

(1962) 05 P&H CK 0016

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 38 of 1961

Bhai Siri Ram Singh

APPELLANT

Vs

S. Santokh Singh
 S. Santokh Singh Vs Bhai Siri Ram
Singh

RESPONDENT

Date of Decision : 29-05-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Limitation Act, 1908 — Section 19
Partnership Act, 1932 — Section 6

Citation : AIR 1963 P&H 95

Hon'ble Judges : D. Falshaw, C.J;I.D. Dua, J

Bench : Division Bench

Advocate : D.N. AwasthyG.P. Jain, F.C. Mittal, Hem Raj Mahajan and S.S.
Mahajan, for the Appellant;

Final Decision : Allowed

Judgement

Inder Dev Dua, J.—This appeal is directed against the judgment of a learned Single Judge of this Court in R. S. A. No. 288 of 1956, whereby he allowed the appeal and reversing the judgment and decree of the learned District Judge restored that of the Court of first instance. Facts giving rise to the dispute briefly stated are that Bhai Siri Ram Singh plaintiff (respondent in this appeal) instituted a suit on 10th of August, 1949, for rendition of accounts of the dissolved partnership and for recovery of the amount which may be found due to him from his partner S. Santokh Singh defendant. The parties are admittedly related to each other. According to the plaintiff's allegation they were doing business of agricultural fanning in partnership in Khamgarh and Sadiq Nagar in Bahawalpur State, now in Pakistan.

They obtained on lease from Messrs Panju Mal Khazan Chand 70 squares of agricultural land in Chak Mohd Amir pucca in the same State, in December 1941, for cultivating it in partnership till Rabi 1944, on certain terms. During the

continuation of this partnership a sum of Rs. 5,000/- was paid by S. Santokh Singh defendant to Bhai Siri Ram Singh plaintiff on 2nd December, 1942, towards part payment of the plaintiff's share of the profits but no accounts were ever rendered by the defendant. As the entire income had been received by the defendant and as in spite of repeated demands he never cared to render full account of the income realized by him and of the expenses incurred, the plaintiff was compelled as a last resort to file the present suit.

2. The defendant resisted the suit questioning the jurisdiction of the Court and also pleading time bar. The allegation of partnership in respect of the lease in Chak pucca was also denied. The plaintiff, according to the defendant, was to be given profit as bonus for his work as a supervisor.

3. The pleadings of the parties gave rise to the following issues:-

(1) Whether the suit is within time?

(2) Whether the Court has jurisdiction to hear the suit?

(3) Whether the plaintiff was not a partner in the lease of Chak Pacca and the share in the profit was to be given to plaintiff as a bonus merely for his working as a Supervisor?

(4) If issue No. 3 is not proved, what were the terms of the partnership?

(5) If issue No. 3 is not proved, whether the defendant is not liable to render the accounts?

4. The trial Court after considering the evidence on the record upheld the plea of partnership between the parties in regard to the lease in question on the terms enumerated in the plaint. In view of this finding, issue No. 5 did not arise. The suit was held to be within limitation on the ground that the defendant had acknowledged his liability to render accounts as per letters Exhibits P. 3 to P. 6. The jurisdiction of the Courts at Jullundur was also upheld on the ground that the defendant had a residence within the jurisdiction of the Court and also because the head office of the partnership was also located within the limits of the Court's jurisdiction where the accounts were also maintained.

5. The defendant went in appeal to the Court of the District Judge. That Court upheld the decision on the issue of jurisdiction. On the question of partnership, however, after considering the evidence on the record it came to the conclusion, in disagreement with that of the trial Court, that there was neither any direct evidence of partnership nor were there any circumstances which led to the inference in favour of the existence of such a partnership. The decision on the plea of limitation was also reversed, the Court holding that the letter Exhibits P. 3 to P. 6 did not refer to any partnership. According to the Court of First Appeal, acknowledgment must be self-contained and no extrinsic evidence could be led to show that the acknowledgment related to the liability in question. For these reasons, the Court of the District Judge allowed the appeal and setting aside the

decree of the trial Court dismissed the plaintiff's suit with costs throughout.

