Thawariya vs Firm Rajesh Kumar Heera Lal on 8/1/2007

JUDGMENT

Harbans Lal, J.

1. This civil second appeal under Section 100 of the Code of Civil Procedure has been preferred against the judgment and decree dated 19.7.1989 passed by the learned Addl. District & Sessions Judge, Kishangarhbas (Alwar) whereby the appeal No. 25/1987 has been dismissed up-holding the judgment and decree dated 24.2.1987 of the learned Civil Judge, Kishangarhbas in Civil Original Suit No. 73/1985 vide which the suit of the plaintiff-respondent has been decreed.

2. Briefly stated, the relevant facts are that the plaintiff- respondent filed a civil original suit in the aforesaid court on 12.1.1981 inter-alia pleading that the plaintiff firm is a registered partnership firm under the Indian Partnership act, 1932 (in short 'the Act') and it has three partners namely Hazari Lal, Babu Lal and Smt. Shanti Devi. It carries on business of commission agent in Khairthal town. The defendant appellant took a loan of Rs. 4.500/- from the plaintiff-firm on 20.2.1978, but neither repaid the said loan nor brought 'gwar' and other grains at the shop of the plaintiff-respondent firm for sale. He was given notice, but he neither gave any reply to the notice nor repaid the aforesaid loan amount. So, the suit out of which this appeal has arisen was filed. The defendant appellant contested the suit denying all the averments made in the plaint and claiming Rs. l,000/- as special costs, the trial court framed five issues including the issue No. 2 pertaining to the registration of the plaintiff firm under the Act. The trial Court after taking evidence of both the parties and affording opportunity of hearing, decreed the suit. The appeal preferred from the said judgment and decree was dismissed as indicated above. Hence, the instant second appeal which was admitted on 26.3.1991 on the following substantial questions of law.

1. Whether the suit filed by the respondent-plaintiff firm could be decreed without the finding that the respondent firm was registered on the date of filing of the suit and the partner through whom the suit was filed was one of its registered partners?

2. Whether the above said question cannot be raised by the respondent when he had not taken this objection before the courts below?

3. I have heard learned Counsel for the parties and have perused the judgment and decree of the trial court as well as that of the first appellate Court. I have also perused the record.

4. Learned Counsel for the appellant has contended that the plaintiff firm being not registered under the Act and its members having not been shown as entered in the register of firms, the suit was barred by the provisions of Section 69(2) of the Act. Reliance has been placed on Jammu Cold Storage and General Mills Ltd. v. Khairati Lal and Sons AIR 1960 Jammu & Kashmir 101 (FB) and Shreeram Finance Corporation v. Yasin Khan and Ors. . It is also submitted that the

subsequent registration of the plaintiff firm cannot cure the defect.

5. Learned Counsel for the defendant-respondent has contended that the plea with regard to the non-registration of the plaintiff-firm has not been specifically raised in the written statement and before the learned courts below. It is a mixed question of fact and law. Unless this question is enquired into and decided the provisions of Section 69(2) of the Act cannot be invoked by any party to the suit in the second appeal. Reliance in this regard has been placed on Kalyan Sahai v. Firm Lachhinarain Shambhulal LIR (38) 1951 Rajasthan 11, M.J. Velu Mudaliar and Anr. v. Sri Venkateswara Finance Corp. and Ors. AIR

1972 Andhra Pradesh 63, Samyuktha Cotton Trading Co. v. Bheemineni Venkata Subbaiah and Ors. , N.A. Muunavar Hussain Sahib and Anr. v. E.R. Narayanan and Ors. , Popsingh Mahadeo Prasad v. Dipchand Ray and Anr. and Raptakos Brett & Co. Ltd. v. Ganesh Property .

6. I have carefully considered the rival submissions. Section 69(2) of the Act which deals with the effect of non-registration of the firm reads as under:

69(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.

7. It has been held in Jammu Cold Storage and General Mills Ltd. v. Khairati Lal and Sons (supra) the provisions of Sub-section (2) of Section 69 of the Act are mandatory. The registration of the firm is a condition precedent to the right to institute the suit. If on the date of institution of the suit the firm is not registered, the subsequent registration cannot validate the suit. The only option left to the court is to dismiss it.

8. In Shreeram Finance Corporation v. Yasin Khan and Ors. (supra), the plaintiff-firm was registered and its members were also shown entered in the register of firms, but there was change in the Constitution of the firm. Two of the partners shows as partners in the register of firms retired and one new partner was added. Two minors were admitted to the benefit of the firm. It was held by the Hon'ble Apex Court that the suit filed by the firm after change in the constitution and before change was notified to the registrar was not maintainable as the current partners were not shown in the register of the firms on the date of the suit.

