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service. Moreover, no employer can be compelled to retain an employee in service. For improper dismissal the aggrieved employee's remedy appears to me to be a suit for damages. Before a writ of mandamus can issue, it should be possible to hold in the words of clause (b) of section 45 of the Specific Relief Act that "the doing or forbearing is, under any law for the time being in force, clearly incumbent" on the person against whom the mandamus is to issue. The phrase "clearly incumbent" is not equivalent to "incumbent". The word "clearly" has to be given its natural meaning. If given that meaning it comes to this that before this Court issues a mandamus it must hold imperatively that Government must keep the petitioner in its employ. In the facts of this case it is impossible to come to this conclusion. Moreover, before a writ of mandamus is issued it must be held that the applicant had no other specific and adequate legal remedy. In the facts of this case I cannot so hold. I would hold in the words of Fuller C. J., in the case of *Eleverton R. Chapman*, (1), that "the orderly administration of justice will be better subserved" by declining to exercise jurisdiction in favour of the petitioner.

APPELLATE CIVIL.

Before Harnam Singh and Kapur, JJ.

1952

September 18th

FIRM JOINT HINDU FAMILY PURAN MALL-GANGA RAM,—*Plaintiffs-Appellants,*

versus

THE CENTRAL BANK OF INDIA, LTD.,—*Defendant-Respondent.*

Regular first Appeal No. 121 of 1948.

Indian Partnership Act, (IX of 1932)—Section 69—Whether bars the institution of the suit—Subsequent Registration—Effect of—Whether validates the suit—Difference between the word 'institute' in Section 69 of Partnership Act and the word 'commence in section 171 *of Indian Companies Act, stated.*

The plaintiff firm filed the suit without being registered under section 59 of the Indian Partnership Act. The defendant objected that the suit was liable to dimissal

(1) 156 U.S. 211.

under section 69 of the Act as the plaintiff firm was not registered. The reply was that the plaintiff was a Joint Hindu Family Firm and did not require registration. During the pendency of the suit, however, the plaintiff firm got itself registered under section 59 of the Partnership Act and pleaded that the suit may be deemed to have been instituted on the day the plaintiff firm was registered.

Held, that the plaintiff firm was not a Joint Hindu Family Firm and as it had not got itself registered under section 59 of the Partnership Act before instituting the suit, the suit was not maintainable. Under section 69 of the Partnership Act, the prohibition is against the institution of the suit, i.e., the presentation of the plaint by a firm which is not registered under section 59 of that Act from which it follows that the registration of the firm is a condition precedent to the institution of the suit and want of registration will make the proceedings null and void. It is, therefore, necessary that its provisions should be observed with complete strictness and subsequent registration of the firm is of no avail as it cannot validate what in law did not exist.

Joint Hindu Family Firm Des Raj-Prem Chand v. *Registered Firm Hira Lal-Kali Ram,* (1); *Hori Ram Singh* v. *The Crown* (2), *Basdeo Aggarwal* v. *Emperor,* (3), *Ganjanan Laxman* v. *Bhalchandra Keshav,* (4), *Abdul Rehman* v. *Cassum Ebrahim* (5), *Attorney-General* v. *Fellow* (6), *Sayad Hussain Miyan* v. *Collector of Kaira* (7), *Gopal Dei* v. *Kanno Dei* (8), relied on; *Debi Sahai* v. *Gillu Mal* (9), distinguished; *Nazir Ahmed* v. *Peoples Bank of Northern India* (10), *Vardarajulu* v. *Rajamanika* (11) and *Radha Charan* v. *Matilal* (12), not approved.

Per Harnam Singh, J. *Held,* that there is a difference between the meaning of the word 'institute' in section 69 of the Partnership Act and the word 'commence' in section 171 of the Indian Companies Act. Plainly, the prohibition contained in section 69 of the Partnership Act is to the presentation of the plaint, whereas the prohibition contained in section 171 of the Indian Companies Act is to the issuance of the first compulsory process to bring the parties into Court.

Attorney-General v. *Brown* (13), relied on.

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(1) 54 P.L.R. 345
(2) I.L.R 1940 Lah. 400
(3) 1945 F.C.R. 93.
(4) I.L.R 1942 Bom. 293
(5) I.L.R. 36 Bom. 168
(6) (1820) I.J. & W. 254
(7) I.L.R. 21 Bom. 257
(8) I.L.R. 26 All. 162
(9) A.I.R. 1938 Lah. 563.
(10) I.L.R. 1942 Lah. 517
(11) A.I.R. 1937 Mad. 767
(12) 41 C.W.N. 534
(13) 145 E.R. 1129.