6. The plaintiff then appealed to this Court and a learned Single Judge holding that the question of the existence of partnership was a mixed question of fact and law went into the entire evidence and on its appraisal came to the conclusion that the partnership between the parties was fully established. I may here reproduce the conclusion of the learned Single Judge in his own words :-

"The entire documentary evidence in this case leads me to the irresistible conclusion that the parties worked as partners for exploitation of the Chak-Pacca lease, in which there was an undoubted sharing of the profits. The plaintiff admittedly received a sum of Rs. 5,000/- as a share of profits and as said in Lindley on Partnership (Eleventh Edition) at page 44, "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business" though the receipt of such a share does not of itself make him a partner in the business. As held in *Badeley v. Consolidated Bank Ltd.*, a decision of the Court of Appeal in (1888) 38 Ch D 238, "if all that is known is that two persons are participating in the profits of a business, this unless explained, leads to the conclusion that the business is the joint business of the two and that they are partners."

7. The objection raised on behalf of the defendant before the learned Single Judge that the conclusion of the learned District Judge was based on a finding of fact was repelled with the observation that the letters on which reliance had been placed by both parties had not been subjected to any close analysis by the District Judge and his decision was based primarily on the circumstances of the case, more especially the absence of an agreement, the uncertainty about the plaintiff's position regarding the place where the agreement of partnership was made, the absence of proof of any financial contribution by the plaintiff and the controlling hand of the defendant in the business management.

According to the learned Single Judge, it was incumbent on the District Judge, as a final Court of fact, to consider the legal effect of the correspondence on which both parties had placed reliance, and he should not have disposed of the entire correspondence with the observation that though these letters indicate an identity of interest in the business the plaintiff had nowhere been described as a partner. The proper approach, according to the learned Single Judge, would have been for the District Judge to consider the contents of the letters and not their omissions. In this view of the matter the learned Single Judge felt bound to hold that the finding of the lower appellate Court lacked the foundational basis of evidence.

The learned Judge further observed that the question whether a person is a partner or not is a mixed question of law and fact. Reliance for this view was placed on *Debi Parshad Vs. Jai Ram Dass and Another*, . Reference was then made to *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, , for the view that interference by High Court is justifiable where the

finding of fact on a matter which is a mixed question of law and fact is unreasonable and perverse in nature. Reviewing the entire evidence, the learned Judge, as already noticed, found himself unable to agree with the defendant's contention that the parties had entered into a joint venture without any joint interest as this conclusion did not derive sustenance from the documentary evidence. Holding partnership to be proved, according to the learned Judge, the question of limitation did not arise and indeed this is said to have been conceded by the learned counsel for the defendant. With these conclusions, the learned Single Judge, as already observed, allowed the appeal and setting aside the judgment and decree of the learned District Judge restored that of the trial Court.

8. On Letters Patent Appeal, Shri Awasthy has laid stress on the contention that the conclusions of the learned District Judge were based on findings of fact and, therefore, the learned Judge in Single Bench had no jurisdiction to re-evaluate the evidence and come to its own independent findings. Reliance has in this connection been placed on *Deity Pattabhiramaswamy v. S. Hanymayya* AIR 1959 SC 57, the head note of which reads thus:-

"the provisions of Section 100 CPC are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that, the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence."

Reference in the course of judgment has been made by the Supreme Court to the earlier Privy Council decisions in *Durga Chowdhry v. Jawahir Singh* ILR Cal 23 (PC), *Midanopore Zamindari Co., Ltd. v. Uma Charan* AIR 1923 PC 187, and AIR 1930 91 (Privy Council) Particular emphasis has been laid by the appellant's counsel on the following observations of the Supreme Court :-

"But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100, Civil Procedure Code, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public."

