
(2005) 05 CAL CK 0022
In the Calcutta High Court
Case No : F.A. No. 207 of 2002

Goutam Hazra and Another APPELLANT
Vs
Pinaki Hazra and Others RESPONDENT

Date of Decision : 04-05-2005

Acts Referred:

Bengal Excise Rules, 1993 — Rule 207, 208
Contract Act, 1872 — Section 23, 65

Citation : (2005) 3 CHN 364 : (2006) 2 CTLJ 121

Hon'ble Judges : Rajendra Nath Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Bidyut Kr. Banerjee, Shila Sarkar and Arnab Roy, S.P. Roy Chowdhury, Durga Prosad Majumder and S. Dasgupta, for the Appellant;

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of the plaintiffs in a suit for dissolution of partnership firm and accounts and is directed against Order No. 19 dated 17th March, 2001 passed by the Civil Judge, Senior Division, 1st Court, Barasat in Title Suit No. 105 of 2000 thereby rejecting the plaint on the basis of application filed by the defendant.

2. The present appellants filed the aforesaid Title Suit No. 105 of 2000 thereby praying for the following relief:

"(a) A decree for dissolution of partnership business may be passed against the principal defendant directing the principal defendant to render the accounts in favour of the plaintiffs from the year 1996-2000.

(b) An order of permanent injunction may be passed against the principal defendant restraining him from taking/grabbing the capitals from the said firm of the said partnership business and/or from investing the capital of the partnership firm into other business and/or from removing the books of accounts from the place of business into other place of business and/or encumbering the said

business.

(c) For all costs of the suit.

(d) For all other relief and relief the plaintiffs are entitled to get."

3. The case made out by the appellants may be epitomised thus :

(i) The plaintiffs and defendant No. 1 are full brothers and the proforma-defendant is the father of the parties.

(ii) The proforma-defendant No. 2 gave proposal for filing an application for getting liquor-licence through his eldest son, the defendant No. 1 and accordingly, he applied for such licence and the same was granted in the name of defendant No. 1 on 9th December, 1985 for sale of foreign liquor to the public for consumption. But as a matter of fact, at the relevant point of time, the defendant No. 1 had not the financial capability of opening such a business. After grant of such licence, it was settled between the plaintiffs and defendant at the instance of the proforma-defendant that they would all work as partners and there would be no necessity of engaging any outsider as employee for selling of foreign liquor in the counter.

(iii) As none of the plaintiffs and defendant No. 1 had any source of income for the purpose of opening of such foreign liquor business, the proforma- defendant provided them money for opening of foreign liquor shop. At that time, there was no written agreement of partnership but it was decided that such partnership agreement would be executed in future. Subsequently, after making investment of money by the proforma- defendant and after giving full time service by the plaintiffs along with defendant No. 1, the business became lucrative and afterwards on 17th September, 1987, a partnership agreement was entered into among the plaintiffs and defendant No. 1. According to such partnership agreement, the trade licence would stand in the name of defendant No. 1 and if any dispute arose, in such circumstances, the licence would be changed. It was further agreed that both plaintiffs and defendant No. 1 would purchase the articles of business and would keep proper accounts and if needed by any of the partners, he would take out the same subject to the maintenance of accounts etc. and anyone of the partners would be entitled to deposit money or withdraw the same on behalf of the other partners. It was further provided that if the situation so demanded, both the plaintiffs and principal defendant would appoint such person as would seem necessary for dealing with the business- transaction. The agreement provided that all the partners would have 1/3rd share of interest over such business and if any one wanted to transfer his share, he would give proposal to others for purchasing of such share and without taking any consent from other partners no one would transfer his share.

(iv) Subsequently, dispute and differences arose between the parties and it became impossible for the plaintiffs to continue as partners. It appeared that due to non-payment of amount towards repayment of loan, the interest on principal

amount in respect of loan given by the State Bank of India reached a figure of Rs. 7.50 lakh.

(v) The defendant with ulterior motive was trying to take away capital of the firm" and intended to invest such capital in other business and even did not allow the plaintiffs to enter into such foreign liquor shop and at the same time refused to render any account. Hence the suit.

