

CIVIL APPEAL

Present: The Hon'ble Justice S.P. Talukdar

Judgment on: 25.03.2010

R.V.W. No.21 of 2008

IN

C.O. No.2161 of 2006

Sri Satajit Maity & Ors

Vs.

M/s. R.S.S.Bricks Works (Brand Deep) & Ors.

POINTS:

REVIEW- Review whether maintainable if the decision rendered is so monstrous, so absurd, so palpably wrong, or an error had occurred by reason of counsel's mistake or it crept in by reason of an oversight on the part of the court- It is not for the Court to consider whether it would decide the same matter had it been initially brought before it- Code of Civil Procedure, 1908 O47 R1

FACTS:

The applicant filed the present application under Order 47 Rule 1 of the Code of Civil Procedure and has sought for review of the judgment and order. The plaintiffs and defendants No.1 & 2 started their partnership business and invested equal amount as capital of the business. Taking advantage of the intimate relationship, defendant Nos. 1 & 2 committed breach of terms of the Partnership Deed by misappropriating money and not rendering its true accounts. Plaintiffs being left with no choice filed a suit with a prayer for declaration that they have half share in the partnership business as well as for other reliefs. Learned Trial Court by composite order allowed the application for injunction and directed the parties to maintain status quo in respect of the firm. In the application filed

before this Court under Article 227 of the Constitution, the defendants sought to assail the said order. It was contended that learned Trial Court was not justified in protecting the suit under Section 69 (3) (a) of the Partnership Act. On the other hand, it was submitted on behalf of the Opposite Party that there had been no jurisdictional error so as to justify any interference by this Court. This Court dismissed the application under Article 227 of the Constitution and thereby affirmed the impugned Order.

HELD:

In response to an application under Article 227 of the Constitution, the High Court exercises its power of superintendence. The Court is primarily concerned as to whether the Court, which passed an order, had the jurisdiction to do so or not. The Court is not expected to go for a detailed probe as to whether there had been any error in appropriation of fact or application of law. The order is, no doubt, a composite order since Learned Court in the said order apart from holding the case as maintainable directed the parties to maintain status quo. A party aggrieved by an order of injunction certainly could not approach this Court with an application under Article 227 of the Constitution.

Para-16

It is not for this Court to consider whether it would decide the same matter had it been initially brought before it. This is not the test for a reviewing body. It has only to consider whether the decision rendered is so monstrous, so absurd, so palpably wrong, that interference is called for.

Para-17

If an error had occurred by reason of counsel's mistake or it crept in by reason of an oversight on the part of the court, there can be no reason why an aggrieved person cannot seek redress by filing an application for review. The Court does not think that there is any justification for any change of decision. This is not to suggest that the suit under reference cannot be held to be not maintainable at any subsequent stage. But this court does not find any material to the satisfaction of its judicial conscience so as to non-suit the plaintiffs at this stage.

Para-23

CASES CITED:

Loonkaran Sethia vs. Mr. Ivan E. John & Ors., A.I.R 1977 Supreme Court 336

Mt. Jamna Kuer vs. Lal Bahadur & Ors., A.I.R (37) 1950 Federal Court 131.

The Nakagarh Dehati Co-operative Transport Society Ltd., vs. Beli Ram, A.I.R. 1981, Himachal Pradesh, 1.

Mukund Balkrishna Kulkarni vs. Kulkarni Powder Metallurgical Industries & Anr., (2004) 13 S.C.C. 750.

For the Applicant: Mr. Diptendu Majumder

Mr. Indranil Banerjee.

For the Opposite Party: Mr. Probal Mukherjee

Mr. Kajal Roy.

THE COURT:

1. The instant application is one under Order 47 Rule 1 of the Code of Civil Procedure.

2.The applicant by filing the present application has sought for review of the judgment and order dated 18th January, 2008 passed by this court in C.O. No.2161 of 2006.

3.The backdrop of the present case may briefly be stated as follows: -

4.The plaintiffs and defendants No.1 & 2 started their partnership business under the name and style of M/s. R. S. S. Bricks Works (Brand Deep). They invested equal amount as capital of the business. A Deed of Partnership was executed on 2nd November, 2004. Taking advantage of the intimate relationship, defendant Nos. 1 & 2 committed breach of terms of the Partnership Deed by misappropriating money and not rendering its true

accounts. Plaintiffs being left with no choice filed a suit with a prayer for declaration that they have half share in the partnership business as well as for other reliefs.

5. Defendant Nos. 1 & 2 by filing a written statement denied the material allegations made by the plaintiffs.

6. In response to an application under Order 39 Rule 1 & 2 read with Section 151 of the C.P. Code, defendants filed a written objection and by filing a separate application, challenged the maintainability of the suit.

7. Learned Trial Court by composite order dated 11th May, 2006 allowed the said application for injunction and directed the parties to maintain status quo in respect of the firm under the name and style of M/s. R. S. S. Bricks Works (Brand Deep) till disposal of the suit.

8. In the application filed before this court under Article 227 of the Constitution, the defendants sought to assail the said order on the ground that in view of Section 69 (1) of the Indian Partnership Act, 1932, the suit could not be held to be maintainable unless it is one for dissolution of the firm or for accounts of a dissolved firm or for realization of the property of such dissolved firm. It was contended that learned Trial Court was not justified in protecting the suit under Section 69 (3) (a) of the Partnership Act.

9. On the other hand, it was submitted on behalf of the Opposite Party herein that there had been no jurisdictional error so as to justify any interference by this court.

10. This court by judgment dated 18.01.2008 dismissed the application under Article 227 of the Constitution and thereby affirmed the impugned Order No.15 dated 11th May, 2006.

