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M/S. AVK TRADERS

v.

KERALA STATE CIVIL SUPPLIES CORPORATION LTD.
(Civil Appeal No. 9697 of 2013)

OCTOBER 29, 2013

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[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Code of Civil Procedure, 1908 - Or.XXII, r.10 - Devolution of interest during pendency of suit - Suit instituted by partnership firm consisting of two partners - One of the two partners died - Subordinate Court allowed amendment sought by the sole surviving partner (appellant) and permitted him to proceed with the suit as a proprietary concern - Justification - Held: Justified - The Court can grant leave to prosecute the suit against the person to or upon whom such interest has been devolved - On facts, the partner who died was none other than the father of the appellant, and the other heir of the deceased partner was the sister of appellant who was not interested in joining the firm - Therefore, there was complete devolution of interest in favour of the appellant - High Court by taking a hyper-technical approach held that if prayer of appellant was allowed, the same would alter the nature and character of the suit - Such a stand cannot be countenanced considering the peculiar facts and circumstances of the case - Further, the High Court failed to notice that if the partnership firm succeeds in the suit, the decree so granted would not be executable, and hence a nullity.

A registered partnership firm, consisting of only two partners, filed a suit against respondent-corporation. During pendency of the suit, one of the partners died. Though the firm stood dissolved, in terms of the partnership deed, the sole surviving partner (appellant) could continue the business of the firm as a proprietary concern. Consequently, all the interests of the firm stood

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devolved upon the appellant. He filed an application for leave to continue to prosecute the suit as a proprietary concern; and another application seeking necessary amendment of the plaint. The Subordinate Court allowed the applications preferred by the appellant. A

Aggrieved, the Respondent-Corporation preferred Petition before the High Court. The High Court did not allow the prayer for amendment of the plaint moved by the appellant holding that there was no question of altering and amending the plaintiff-partnership firm as a proprietary concern as that would alter the nature and character of the suit, which cannot be permitted, and further that the indefeasible rights of the legal heirs of the deceased partner were insulated under sub-rule (2) of Rule 4 of Order XXX of CPC. Hence the present appeal by the appellant. B C D

Allowing the appeal, the Court

HELD: 1.1. The Subordinate Court allowed the prayer of appellant possibly bearing in mind the principle laid down in Order XXII Rule 10 CPC, which deals with the procedure in case of assignment before the final order of the suit. Rule 10 refers to "devolution of any interest" during the pendency of the suit. In such a case, the Court can grant leave to prosecute the suit against the person to or upon whom such interest has been devolved. Admittedly, the partner who died is none other than the father of the Appellant and the other sole surviving heir is his sister. Sister is admittedly not interested in joining the firm and, therefore, she is not taking over the assets and liabilities of the firm. Therefore, there has been a complete devolution of interest in favour of the Appellant. Under the circumstances, the Subordinate Court had allowed the amendment and permitted the Appellant to proceed with the suit, granting necessary amendment, which, according to the Subordinate Court, was E F G H

- A necessary for a proper and effective adjudication of real dispute between the parties. The High Court by taking a hypertechnical approach held that if such a prayer is allowed, the same would alter the nature and character of the suit. Such a stand cannot be countenanced
- B considering the peculiar facts and circumstances of the case. [Para 9] [568-H; 569-A-E]

- 1.2. The legal consequences pointed out by the High Court might apply in a case where one of the several partners dies in the suit instituted in the name of the partnership firm as compared to when one of the two partners of the partnership dies. Further, the High Court failed to notice that if the partnership firm succeeds in the suit, the decree so granted would not be executable, and hence a nullity. [Para 10] [569-E-F]

- D *Purushottam Umedbhai & Co. v. Manilal & Sons* AIR 1961 SC 325: 1961SCR 982; *CIT v. Seth Govindram Sugar Mills* AIR 1966 SC 24: 1965 SCR 488 - cited.

E Case Law Reference:

1961 SCR 982 cited Para 7

1965 SCR 488 cited Para 7

- F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9697 of 2013.

From the Judgment and Order dated 29.03.2012 of the High Court of Kerala at Ernakulam in Original Petition (C) No. 631 of 2012.

- G Gaurav Mitra, Shivendra Singh, Madhurima Tatia for the Appellant.

