

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

BRIJ KISHORE RAM SARUP (PLAINTIFF) v. SHEO
CHARAN LAL (DEFENDANT)*

1937
September,
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Partnership—Firm—Firm as such can not be a partner in another firm—All the members individually can be partners with others in a new firm—Suit by members of old firm against the new partners—Suit in the name of old firm—Frame of suit—Maintainability—Civil Procedure Code, order XXX, rules 1, 2.

A firm being only an association of persons which has no corporate capacity, a firm as such can not enter into a partnership with other individuals. But all the members of the firm individually can enter into a contract of partnership with other individuals and so can be included with the other individuals as partners in a larger firm; only, the old firm as such will not be regarded in law as being a member of the new partnership.

In such a case a suit by the members of the old firm, brought in the name of that firm in accordance with the form of procedure laid down in order XXX of the Civil Procedure Code, against the other partners in the new firm is maintainable, and although the court may not consider the old firm as such to be entitled to any decree it will give appropriate reliefs to the individuals composing that firm. Under order XXX it is clear that it is not contemplated that a firm should institute a suit as a legal entity; the idea is that the partners themselves should sue or be sued, but a provision is made by way of convenience of procedure that one of the members of the partnership can act on behalf of the others in instituting and prosecuting the suit.

Dr. M. Wali-ullah and Mr. R. K. S. Toshniwal, for the appellant.

Mr. Harmandan Prasad, for the respondent.

NIAMAT-ULLAH, J.:—This is a second appeal by the plaintiff and arises out of a suit for rendition of accounts of a partnership business, which is alleged by the plaintiff to have been previously dissolved. In the alternative, the plaintiff prays for dissolution of the partnership.

*Second Appeal No 1442 of 1934, from a decree of P. C. Agarwal, Additional District Judge of Cawnpore, dated the 9th August, 1934, confirming a decree of Manzoor Ahmad Khan, Munsif of Akbarpur, dated the 27th of February, 1934.

The suit was brought in the firm name, Brij Kishore Ram Sarup. According to the plaintiff the members of this firm were Ram Sarup, Lachmi Narain alias Minnu, and Lachmi Narain son of Hem Raj. The plaint was signed and verified by Lachmi Narain son of Hem Raj. The sole defendant impleaded in the case was Sheo Charan Lal, respondent in this Court. It is alleged in the plaint that on Pus Sudi 12, Sambat 1985, the defendant approached the plaintiff firm and proposed that the parties might enter into a partnership for purchase and sale of grain at Sagar, and that the partners of the plaintiff firm agreed to the defendant's proposal and a partnership was brought about between the plaintiff and the defendant. There are other allegations in the plaint which for the purpose of the present appeal it is not necessary to mention in detail. According to the plaint the partnership was subsequently dissolved, but the account of the rights and liabilities of the parties has not yet been taken. For that purpose the present suit was brought.

The defence, so far as it is necessary for the purpose of the appeal, is that a partnership was entered into between the defendant on one side and Ram Sarup and Lachmi Narain alias Minnu on the other. It was denied that Lachmi Narain son of Hem Raj, who signed and verified the plaint, was a member of such firm. It was also pleaded that there was a non-joinder in the suit and that the frame of the suit was bad. No particulars were, however, given of the plea of non-joinder and that relating to the frame of the suit.

The trial court set down two issues for trial. One was whether there was a non-joinder, and the other was whether the suit as brought was maintainable. It found on the first question that there was no non-joinder, but held that the suit was not maintainable in the form in which it had been brought. The plaintiff appealed to the learned District Judge, who does not appear to have expressed any clear opinion on the first question but

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concurring with the first court in holding that the suit was not properly framed and was therefore not maintainable.

The reason why the lower courts considered that the suit as brought was not maintainable is that it has been brought in the name of the firm Brij Kishore Ram Sarup as plaintiff which is alleged to have entered into a partnership with the defendant. The lower courts were of opinion that a firm could not enter into a contract of partnership with another person. Neither of them, however, has gone so far as to hold that if a contract of partnership is otherwise validly entered into, it should be considered as a nullity. The plaintiff asked both the courts for permission to add all necessary parties, but this prayer was not allowed on the ground that as the suit by persons sought to be added had become time barred, it would not be equitable to allow the addition of parties at that stage.