Regular First Appeal from the decree of Shri Jagan Nath, Senior Sub-Judge, Hissar, dated 14th July 1948, dismissing the plaintiff's suit.

F. C. MITAL and S. C. MITAL, for Appellant.

TEK CHAND and H. L. SIBAL, for Respondent.

JUDGMENT.

Kapur, J. KAPUR, J. This is a plaintiffs' appeal against the judgment and decree of Mr. Jagan Nath, Senior Subordinate Judge, Hissar, dismissing the plaintiffs' suit.

The plaintiffs claiming to be a joint Hindu family firm brought the suit, out of which this appeal has arisen, for recovery of Rs. 10.000 on account of "non-delivery or mis-appropriation" of pledged goods. The defence, *inter alia*, was that the plaintiff-firm was not a joint family firm and no suit could be instituted because it was not a registered firm. The learned Judge raised two issues—

(1) Is the plaintiff-firm a joint Hindu family business and does not require registration ?

(2) If not, should the suit fail ?

He held, that it was not a joint family firm and as it was admitted that it had not been registered under section 69 of the Partnership Act it could not institute the suit and even though the registration had been effected after the suit had been brought the defect of want of registration could not be rectified.

Counsel for the appellants has submitted in the first instance that the plaintiff-firm is a joint Hindu family firm and is not a contractual firm and, therefore, no registration was necessary.

There is a document, Exhibit D. 4, on the record, i.e., a letter signed by Mangal Chand and Chhabil Das addressed to the Agent of the Central

Bank of India, Ltd., Hissar, dated the 11th of December 1945. In this it is stated—

> "We the undersigned, are the partners in the said firm ..... The Bank may recover its claim from the estate of any or all of the partners of the firm.
>
> Whenever any change occurs in our partnership. ..... We undertake to inform the Bank and our individual responsibility to the Bank will continue until....."

Mangal Chand plaintiff made a statement before issues in which he admitted that this document, Exhibit D. 4, was signed by him and that their firm was not a registered firm and also that the firm had been started eight years ago. He made a supplementary statement in which he stated that the account-books were lost in the disturbances.

For the plaintiffs two persons were produced as witnesses. The first is Khushi Ram, P. W. 1. He does not seem to be of much assistance to the plaintiffs as he does not say that the plaintiff-firm is a joint Hindu family firm. All he says is that they, the brothers, are joint. No stranger is a partner in it .And also that "the firm was started seven or eight years ago". This does not show that there is any joint Hindu family firm. The other witness is P. W. 2, Tara Chand, who has stated that the plaintiff-firm is owned by Chhabil Das and Mangal Chand who are real brothers and are joint, that the firm is a joint Hindu family concern and no stranger is a partner in it. In cross-examination he said that Mangal Chand's sons were joint with him.

It is significant that neither of the partners appeared as a witness to support the case that they were members of a joint Hindu family and their firm was a joint Hindu family firm. The books of account, which would have been the best evidence

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in favour of the firm being a joint Hindu family firm were not produced on the ground that they had got lost during the disturbances. There is no explanation as to why the plaintiffs described themselves as partners of a firm when they were executing Exhibit D. 4. On this evidence, I would hold that the plaintiffs have not proved that the firm is a joint Hindu family firm and is not a contractual firm. In this connection counsel for the appellants relied on a judgment in *Debi Sahai* v. *Gillu Mall* (1), but there the learned Judge remarked that there was evidence which showed that the firm was a joint Hindu family firm. It was not decided as a mere question of law but on the evidence in that case it was held that the firm was a joint Hindu family firm.

It was then submitted by Mr. Faqir Chand Mittal that as the firm was registered on the 7th of June 1948, which was about two months after the institution of the suit, the suit should not have been dismissed, but it should have been taken to have been instituted as from the date of the registration and he relied on *Nazir Ahmad* v. *Peoples Bank of Northern India* (2), where it was held that a suit instituted against a company in liquidation without the leave of the Court as required by section 171 of the Indian Companies Act should not be dismissed if within the period of limitation leave of the Court is obtained and is produced in Court. But that was a case under section 171 of the Indian Companies Act where the word "institute" has not been used but the words used are "shall be continued or commenced". No doubt at page 542, Ram Lall, J., relying on *Vardarajulu* v. *Rajamanika* (3), and on *Radha Charan* v. *Matilal* (4), made certain observations which seem to show that in his view a suit filed by an unregistered partnership could be validated by a subsequent registration of the firm. But as was held in a Division Bench judgment of this Court in *Joint*

