



IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

C.R.P.No.2208 of 2019

Between:

Dasari Sambasiva Rao, S/o.Venkata Rattaiah

... PETITIONER

AND

M/s. Sri Srinivasa Service Station,
Rep.by its Managing Partner
Dammalapati Srinivas and two others

... RESPONDENTS

DATE OF ORDER PRONOUNCED: 22.01.2021

SUBMITTED FOR APPROVAL

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

1. Whether Reporters of Local Newspapers
may be allowed to see the order? Yes/No
2. Whether the copy of order may be
marked to Law Reporters/Journals? Yes/No
3. Whether His Lordship wish to see the
fair copy of the order? Yes/No

M.VENKATA RAMANA, J



***IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

***HONOURABLE SRI JUSTICE M. VENKATA RAMANA**

+ C.R.P.No.2208 of 2019

% Dated : 22.01.2021

Between:

Dasari Sambasiva Rao

... PETITIONER

AND

\$ M/s. Sri Srinivasa Service Station, rep.by its Managing Partner
Dammalapati Srinivas and two others

... RESPONDENTS

! Counsel for petitioner : Mr. M.Chalapati Rao

^Counsel for Respondents : None appeared

<GIST :

>HEAD NOTE:

? Cases referred:

1. 2018(1) ALT 684
2. AIR 2003 AP 418
3. 1994(6) SCC 322
4. 1985 AIR 1096
5. AIR 1976 CAL 1471
6. AIR 11942 MAD.252
7. AIR 1945 MAD.146

M.VENKATA RAMANA, J



HON'BLE SRI JUSTICE M. VENKATA RAMANA

C.R.P.No.2208 of 2019

ORDER:

This Civil Revision Petition is directed against order in E.A.No.121 of 2018 in E.P.No.82 of 2006 in O.S.No.693 of 2004 on the file of the Court of learned II Additional Senior Civil Judge, Vijayawada.

2. The petitioner is first J.Dr. The first respondent is the D.Hr. and the respondents 2 and 3, who are no more, were J.Drs.2 and 3.

3. The first respondent instituted the suit against the petitioner and respondents 2 and 3 as a partnership firm, represented by it's partner Sri Dammalapati Srinivas, on the foot of two promissory notes, in all for Rs.2,66,672/-. The suit was decreed on 03.03.2006 basing on the material produced by the first respondent and also for the reason that the petitioner did not choose to participate during the trial. Thus, it remained an *ex parte* decree.

4. In execution of this decree, the first respondent instituted E.P.No.82 of 2006 for realisation of decretal amount. The mode of execution sought was by attachment and sale of immovable property. The petitioner also contested this execution petition and his objections were overruled. His son Sri Bhanu Mahesh filed a claim petition in E.A.No.262 of 2011 under Order XXI Rule 58 CPC read with Section 151 CPC. It was dismissed on contest by the executing Court and thereafter the execution petition was posted for sale of the property to 06.08.2018.

5. The execution petition was dismissed for default since sale papers were not filed on 23.10.2017. Therefore, the first respondent filed E.A.No.46 of 2018 for restoration of the same and it was allowed by an order of the executing Court dated 06.06.2018, rejecting the objections



raised on behalf of the petitioner. It appears that objection in terms of Section 69(2) of Indian Partnership Act as to maintainability of the suit and thus questioning the decree was raised as one of the objections while opposing E.A.No.46 of 2018.

6. Against the order in E.A.No.46 of 2018, the petitioner presented C.R.P.No.3754 of 2018 on the file of the then High Court of Andhra Pradesh, at Hyderabad. In respect of nature of such objection, the observations in the above C.R.P. in the order dated 06.07.2018 are as under:

“The learned counsel for the revision petitioner contended that the decree itself was a nullity on account of unregistered partnership firm filing the suit. But this is a question that the petitioner should have either raised before the trial Court or should at least raise in the execution proceedings. This cannot be raised in an application for restoration of the E.P. Therefore, leaving it open to the petitioner to raise all objections available to him under law within a week from the date of receipt of a copy of the order, this Civil Revision Petition is dismissed. No costs.”

7. On the strength of these observations, the petitioner filed E.A.No.121 of 2018 purportedly under Section 47 CPC read with Section 151 CPC to declare that the decree dated 03.03.2006 passed in the suit O.S.No.693 of 2004 is null and void.

8. The main contention of the petitioner in the above petition was basing on the status of the first respondent as an unregistered partnership firm, which cannot enforce any liability against a third party in terms of Section 69(2) of Indian Partnership Act. The main ground thus urged was that the first respondent was not registered under Section 59 of Indian Partnership Act and that Sri Dammalapati Srinivas,



being its managing partner. Another objection raised was that the property mentioned in the schedule of the execution petition did not stand in the name of the petitioner and that it belonged to his son Sri Bhanu Mahesh.

