ORETRA ENTERPRISES & OTHERS
v
WIJEKOON

COURT OF APPEAL
DISSANAYAKE J.,
SOMAWANSA J.,
D.C. MT. LAVINIA 2950/M
C.A. 691/93 (F)
FEBRUARY 21, 2002
MARCH 25, 2002
MAY 21, 2002
JULY 9, 2002

Accident – Negligent driving - Misjoinder of parties – Can a partnership be sued? – Applicability of the Law of England – Introduction of Law of England Ordinance, 5 of 1951, Section 3 – Code of Civil Procedure – Procedural matters – Partnership – Is it a juristic person ?

Held :

(1) Partnerships are not juristic persons and are not recognised by our law as separate entities.

(2) In Sri Lanka all procedural matters are dealt with exhaustively and comprehensively in the Code of Civil Procedure. In matters relating to procedure no Court would have recourse to the laws of England either through the Introduction of the Laws of England Ordinance or by any other enactment.

(3) Under and in terms of Section 3 of the above Ordinace though the Laws of England are applicable in respect of partnerships, it is certainly not applicable in respect of procedural matters such as the status of a party instituting action in a Court of Law. In Sri Lanka if a partnership has to be sued, the action should be brought against all its members.

APPEAL from the Judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Meina Mohamed* v *Shahul Hameed* - Vol.xi CLW 61
2. *Letchemanan* v *Shanmugam* 8 NLR 121 -
3. *Suppiah* v *Paliahpillai* - 14 NLR 392

Peter Jayasekera with *Gamini Pieris* for Defendant Appellants.

Jayatissa Herath for Plaintiff Respondent.

Cur.adv.vult

November 22, 2002

SOMAWANSA, J.

The plaintiff-respondent instituted action in the District Court of Mt. Lavinia against the 2nd, 3rd, 4th and 5th defendants-appellants and two other defendants claiming damages in a sum of Rs. 800,000/- jointly and severally on account of injuries sustained by her in consequence of an accident that occurred on 02.08.1982 as a result of negligent driving of the petrol bowser bearing registration No. 27 Sri 6773 by the 6th defendant in the course of his employment under and or under the control and management of the 1st defendant and 3rd to 5th defendants-appellants. It was the position of the plaintiff-respondent that the 1st defendant was the registered owner of the said petrol bowser and the 2nd to 5th defendants-appellants who were transporters of petroleum products from the Petroleum Corporation Kolonnawa terminal to various filling stations had taken on lease the said petrol bowser from the former and that on 02.08.1982 she was knocked down by the said petrol bowser bearing registration No. 27 Sri 6773 while being driven negligently by the 6th defendant causing multiple injuries to her. Neither the 1st defendant nor the 2nd to 5th defendants-appellants denied the occurrence of the said accident on 02.08.1982 or that the said petrol bowser was driven by the 6th defendant at the time of the accident.

The 1st defendant while admitting that he was the registered owner of the said petrol bowser denied any liability. The position of the 2nd to 5th defendants-appellants was that the 3rd defendant-appellant was not a partner of the 2nd defendant-appellant partnership, that the said petrol bowser bearing No. 27 Sri 6773 was leased to Overseas Recruitment and Travels Ltd., together with the driver by the 1st defendant at the time the accident occurred and was engaged in the work of the said company. Therefore the 2nd to 5th defendants-appellants denied any liability to pay damages to

the plaintiff-respondent as they bore no legal liability for the negligence of the driver the 6th defendant. They also averred that there was a misjoinder of parties and causes of action and prayed for a dismissal of the plaintiff-respondent's action.

At the commencement of the trial 6 admissions were recorded viz :

1. that at the time relevent to this action the 1st defendant was the registered owner of vehicle No 27 Sri 6773.
2. as stated in paragraph 6 of the answer of 2nd to 5th defendants-appellants the 4th and 5th defendants-appellants are shareholders of the 2nd defendant-appellant partnership.
3. as stated in paragraph 7 of the answer of the 2nd to 5th defendants-appellants that at the time the accident occurred M/S. Overseas Recruitment and Travels Ltd., had hired the said vehicle with its driver for its work or business activities.