(1) A.I.R. 1938 Lah. 563
(2) I.L.R. 1942 Lah. 517
(3) A.I.R. 1937 Mad. 767
(4) 41 C.W.N. 534

Hindu Family Firm Des Raj-Prem Chand v. *Registered Firm Hira Lal-Kali Ram* (1), those observations must be considered as obiter as the statute was a different one where different words had been used and these observations had not the concurrence of the other two Judges. Mr. Justice Backett delivered a separate judgment and Mr. Justice Tek Chand merely agreed in the answer proposed by his learned brethren. In *Des Raj's* case it had been observed by Falshaw, J., with whom I agreed:—

> "The weight of authority, and in fact all the reported cases on the point which deserve to be taken into consideration, are clearly to the effect that subsequent registration will not validate the suit".

In two judgments of the Federal Court, which no doubt were under different statutes but where the words used were the same, the view taken was that a subsequent sanction taken does not validate a prosecution which was instituted without such sanction. The first case is *Hori Ram Singh* v. *The Crown* (2), which was a case under section 270 (1) of the Government of India Act of 1935 The words of the statute were—

> 270 (1). No proceeding, civil or criminal, shall be instituted against any person....."

Referring to these words Sulaiman, J., said at page 426—

> "The prohibition is against the institution itself and its applicability must, therefore, be judged in the first instance at the earliest stage of institution".

In a later judgment of the Federal Court in *Basdeo Aggarwala* v. *Emperor* (3), under the Drugs Control Order, in clause 16, it was provided—

> "No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction

(1) 54 P.L.R 345
(2) I L.R. 1940 Lah. 400
(3) 1945 F.C.R 93

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of the Provincial Government".

The appellant in that case was produced before the Chief Presidency Magistrate, on 2nd May 1944. Certain proceedings were taken and the case was adjourned to the 16th May 1944 for evidence and order for bail was also made. The case was then adjourned to the 24th May, on which date the sanction of the Provincial Government was filed and it was held—

> "The words of clause 16 of this Order are plain and imperative and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, they should be regarded as completely null and void, and if sanction is subsequently given, new proceedings should be commenced *ab initio*".

His Lordship went on to say "The prosecution in this case was clearly instituted without the previous sanction required by clause 16 ..... the whole proceedings in this case are null and void".

The words used in section 92 (2) of the Civil Procedure Code are similar and they are—

> "No suit ..... shall be instituted ... .except in conformity with the provisions of that subsection".

and it has been held that the obtaining of a consent in writing of the Advocate-General is a condition precedent to a valid institution of a suit under this section. Where no such consent has been obtained the suit must be dismissed and cannot be rectified by any subsequent amendment. In *Ganjanan Laxman* v. *Bhalchandra Keshav* (1), it was held—

> "The consent of the Advocate-General was necessary to the institution of the suit

(1) I.L.R. 1942 Bom. 293

and in the absence of such a consent the suit was not maintainable".

In *Abdul Rehman* v. *Cassum Ebrahim* (1), the plaintiffs as relators obtained the sanction of the Advocate-General under section 92 of the Civil Procedure Code. They filed a suit against three defendants in respect of certain charitable properties. When the suit was called on for hearing, two of the defendants were struck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint but no sanction of the Advocate-General was obtained previous to the amendment of the plaint. It was held that the plaintiffs were not entitled to bring the suit against the added defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint. In *Attorney General* v. *Fellow* (2), Lord Chancellor said that an amendment could not be permitted without the sanction of the *Attorney-General.* In *Sayad Hussain Miyan* v. *Collector of Kaira* (3), a similar view was taken by a Division Bench of the Bombay High Court. The Allahabad High Court in *Gopal Dei* v. *Kanno Dei* (4), held that the consent as provided in section 92, Civil Procedure Code, is a condition precedent to the institution of the suit and if no valid consent is given before the suit is instituted the mistake cannot subsequently be rectified, unless by means of withdrawal of the suit with permission to institute a fresh suit.

I, therefore, hold that as there was no registration of the firm under section 69 of the Partnership Act before the suit was instituted, subsequent registration will not rectify that mistake. I would, therefore, dismiss this appeal with costs.

(1) I.L.R. 36 Bom. 168
(2) (1820) I.J. & W. 254.
(3) I.L.R. 21 Bom. 257
(4) I.L.R. 26 All. 162.

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HARNAM SINGH, J. In order to appreciate the points that arise for decision in Regular First Appeal No. 121 of 1948, the facts of the case may be set out in some detail.

On the 6th of April 1948, Messrs. Puran Mal-Ganga Ram instituted Civil Suit No. 43 of 1948, against the Central Bank of India, Limited, for the recovery of goods pledged or in the alternative for the recovery of rupees 10,000 on account of non-delivery of the goods pledged and misappropriation.