The counsel has also referred us to *Paras Nath Thakur v. Suit. Mohani Dasi* AIR 1959 SC 1204, where it has been observed that the finding of fact even when it is an inference from other facts found on evidence does not become a question of law except in certain specified cases. In this connection, reference was made to the earlier decision of the Supreme Court in *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, the decision relied upon by the learned Single Judge.

There is still another decision in *G. Venkataswami Naidu and Co. Vs. The*

Commissioner of Income Tax, on which too the counsel placed his reliance. In that case the Supreme Court discussed the effect of the decision of the Court of First Appeal on a question of mixed law and fact. To this decision I will have to advert more closely a little later. Reference has also been made to a still later decision of the Supreme Court in *Raruba Singh v. Achal Singh* AIR 1961 SC 1097, for the proposition that in second appeal the High Court's jurisdiction is confined only to questions of law.

9. On behalf of the respondent, Shri Mittal has placed strong reliance on a Division Bench decision of this Court in *Commr. of Income Tax, Punjab, Pepsu, Himachal Pradesh and Bilaspur, Simla Vs. Hira Mall Narain Dass*, observed that the question whether a person is a partner or an agent of a firm is a mixed question of law and fact, and that if in deciding a question of fact the Court of First Appeal does not take into consideration documents which had an important bearing the finding given by the Court of First Appeal is not binding on the High Court in second appeal. In this connection, our attention has also been drawn to Section 4 of the Partnership Act which defines the terms "partnership", "Partner" and "firm", and it has been contended that it is a question of law to draw an inference of the existence of partnership from basic facts and, therefore, this conclusion, based on the inference so drawn, constitutes a question of law reviewable by a Court of Second Appeal. The respondent has also tried to get assistance from the Supreme Court decisions to which our attention has been drawn on behalf of the appellant, particularly *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*,

10. Now, in *Debi Parshad Vs. Jai Ram Dass and Another*, the learned Single Judge came to the conclusion that the learned District Judge there had misread and mis-construed Explanation 2 to Section 6 of the Indian Partnership Act. The learned Single Judge there upheld the argument that partnership is a matter of intention which is a question of fact but he justified his interference on the ground that the law applicable in arriving at the question of fact having not been correctly applied the finding became reviewable by the Court of Second Appeal. The reasons given by the learned Single Judge in that case for interference in Second Appeal thus appear to me unexceptionable and it is only when a principle of law has been wrongly applied even when coming to a finding of fact that this Court can interfere on Second Appeal. The decision on this point was affirmed on appeal by the Division Bench. The position has been clarified by the Supreme Court in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, of the report Gajendragadkar, J., who spoke for the Bench, has after referring to *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, put the position thus:-

"Even if the conclusion of the tribunal about the character of the transaction is treated as a conclusion on a question of fact, it cannot be ignored that, in arriving at its final conclusion on facts proved, the tribunal has undoubtedly to address itself to the legal requirements associated with the concept of trade or

business. Without taking into account such relevant legal principles it would not be possible to decide whether the transaction in question is or is not in the nature of trade. If that be so, the final conclusion of the tribunal can be challenged on the ground that the relevant legal principles have been misapplied by the tribunal in reaching its decision on the point; and such a challenge would be open u/s 66(1) because it is a challenge on a ground of law. The same result is achieved from another point of view and that is to treat the final conclusion as one on a mixed question of law and fact. On this view the conclusion is not treated as one on a pure question of fact, and its validity is allowed to be impeached on the ground that it has been based on a misapplication, of the true legal principles. It would thus be seen that whether we call the conclusion in question as one of the fact or as one on a question of mixed law and fact, the application of legal principles which is an essential part in the process of reaching the said conclusion is undoubtedly a matter of law and if there has been an error in the application of the said principles it can be challenged as an error of law. The difference then is merely one of form and not sub-stance; and on the whole it is more convenient to describe the question involved as a mixed question of law and fact. That is the view expressed by this Court in the case of *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, ; and in our opinion, it avoids any confusion of thought and simplifies the position by treating such questions as analogous to those falling under the category of questions of law."