4. After entering appearance in the suit, the defendant No. 1 filed an application for rejection of the plaint on the ground that even on the basis of averments made in the plaint, the suit was not maintainable, inasmuch as, according to Bengal Excise Rules, after a licence had been given to a person, if any partner was taken, such act of the licence-holder would amount to "deemed transfer" of licence and was prohibited. In other words, the defendant No. 1 contended that on the basis of averments made in the plaint it was clear that the plaintiffs wanted to enforce a void agreement prohibited under the law of the land and as such, the plaint was liable to be rejected.

5. By the order impugned herein, the learned Trial Judge has accepted the plea of defendant No. 1 and has rejected the plaint.

6. Being dissatisfied, the plaintiffs have come up with the present appeal.

7. Mr. Banerjee, the learned Senior Advocate appearing on behalf of the plaintiffs has first contended before this Court that by mere entering into an agreement to run a business for sale of foreign liquor for which licence is given to one of the parties, there is no infringement of Bengal Excise Rules. Mr. Banerjee contends that here the parties merely entered into agreement for running of the said business on the basis of licence under defendant No. 1 and thus, the same is not prohibited. According to Mr. Banerjee, there has been no transfer of licence in favour of plaintiffs and as such, the licence being still in the name of defendant No. 1, there has been no violation of law.

8. Secondly, Mr. Banerjee contends that even if, it is assumed for the sake of argument that the partnership agreement was invalid, such finding can be arrived at only after taking evidence and if at the time of hearing it appears that the parties under misconception of law without knowing its implication entered into such agreement, in such a case, the plaintiffs are entitled to get back the benefits from the defendant that he received out of such agreement. Mr. Banerjee further contends that by seeking dissolution of the firm the plaintiff never intended to enforce the agreement but wanted to get out of the agreement and thus, the suit was not barred.

9. In support of such contentions, Mr. Banerjee relied upon the following decisions:

1. Dhuri Co-operative Cum-Marketing-cum-Processing Society v. Budh Ram & Ors., reported in AIR 1971 PH 134.

2. L. Shiv Dayal L. Mela Mal and Others Vs. Firm Bishan Dass Shankar Dass, .
3. Gordhandas Kessowji v. Champsey Dossa & Ors., reported in AIR1921 PC 137.
4. Chennuru Ramarao Vs. Gowri Sankar Talkies, Tekkali and Others, .
5. Smt. Janki Bai Chunnilal Vs. Ratan Melu and Another, .
6. Jer & Co. v. Commissioner of Income Tax, U.P., reported in 1972 TL.R.2436.
7. Shital Prasad v. Commissioner of Income Tax, Lucknow, reported in 1985 Tax L.R. 1353.

10. The aforesaid contentions of Mr. Banerjee are seriously disputed by Mr. Roy Chowdhury, the learned Senior Advocate appearing on behalf of the defendant No. 1. According to Mr. Roy Chowdhury, Rules 207 and 208 of the Bengal Excise Rules specifically mention that introduction of any partner after settlement of licence amounts to transfer of licence itself and therefore, such an agreement is hit by Section 23 of the Contract Act. Mr. Roy Chowdhury, thus, contends that the agreement being opposed to law, the learned Trial Judge rightly rejected the plaint. As regards the second contention advanced by Mr. Banerjee, Mr. Roy Chowdhury submits that in this case the plaintiffs have not prayed for refund of the money invested in any illegal business but in fact has prayed for getting share of the profit out of it and therefore, the suit is, in a sense, one for enforcing the agreement of illegal partnership. Mr. Roy Chowdhury, thus, prays for dismissal of the appeal after upholding the order of the learned Trial Judge.

11. Therefore, the question that arises for determination in this appeal is whether on the basis of averments made in the plaint the suit is barred by any law for the time being in force.

12. We first propose to deal with the contention of Mr. Banerjee that there is no bar in entering into agreement of partnership for running of a liquor- shop, if licence remains in the name of one of the partners. To appreciate the aforesaid question, Rules 207 and 208 of the Bengal Excise Rules as it stood at the time of entering into agreement are quoted below :

"207. Permission required for transfer or sub-lease. -No transfer or sub-lease (whether entire or partial) of a licence shall be made except with the previous permission of the Collector and the approval of the Commissioner. The Collector, shall not allow such transfer, or sub-lease, unless good and sufficient reason be shown to his satisfaction, and unless the transferee or sub-lessee is, in his opinion, fit and qualified to hold such license.