On the 5th of May 1948, the defendant-bank filed written statement. In paragraph No. 1 (a) of that statement it was pleaded that the plaintiff firm, being unregistered, Civil Suit No. 43 of 1948, was liable to dismissal.

On the pleadings of the parties the Court of first instance fixed the following issues :—

(1) Is the plaintiff-firm a joint Hindu family business and does not require registration ?

(2) If not, should the suit fail ?

On the 7th of June 1948, the Registrar of Firms, East Punjab, acknowledged the receipt of statement prescribed by section 58 (1) of the Indian Partnership Act, 1932. In that letter the Registrar mentioned that the statement had been filed and the name of the firm Puran Mal-Ganga Ram, Tehsil Bhiwani, District Hissar, had been entered in the register of firms.

Finding that the plaintiff-firm was not a joint Hindu family business, the Court of first instance has dismissed the suit, leaving the parties to bear their own costs.

From the decree passed by the Court of first instance on the 14th of July 1948, the plaintiff-firm appeals under section 96 of the Code of Civil Procedure.

In arguments counsel for the appellant maintains that the plaintiff-firm being a joint Hindu family firm, no registration of the firm was necessary and that in any case the suit should have been deemed to have been instituted on the 7th of June 1948, when the plaintiff-firm was registered under section 59 of the Indian Partnership Act, 1932, hereinafter referred to as the Act.

On the 11th of December 1945, Mangal Chand and Chhabil Das wrote letter, Exhibit D. 4, to the defendant-bank. That letter reads:—

> "As the firm of Puran Mal-Ganga Ram have dealings with Bank, we beg to inform you that we, the undersigned, are the partners in the said firm. We are jointly and severally responsible to the Bank for the liabilities of the firm to the Bank. The Bank may recover its claim from the estate of any or all of the partners of the firm.
>
> Whenever any change occurs in our partnership or agency, we undertake to inform the Bank of the same in writing and our individual responsibility to the Bank will continue until we receive from the Bank an acknowledgement of that letter and until all our liabilities to the Bank are discharged.
>
> Yours faithfully,
>
> (Sd.) MANGAL CHAND.
>
> (Sd.) CHHABIL DAS".

From the letter, Exhibit D. 4, it is plain that the plaintiff-firm was a partnership within section 4 of the Act.

Section 5 of the Act provides that the relation of partnership arises from contract and not from status, and, in particular the members of a Hindu undivided family carrying on a family business

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as such are not partners in such business. Letter, Exhibit D. 4, shows that there was a contractual partnership between Mangal Chand and Chhabil Das.

Khushi Ram stated that the firm belonged to Chhabil Das and Mangal Das, who were real brothers and that no stranger was a partner in the plaintiff-firm. In reply to a Court question Khushi Ram has stated that the plaintiff-firm was started by the two brothers, seven or eight years ago. Clearly, the evidence given by Khushi Ram, P. W. 1, shows that the business carried on by Mangal Das and Chhabil Das was not a family business within section 5 of the Act.

Tara Chand, P. W. 2, gave evidence that the plaintiff-firm belonged to Chhabil Das and Mangal Das who are real brothers and are joint. He then gave evidence that the plaintiff-firm was a joint Hindu family concern which had been in existence for seven or eight years prior to 1948, adding that no stranger was partner in the firm. Gopi Ram, father of Chhabil Das and Mangal Das, carried on business at Calcutta before he died.

In the Court of first instance the plaintiff-firm did not produce their account-books and neither Chhabil Das nor Mangal Das gave evidence in the case.

In my judgment the evidence given by Khushi Ram and Tara Chand is not sufficient to rebut the evidence furnished by the letter, Exhibit D. 4. That being so, I confirm the decision given by the Court of first instance that the plaintiff-firm was a partnership-firm.

Section 69 (2) of the Act provides that 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.

In construing section 69 of the Act in some cases Courts have been of the opinion that suit by an unregistered firm can be validated by the subsequent registration of the firm. In other cases the view has been taken that a subsequent registration of the firm cannot cure the defect which existed at the time of the institution of the suit. In my opinion, a suit by an unregistered firm cannot be validated by the subsequent registration of the firm.

Now, first of all I come to that conclusion upon the language of the section. Clearly, section 69 of the Act is framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before a suit is maintainable at all. The prohibition contained in section 69 of the Act is against the institution of the suit itself and its applicability must, therefore, be judged in the first instance at the earliest stage of the institution. In this connection *Hori Ram Singh* v. *Crown* (1), and Basdeo *Aggarwal* v. *King Emperor* (2), may be seen.

