

In the Court of the Principal District Judge, Madurai
Present: Thiru. S. Sivakadatcham, B.Sc., M.L.,
Principal District Judge, Madurai

Friday, this the 12th day of January, 2024

I.A.No.915/2020 in O.S.No.126/2019

Periyasamy Servai Chandran
Proprietor of SMAART HOME FURNITURE

...Petitioner/Defendant

/vs/

1.A. Ganesan
2. A. Venkat Annamalai
Partners of SMART HOME GRAND

...Respondents/Plaintiffs

This petition coming on 04.10.2023 for hearing before me in the presence of M/s H.Arumugam & K.Selvam, Advocates for the petitioner and of Thiru S.M.Arunkumar, Advocate for the respondents and upon hearing both sides and having stood over for consideration till this day, this court delivered the following:-

ORDER

The petitioner has filed this petition under Order 7 Rule 11 of CPC to reject the plaint with costs.

2. The averments set out in the affidavit filed along with petition are briefly as follows:-

The respondents filed the suit for permanent injunction restraining the petitioner from infringing their registered trade mark namely 'SMART HOME GRAND' and for other reliefs. The respondents have filed the suit in the

capacity of partnership fir, in the name of SMART HOME GRAND. They have not disclosed about registration and also not produced any document for registration of firm. The petitioner filed written statement specifically contending non-maintainability of suit in view of non-registration of firm. The respondents did not plead further anything about registration of firm u/s 59 of Indian Partnership Act, but examined P.W.1 in chief and marked photo copies of documents. The petitioner was advised to file separate petition for eschewing the marking of photocopy of document. Section 69 of Indian Partnership Act debars the unregistered firm from filing suit. Hence, this petition is filed to reject the plaint.

3 The averments set out in the counter affidavit filed by the respondents are briefly stated as follows:-

The averments made in the petition affidavit are all false. The respondents are doing business in the name and style of 'SMART HOME GRAND' dealing with all type of furniture, furnishing accessories and lighting all home interior products. They have applied for registration of trade name and mark 'SMART HOME GRAND' on February,2012 and the concerned Registrar issued Trade Mark Registration No.2276360 under clause 35 and the same was duly registered under Registration No.1767595. The respondents being registered proprietor trade mark no other person is entitled to in any way use the trade name 'SMART HOME GRAND' and symbol. The petitioner is not legally entitled to use the name 'SMART HOME GRAND'. But, the petitioner is

continuing business under the same name 'SMAART HOME FURNITURE'. In spite of questioning, the petitioner is continuing the same illegality. So, the respondents filed the suit and examined P.W.1 on their side and the suit is posted for cross examination. At this stage, the petitioner filed this petition to drag on the trial proceedings. So, the petition is liable to be dismissed.

4. The point for determination;

Whether this petition is allowable or not?

5. Both sides have not adduced either oral evidence or documentary evidence. Heard both sides.

6. Point:

The learned petitioner's counsel contended that the respondent/plaintiff is a partnership firm and registered in the trade mark name as SMART HOME GRAND and the plaintiff filed the suit in the capacity of partnership firm. But, the plaint averments nowhere it is mentioned whether it was registered duly under Indian Partnership Act. No suit can be filed by the unregistered partnership firm u/s 69 of Indian Partnership Act. So, the plaint may be rejected.

7. On the other hand, the learned respondents' counsel contended that the respondents are only partners, but the firm is not a partnership firm. Furthermore, they have filed the suit only under the category of partners. So, section 69 of Indian Partnership Act is not attracted and also contended that there is no bar to file a suit to infringe of statutory right under common law, for which the learned counsel draws the attention of the court to the citation

reported in **2000(2) Supreme Court 145 (M/s Haldiram Bhujiweala & Anr /vs/ M/s Anand Kumar Deepak Kumar & Anr).**