208. Partner in business to be named. -The names of partners (if any) shall be disclosed at the time of settlement, and it shall be open to the Collector to refuse to settle a shop with a number of partners. The admission of any person to partnership after settlement shall be deemed to be a partial transfer and shall not be made except under the provisions of Rule 207."

13. According to Rule 207 quoted above no transfer or sub-lease of a licence would be made except with the previous permission of the Collector and the approval of the Commissioner. According to Rule 208, the names of partners, if any, should be disclosed at the time of settlement of licence and it shall be open to the Collector to refuse to settle a shop with a number of partners. The said Rule further provides that admission of any person to partnership after grant of licence should be "deemed to be a partial transfer" of licence and should not be made except under the provisions of Rule 207.

14. Therefore, the last part of Rule 208 makes introduction of partners after grant of licence in favour of a person "a deemed transfer" of licence by operation of law, although in reality, there is no transfer of licence. Once such "deemed" provision is incorporated in the statute, in our view, Mr. Roy Chowdhury is justified in submitting that introduction of any partner subsequent to the grant of licence is totally forbidden and is void in law. It is now settled law that if any agreement is void ab initio being contrary to Section 23 of the Contract Act, such agreement cannot be enforced.

15. We also do not find any substance in the contention of Mr. Banerjee that in this case the plaintiffs did not want to enforce the agreement but sought to get out of it and for that reason by taking aid of Section 65 of the Contract Act had prayed for refund of money invested in the business.

16. On the basis of the averments made in the plaint itself it is clear that the plaintiffs have affirmed the agreement and according to them, the defendant though bound by the terms of agreement violated the terms of the same and as such, those violations have given rise to cause of action of filing of a suit for dissolution of partnership firm and accounts. It further appears that the plaintiffs have not framed the suit as if it is one for refund of the money invested in an illegal business through misconception of law; on the other hand, it has demanded share of profits of the business by virtue of the agreement entered into between the parties as if the agreement is a valid one. Therefore, filing of suit for dissolution of a partnership and for accounts necessarily implies enforcement of agreement of partnership and to get dissolution in terms of the agreement itself and also to get share out of such agreement. We, thus, find that the plaintiffs have not filed this suit for mere recovery of money invested in an illegal partnership entered into through misconception of law. The plaintiffs nowhere in the plaint have alleged misconception of any law. But on the other hand, affirmed the agreement and wanted to enforce the agreement by dissolving the same after getting share of profit.

17. We now propose to deal with the decisions cited by Mr. Banerjee.

18. In the case of Dhuri Co-operative Cum-Marketing-cum-Processing Society vs. Budh Ram & Ors. (supra), a learned Single Judge of the Punjab & Haryana High Court was considering the question whether a person holding a licence for carrying on business of buying and selling ginned cotton under the Cotton

Control Order, 1955, was prohibited either by the said order or by any other law from entering into partnership with a non-licensee to carry on that business.

In the context of such a case, it was held that such partnership is not forbidden by law and therefore the learned Single Judge held that Cotton Control Order, 1955 did not contain any provision prohibiting a licensee from entering into partnership with a non-license-holder and thus, was of the view that a suit for account for such partnership was maintainable. In the case before us, we have already pointed out that taking of any partner after settlement of licence is prohibited under Bengal Excise Rules and is deemed to be partial transfer of licence. Therefore, the said decision cannot have any application to the fact of our case.

19. In the case of Shiv Dayal L Mela Mal & Ors. v. Firm Bishan Dass Shankar Dass (supra), the Division Bench of Punjab High Court was considering whether a licensee under the Opium Act could contract with a third person in consideration of money contributed by the latter to share profits and losses of his business contravening Order 59 of Punjab Opium Orders. According to Order 59(1), any licence, permit or pass granted under Orders might be at any time revoked, cancelled or suspended by the Deputy Excise and Taxation Commissioner, if the same was transferred or sublet by the holder thereof without permission of the Deputy Excise and Taxation Commissioner. According to the said Division Bench, the said provision did not prohibit creation of partnership for sharing profit and loss of the business on the basis of contribution by the outsider. In the said Order No. 59(1), there is no stipulation of "deemed transfer" on introduction of a partner in the business by a licensee. Therefore, the said decision cannot help to Mr. Banerjee's client in any way.

