrued under the agreement was not maintainable. Reference was made to the provisions of Section 69 of the said Act. Relying upon the judgment of the Honourable Supreme Court in *Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri & others* [(1987) 3 SCC 538], it was urged that there being a partnership agreement between the parties and the same not being registered, the suit was barred by provisions of Section 69 (2) of the said Act. The trial Court, without considering the material aspects of the matter, erred in rejecting the application filed by the defendant under provisions of Order-VII, Rule 11 of the Code. The suit was, therefore, liable to be dismissed.

5. Shri D. V. Mahajan, learned counsel for the plaintiff, supported the impugned order. According to him, there was no partnership between the parties. It was merely agreed that the JCB machine would be jointly purchased and would be operated by the parties jointly. The absence of registration of the Agreement dated 27th November, 2014 was of no consequence as there was no partnership in existence. Even if it was assumed that there existed a partnership, the suit as filed was not for enforcing any right under the Partnership- Deed. Referring to the averments in the plaint, it was submitted that it was

the case of the plaintiff that the defendant by conducting himself in a manner contrary to the agreement had committed misconduct and for such acts, the suit seeking appropriate relief was maintainable and not barred by provisions of Section 69 (2) of the said Act. It was submitted that the prayer for handing over the said machine to the plaintiff for its use for a period of two years was not based on the agreement dated 27th November, 2014. The prayer seeking distribution of rent from the said machine was in the nature of seeking relief of dissolution and in view of Section 69 (3) of the said Act, such relief could be sought by the plaintiff even if the partnership agreement was not registered. In support of his submissions, the learned counsel placed reliance on the decisions in [1] Mukund Balkrishna Kulkarni Vs. Kulkarni Powder Metallurgical Industries & another [(2004) 13 SCC 750], [2] Chandrayya Mutwayya Irabatti Vs. Sidram Ganpat Ingale [AIR 2006 Bom. 76], and [3] Valji Shamji Chheda & others Vs. Bhuderbhai Bajidas Patel & others [2012 (6) ALL MR 882]. It was, therefore, submitted that the trial Court did not commit any error, much less a jurisdictional one when it held the suit to be maintainable.

6. I have heard the learned counsel for the parties at length and I have given due consideration to their respective submissions.

7. Two questions fall for determination :-

[1] Whether there was a partnership between the plaintiff and defendant on the basis of Agreement dated 27th November, 2014?, and

[2] If there was a partnership agreement, whether the suit as filed was barred by Section 69 (2) of the said Act as the partnership was not registered?

8. The Agreement dated 27th November, 2014 between the parties is not in dispute. As per this agreement, the parties have stated that on 21st October, 2013, they had purchased a JCB Machine jointly. Same was to be given on rent and the returns as well as the expenses in that regard were to be borne equally. A reference was made to the contribution of amount of Rs. 1,75,000/- each by both the parties. Though the machine was registered in the name of the defendant, it was jointly owned by both of them. The machine was not to be sold without the consent of either party and further expenses were also to be borne equally.

In *Helper Girdharbhai* [supra], the Honourable Supreme Court while determining the question as to the existence of a partnership held that there must be an agreement entered into by all persons concerned, the agreement must be to share the profits of a business and the business must be carried out by all or any of the persons concerned acting for all. If these requirements were satisfied, it could be held that in law there was a

partnership between the parties. When the agreement dated 27th November, 2014 is viewed in the light of aforesaid principles, it becomes clear that all these requirements stand duly satisfied and there existed a partnership between the plaintiff and the defendant. The JCB machine was jointly purchased through equal contribution. There was an agreement to share profits equally and also to bear the expenses equally. The manner in which the business was to be carried out was also agreed. It is, therefore, held that there existed a partnership between the plaintiff and the defendant in terms of agreement dated 27th November, 2014.

9. Once it is found that there existed a partnership between the plaintiff and the defendant, the question is with regard to maintainability of the suit in absence of the partnership being registered. The defendant having sought rejection of the plaint under provisions of Order-VII, Rule 11 of the Code, it is only the plaint averments that are required to be taken into consideration at this stage for considering the bar as urged. Perusal of the plaint indicates that according to the plaintiff, it was agreed that the plaintiff would get an amount of Rs. 6,000/- per month as wages for operating the said machine. Though plaintiff worked as an operator on said machine for a period of two years, he had not received any wages. The agreement dated 27th November, 2014 is silent with regard to payment of wages of Rs. 6,000/- per month to the plaintiff. It is further pleaded that the defendant appointed another person to operate the said machine and neither were the account books nor expenses of the JCB machine shown to the plaintiff. In other words, it is the case of the plaintiff that the defendant has conducted himself in a manner contrary to the agreement dated 27th November, 2014.