8. Records perused. The respondents have filed the suit seeking for (a) restraining the defendant, his men, agents from in any infringe the register trade mark name of the plaintiffs by using adopting or copying the word ‘SMART HOME GRAND’ either individually or collectively; (b) restraining the defendant his men agents or successor from in any way to start new business at any place in Tamilnadu in the name and style of ‘SMART HOME FURNITURE’ or by using or infringing deceptively or cunningly pronounced as either by collective words or individual word of the plaintiffs registered trade name and mark ‘SMART HOME GRAND’ or “SMART HOME” or ‘SMART’ or ‘HOME’ till disposal of the suit; (c) to grant mandatory injunction directing the defendant to close all the shops running business in the name and style of ‘SMART HOME FURNITURE’ or directing the defendant to remove the name and style of the business ‘SMART HOME FURNITURE’ especially at Madurai and anywhere at Tamilnadu and (d) directing the defendant to render true and proper accounts of the business being carried by infringing the plaintiffs’ registered trade name. The defendant has filed its written statement and the suit is posted for cross examination of P.W.1. At this juncture, the petitioner filed this petition to reject the plaint on the ground that the plaintiff has not filed any document to show that the partnership firm is registered one and there is a bar u/s 69 of Indian Partnership Act to file a suit. It is needless to say that if the

petition filed under Order 7 Rule 11 CPC, the plaint averments can alone be taken into consideration. Apart from that a plaint can be rejected only on grounds that where it does not disclose a cause of action and where the suit appears to be barred by any law. So, if the plaint averments would show that there is bar or barred by any law or it does not disclose the cause of action, the plaint shall be rejected. The petitioner herein advanced contention that the plaintiff is partnership firm registered trade mark in the name and style of ‘SMART HOME GRAND”, which is a partnership firm, but the plaintiff has not filed any partnership deed which is barred by section 69 of Indian Partnership Act. Section 69 of Indian Partnership Act reads as follows;

69. Effect of non-registration.—

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(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.

So, on careful perusal of plaint averments, particularly, in cause title it is mentioned as ‘A.Ganesh and A.Venkat Annamalai, partners of SMART HOME GRAND”. But, in the plaint it is averred that the plaintiffs are doing business in the name of style as SMART HOME GRAND dealing with all types of

furniture, furnishing accessories, lighting, all home interior products at Madurai. Nowhere in the plaint averments it is stated that it is partnership firm, it is simply stated that it is registered trade made in the name and style as 'SMART HOME GRAND'. So, the plaintiffs themselves nowhere stated that it is partnership firm. So, the bar u/s 69 of Indian Partnership Act does come into play. On perusal of written statement also nowhere raised contention as the plaintiff is a partnership firm and not registered the firm under Partnership Act and partnership deed is not at all filed. First time, the petitioners raised the contention in this petition only. As discussed supra, the plaintiffs nowhere in the plaint stated that it is a partnership firm and they have clearly stated in the cause title as they are partners only. In the counter itself particularly in para no.10 that the respondents/plaintiffs have not filed the suit in the capacity of partnership firm and also stated that it is not the firm and the plaintiffs are only partners of 'SMART HOME GRAND BUSINESS'. So, the respondent's contention that the plaintiff has not filed registered partnership deed and there is bar u/s 69 of Indian Partnership Act is untenable. Furthermore, the learned respondent's counsel draws the attention of the court to **2000(2) Supreme 145** wherein the Hon'ble Supreme held in para 25 as follows;

"For all the reasons given above, it is clear that the suit is based on infringement of statutory rights under the Trade Marks Act. It is also based upon the common law principles of tort applicable to passing-off actions. The suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the unregistered firm with third

parties in the course of the firm's business transactions. The suit is therefore not barred by Section 69(2)."

The citation is squarely applicable to the facts of this case. Apart from as per section 69(3) there is bar to file suit of *claim of set-off or other proceeding to enforce a right arising from a contract*. Section 69(3) of Indian Partnership Act reads as follows;

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

So, as discussed supra, this petition is devoid of merits and the petition is liable to be dismissed.

9. In the result, this petition is dismissed. No cost.

Dictated to the stenographer, transcribed by him, corrected and pronounced by me in open court this the 12th day of January, 2024.

Principal District Judge,
Madurai.

List of witnesses examined:-

Petitioners side – Nil

Respondents side – Nil

List of documents marked:-

Petitioners side – Nil

Respondents side - Nil

Principal District Judge,
Madurai