In the case of *Jai Dayul Madan Gopal* (1) it was held by a Division Bench of this Court that a firm, as such, could not enter into a partnership with one or more other individuals. This was held to be the result of the language employed in section 239 of the Indian Contract Act, in which partnership is defined as the relation which subsists between "persons" who agreed to combine their property, labour or skill in some business and to share the profits thereof between them. It was considered that a firm, which is not a legal entity for purposes of a contract, cannot be considered to be a person within the meaning of section 239 of the Indian Contract Act. The case in which this view was taken arose under the Income-tax Act, and the question was whether the income of a firm arising from other partnership concerns in which the firm was a partner should be considered to be the income of the firm as such for the purposes of assessment of income-tax. If the firm could not in law

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enter into a partnership with outsiders, the income derived from the partnership concerns in question would not be assessable to income-tax as the income of the firm. It should be noted that a firm is a legal entity for assessment of income-tax, though it is not such for entering into a contract of partnership. The further question as to whether, if a partnership is in fact entered into between a firm and another individual, it should be considered to be a partnership, of which all the members of the partner firm and the other individual should be considered to be partners, did not assume importance in that case nor was it decided. In the present case the question is of importance and has to be decided.

I accept the view expressed in the case of *Jai Dayal Madan Gopal* (1) that a firm as such cannot enter into partnership with other individuals. At the same time it must be held that a firm is only an association of persons who have no corporate capacity and that if a partnership is in fact entered into and if all the partners of the firm are consenting parties to the agreement of partnership, or are represented by a duly authorised person when the contract of partnership is concluded between the firm and others, or subsequently ratify it, a partnership will come into existence, though it will not be regarded as a partnership of which a firm as such is a partner. Such a partnership will have for its members all the partners of the partner firm and the others. In this view the present suit is not liable to dismissal, if it is not bad for any other reason. On the allegations contained in the plaint I would hold that a partnership was brought about by the agreement referred to in the plaint between the partners of the firm Brij Kishore Ram Sarup as individuals and the defendant. If the defendant's allegation be accepted and it be assumed that there was a contract of partnership between the defendant on the one side and Ram Sarup and Lachmi Narain alias Minnu on the other, a partnership should be deemed to have been

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brought about between the aforesaid three persons. The only difference between the parties seems to be that according to the plaintiff the partnership included four persons, namely Ram Sarup, Lachmi Narain alias Minnu and Lachmi Narain son of Hem Raj on the one side and the defendant on the other; while according to the defendant the partnership had for its members only three persons, namely the defendant on one side and Ram Sarup and Lachmi Narain alias Minnu on the other. As, on the authorities, the firm as such could not become a partner, its members were partners not as a corporate body but as individuals. Unless there is something in the frame of the suit which is fatal to it, I see no reason why the suit should not be considered to be one in respect of such partnership as may be found to have been created by act of the parties.

Strong exception has been taken by learned counsel for the defendant respondent to the frame of the suit. It is said that as the plaint has been signed and verified by Lachmi Narain son of Hem Raj, who according to the defence is not a partner of the plaintiff firm, the suit cannot be considered to have been brought by the partners Ram Sarup and Lachmi Narain alias Minnu, who alone became partners in the new firm. These two and the defendant are the only persons who, according to the defendant, are partners in the partnership which is the subject-matter of the suit. How far this contention can be given effect to will depend upon the findings which the court will eventually arrive at upon the other questions arising in the case. As already stated, the lower appellate court has not recorded a definite finding as to whether Lachmi Narain son of Hem Raj is a partner of the plaintiff firm and whether he became a partner in the new firm. It seems to me that if it be found that a partnership was entered into between Ram Sarup, Lachmi Narain alias Minnu and Lachmi Narain son of Hem Raj on one side and the defendant on the other because the aforesaid three persons were members

