

ALLAHABAD HIGH COURT

Lala Ram Kumar

Vs.

Kishori Lal

(Sinha, J.)

27.09.1945

JUDGMENT

Sinha, J.

1. This is an application in revision, against an order of the learned Small Cause Court Judge of Aligarh by which he dismissed the suit brought on the basis of a bond, dated 27th October 1936, on a preliminary ground. There was a firm, Musamal Ram Kumar, consisting of two partners, Musamal and Ram Kumar. On 27th October 1936, the bond in suit was executed by one Pt. Kishori Lal in favor of the firm. Musamal died on 19th April 1941, leaving a widow, Mt. Ansuiya Devi, and an adopted son, Jaggomal. The adoption is disputed and we might leave it at that. A suit - Suit No. 65 of 1942 - was instituted with an allegation of payment of L 4 on 18th September 1939, in order to obviate the bar of limitation. On an objection that it was barred by Section 69, Partnership Act, Act 9 [IX] of 1932, the suit was withdrawn on 17th August 1942, with liberty to file a fresh suit and the suit, which has given rise to the present application in revision, was instituted on 18th September 1942. Various pleas were raised in defence but before we deal with them, we might mention the frame of the earlier suit, which will have considerable bearing upon the fate of the present suit.

2. The plaintiff purported to bring it on behalf of the firm, Musamal Ram Kumar, with an allegation that, on the death of Musamal, half of the assets belonged to him and the remaining half to the widow and the adopted son, inasmuch as they were admitted as partners and the firm continued. It was pleaded in defence that the firm was a registered firm and the death of Musamal brought about its dissolution under Section 42 of the Act and, as the new firm was not registered, Section 69 operated as a bar to the suit. It was in these circumstances that the Court allowed the earlier suit to be withdrawn and granted liberty to bring another suit. The present suit was instituted by Ram Kumar in his personal capacity with an allegation that the death of Musamal, on 19th April 1941, brought about a dissolution of the firm and his widow and the adopted son were being impleaded as defendants 2 and 3. The execution of the bond was admitted, but the bars of limitation and of Sections 69 and 72, (sic Section 42), Partnership Act,

were pleaded. Consideration was also denied. It was also pleaded that the deceased Musamal died leaving daughters who Ought to have been impleaded as party and the suit was, there, fore, bad for nonjoinder. Certain other minor pleas were raised which need not detain us. The learned Small Cause Court Judge held that the absence of the daughters from the array of parties in the presence of their mother, did not cause any non-joinder. He held that the suit was not barred by Section 72, (sic Section 42), Partnership Act, but Section 69 did constitute a bar and dismissed the suit on this preliminary ground. The only question which calls for an answer is whether the suit is barred by Section 69(2), Partnership Act. Section 69(2) is in these terms:

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.

The learned Counsel for the appellant contends that the frame of the suit does not attract the application of this provision of law, inasmuch as it has not been brought "by or on behalf of a firm" and relies upon the following quotation from Lindley on Partnership, at p. 350 (Edn. 10):

One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as principal, and not on behalf of himself and others.

and on *Goverdhandoss Takersey v. Abdul Rahiman*¹, There are certain observations supporting him but we do not think the decision goes the whole length with the plaintiff. The facts of this case were briefly these:

3. On 9th November 1936, defendant 1, who held a general power-of-attorney from defendant 2, agreed to sell to defendant 3, as an agent of the plaintiff, thirty tons of sandal wood on certain conditions. A sum of L 8700 was paid to him in advance by defendant 3 on behalf of the plaintiff. The plaintiff, on being apprised of this contract, refused to accept the terms and directed defendant 3 to cancel the agreement. On 16th February 1988, the plaintiff, Goverdhandoss Takersey, brought a suit for refund of the amount on the allegation that the validity of the contract depended upon his consent, which he never gave. One of the pleas in defense, as the case crystallized before the High Court, was that the contract was on behalf of the firm Goverdhandoss Takersey and, as it was not a registered firm, the suit was barred by Section 69(2), Partnership Act. At page 637, the learned Judges do say:

The provisions of Section 69(2), Partnership Act, could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, ex facie it purports to be-filed either by or on behalf of the firm or even, as urged by Mr. Sitarama Rao, in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit that he has received out of that suit to

the firm of which he is a partner eventually.