Ramesh Babu M.R. for the Respondent.

- H The Judgment of the Court was delivered by

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K.S. RADHAKRISHNAN, J. 1. Leave granted.

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2. OS No.39 of 2008 was a suit preferred on 1.1.2008 by M/s AVK Traders, a partnership firm, for realization of an amount of Rs.53,39,648/- against the Respondent Corporation for claims with regard to various supplies made to the Corporation during the year 2004-06. Respondent Corporation filed its written statement on 26.5.2008 denying the claim. M/s AVK Traders was a partnership firm with only two partners, the Appellant and his father. The partnership was later re-constituted. The re-constituted partnership under the Partnership Deed dated 4.11.2002 contained the following clause :-

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"In the event of retirement of partner or refusal of the legal representative of the deceased partner to become the partner of the partnership as on the expiry of the period given to them to become partners or on the expiry of the period given to them to become partner, the other partner shall have the power to purchase his share by giving notice to retired partner or the legal representative of the deceased partner in writing to that effect within three calendar months or receipt of the notice by the retained partner or the legal representative of the deceased partner. If the surviving partner fail to purchase the share of the partnership or the legal representative fail to express their interest within the said period, the partnership shall dissolve as on the expiry of three months mentioned earlier....."

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During the pendency of the suit on 2.2.2009, the father of the Appellant, who was a partner, expired. The Appellant and his sister were the only legal representatives of the deceased father. On the death of the father, the partnership stood dissolved w.e.f. 24.5.2009 since the sister was not interested in becoming a partner of the firm.

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3. In view of the above-mentioned clause, though the firm stood dissolved on 24.5.2009, the sole surviving partner could continue the business of the firm as a proprietary concern.

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A Consequently, all the interests of the firm stood devolved upon the Appellant and he filed I.A. No.817 of 2002 in O.S. No.39 of 2008 for leave to continue to prosecute the suit for and on behalf of M/s AVK Traders as a proprietary concern. The Appellant also preferred I.A. No.814 of 2012 seeking necessary
 B amendment of the plaint. Appellant also filed I.A. No.815 of 2012 under Order XXIII Rule 17 read with Section 151 CPC praying for recalling and examining PW1. The Subordinate Court by a common order dated 8.2.2012 allowed all the
 C aforementioned applications preferred by the Appellant. With regard to the prayer for continuing the suit, the Subordinate Court held as follows :-

"In the instant case, out of two partners in the plaintiff firm, one partner died during the pendency of the suit and as such the partnership got dissolved. Therefore, I hold that
 D the other partner viz. the 2nd petitioner is entitled to continue the suit. Hence, necessary amendment is also required to the plaint. Therefore, for a proper and effective adjudication of the real dispute between the parties the proposed amendment is also liable to be allowed....."

E 4. The Respondent Corporation preferred I.A. No.809 of 2012 under Order XIV Rule 5 CPC seeking framing of additional issues. The Subordinate Court vide order dated 8.2.2012 dismissed I.A. No.809 of 2012 filed by the Respondent
 F Corporation.

5. Aggrieved by the above-mentioned orders, the Respondent Corporation preferred Original Petition (Civil) No.631 of 2012 before the High Court of Kerala seeking the following reliefs :-

G "(a) To call for the records leading to Ext.P11, P11(a), P11(b) & P12 and set aside the same.

(b) To declare that the respondent/plaintiff is not entitled to continue the suit as a Proprietary concern.
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(c) To direct the Court below to frame additional issues as prayed for in Ext.P-4. A

(d) To issue any other appropriate order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case." B

The High Court did not allow the prayer for amendment of the plaint moved by the surviving partner and held as follows :-

"When the above be the settled position of law, the application for amendment moved by the surviving partner to alter the cause title to convert the suit as one by the proprietary concern with him as its 'proprietor', which was instituted in the name of a firm, for the reason of the death of the Managing Partner and also non-interestedness of the legal heirs of that partner to come on record, has no basis or merit at all, as the death of the Managing Partner in no way affects the continuance of the suit instituted in the 'firm name', in view of the protection afforded under Order XXX Rule 4 of the Code." C D