of the firm Brij Kishore Ram Sarup, the suit brought in the name of the firm is open to no objection. It may be that the court may not consider the firm as such to be entitled to any decree but may give appropriate reliefs to the individuals composing that firm. Order XXX of the Civil Procedure Code allows two or more persons claiming to be partners and carrying on business in British India to sue in the name of the firm of which they are partners. It is open to the defendant to have the names of the partners of the plaintiff firm disclosed; and on demand being made by the defendant the names of the partners must be disclosed. Order XXX, rule 2(3) provides that where the names of the partners are declared, the suit shall proceed in the same manner, and the same consequences in all respects will follow, as if they had been named as plaintiffs in the plaint. The proviso appended to this sub-rule is important in that it lays down that the proceedings shall nevertheless continue in the name of the firm. I think that the policy underlying order XXX is no more than to afford facility in the joinder of parties who may be numerous. In an ordinary case it may be perfectly immaterial to the defendant as to who the partners are, and it may not be necessary to encumber the record by having the names of all the partners mentioned in the array of the parties. The interest of the defendant has been safeguarded by the provision that if he requires the names of the partners to be mentioned, the plaintiff must disclose the names of all the partners who are represented by the firm name and who will be bound by any decree that may be passed in the suit, provided, of course, there is no dispute among the partners *inter se* as to whether any one of them is a partner at all.

Ram Sarup, Lachmi Narain alias Minnu and Lachmi Narain son of Hem Raj being partners of the plaintiff firm, according to the plaint, had every right to sue in the name of their firm. In such a suit it is open to the court to grant a relief to them individually if they are

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found entitled to it. The fact that as the result of a certain agreement the firm, as such, did not become a partner will not prevent the court from holding that the individual partners of the firm became partners in the other firm, if such was the legal result of the contract of partnership in question.

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The defendant did not call upon the plaintiff to disclose the names of its partners. The reason was obvious. He knew what the plaintiff's case was. He set up his own case as regards the names of the partners of the plaintiff firm and maintained that Lachmi Narain son of Hem Raj, who had signed and verified the plaint, was not a member of it. He contended, at least by implication, that, inasmuch as Lachmi Narain son of Hem Raj was not a partner of the plaintiff firm, the plaint, which was signed and verified by him, could not be considered to be a plaint on behalf of the firm, which did not include Lachmi Narain son of Hem Raj as a partner. If the court finds that Lachmi Narain son of Hem Raj is a partner of the firm Brij Kishore Ram Sarup, the suit should be considered to have been brought by three persons, namely Ram Sarup, Lachmi Narain alias Minnu and Lachmi Narain son of Hem Raj. Otherwise it should be considered to have been brought by Ram Sarup and Lachmi Narain alias Minnu, in which case the question would arise whether the plaint was signed and verified by a person having authority to do so on behalf of Ram Sarup and Lachmi Narain alias Minnu. As I have already said, this and the allied questions have not been considered by the lower courts. On the main question decided by them, I hold that the suit is maintainable if it be found that a contract of partnership was entered into between the defendant on one side and one or more persons authorised to act on behalf of the partners of the plaintiff, whoever they were, on the other. Such a contract, if proved, would result in a partnership, of which the partners

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should be considered to be the defendant and the individual partners of the firm Brij Kishore Ram Sarup.

In the view of the case I have taken, I would allow the appeal, set aside the decree of the lower appellate court and remand the case to that court for disposal according to law as herein indicated.

ALLSOP, J.:—I agree with the order proposed by my learned brother. It seems to me that there has been some confusion in the courts below in applying a meaning to the word "firm". It is obviously true, as held in the case of *Jai Dayal Madan Gopal* (1) that a firm as such cannot be a partner in another firm. The reason, however, is that a firm has no separate entity and is not a legal person apart from members of it. In section 239 of the Indian Contract Act, where the term "partnership" is defined, the word "person" is used, and there might have been some difficulty in saying that a firm was not a person for the purpose of that section, because under the General Clauses Act of 1868 the term "person" includes any company or association or body of individuals, whether incorporated or not; but that definition is subject to the consideration whether there is anything repugnant to it in the subject or context, and it was held in the case to which I have referred that the other provisions of the Indian Contract Act were such that it would be repugnant to them to hold that the term "person" in section 239 of the Act included a firm. I think there can be no doubt that a firm is not a legal person or a legal entity apart from its members. That was certainly the law in England upon which the Contract Act was based. There are provisions in the Act which show that there was no intention that a firm should have an existence apart from the members of it. If there had been any such intention, the firm would have continued despite changes in its component parts. This, however, is not the case. Normally when one of the partners ceases to be a member of the partnership,