In *Hori Ram Singh* v. *Crown* (1), section 270 (1) of the Government of India Act, 1935, came up for construction before their Lordships of the Federal Court. Section 270 of the Government of India Act directed that no proceedings, civil or criminal, *shall be instituted* against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion and in the case of a person employed in connection with the affairs of a province of the Governor of that province in his discretion. In construing that section Suleman, J., said—

> "Section 270 (1) directs that no proceedings, civil or criminal, shall be instituted,

(1) I.L.R. 21 Lah. 400
(2) 1945 F C.R. 93

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etc., etc. The prohibition is against the institution itself and its applicability must, therefore, be judged in the first instance at the earliest stage of the institution."

In *Basdeo Aggarwala* v. *King Emperor* (1), clause 16 of the Drugs Control Order, 1943, came up for construction before the Court. Clause 16 of the Order provides that no prosecution for any contravention of the provisions of the Order shall be instituted without the previous sanction of the Provincial Government. In construing clause 16 of the Order the Court found—

> "In our judgment the words of clause 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as *completely null and void, and if sanction is subsequently given, new proceedings should be commenced* ab initio."

From the law stated in I. L. R. 21, Lah. 400 and 1945 F. C. R. 93, it is plain that the prohibition contained in section 69 of the Act is to the institution of the suit itself and that subsequent registration of the firm cannot validate the institution of the suit which is null and void.

Basing himself upon *Nazir Ahmad and others* v. *The Peoples Bank of Northern India, Limited* (2), counsel urges that the subsequent registration of the firm validates the institution of the suit.

In *Nazir Ahmed and others* v. *The Peoples Bank of Northern India, Limited* (2), the point that arose for decision was under section 171 of

(1) 1945 F C.R. 93
(2) I.L.R. 23 Lah. 517

the Indian Companies Act. Section 171 of the Indian Companies Act reads:—

> "When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceedings *shall be proceeded with* or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose."

In deciding the point that arose in *Nazir Ahmed and others* v. *The Peoples Bank of Northern India, Limited* (1), Ram Lal and Beckett, JJ., point out that section 171 of the Indian Companies Act corresponded to section 177 of the English Act, which was in identical terms except that in the Indian Act the word 'suit' has been substituted for the word 'action' in the English Act. That being so, Ram Lal and Beckett, JJ., thought that the word 'commenced' occurring in section 171 of the Indian Companies Act should be assigned the same meaning which was assigned to the word 'commenced' appearing in section 177 of the English Act. Relying upon the English decisions under section 177 of the English Act Ram Lal and Beckett, JJ., found that the grant of leave by the liquidation Court was not to be regarded as a condition precedent to the institution of the suit.

In England the law is that the first compulsory process to bring the parties into Court must be considered to be the commencement of the suit. In *Attorney-General* v. *Brown* (2), Macdonald, Chief Baron, delivering the opinion of the Court said—

> "That it has been the regular and constant practice for more than a century to consider the *capias* as the commencement of the proceedings ; nor is there much danger in that practice to the

(1) I.L.R. 23 Lah. 517
(2) 145 E.R. 1129

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defendant, for the Court can always call for the process and see whether it was actually issued in time. We cannot, therefore, break in upon a practice so long established; but if the defendant questions it, he must do so by an application to the Court, and not by a motion for a new trial."

Order II, rule I of the Supreme Court Rules, 1883, provides, *inter alia*, that every action in the High Court shall be commenced by a writ of summons. The procedure contemplated by rule I of Order II of the Rules of the Supreme Court, 1883, corresponds to the procedure provided by section 27 of the Code of Civil Procedure. Section 26 of the Code enacts that suit shall be instituted by the presentation of the plaint whereas section 27 of the Code provides that where a suit has been duly instituted, a summons shall be issued to the defendant to appear and answer the case. Plainly, the prohibition contained in section 69 of the Act is to the presentation of the plaint, whereas the prohibition contained in section 171 of the Indian Companies Act is to the issuance of the first compulsory process to bring the parties into Court.

Now, the suit out of which this appeal has arisen was instituted on the 6th of April 1945, whereas the plaintiff-firm was shown for the first time in the Register of Firms maintained under section 59 of the Act on the 7th of June 1948. That being so the institution of the suit should be regarded as completely *null and void*. If the institution of the suit be nullity, the subsequent registration of the plaintiff-firm could not validate what in law did not exist.

For the reasons given above I would affirm the decree passed by the Court of first instance and dismiss the appeal with costs.