11. Mr. Majumdar appearing as learned Counsel for the applicant in respect of this review application first submitted that Section 69 of the Partnership Act, 1932 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. Referring to the decision in the case between Loonkaran Sethia vs. Mr. Ivan E. John & Ors., as reported in A.I.R 1977 Supreme Court 336, it was contended

that a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69. In course of his submission, it was mentioned that the plaintiffs did not claim to recover the outstanding amount of a dissolved firm.

12. It was also submitted that when there is an error apparent on the face of the record, whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the court, is not a circumstance, which can affect the exercise of jurisdiction of the court to review its decision. In this context, Mr. Majumdar referred to the decision in the case between Mt. Jamna Kuer vs. Lal Bahadur & Ors., as reported in A.I.R (37) 1950 Federal Court 131. In the case between The Nakagarh Dehati Co-operative Transport Society Ltd., vs. Beli Ram, as reported in A.I.R. 1981, Himachal Pradesh, page 1, the Full Bench of the Himachal Pradesh High Court held that failure of the court to take into consideration an existing decision of the Supreme Court taking a different or contrary view on a point covered by judgment would amount to a mistake or error apparent on the face of the record. But a failure to take into consideration a decision of the High Court would not amount to any mistake or error apparent on the face of the record.

13. In the case between Mukund Balkrishna Kulkarni vs. Kulkarni Powder Metallurgical Industries & Anr., as reported in (2004) 13 S.C.C. 750, the Apex Court held that the right of partner to ask the dissolution of a firm is a right the enforcement of which is otherwise forbidden under Section 69 (1). It is because of the exception under sub-section (3) of

Section 69 that a person suing as a partner can enforce a right under the contract for dissolution of the firm and accounts.

14. In response to this Mr. Probal Mukherjee as learned Counsel for the Opposite Party first submitted that the order dated 11th May, 2006 passed by the learned Trial Court is a composite order since the learned Court by the said order while holding that the suit is maintainable, also directed the parties to maintain status quo in response to an application for temporary injunction.

15. Inviting attention of the court to the prayer made in the plaint, Mr. Mukherjee contended that the plaintiffs also sought for accounts in the said plaint and there could be no reason for not seeking such reliefs even though the concerned partnership firm was an unregistered one. Mr. Mukherjee then submitted that “review” is not an “appeal”.

16. In response to an application under Article 227 of the Constitution, the High Court exercises its power of superintendence. The court is primarily concerned as to whether the court, which passed an order, had the jurisdiction to do so or not. The court is not expected to go for a detailed probe as to whether there had been any error in appropriation of fact or application of law. The order dated 11th May, 2006 is, no doubt, a composite order since learned Court in the said order apart from holding the case as maintainable directed the parties to maintain status quo. A party aggrieved by an order of injunction certainly could not approach this court with an application under Article 227 of the Constitution. And, the other part of the order that the suit is maintainable is just in response to an application filed by the defendants before the learned Trial Court challenging the maintainability. It cannot be denied that the plaintiffs in the said suit also sought for accounts.

17. It is not for this court to consider whether it would decide the same matter had it been initially brought before it. This is not the test for a reviewing body. It has only to consider

whether the decision rendered is so monstrous, so absurd, so palpably wrong, that interference is called for.

18. No doubt, Section 69 of the Partnership Act clearly lays down that 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.

19. Sub-section (2) of Section 69 reads as follows: -

“(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.”

20. Sub-section (3) of Section 69 lays down that the provision of Sub-section (1) and (2) shall also apply to a claim of set off or other proceeding to enforce a right arising from a contract, but shall not affect 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.

21. The plaintiffs in the suit sought for accounts and such prayer is required to be considered in the context of the entire averments made in the plaint. The legal status of the plaintiffs can only be effectively appreciated upon consideration of the entire averment as made in the plaint. It is nobody's case that the plaint before the learned Trial Court was liable to be returned or rejected. The exact character of the business under reference and the legal status of the parties engaged in such business can be better appreciated at a subsequent stage. Mr. Mukherjee as learned Counsel for the Opposite Party as referred to Section 34 of the Specific Performance Act while contending that there can be no reason why relief in the form of declaration cannot be sought for. He laid emphasis mainly on the prayer 'C' which, according to him, in any event cannot permit throwing of the plaintiffs out at this stage.

22. Order 47 Rule 1 of the Code of Civil Procedure relates to application for review of judgment. Here, the applicant has not sought for review after discovery of any new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced earlier. Mr. Majumdar submitted that such review can also be sought for on account of some mistake or error apparent on the face of the record or for any other sufficient reason.

23. Mr. Majumdar referring to the decision in the case of Mt. Jamna Kuer (supra) submitted that if an error had occurred by reason of counsel's mistake or it crept in by reason of an oversight on the part of the court, there can be no reason why an aggrieved person cannot seek redress by filing an application for review. There is, no doubt, force in the submission made by Mr. Majumdar in this regard. But the earlier application under Article 227 of the Constitution was dismissed and the impugned order dated 11th May, 2006 passed by the learned Trial Court was affirmed on the grounds as mentioned in the judgment dated 18th January, 2008, which has been sought to be reviewed. Even after considering the judgment now relied upon by the learned Counsel Mr. Majumdar, I do not think that there is any justification for any change of decision. This is not to suggest that the suit under reference cannot be held to be not maintainable at any subsequent stage. But this court does not find any material to the satisfaction of its judicial conscience so as to non-suit the plaintiffs at this stage. The application, being R.V.W. No.21 of 2006 stands accordingly disposed of without any manner of interference with the judgment dated 18th January, 2008.

24. No order as to costs.

25. Xerox certified copy of this judgment, if applied for, be supplied to the parties upon due compliance of the legal formalities.

(S.P.Talukdar, J.)