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the partnership is dissolved, and that is also the case on the death of a partner. The partners have personal liabilities for the payment of debts and for compensation for damages caused to others by members of the partnership. If a firm cannot be a member of another firm as such, it is because it is not a legal entity; and if it is not a legal entity, it similarly cannot enter into a contract or any other legal relation as a firm. The word "firm" is merely a convenient way of referring to a group of individuals who have entered into a contract among themselves to take part in certain transactions. It seems to me that the courts below were misled because they regarded the firm as not being a legal entity when it came to the question of entering into a partnership contract, but at the same time treated it as a legal entity when it came to the question of instituting a suit on its behalf. Under order XXX of the Code of Civil Procedure it is clear that it is not contemplated that the firm shall institute a suit as an entity. Rule 1 of the order says that "Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm of which such persons were partners at the time of the accruing of the cause of action." It is clear that the idea is that the partners themselves should sue or be sued, but a provision is made by way of convenience of procedure that one of the members of the partnership shall act on behalf of the others. Sub-rule (2) of rule 1 says that "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 or certified by any one of such persons", that is, by any one of the partners. The suit in the present case was instituted by a person who alleged that he was one of the partners on behalf of all, and his action has not been repudiated. The result it seems to me, is

that the suit was perfectly well instituted on behalf of the partners, provided that this man was a partner in the firm on behalf of which he was claiming. Although it may be said that a firm as such cannot enter into a contract of partnership, because it is not a legal entity, still there is nothing to prevent the individual members of a firm from being included in a larger partnership in another firm. In the present case, for instance, it is said that there were three persons in the firm Brij Kishore Ram Sarup. It is alleged that the defendant approached them and asked them to enter into another partnership with him to carry on another business. It does not matter with which member of the firm Brij Kishore Ram Sarup the defendant carried on negotiations. It was understood that the negotiations were on behalf of the firm Brij Kishore Ram Sarup, or in other words, on behalf of all the other members thereof. The defendant was entering, if the allegations are true, into a contract with all the partners in the firm Brij Kishore Ram Sarup. The man who negotiated with him or those who negotiated with him was or were setting himself or themselves up as agents of the other partners and their conduct as agents has not been repudiated. At the present moment all those who are partners in the firm Brij Kishore Ram Sarup are making a claim against the defendant. There was nothing that I can see to prevent the latter from entering into a contract of partnership with all the original partners in the firm Brij Kishore Ram Sarup. The incidents of a partnership depend upon the contract into which the parties enter. I can see no reason why Sheo Charan Lal should not have contracted a partnership with the members of the firm Brij Kishore Ram Sarup, dealing with them as if they were a separate body. It is easy to think of an instance where something of this kind might have happened. Let us take it that there are two partners *A* and *B* in a firm and that the arrangement between them is that *A* will get three-fourths and *B* one-fourth of

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the profits arising from their business. Let us suppose that they enter into a contract with a third person C to carry on business as a larger separate firm, and C agrees that he will pay a certain portion of the profits from that business to A and B to be divided according to the terms of their original partnership. In a case of that kind the terms of the original partnership will be understood to have been included in the contract of further partnership which leads to the creation of a new firm. In the present case it was understood that the members of the partnership Brij Kishore Ram Sarup should recover a certain proportion of the profits from the business of the larger firm. I can see no reason why one of them cannot sue on behalf of all in accordance with the form of procedure laid down in order XXX of the Code of Civil Procedure, and, as I have already said, I agree with the order which my learned brother proposes to pass.

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Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

ASHRAF (APPLICANT) v. SAITH MAL (OPPOSITE PARTY)*

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U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 45(5) and 47—Appellate decision—"Final", meaning of—Revision lies—Civil Procedure Code, section 115—Power of revision—U. P. Encumbered Estates Act, sections 9(3), 13—Extension of time to file written statement—Jurisdiction.

Section 45(5) of the U. P. Encumbered Estates Act, which says that the decision on an appeal under that section shall be "final", means only that the decision is not subject to any further appeal; it does not mean that the decision is final in the sense that the power to interfere in revision under section 115 of the Civil Procedure Code is shut out.

Under section 9(3) of the U. P. Encumbered Estates Act an extension of time of not more than two months can be granted for the filing of a written statement by a claimant, and as soon as the period of two months elapses, the claim of the claimant who has failed to file his written statement is deemed

*Civil Revision No. 105 of 1937.