It appears, therefore, that according to the decisions of the Supreme Court just noticed unless there is an error of law in arriving at the conclusion on a question of mixed law and fact, the conclusion though based upon the primary evidentiary facts cannot be challenged on second appeal. Error in appreciating documentary evidence or errors in drawing inferences are not considered as errors of law and conclusions of fact even if based on circumstances have generally been considered to be binding on this Court on second appeal. Of course, construction of a document of title is on a different footing and is treated on the same basis as error of law.

11. Now, in the case in hand Shri Mittal has submitted that the decision of the trial Court was clear and detailed but that of the learned Judge suffered from legal errors which have been set right by the learned Single Judge. The counsel has in this connection drawn our attention to Section 6 of the Indian Partnership Act and submitted that in order to determine whether the requirements of this section are satisfied all facts proved on the record have to be considered together. With this preliminary submission the counsel has read the judgment of the learned District Judge. This judgment shows that the learned District Judge first, on considering the evidence on the re-cord, concluded that there was no. partnership agreement expressly created between the parties, This conclusion is not assailed before us.

The learned Judge then proceeded to observe that such an agreement need not

be express and it can properly and legally arise out of mutual understanding evidenced by a consistent course of conduct and also by express admissions of the parties. He then proceeded to state that in the present case in the plaint as well as in his statement as a witness the plaintiff's claim was based on an express agreement made on a particular day at Jullundur and that having so stated his case he could not be permitted to fall back on mutual understanding giving rise to relationship of partnership. Finally, the District Judge opined that even if the plaintiff could rely on such a plea enough evidence had not been brought on the record to warrant a presumption in favour of existence of a partnership. The District Judge then considered the documentary evidence produced in the case and after adverting to it in a detailed matter, he observed that there were no circumstances justifying inference of partnership. The learned Judge also in this connection stated that mutual agency was an essential element of partnership and holding this element to be wanting in the case before him, he repelled the contention of the existence of partnership.

12. The counsel has contended that the learned District Judge had not kept to the forefront the essential requisites contained in Section 6, Indian Partnership Act, and, therefore, his finding was vitiated by an error of law. Here it would be helpful to reproduce Section 6:-

"6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1. The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2. The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business; and in particular, the receipt of such share or payment -

- (a) by a lender of money to persons engaged or about to engage in any business,
- (b) by a servant or agent as remuneration,
- (c) by the widow or child or a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the good will or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business."

Considering the decision of the learned District Judge in the background of this section, I am afraid I do not find it possible to hold that he has in any way ignored the basic principle underlying this section.

13. The counsel then submitted that Exhibits P. 35 "and P.B. were not considered by the learned District Judge and that his failure to consider these two documents vitiates his judgment. Emphasis has also been laid on the circumstance that revenue for the land in question was paid by the respondent-plaintiff.

14. After devoting my most earnest thought to the contentions raised at the bar I am of the view that however erroneous the decision of the learned District "Judge may be on the merits (a point on which I express no opinion), it is difficult to hold that it is vitiated by an error of law. Merely because the Court of second appeal, if sitting as a Court of first appeal may have come to a different conclusion on a question of fact or even on a question of mixed law and fact, it would by itself constitute no ground for interference on second appeal; it is the application of legal principles in the process of reaching the conclusion which affords a justification for interference with that conclusion on second appeal and if there is no such error in applying the true legal principles, then, as I consider the Supreme Court decision in *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, there is no scope for interference by the Court of second appeal. I would, therefore, be inclined to hold that the conclusion on the question of non-existence of partnership being a finding of fact could not be reversed on second appeal, and the learned Single Judge was not justified in reversing it.

