

Delhi High Court Miraj Marketing Corporation vs Vishaka Engineering And Anr. on 23 November, 2004 Equivalent citations: 115 (2004) DLT 471, 2005 (79) DRJ 209 Author: M Sharma Bench: M Sharma, G Mittal JUDGMENT Mukundakam Sharma, J. 1. This appeal arises out of the judgment and order passed on January 31, 2003 by the learned Additional District Judge in Suit No. 121/2000 dismissing the said suit. 2. The suit was instituted by the appellant as the plaintiff against the respondents-defendants. In the cause title of the plaint, the appellant-plaintiff described itself as follows:- “M/s. Miraj Marketing Corporation (Regd) 206, IInd Floor, Miraj Plaza, East Patel Nagar, Delhi-8” [Through its authorised representative] Mr.Amitabh Sharma The original plaint filed by the plaintiff was amended subsequently and in the amended plaint also the appellant-plaintiff described itself as above. In paragraph 1 of the plaint the plaintiff stated that the plaintiff is a proprietorship firm having its office at the aforementioned address. The said suit was instituted by the appellant-plaintiff seeking for a decree for recovery of Rs. 4,34,600/- along with pendente lite and future interest from the date of institution of the suit till realisation. 3. In the written statement filed by the defendants, certain preliminary objections were raised. One of the said objections was that the plaint had not been signed or verified, or the suit had not been filed by a duly authorised person and that Mr. Amitabh Sharma was neither the proprietor nor a duly authorised representative of the plaintiff firm and as such Mr. Amitabh Sharma was not competent or empowered to file, sign and verify the plaint and hence the said suit of the plaintiff was liable to be dismissed on the said ground. 4. On the pleadings of the parties, the trial court framed the following issues:- 1. Whether the plaintiff is entitled to the suit amount? OPD. 2. Whether the suit of the plaintiff is barred by section 69(2) of the Partnership Act? OPD. 3. Whether the suit of the plaintiff is barred U/O 13 Rule 10 CPC? OPD. 4. Whether the suit of the plaintiff is not signed and verified by a duly authorised person? OPD. 5. Whether the plaintiff is entitled to the interest, if so, at what rate? OPP. 6. Relief. 5. During the course of trial the appellant-plaintiff examined Shri Ajay Gogia as PW-1 and filed his examination-in-chief by way of an affidavit. The appellant-plaintiff also examined Shri A.K. Pandey as PW-2 and also filed his examination-in-chief through an affidavit whereas the respondents-defendants examined Mr.Sanjeev Kapil as DW-1. 6. In the verification of the affidavit filed by way of evidence filed by Shri Ajay Gogia as PW-1, it was stated thus:- “Verification: Verified on this 30th day of July 2002, that the contents of the above affidavit is (are) true and correct to the best of my knowledge and nothing material has been concealed there from.” Similar verification was also done in the affidavit filed by way of evidence by Shri A.K. Pandey as follows:- “Verification: Verified on this 30th day of July 2002 that the contents of the above affidavit is true and correct to the best of my knowledge and nothing material has been concealed there from.” 3. The learned Additional District Judge thereafter heard the arguments in the said suit and by judgment and order passed on January 31, 2003 he dismissed the said suit filed by the plaintiff in the light of the evidence recorded by him as against Issues No. 1, 4 and 5. Issues No. 1 and 5 were taken up first. While discussing the said issues, the learned trial

court referred to the aforesaid verifications appended to the affidavits by way of evidence by the witnesses of the plaintiff. In the light of the said verifications in both the affidavits it was held that it could not be said that the verification of the two affidavits was in compliance with Order 19 of the Code of Civil Procedure. The trial court further held that the affidavits/evidence filed by the plaintiff was not proper and legal evidence and no reliance could be placed safely on them and, therefore, the said affidavit could not be read in evidence. It was also held that as the plaintiff had failed to lead any evidence therefore there was no evidence on record, and consequently the plaintiff had failed to discharge the onus. The said issues were decided in favor of the defendants and against the plaintiff. 4. So far issue No. 4 is concerned, it was held by the learned trial court that the present suit had been brought in the name of M/s. Miraj Marketing Corporation through one authorised representative Mr. Amitabh Sharma who was not the proprietor and no authority of Mr. Amitabh Sharma was proved on record. Mr. A.K. Pandey, PW-1, filed affidavit by way of evidence wherein he had stated that he was the proprietor of the plaintiff firm and that the plaintiff was a sole proprietorship firm. He had not stated in his affidavit that the plaint was signed and verified by him. 5. It was submitted by the counsel for the plaintiff during the course of his arguments before the trial court that the plaint had been filed by the proprietor, Shri A.K. Pandey, on behalf of the proprietorship firm. As there was no statement as to who was the proprietor of the firm in the plaint nor it was mentioned as to who had signed the plaint, it was held by the trial court that a proprietorship firm is not a legal entity and, therefore, the suit could not be brought in the firm's name. The suit was accordingly dismissed. Being aggrieved by the said judgment, the present appeal is filed on which we have heard the learned counsel appearing for the parties and gone through the record. 6. It was submitted by the learned counsel appearing for the appellant that the verifications/affidavits filed by way of evidence were in the nature of evidence and the said affidavits were properly verified as required under Rule 3 of Order XIX of the Code of Civil Procedure. It was submitted by him that both the deponents, namely, Shri Ajay Gogia and Shri A.K. Pandey, in their verifications in the affidavits had stated that the contents of the affidavits were true and correct to the best of their knowledge and, therefore, the said verifications in both the affidavits satisfied the requirements of Rule 3 of Order XIX of the Code of Civil Procedure. 7. Order XIX of the Code of Civil Procedure permits a court to receive evidence by way of affidavit for proving particular fact or facts. Affidavits are not included in the definition of 'evidence' in section 3 of the Evidence Act and can be used as evidence only if, for sufficient reasons, a court passes an order to that effect under Order XIX Rule 1 or 2 of the Code of Civil Procedure. As to how an affidavit is to be filed is also set out in Rule 3 of the said Order XIX. It is provided therein that the affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated. 8. In the case entitled A.K.K. Nambiar v. Union of India, , it was held by the Supreme Court that in the absence of proper verification, affidavits could not be admitted in evidence.