6. The High Court also took the view that there is no question of altering and amending the plaintiff firm as a proprietary concern as that would alter the nature and character of the suit, which cannot be permitted. Further, it was also held by the Court that no further dilation over that aspect is called for in the case other than pointing out that the indefeasible rights of the legal heirs of a deceased partner in a suit filed by a firm are insulated under sub-rule (2) of Rule 4 of Order XXX of the Code. The High Court, however, did not interfere with the order of the Subordinate Court allowing the application for recalling PW1 for further examination. With regard to the prayers of the Respondent Corporation for raising additional issues, the High Court took the view that the same should have been allowed. Consequently, the prayer made by the Respondent Corporation for framing additional issues was allowed. Aggrieved by the above-mentioned order, this appeal has been preferred by the Appellant. E F G H

A 7. Learned counsel appearing for the Appellant submitted
 that on the death of one of the partners of a partnership firm
 consisting of only two partners, remaining partner has become
 the sole proprietor/owner with all assets and liabilities and as
 such he can always proceed with the suit as per the provisions
 B contained under Order XXII Rule 10 CPC. Learned counsel
 also submitted that the reasoning of the High Court, if at all
 apply, could apply in a case where there are more than one
 partners after the death of a partner, in the event of which the
 firm could continue with minimum of two partners. In such a
 C situation, learned counsel suggested that the provision of sub-
 rule (2) of Rule 4 of Order XXX of the Code would apply.
 Learned counsel placed reliance on the judgment of this Court
 in *Purushottam Umedbhai & Co. v. Manilal & Sons* [AIR 1961
 SC 325], particularly para 9 of the said judgment in support of
 D this contention. Learned counsel also made reference to the
 judgment of this Court in *CIT v. Seth Govindram Sugar Mills*
 [AIR 1966 SC 24].

8. Learned counsel appearing for the Respondent
 Corporation, on the other hand, submitted that if the Appellant
 E is allowed to continue the suit in the name of the firm, all the
 defence set up by the defendant in the written statement would
 be frustrated. Learned counsel also submitted that if the
 amendment sought for is allowed, that will alter the very nature
 and character of the suit and that the High Court has rightly
 F rejected that prayer which calls for no interference by this Court.

9. We are in this case faced with a situation of a registered
 partnership firm, consisting of only two partners, filing a suit
 when both the partners were alive and during the pendency of
 the suit, one of the partners died and legal heir of the deceased
 G partner did not show any interest either in the assets of the firm
 or in the liabilities and had refused to join as a partner. The
 question is, on dissolution of the partnership firm on the death
 of the partner, could the suit already filed be proceeded with
 by the remaining so-called partner. We notice, the Subordinate
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Court has allowed that prayer possibly bearing in mind the principle laid down in Order XXII Rule 10 CPC, which deals with the procedure in case of assignment before the final order of the suit. Rule 10 refers to "devolution of any interest" during the pendency of the suit. In such a case, the Court can grant leave to prosecute the suit against the person to or upon whom such interest has been devolved. Admittedly, the partner who died is none other than the father of the Appellant and the other sole surviving heir is his sister. Sister is admittedly not interested in joining the firm and, therefore, she is not taking over the assets and liabilities of the firm. Therefore, there has been a complete devolution of interest in favour of the Appellant. Under the circumstances, the Subordinate Court had allowed the amendment and permitted the Appellant to proceed with the suit, granting necessary amendment, which, according to the Subordinate Court, was necessary for a proper and effective adjudication of real dispute between the parties. The High Court, in our view, by taking a hypertechnical approach held that if such a prayer is allowed, the same would alter the nature and character of the suit. In our view, such a stand cannot be countenanced considering the peculiar facts and circumstances of the case.

10. We are of the view that the legal consequences pointed out by the High Court might apply in a case where one of the several partners dies in the suit instituted in the name of the partnership firm as compared to when one of the two partners of the partnership dies. Further, the High Court failed to notice that if the partnership firm succeeds in the suit, the decree so granted would not be executable, and hence a nullity. In such circumstances, we are inclined to allow this appeal and set aside the order of the High Court interfering with the order of the Subordinate Court allowing the application for amendment and permission to prosecute the suit as prayed for. Ordered accordingly.

B.B.B.

Appeal allowed.