10. At this stage, it would be relevant to refer to the observations of the Honourable Supreme Court in paragraph 26 of its judgment in M/s. Haldiram Bhujawala & another Vs. M/s. Anand Kumar Deepak Kumar & another [AIR 2000 SC 1287], which reads as follows:-

"26. Further Section 69 (2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could not only be a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a Motor Car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, - it is clear that the relief for possession against defendant in the suit does not arise from any contract with defendant entered into in the course of plaintiff firms' business with defendants but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a

suit would be maintainable and Section 69 (2) would not be a bar, even if the firm is unregistered on the date of suit."

From the aforesaid, it is clear that even if the source of title to the JCB machine is based on agreement dated 27th November, 2014, its reference as made in the plaint is merely to indicate a historical fact.

11. The reliefs sought by the plaintiff would indicate whether the plaintiff is seeking enforcement of a right arising from a contract. One relief sought is to hand over the said machine to the plaintiff for a period of two years for using the same. This relief cannot be said to be based on a right arising from the contract. In *Mukund Balkrishna Kulkarni* [supra], it was held by the Honourable Supreme Court that before a plaintiff can be non-suited under provisions of Section 69 (1) of the said Act, it must be shown that the suit has been filed by a person "suing as a partner in a firm" and that the suit must be to enforce a right arising from a contract. As can be seen from the nature of reliefs sought by the plaintiff, it cannot be said that the suit seeks to enforce a right arising from a contract.

Another relief sought is with regard to producing the account books, appointing a Receiver and distributing the amounts in question equally between the plaintiff and the defendant. In the aforesaid decision, it was further observed that the Hon^{ble} Supreme Court in view of the exception carved out by Section 69 (3) of the said Act, a person suing as a partner can enforce a right under the contract for dissolution of the firm and accounts. A claim for half share in the firm's assets is a necessary corollary to a prayer for dissolution and without a prayer for specified shares in the firm's assets and business, the relief that may be granted in a suit for dissolution would be ineffective. Thus, the prayer made in the plaint for appointing a Receiver and distributing the amounts in question in equal share would be maintainable and would relate to the exception under Section 69 (3) of the said Act. In *Valji Shamji Chheda & others* [supra], the aforesaid decision was relied upon and the suit therein was held to be maintainable.

12. There is another aspect of the matter. If the acts of the defendant prima facie are shown to be based on a misconduct committed by a partner, the suit for damages in that regard would not be barred by Section 69 of the said Act. This has been held in *Chandrayya* [supra]. The facts in that case indicate that a Partnership- Deed was executed between seven persons. However, one of the defendants had broken the lock put on the premises of the firm and had put his own lock. In that backdrop, the plaintiff filed a suit for recovery of certain amounts. Relying upon the judgment of the Division Bench in *Navinchandra Jethabhai & another Vs. Moolchand Sadaram Gindodiya* [AIR 1966 Bom. 111], it was held that the suit of said nature was essentially a suit for damages

for a misconduct and the same would not be barred by Section 69 of the said Act. On reading the plaint averments, it is clear that the plaintiff has based the suit on the cause of action relating to the alleged misconduct of the defendant. The plaintiff has sought relief on that basis in the suit. The suit, therefore, would be maintainable and not barred by Section 69 of the said Act.

13. Thus, from the aforesaid, it is found that though there existed a partnership between the plaintiff and the defendant, the suit as filed was not based on any contract between the parties and that relief was sought in view of the alleged misconduct committed by the defendant. Non-registration of the partnership was, therefore, not fatal to the tenability of the suit. Hence, for aforesaid reasons which are distinct from the reasons assigned by the trial Court, I find that the application under provisions of Order-VII, Rule 11 of the Code was rightly rejected. The trial Court did not commit any jurisdictional error in that regard. The Civil Revision Application, therefore, stands dismissed with no order as to costs.