By 4th to 6th admissions parties admitted that on 02.08.1982 the said vehicle 27 Sri 6773 met with an accident and as a result the plaintiff-respondent received physical injuries as stated in paragraph 10 of the answer of the 2nd to 5th defendants-appellants.

Five issues were raised on behalf of the plaintiff-respondent while 05 issues were raised on behalf of the 1st defendant and 04 issues were raised on behalf of the 2nd to 5th defendants-appellants. Issue No. 08 raised by the 1st defendant was taken up for hearing as a preliminary issue and parties were directed to file written submissions. The learned District Judge by his order dated 19.06.1989 held that in view of the said admission No.3, no cause of action has been disclosed against the 1st defendant and that there is a misjoinder of parties. Accordingly he discharged the 1st defendant from the proceedings and proceeded with the trial. At the conclusion of the trial the learned District Judge by his judgment dated 18.11.1993 held with the plaintiff-respondent. It is from the said judgment that the 2nd to 5th defendants-appellants have preferred this appeal.

At the hearing of this appeal it was contended on behalf of the 2nd to 5th defendants-appellants that the learned District Judge had erred in holding that the 3rd defendant-appellant was a partner of the 2nd defendant-appellant partnership and therefore was liable

in damages. Issue No.11 has been raised by the 2nd to 5th defendants-appellants on this basis that if the 3rd defendant-appellant is not a shareholder of the 2nd defendant-appellant partnership, can this action be maintained against him? The learned District Judge has answered this issue in the affirmative holding that it is proved that the 3rd defendant-appellant is a shareholder of the said partnership.

However on a examination of the evidence led in this case, I am unable to find any evidence which would support this finding. In the absence of any such evidence to establish the fact that the 3rd defendant-appellant is a shareholder of the 2nd defendant-appellant partnership, I am of the view that the learned District Judge has erred in coming to a finding that the 3rd defendant-appellant is a shareholder and that the action could be maintained against him. This fact is conceded by the 2nd to 5th defendants-appellants in paragraph 06 of their written submissions dated 09.07.2002 where it is stated that "at this stage it is conceded that at the time of the accident the 3rd defendant has not been proved to be a partner of the 2nd defendant company". Accordingly the answer to issue No.11 has to be in the negative and the said answer has to be corrected to read as "3rd defendant-appellant is not a shareholder and therefore this action cannot be maintained against him". Consequently the appeal of the 3rd defendant-appellant has to succeed.

Another matter that was argued by the counsel for the 2nd to 5th defendants-appellants is that the learned District Judge erred in holding that the 2nd defendant-appellant being a partnership could be sued in the partnership name. In support of this averment the counsel quoted Weeramantry on Contract Vol. (01) page 542 -

> "Partnerships are not juristic persons and are not recognised by our law as separate entities. It follows that partnership cannot hold property in the partnership name nor can they sue or be sued in the partnership name. The partnership is no more than a collection of separate individuals and these separate individuals would be the owners of the property of the partnership. These separate individuals must be the plaintiffs or the defendants in any action by or against the partnership".

In Sri Lanka all procedural matters are dealt with exhaustively and comprehensively in the Code of Civil Procedure. In the circumstances, in matters relating to procedure no Court would have recourse to the laws of England either through the Introduction of the Law of England Ordinace No.5 of 1852 or by any other enactment. Therefore while it is possible that under and in terms of Section 3 of the aforesaid law, the laws of England are applicable in respect of partnerships, it is certainly not applicable in respect of procedural matters such as the status of a party instituting action in a court of law. So while it may be possible that an action could be instituted in the name of a partnership in England the same will not be possible in Sri Lanka in view of the procedural laws prevailing in Sri Lanka. No where in the Civil Procedure Code does it state that an action could be instituted in the name of the firm thereby altogether precluding the institution of such action. In drawing this distinction *Lyndley on Partnership* (17th Edition 1995 at page 437) states that *"Civil actions brought by partners against a third party or vice versa are governed by the same rules of procedure as other actions, save that the partners may sue or be sued in the firm name. However this procedural nicety should not be permitted to obscure the importance of identifying the correct parties to such an action particularly where the composition of the firm has not remained static".*

The matter was put beyond any doubt by the judgment of Wijeyawardene CJ in *Meina Mohamed* v *Shahul Hameed* [1] where he stated that "rules of procedure are not binding on us though in deciding questions with respect to the law of partnership the law to be administered is the same as would be administered in England".