9. Thus, validity and executability of the decree were questioned in terms of Section 47 CPC.

10. The first respondent resisted the above petition mainly contending that institution of the suit by it as an unregistered partnership firm and bar under Section 69(2) of Indian Partnership Act were never urged either in the suit or in the execution petition or in claim application filed by the son of the petitioner in E.A.No.262 of 2011. Therefore, the first respondent contended that it is not open for the petitioner to raise the same for the first time by means of this petition. He also contended that an application in terms of Section 47 CPC is not maintainable in the circumstances and such petition was filed only to harass him by vexatious means. He also disputed the claim of the petitioner that this property against which execution proceedings have been levied did not belong to him and that it belonged to his son.

11. In the executing Court, the petitioner examined himself as P.W.1 and relied on Ex.A1 to Ex.A4, in support of his contention. No evidence was let-in on behalf of the first respondent.

12. On the material, the executing Court held that a bar in terms of Section 69(2) of Indian Partnership Act, is not applicable to the present case on the premise that the suit was instituted basing on two promissory notes, which are covered by Sections 30 and 37 of Negotiable Instruments Act. It was further observed that the bar set out by the petitioner is applicable only in case of enforcement of terms of contract



and not with reference to the claim based on the promissory notes, viz. the negotiable instruments.

13. Sri M.Chalapati Rao, learned counsel for the petitioner strenuously contended that the executing Court lost sight of the fact that a negotiable instrument is nothing but reflection of the contract entered into between the parties and the observations of the executing Court in this context are not only surprising but also strange. Contending that very initiation of the proceedings by nature of the suit against the petitioner by the first respondent is impermissible, since the suit as such could not have been presented in terms of Order XXX Rule 1 CPC when the first respondent is not a registered partnership firm on account of bar under Section 69(2) of Indian Partnership Act, the decree is stated being a nullity, which could not be put in, in execution against the petitioner. It is further contended that such decree being nullity and *void ab initio*, absence of an objection on this score at earlier stages of the litigation is not a bar by itself, since in terms it relates to executability of the decree itself. Thus, learned counsel justified the action of the petitioner in filing a petition under Section 47 CPC questioning the decree and sought to set aside the order of the executing Court impugned in this matter.

14. The first respondent though served notice in this revision petition, did not choose to enter appearance through an advocate. Therefore, the matter is required to be decided basing on the material available.

15. Now, the point for determination is, “Whether the decree in question being null and void against the petitioner, cannot be executed and if it is amenable to consider under Section 47 CPC?”



16. The first respondent instituted the suit as a partnership firm represented by its managing partner Sri Dammalapati Srinivas against the petitioner and the respondents 2 and 3. It should be in terms of Order XXX Rule 1 CPC. It reads as under:

“1. Suing of partners in name of firm:-

(1) Any two or more persons, claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule(1), it shall, in the case of any pleading or other document required by or under this code to be signed, verified or certified by the plaintiff or the defendant suffice if such pleading or other document is signed, verified by any one of such person.”

17. The cause of action to lay the suit as seen from the decree arose on 01.02.2002 when the petitioner executed two promissory notes in favour of the first respondent and also when a legal notice was issued on 13.11.2003 to him at Vijayawada. Therefore, for the purpose of filing the suit, in terms of Order XXX Rule 1 CPC on the date when the cause of action arose, it should be proved that the first respondent being a partnership firm had partners including Sri Dammalapati Srinivas.

18. In terms of Section 59 of the Indian Partnership Act, a partnership firm is required to be registered and in such process, it shall be entered in a register called ‘the Register of Firms’ by the Registrar of Firms.



A statement in respect thereof, which shall be in terms of Section 58 of Indian Partnership Act including furnishing names and addresses of the partners, shall be filed before the Registrar of Firms.

19. For the present purpose, Section 69 of Indian Partnership Act, which refers to effect of non-registration, is relevant. In as much as the petitioner is a third party to this firm, it is appropriate to consider effect of Section 69(2) of Indian Partnership Act. It reads as under:

“69. Effect of non-registration:(1).....

(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. Therefore, no suit to enforce against a third party on behalf of a firm, shall be instituted unless it is registered and through the partners, who are shown in the Register of Firms in such capacity.

21. When effect of Section 69(2) of Indian Partnership Act is read in conjunction with Order XXX Rule 1 CPC, it leads no matter of doubt that on the date when the cause of action for institution of the suit arises, in order to enforce a liability against a third party on behalf of a firm, the suit sought to be instituted, should necessarily meet the requirements in terms of Section 59 and Section 69(2) of Indian Partnership Act.

22. Admittedly, the first respondent was not a registered partnership firm meeting above requirements on the date when the suit was instituted, viz., on 14.06.2004 (date of presentation of the plaint).