4. But at p. 638 they make it clear the particular contract was not entered into by defendant 3 as an agent of the firm Goverdhandoss Takersey but on behalf of the individual. Say they:

1 AIR 1942 Mad 634 : (1942) ILR Mad 775 : (1942) 2 MLJ 636 : 1942-55-LW 446

It is true that the agreement, Ex. J, does not clearly state that defendant 3 was acting on behalf of the individual Goverdandoss Takersey and not on behalf of the firm carrying on business in that name but on going through the various letters that were exchanged between the various parties to the suit (Exs. F-14, V, K, L and L-1) there is no doubt left in our minds that defendant 3 had entered into the contract, Ex. J, as an agent and on behalf of the individual Goverdandoss Takersey and not the firm of that name.

It is, therefore, obvious that this case is no authority for the question of law which awaits decision in this case. The case, how-ever, may be approached from another point of view and from that point of view the claim appears to be unanswerable. It has been found by the learned Small Cause Court Judge that the firm Musamal Ram Kumar was a registered firm. Section 42 of the Act says:

Subject to contract between the partners a firm is dissolved : (a) if constituted for a fixed term, by the expiry of that term; (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof; (c) by the death of a partner; and (d) by the adjudication of a partner as an insolvent.

This case is governed by Clause (e), i.e., the death of a partner. The question is : did the death of Musamal necessarily cause a dissolution? The key to the solution of the problem is furnished by the controlling clause : "Subject to contract between the partners a firm is dissolved." How is that contract to be ascertained? Does the law require an express contract; does it allow a contract by implication or, in other words, a contract to be deduced from the conduct of the parties? While considering the relevant provision of Section 253(10), Contract Act, which was the corresponding provision of law before the present Act, it was held by Subrahmania Ayyar and Boddam JJ. in *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*² that "A fresh contract to continue the business could be inferred from the conduct of the parties." To the same effect are *Gokul Krishna Das v. Sashimukhi Dasi*³ *Raghumull v. Luchmondas*⁴ and *Haramohan Poddar v. Sudarson Poddar*⁵, It might also be mentioned that *Raghumull v. Luchmondas*⁶ was subsequently affirmed by their Lordships of the Privy Council. It is contended that the intention or the conduct must be that of the original contracting parties and, as there is nothing on the record to indicate that intention or contract, this plea is not available to the plaintiff. In *Gokul Krishna Das v. Sashimukhi Dasi*⁷ Sir Asutosh Mookerji has distinctly said that the subsequent conduct, after the death of one of the partners, can be evidence of the intention of the original contracting parties. Says he at page 300:

There is no direct evidence to show what was the contract between the parties in this respect at the inception of the partnership; but the Subordinate Judge has held - and his view does not appear to have been contested before the District Judge - that the conduct of the parties since 1887 shews that there must have been a contract between the original parties that the partnership would not be dissolved by the death of any partner. There is no room for the theory that after the death of the husband of the plaintiff a new partnership was constituted between herself and the surviving partners. The true view is that the original partnership was continued

²(05) 28 Mad. 344 ⁴(17) A.I.R. 1917 Cal. 52 ⁶(17) A.I.R. 1917 Cal. 52

³(12) 13 I.C. 23 ⁵ AIR 1921 Cal 538: 66 Ind. Cas. 811 at p. 849

⁷(12) 13 I.C. 23

by common consent with this difference that the plaintiff replaced her husband and this condition of things can be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners.

To the same effect is the decision in *Punjab and Sind Bank, Ltd. v. Kishen Singh Gulab Singh*⁸ Bhide J., who delivered the judgment, clearly says at p. 352:

It appears that Uttam Singh had died before the mortgage of 1925, but it does not necessarily follow that the firm was dissolved. The dissolution of a firm, in such a contingency is subject to contract between the parties (vide Section 42, Partnership Act), and an intention to continue the business in partnership with legal representative may be gathered from the conduct of the parties.

5. The conduct of the parties may be of the parties, subsequent to the death of Uttam Singh. We have, therefore, to consider what was the conduct of the parties. The earlier suit was brought on the allegation that, after the death of Musamal, his heirs were his widow and his adopted son and that they were, as the surviving members of his family, partners in the old partnership. Indeed, there was, according to Ex. A-2, a statement of the plaintiff's counsel to this effect in the earlier suit. It has also come in evidence that the mother and the adopted son applied for registration of their new firm with Ram Kumar and themselves as partners, but still retaining the name of the old firm, although that application was returned to them by reason of some technical mistakes. It is, however, a clear evidence of the common intention of all the parties to continue the old firm with Ram Kumar and the surviving members of Musamal's family as partners. We, therefore, find that there is abundant evidence on the record as reflecting the original intention of the founders of the partnership. This, it might be mentioned, is the normal feature of a partnership in this country. In *Anant Ram v. Channu Lal*⁹ the learned Judges say:

This, for instance, was done in the case of the appellant Anant Bam on the death of his father Lalman, and also in the case of Lalman on the death of his father Lachman Das. The members of the firm apparently did not act on the rule by which a trading firm is dissolved by the death of one partner. They simply by consent admitted a son of the deceased partner in the room of the latter, and went on as before with the business.