The fact that the question of whether action should be instituted in the name of a firm is a procedural and not a substantive matter is clearly borne out by fact that the relevant English law is stated in the Judicature Acts of England and is not a part of the substantive law relating to partnerships. This is further strengthened by the fact that the single only instance when an action could be instituted in the name of a firm in Sri Lanka was during the existence of the Administration of Justice Law No. 25 of 1974. However since the repeal of the said law, the Civil Procedure Code which has replaced the said Law has not made any provision for an action by or against

a firm in its own name. In the circumstances it has become an inveterate practice to have an action instituted by or against a firm in the name of all its individual partners".

Drawing the aforesaid difference in the laws prevailing in Sri Lanka and the law of England H.W. Thambiah, Q.C. in the *Principles of Ceylon Law* at page 546 states *"in England, in view of the statutory provisions an action can be brought in the firm's name, but in Ceylon if a partnership has to be sued, the action should be brought against all its members".*

Professor Weeramantry in his Law of Contracts states at page 531:

"Our Code of Civil Procedure contains no provision similar to the provision in the English rules made under the Judicature Act by which two or more persons who are co-partners may be authorized to sue in the name of the firm"

In the case of *Letchemanan* v *Sanmugam* (2) Layard CJ stated that *"there is no provision in our Procedure Code, such as there is in the English rules, made under the Judicature Act, which authorize any two or more persons claiming as co-partners and carrying on business within the jurisdiction of the High Court in England to sue in the name of the firm of which such partners were members at the time of the accruing of the cause of action".*

In the light of the above reasoning I am inclined to take the view that this action cannot be maintained as against the 2nd defendant-appellant which is a partnership and not a legal person in the eye of the law.

It is to be noted that in the instant case the partnership has been independently sued and the names of the 4th and 5th defendants-appellants have not been identified as partners of the partnership, though it is so averred in the pleadings in the plaint. It is also to be noted that in the course of the evidence of the 3rd defendant-appellant it revealed that the said partnership consist of 3 partners and only two of them have been made parties to this action while Sumathipala Alahakoon the 3rd partner was not made a party to this action. This I think is an error in the procedure which would render the plaint to be dismissed.

In the case of *Suppiah* v *Paliahpillai* (3) it was held that all the partners of the firm should have joined in the action. This is so because the plaintiff-respondent has no right to pick to sue from the partnership.

It appears that from the time the 1st defendant who was the owner and the insured was discharged from the proceedings the plaintiff-respondent, the Court and the defendants-appellants have gone on a voyage of discovery. It appears to me that the order made by the learned District Judge to discharge the 1st defendant who was the owner and the insured of the vehicle and the legally liable employer of the driver, purely on written submissions was an error. Be that as it may the fact that the accident did occur and the fact that the plaintiff-respondent was its victim and the fact that she did suffer injuries has been admitted and also has been proved. However the person or persons legally liable to compensate the plaintiff-respondent for the injuries sustained by her has not been proved. In the circumstances it is my view that in fairness to the victim of the accident I would set aside the judgment of the learned District Judge and send the case back to the District Court for a trial *de novo* with the right to amend the plaint if the plaintiff-respondent so desires.

I direct the Registrar of this Court to return the case record to the appropriate District Court forthwith and also direct the learned District Judge to hear and conclude the case expeditiously as he can. Accordingly the appeal is allowed. However I award no costs.

DISSANAYAKE. J. - I agree.

Appeal allowed.

Case sent back for trial de novo with the right to amend the plaint.