23. The executing Court did consider the fact that the first respondent firm was not registered in terms of Section 69(2) of Indian Partnership Act.

24. However, the executing Court took into consideration absence of defence from the petitioner in terms thereof either in the suit proceedings or at the initial stages in the execution proceedings including in the claim petition filed by the son of the petitioner. Thus, the resistance of the first respondent as set out in the counter and in the enquiry before it weighed with the executing Court.

25. In as much as very institution of the suit by an unregistered firm suffers bar on account of infraction of Section 69(2) of Indian Partnership Act, which in terms should be the requirement to institute a suit by a partnership firm following Order XXX Rule 1 CPC, any inaction or absence of defence in that respect cannot be a measure to make the decree passed, acceptable or valid. The question relating to this bar in failing to follow the mandatory provision of the statute, which clearly bars right to enforce the claims by a un-registered partnership firm against third parties, a decree so passed remains a nullity and is void.

26. In this context, Sri M.Chalapathi Rao, learned counsel while referring to this situation rightly relied on **NEW INDIA ASSURANCE CO.LTD. REP.BY ITS DIVISIONAL MANAGER, TADEPALLIGUDEM v. M/S. VARSHA AQUA FARM, SARVASIDDI, VISAKHAPATNAM, REP.BY ITS MANAGING PARTNER¹**. One of the learned Judges of this Court in this context observed that a suit is not maintainable which was filed by an unregistered firm, to enforce a right arising from a contract. The facts in the above case mostly considered, the effect of registration of a firm

¹ 2018(1) ALT 684



pendente lite, and yet, the observations concerning application of Section 69(2) of Indian Partnership Act, are relevant.

27. Before the executing Court, on behalf of the petitioner the judgment of Division Bench of the then High Court of Andhra Pradesh at Hyderabad in **ANDHRA PRADESH CO-OPERATIVE WOOL SPINNING MILLS LTD. AND OTHERS v. G. MAHANANDI AND COMPANY WOOL LTD.**² was relied on. In this ruling, effect of a decree passed in favour of an unregistered partnership firm, was considered in an appeal under Section 96 CPC though no such defence in terms of Section 69(2) of Indian Partnership Act was raised in the trial Court. In para 12 of this ruling, it is observed in this context as under:

12.....

“The defence that a suit by a firm which is not established to be a registered firm is not maintainable-in our view is not defence based on facts on which the party relies upon the existence or otherwise of a jurisdictional facts. Assuming for the sake of argument the appellants herein took such a plea; they could not have established the fact that the first respondent firm is an unregistered firm as it is a negative fact. It is only the plaintiff who can plead and prove that the firm is a registered firm if at all it is; in our view the burden to plead and prove that the plaintiff is a registered firm and therefore is entitled to maintain the suit against a third party is always on the firm in view of the legislative mandate under [Section 69\(2\)](#) of the Indian Partnership Act - otherwise the cause of action for such a suit is not complete. The Supreme Court in [Bloom Dekor Limited v. Subhash Himat Lal Desai](#)³, held as follows:

² AIR 2003 AP 418

³ 1994 (6) SCC 322,



"By "cause of action" it meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit..."

28. Further, in para-13 of the same ruling, it is observed to the effect that the question relating to registration of a partnership firm is a jurisdictional fact and becomes a part of cause of action. The relevant observations in this para-13 are extracted hereunder:

"13. In the context of a suit by a partnership firm the fact that the partnership firm is a registered firm and therefore entitled to maintain a suit against a third party becomes a jurisdictional fact and becomes part of the cause of action in the absence of any pleading or proof in that regard that cause of action is incomplete. In our view the suit must fail on that count. The Supreme Court in [Jaswant Singh v. Custodian of Evacuee Property, New Delhi](#)⁴, held as follows:

"...A cause of action for a proceeding has no relation whatever to the defence which may be set up nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be to the cause of action or in other words to the media upon which the plaintiff or the applicant asks the Courts to arrive at a conclusion in his favour....."