They also accept the principle that, from the subsequent conduct, after the death of a partner, of the surviving partners and of the heirs of the deceased, the intention of the founders may be deduced. Say they:

From this action we gather that this was in accordance with the agreement entered into when the partnership was started.

⁸(35) AIR 1935Lah 350

⁹(03) 25 All 378

Indeed, such a course is not only compatible with law, but is alone compatible with ordinary business requirements. In *Mt. Basanti Bibi v. Babu Lal Poddar*¹⁰ which was a case of a partnership consisting of one family and a number of strangers, the daughter of one of the members of that family claimed a share in the estate of her father. It was pleaded that the claim was 'barred by limitation as the death of the father, which took place many many years ago, had the effect of dissolving the partnership. The learned Judges rejected this argument and observed at p. 1519:

Now if in the case of this factory business the death of every one of the 30 partners was to ipso facto dissolve the partnership, a great deal of practical inconvenience would result. The business has been going on for a very long time, and there is no evidence whatever on the record that the business has been treated as dissolved on each of the occasions on which one of the 30 owners died. We consider, therefore, that in the present case there must be presumed to be an implied contract to the effect that the death of one of the partners of this factory will not dissolve the partnership business.

6. We are, therefore, of opinion that the conduct of the parties establishes that there was a "contract" within the meaning of Section 42, that the death of a partner need not necessarily cause a dissolution of the partnership and that the old partnership still continues. If there was, on the death of Musamal, an application for registration, it was something which was not legally necessary, but it, at any rate, evidences a desire on the part of every one concerned that the old partnership was to continue, inasmuch as the style of the firm was to be the same, viz., Musamal Ram Kumar.

7. The case might be considered from yet another point of view. Section 69(3)(a) speaks of the enforcement of "any right or power to realise the property of a dissolved firm." It also makes it clear that the bars created by Clauses (1) and (2) will not affect the right recognised by this

clause. Assuming that the old partnership was dissolved, there was nothing to prevent the plaintiff either himself or along with the surviving members of the family of Musamal to realise the property by bringing a suit on the bond. Section 69(3)(b) recognises the powers of an official assignee, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner, without any hindrance created by Sub-sections (1) and (2). If it is permissible to the Receiver to realise the property of an insolvent partner, there is no reason to deny that right to some one else. This interpretation of the Act receives support from *Bhagwani Morarji Goculdas v. Alembic Chemical Works Co. Ltd¹¹*, The learned Judge has made this point clear at p. 386:

Under Section 69, Sub-section (3), Sub-clause (b), Partnership Act, the power of the Official Assignee to realise the property of an insolvent partner is not affected by the prohibitions contained in Sub-sections (1) and (2). Section 52, Presidency Towns Insolvency Act, 1908, describes the property of the insolvent which is divisible amongst his creditors, and among this property is the right to sue for damages for breach of contract which becomes vested in the Official Assignee on the adjudication of an insolvent. Therefore, under Section 69, Sub-section (3),

¹⁰(31) A.I.R. 1931 All. 328

¹¹ AIR 1943 Bom 385 : AIR 31 1944 Bom 205 : (1944) 14 Comp Cas 175 (Bom) : (1944) 46 BOM LR 265

Sub-clause (b), the Official Assignee can sue for damages for breach of contract on behalf of an insolvent partner of a firm although that firm has not been registered. If the right of the Official Assignee to sue for damages for breach of contract can be considered as a suit to realise the property of an insolvent partner, I fail to understand why a suit by the partners of a dissolved firm of the same nature cannot be considered a suit to realise the property of a dissolved firm. It would be contrary to the well known canons of construction to give to the word 'property' one meaning in Sub-clause (b) of Sub-section (3) of Section 69 and a different meaning to the same word in Sub-clause (a) of Sub-section (3). In any case if damages are realised for a breach of contract, these damages would undoubtedly become partnership property, and the whole scheme of Sub-clause (a) of Sub-section (3) which I am considering is to enable partners of a dissolved partnership to realise all the assets of the dissolved firm.

8. We hold that the suit is not barred by Section 69(2), Partnership Act. We, therefore, allow this application in revision and set aside the order of the Court below, but as it has been disposed of on a preliminary point, we send the case back to that Court with the direction to re-admit it to its original number and dispose it of according to law, Costs here and hitherto will abide the event.