9. In the instant case, the plea with regard to registration of the firm was denied in the written statement and an issue being Issue No. 2 was also framed with regard thereto and the same was decided in favour of the plaintiff. The learned court below did not discuss this issue at all. This appeal has been admitted on the substantial question of law pertaining to this aspect of the matter.

10. Learned Counsel for the respondent has contended that the objection with regard to the non-registration of the partnership firm is a mixed question of law and unless this question is raised, enquired into and decided, the provisions of Sub-section (2) of Section 69 of the Act cannot be invoked by any party to the suit in second appeal. Reliance has been placed on Kalyan Sahai v. Firm Lachhminarain Shambhulal (supra) and Popsingh Mahadeo Prasad v. Dipchand Ray and Anr. (supra). It is also contended on the basis of M.J. Velu Mudaliar and Anr. v. Sri Venkateswara Finance Corporation and Ors. (supra) that where the objection as to non-compliance of Section 69(2) of the Act was taken but not pressed, it was held that the suit was maintainable. It is submitted that in the instant case, this objection has not been pressed before the learned Court below and, therefore, it cannot be said that the suit is not maintainable in view of the provisions of Sub-section (2) of Section 69 of the Act. Learned Counsel has then referred to the case of Samyutha Cotton Trading Co. v. Bheemineni Benkata Subbaiah and Ors. (supra) wherein it has been held that subsequent registration while suit is pending would cure the defect and the bar on institution of the suit provided under Section 69(2) of the Act would not apply.

11. Learned Counsel for the respondent has then contended that in view of the observations made in the case of Raptakos Brett @ Co. Ltd. v. Ganesh Property (supra), the law laid down in the case of Shreeram Finance Corporation v. Yasin Khan and Ors. (supra) is not good law and cannot be relied upon. But in the instant case, after referred to the rival contentions made at the bar, their lordships of the Apex Court have observed as under:

All these considerations in an appropriate case may require a relook at the decision of the two−Member Bench of this Court in Shreeram Finance (supra). However, as we have noted earlier, on the facts of the present case, it is not necessary for us to express any final opinion on this question or to direct reference to a larger Bench for reconsidering the aforesaid decision. With these observations, we bring down the curtains on this controversy. Point 2, therefore, is answered by observing that if is not necessary on the facts of the present case in the light of our decision on the first point to decide this point one way or the other. Point 2 is, therefore, left undecided as not surviving for consideration.

As a result of the aforesaid discussion, it is held that the suit as filed by the respondent was partly barred under Section 69 Sub−section (2) of the Partnership Act but was partly not barred and consequently the decree passed by the trial Court as confirmed by the High Court is held to have remained well sustained and calls for no interference in the present appeal.

12. In view of the aforesaid observations of the Hon'ble Supreme Court, it cannot be said that the judgment in the case of Shreeram Finance (supra) is not good law and has been over−ruled. The law laid down by the Apex Court in the afore−mentioned case of Shreeram Finance (supra) holds goods and is binding until it is reviewed and over−ruled. The contention of the learned Counsel, therefore, is untenable and unacceptable that the suit in question is not barred by the provisions of Sub−section (2) of Section 69 of the Act.

13. As indicated above, the question with regard to non− registration of the firm under the Act on the date of the suit has been duly raised, enquired into and decided. So, the objection of the learned Counsel that this objection cannot be raised in second appeal does not survive. The suit out of which this appeal arises was filed on 12.1.1981. It is an admitted fact that the plaintiff− respondent firm was a partner−ship firm and was not registered under the Act on the date of the suit. The firm was registered on 28.1.1981 and the names of its partners were shown to be entered in the register of the firms on the same day i.e. 28.1.1981 after filing of the suit. Therefore, as held by the Apex Court in the aforesaid mentioned case of Shreeram Finance (supra), the subsequent registration of the firm does not cure the defect. The suit is clearly not maintainable in view of the bar under Sub−section (2) of Section 69 of the Act. Both the substantial questions of law framed in this case deserve to be decided in favour of the appellant. The concurrent finding of the learned courts below is based on misreading of the documentary evidence on record and is clearly against the law laid down by the Apex Court. So, the same is unsustainable and deserves to be set aside.

14. Consequently, this appeal is allowed and the judgment and decree dated 19.7.1989 passed by the learned Addl. District & Sessions Judge, Kishangarhbas (Al−war) in Civil Appeal No. 25/1987 and the judgment and decree dated 24.2.1987 of the learned Civil Judge, Kishangarhbas (Alwar) in Civil Original Suit No. 73/1985 are set−aside and the suit of the plaintiff−respondent is dismissed as not maintainable. However, the parties shall bear their own costs of this appeal.