29. Observations in **SUNDERLAL AND SONS v. Y.N. SINGH**⁵, of justice Sabhyasachi Mukherjee (as his lordship then was) are extracted in this context in para-6 of this decision and it is desirable to reproduce them hereunder:

⁴ 1985 AIR 1096

⁵ AIR 1976 CAL 1471



"In this case the decree has been passed. If the decree is a nullity then of course this point can be taken. But the question is whether a decree passed without this point having been taken is nullity or not. In view of the language of the section, in my opinion, a plaint filed by an unregistered firm would not be a plaint at all. If that be so, all proceedings thereunder will be proceedings without jurisdiction. Support for this proposition can be had from the observations of the Division Bench of Madras High Court in the case of [K.K.A. Ponnuchami Gounder v. Mathusami Gounder](#)⁶. Similar view was taken in the case of [A.T. Ponnappa Chettiar v. Podappa Chettiar](#)⁷, [Shriram Sardarmal Diwani v. Gourishankar](#), Firm Laduram Sagarmal v. Jamuna Prosad Chaudhuri, AIR 1939 Pat. 239 and [Dwijendra Nath Singh v. Govinda Chandra](#). This contention, in my opinion, can also be taken at this stage. Reliance in this connection may be placed on the observations of the Judicial Committee in the case of [Surajmall Nagoremull v. Triton Insurance Co., Ltd](#), 52 Ind App 126 - (AIR 1925 PC 83) and in the case of [Gopinath Motilal v. Ramdas](#), AIR 1936 Cal. 133. In the aforesaid view of the matter I am of the opinion that the firm not being registered the decree was a nullity and as such cannot be executed."

".....Jurisdiction as observed by Lord Reid, in the case of [Anisminic Ltd. v. Foreign Compensation Commission](#), (1969) 2 AC 147, at p. 171 of the report of the entitlement of the tribunal to enter upon the inquiry in question. That entitlement in my opinion can only arise from a competent plaint instituted by a plaintiff. If the plaint was incompetent, there was no plaint. There was no suit. Ex facie and without any dispute there was no valid suit. A decree based on such a patent and indisputable error would be an error of jurisdiction and decree passed on such error would be nullity. It, however, the error

⁶ AIR 1942 Mad. 252

⁷ AIR 1945 Mad. 146



depends upon adjudication of disputes, either of fact or law different considerations would apply. After all as the Supreme Court has observed that the question whether there was an error within the jurisdiction or an error of jurisdiction depends upon the nature of the error. In view of the express provision and public policy indicated in [Section 69](#) of the Partnership Act in my opinion entertaining a suit in derogation of that mandatory provision would defeat the purpose of the statute and such an error would amount to an error of jurisdiction and a decree passed on such an error would be a nullity. In the aforesaid view of the matter, in my opinion, on this ground also this decree cannot be executed.”

30. In this backdrop, whether a decree passed in those circumstances could be questioned in terms of Section 47 CPC as to its executability needs consideration.

31. In the circumstances, it cannot be stated that the petitioner cannot make an attempt to reopen this issue under the garb of Section 47 CPC when he did not choose to raise such defence or question, during earlier stages of litigation. The prohibition under Section 69(2) of Indian Partnership Act, is penal and plenary. When such is its impact, mere omission or silence on the part of the petitioner to raise such defence at earlier stages of the litigation cannot benefit the D.Hr., viz., the first respondent. This serious omission as to want of registration of the firm goes to the root of the matter affecting the very institution of the suit. When a plaint presented in such manner, by a firm, which is incompetent to do likewise, cannot lead to proper and legal institution of the suit. Therefore, when this objection is with reference to very maintainability of the suit, a decree passed thereon is not only void but also in improper exercise of jurisdiction amounting to an illegality. It is well known that there cannot be contracting out of the statutory



provisions and a decree passed in derogation of the terms of Section 69(2) of Indian Partnership Act cannot be legally sustained. A decree of this kind, can indeed, be questioned at any stage.

32. As rightly contended by Sri M.Chalapathi Rao, learned counsel for the petitioner, the basis on which the executing Court rejected the contention of the petitioner that the promissory note is not a contract, to say the least is on inappropriate understanding and application of law. Therefore, the basis on which the objection of the petitioner was rejected by the executing Court cannot be sustained. An illegality cannot be elevated to a legal status, in the circumstances. Thus, Section 47 CPC in the circumstances is clearly applicable and it has been rightly invoked by the petitioner questioning this decree.

33. Therefore, the order under revision requires interference and consequently, it has to be set aside.

34. In the result, this Civil Revision Petition is allowed setting aside the order of the learned II Additional Senior Civil Judge, Vijayawada, in E.A.No.121 of 2018 in E.P.No.82 of 2006 in O.S.No.693 of 2004, declaring that decree in O.S.No.693 of 2004 dated 03.03.2006 against the petitioner is a nullity and is un-executable against him. Consequently, proceedings in E.P.No.82 of 2006 against the petitioner (1st J.Dr.) cannot continue and to that extent E.P.No.82 of 2006 in O.S.No.693 of 2004 stands dismissed. Attachment of E.P. schedule property, with reference to the interest of the petitioner (1st J.Dr.) is raised. No costs. All pending petitions stand closed.

M. VENKATA RAMANA, J

Dt:22.01.2021

Rns



HON'BLE SRI JUSTICE M. VENKATA RAMANA

C.R.P.No.2208 of 2019

Date:22.01.2021

Rns