We may also advert to the judgment of this court reported as D.N. Gupta v. Jaswant Singh, , it was held that where an affidavit seeking to leave to defend application is not properly verified it cannot be allowed to be amended but the deponent may be given an opportunity to file another affidavit. In the case of Musebhai Jivanbhai Jivani v. Special Land Acquisition Officer, (1999-2) 19 Gujarat Law Journal 108, the Division Bench of the Gujarat High Court has held that in case of an affidavit what is required to be declared is the source of knowledge whether it is personal knowledge or knowledge on information based on record or on the basis of the legal advice, etc. But to say that the deposition is true to the best of own knowledge is no affidavit and is not in accordance with the provisions of Order XIX, Rule 3 of the Code of Civil Procedure and that such an affidavit does not inspire any confidence so as to act upon the same. It was held that to say that it is true to the best of own knowledge is no affidavit and is not in accordance with the provisions of Order XIX Rule 3 of the C.P.C. 9. The learned trial court has also referred to the decisions of the Supreme Court in A.K.K. Nambiar (supra) as well as some other decisions of this Court and other High Courts and on appreciation thereof held that an affidavit must contain the evidence of the deponent as to such facts of which he is in a position to speak of his knowledge and such facts must be verified on personal knowledge, and only in respect of those facts which are within his knowledge. The facts which are not within his knowledge can be verified on information or belief, and that the source of information or the grounds of belief must be clearly stated so that the opposite party gets an opportunity to verify the averments and make a grievance. Based thereon, the learned Judge concluded that the verifications of the affidavits filed on behalf of the appellant were not in compliance of Order XIX of the Code of Civil Procedure. 10. On examination of the affidavits and the position in law, we find that conclusions drawn by the learned trial court that the verifications of the aforesaid two affidavits are not in compliance with Order XIX of the Code of Civil Procedure are not based on cogent reasons. It was stated by the aforesaid two deponents in the said verifications of the affidavits that all the statements made in the said affidavits are true and correct to the best of their knowledge. Hence, according to the deponents, the entire contents of the affidavits were based on their personal knowledge. Although the said verifications were not sworn as true to the personal knowledge of the deponents, yet in our considered opinion the said verifications substantially comply with the requirement of Rule 3 of Order XIX of the Code of Civil Procedure. These affidavits and the deposition therein would have to stand to the test of cross-examination. Examination of the affidavits and evidence on behalf of the appellant in this background shows that PW-2 Shri A.K. Pandey has stated that the affidavit was prepared on the basis of the record being maintained. There is no such deposition in the affidavit or verification, nor any such record produced. In the face of such statements, hardly any evidentiary value can be attached to the affidavit by way of evidence on behalf of the appellant. 11. Be that as it may, we may also now look to the second contention which was advanced before us and was hotly debated. It was submitted that the suit was instituted in the name of the proprietorship firm

and, therefore, the said suit was not maintainable. The learned trial court also upheld the said contention and dismissed the suit on that score also. Therefore, the aforesaid plea is very relevant and calls for in depth consideration by us. A proprietorship firm has no legal entity like a registered firm. A suit cannot be instituted in the name of an unregistered proprietorship firm and the said suit is to be instituted in the name of the proprietor. It is an admitted position in the plaint that the plaintiff is a proprietorship firm. There is, however, no statement made in the plaint by the plaintiff as to who is the proprietor of the firm. Shri Amitabh Sharma is described in the cause title of the plaint only as an authorised representative. The name of the proprietor of the said proprietorship firm is not given in the plaint. The original plaint which is placed on record has a verification. However, the signature appended to the said verification appears to be that of Shri A.K. Pandey, who was examined in the suit as PW-2, as the main witness. He stated in his cross-examination that he was the proprietor of the plaintiff firm. He also stated in his cross-examination that the plaint was signed, filed and verified by him. PW-1 also in his cross-examination stated that the plaintiff firm was a proprietorship firm and that Shri A.K. Pandey was the sole proprietor of the plaintiff firm. It was, however, stated by him that the plaintiff firm was a registered firm but he could not state as to when the said firm was registered. It is apparent that Shri A.K. Pandey had not instituted the suit. He had only come as a witness. Even in the amended plaint the suit was shown to have been instituted in the name of the firm. A sole proprietorship firm is not a legal entity which can sue or be sued in its own name. Such suit relating to or against the affairs or claims of a proprietorship concern has to be brought or made against the person who is the sole proprietor of the firm. The plaintiff was described to be a proprietorship firm and represented through Shri Amitabh Sharma. Shri Amitabh Sharma had neither signed the plaint nor he signed the power which was filed in the present case. 12. In that view of the matter, we agree with the findings and the conclusions recorded by the trial court that the suit was not instituted by a duly authorised person. Accordingly, we find no infirmity in the judgment and order passed by the learned trial court dismissing the suit on the ground that the suit was not properly instituted. We accordingly dismiss the appeal. However, in the facts and circumstances of the case we leave parties to bear their own costs.