15. In view of the conclusion of the learned Single Judge that there was a partnership in existence, it was conceded before him, that the question of limitation did not arise. Now, that the conclusion on the existence of partnership has been reversed, the question will naturally arise whether or not the suit was within limitation. The learned District Judge when dealing with the question of acknowledgment observed that the acknowledgments must be self-contained and that no outside help should be required in order to show that it related to the debt in suit. The letters Exhibits P.3 to P.6 were held by the learned District Judge not to be self-contained.

Here, it is pertinent to point out that the learned District Judge was not wholly correct in his observations. Surrounding circumstances are, in my opinion, relevant and can always be taken into consideration in construing the words used in the writing which is sought to be utilised as an acknowledgment. Oral evidence of course is to be excluded but not the surrounding circumstances. And then the Courts are generally inclined to lean in favour of a liberal construction of the statements contained in documents said to amount to acknowledgment. Though of course where no admission is made Courts cannot infer one: See *Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and Others*, . Letters Exhibit P.2 and Exhibits P.3 to P.6 are, in my opinion, quite clear in showing admission of liability to account on the part of defendant No. 1. I would, therefore, be inclined to hold that the suit in the present case was within limitation.

16. When Shri Mittal, the learned counsel for the plaintiff-respondent, was confronted with the position that the conclusions of the learned District Judge were of fact and, therefore, binding on this Court, he submitted that there was an alternative case made out by the plaintiff. In this connection he referred to the statement of defendant No. 1 made in the trial Court on 20-4-1953.

According to this statement, the plaintiff had been engaged by defendant No. 1 as a supervising manager of this firm Chak Pucca at Rs. 200/- per month. He was also to get bonus on the profits when declared. Defendant No. 1 had suggested five per cent on the profits as bonus but the plaintiff had left the matter to defendant No. 1. A sum of Rs. 5,000/- had been given by defendant No. 1 to the plaintiff as an advance against this understanding.

S. Santokh Singh began this statement by stating that in his statement dated 22-12-1949, S. Santokh Singh had made reference to Exhibit P.C. in which there is a mention of division of profits. This, it was explained by him referred to certain monies as bonus which were to be arrived at after the profits were received. Shri Mittal in support of this contention placed reliance on a decision of the Supreme Court in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, The following observations have in particular been relied upon:-

"A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had no opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant, in his pleadings. In such circumstances when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff, to a separate suit.

As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in AIR 1943 29 (Privy Council) This appeal arose out of a suit commenced by the plaintiff-appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower Court as well as by the P. C. but the P. C. held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution u/s 65. Contract Act. Although no such alternative claim was made in the plaint, the P. C. allowed it to

be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard ex parte in the absence of the respondent."

In answer to this contention Shri Awasthy submitted that there was no concluded contract between the parties and merely because defendant No. 1 had suggested five per cent on the profits as bonus and the plaintiff had left the matter to him, it would not constitute a legal basis for granting to the plaintiff a decree against defendant No. 1. Shri Awasthy also contended that this plea could not form the subject-matter of an alternative case and indeed he goes to the length of submitting that such an alternative plea would offend the provisions of Order 6, Rule 17, Code of Civil Procedure.

17. After considering the respective contentions raised at the bar, I am inclined to think that unless on the material on the record we come to a conclusion that there was a completed contract between the parties it will not be safe to grant a decree on Letters Patent Appeal to the plaintiff on the basis of the statement made by S. Santokh Singh on 20-4-1953. I quite see that till 20-4-1953 defendant No. 1 had also never taken up the position of giving bonus to the plaintiff on the profits and that this statement was perhaps made to get over the contents of some of the Letters written by the defendant. The position, however, remains that on the basis of this statement it is not possible to come to a conclusion that the payment of five per cent bonus on the profits was one of the terms of the contract entered into between the parties. I am, therefore, unable to sustain the alternative case put forward by Shri Mittal.

18. For the foregoing reasons this appeal succeeds and allowing the same I dismiss the plaintiff's suit. In the circumstances of the case, however, the parties are directed to bear their own costs throughout.

D. Falshaw, C.J.

19. I agree.