20. In the case of Gordhandas Kessowji v. Champsey Dossa & Ors., (supra), the Privy Council was considering whether a licensee under Bombay Salt Act admitting partners but manufacturing salt himself is said to have contravened the provision against alienation of benefits of the licence. In such a context, it was held that a licensee of salt manufacture could not be said to have contravened the terms of his license whereby he is prohibited from alienating the interest simply because he admitted members of his family and others as partners, who however did not actually take part in the manufacture nor was there any document showing transfer of the right of manufacture to such partners. In that decision the relevant provision of the statute prohibiting transfer of license is not available and as such, we are not in a position to know whether there was a clause of "deemed transfer" like the one involved in this case. But the Division Bench of Andhra Pradesh High Court in the case of Commissioner of Income Tax v. Nalli Venkatramana & Ors., reported in 1983 Tax L. R. 1355, while considering the said judgement quoted the relevant clause in the licence which provided that the licensee should not without the written permission of the Collector of Salt Revenue sub-let, sell, mortgage or otherwise alienate whole or in part the privileges granted by the licence of manufacturing

salt on the land within the aforesaid limit. Thus, there was no "deemed" provision in the said licence. Therefore, the said decision cannot assist Mr. Banerjee's client.

21. In the case of *Chennuru Ramarao v. Gowri Sankar Talkies Tekkali & Ors.*, (supra) the question was whether formation of partnership by licensee contravened clause 12 of the Conditions of the Licence which provided that the licensee should not without the permission of the licensing authority assign, sublet or otherwise transfer the licence nor should the licensee without permission as aforesaid allow any other person during the period of currency of the licence to exhibit films in the licensed premises. According to the Division Bench of the Andhra Pradesh High Court, by taking additional partner there was no violation of the licence so long the licence was in the name of the licence-holder. In the Andhra Pradesh Cinemas (Regulation) Act, there is no provision of "deemed transfer" of licence as mentioned in the Bengal Excise Rules and as such, the present case cannot be guided by the said judgment.

22. The case of *Janki Bai Chunnilal v. Ratan Melu & Anr.*, (supra), in our view, is not applicable to the fact of the present case. In the said case question was whether a loan advanced by unregistered money lender is recoverable if during the pendency of the suit for recovery of loan, the registration certificate is obtained. The principle laid down in the said decision is irrelevant in the fact of the present case.

23. In the case of *Jer & Co. v. Commissioner of Income Tax, U.P.* (supra), the question was whether licence issued in the Form FL-II prohibited the holder from entering into partnership. Under the U. P. Excise Manual it was merely provided that the licence should not be sublet or transferred. In such circumstances, the Supreme Court was of the view that since there was no prohibition against entry by holder of licence into a partnership, the partnership could not be said to be illegal. In the case before us, there is specific prohibition of taking partner into the running of the business and if such partner is taken it amounts to "deemed transfer" of licence though not actual one. Therefore, the said Supreme Court decision is of no avail to Mr. Banerjee's client.

24. In the case of *Shital Prasad v. Commissioner of Income Tax, Lucknow* (supra), it was held that a licensee under A.P. Excise Act and Rules framed thereunder were entitled to form partnership with others for carrying on liquor business and formation of such partnership was not illegal. According to Rule 19 under the relevant statute, the licensee should not transfer the licence for the sale of Arruck or Toddy to any other person and where the licence is granted jointly, no licensee shall include or exclude any person except with previous permission of the licensing authority. As according to the Rule 19, a licensee should not transfer the licence to any other person, the Supreme Court was of the view that the position could not be compared to a situation where a licensee actually has transferred the licence in favour of a third party. We have already pointed out that in the Rules we are concerned there is a "deemed" clause which

brings the case within prohibition even though the licence is not actually transferred. Therefore, the principle laid down in the said decision cannot have any application to the fact of the present case.

25. We, therefore, find that all the decisions cited by Mr. Banerjee dealt with provisions of different statutes where there was no similar provision of a "deemed clause" and as such, the Courts were of the view that mere introduction of a partner did not amount to transfer of licence. We have already held that the said principle cannot be applicable to a case under a statute where the legislature has introduced a "deemed clause" of transfer though there is not actual transfer of licence.

26. We, thus, find that the learned Trial Judge in the facts of the present case rightly rejected the plaint on the basis of averments made therein.

27. The appeal is, thus, dismissed. In the facts and circumstances, there will be, however, no order as to costs.

Rajendra Nath Sinha, J.

28. I agree.