(1982) 08 P&H CK 0012

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 106 of 1971

Harphul Chand Died and represented by his legal representatives	APPELLANT
Vs	
Pran Nath (Died) and represented by his legal representative and others	RESPONDENT

Date of Decision : 02-08-1982

Acts Referred:
Partnership Act, 1932 — Section 69

Citation : (1982) 08 P&H CK 0012

Hon'ble Judges : J.V. Gupta, J

Bench : Single Bench

Advocate : S.L. Ahluwalia and Mr. S.K. Aggarwal, for the Appellant; M.L. Sarin, for the Respondent

Final Decision : Dismissed

Judgement

J.V. Gupta, J.—The defendant/appellant Harphul Chand (now deceased) has filed this appeal against the judgment and decree of the Additional District Judge, Jullundur dated 20th July, 1970 whereby the decree of the trial Court dismissing the plaintiff''s suit was set aside and preliminary decree for rendition of accounts was passed in favour of the plaintiff/respondents.

2. On 10th April, 1958 plaintiffs No. 1 and 2 Prem Nath and Dina Nath along with Baij Nath, predecessor-in-interst of the plaintiffs 3 to 8 jointly purchased in equal share with the defendant/appellant Harphul Chand from the President of India through D.R.C. Jullundur, Urban agricultural land measuring 50 Killas and 18 marlas situated within the Municipal limits of Phillaur, for Rs. 36400/-. The final bid was taken by the defendant/appellant for and on behalf of all the four vendees stated above Under the rules then in vogue land could have been purchased only in the name of one person On that account the other three vendees had allowed and authorised the defendant to bid at the auction and got certificate of sale in his name even though the price was paid equally by all.

According to the allegations in the plaint all these facts were admitted in the memorandum dated 7th of October, 1958. Exhibit P-1 duly signed by all the parties. A sale certificate for the purchase of land was issued in the name of defendant on 17-12-1958 on behalf of the President of India. Thus it was stated that all the four vendees became the owners in equal shares of the land purchased. Plaintiff Pran Nath and Baij Nath deceased built their houses on the western side of this plot adjacent to that part of the land where the defendant himself built his own house. All of them were in occupation of their houses since the construction thereof. Since the sale certificate was in the name of defendant/ appellant, he was authorised by the other co sharers to sell parcels of the land with their consent and approval, to realise the sale price, to keep the account there of and distribute 3/4 share to the remaining three vendees while keeping 1/4 to himself as a co-owner. The defendant had realised large amounts of money by the sale of parcels of the land. He did not however, render any account to the plaintiffs which he was bound to do. This necessitated them to file the present suit.

3. In the written statement filed on behalf of the defendant/appellant it was contended that the suit for account was not maintainable. It should have been a suit for specific amount, which could have been easily ascertained. An objection was also taken as to the wrong valuation for the purposes of court-fee and jurisdiction. A specific objection was taken that on the allegations made in the plaint, the suit was barred u/s 69 of the Indian Partnership Act, 1932. Further preliminary objection was taken that the memorandum of agreement dated 7th of October, 1958 was inadmissible in evidence for want of stamp and registration. On merits, it was contended that the land was purchased by the defendant alone and no amount was contributed by the plaintiffs as alleged in the plaint. According to the defendant the entire sale price was paid by him and the sale certificate was in his favour and thus he was exclusive owner of the suit land. The defendant had been selling parcels of the land as exclusive owner thereof and some of these sale deeds have been attested by plaintiff Pran Nath and as such the plaintiffs were estopped from denying the title of the defendant in the suit land. The liability for the rendition of accounts was denied by the defendant. The replication was filed on behalf of the plaintiffs. The preliminary objections taken in the written statement were denied.

.4 On the pleadings of the parties the following issues were framed:--

1. Whether the suit for accounts is maintainable?

2. Whether the suit is barred u/s 69 of the Indian Partnership Act?

3. Whether the suit is barred by time?

4. Whether the plaintiffs are owners of the 3/4 shares of the land mentioned in the plaint?

5. If issue No. 4 is proved, whether the plaintiffs are entitled to rendition of

accounts from defendant?

6. Whether the plaintiffs are estopped from filing the suit by their act and conduct?

7. Whether the value for purposes of court-fee, jurisdiction is not proper? OPD.

8. Relief.

Issues No. 1 and 7 were treated preliminary and thus disposed by the trial court vide order dated 8-3-1967. Both the issues have been found in favour of the plaintiff. The plaintiff''s suit was held to be barred u/s 69 of the Indian Partnership Act for want of registration under that Act. Issue No. 3 was not contested on behalf of defendants and therefore was decided against the appellant Issue No. 4 was found in favour of the plaintiffs holding that they were owners of the 3/4 share of the land. There was no express finding on issue No. 5 in view of the findings of the court on issue No. 2. Issue No. 6 was found against the defendant and as a result of these findings, the plaintiffs suit was dismissed. In appeal the learned Additional Distt. Judge reversed the findings of the trial Court under issue No. 2, as it came to the conclusion that there was no partnership, neither alleged or proved on the record and therefore, the provisions of section 69 of the Partnership Act are not attracted. As a result of these findings, the decree of the trial court was set aside and the preliminary decree for rendition of accounts was passed in favour of the plaintiffs. Dissatisfied with the same, the defendant has now come in appeal in this court.

5. The learned counsel for the appellant vehemently contended: that (i) in view of the agreement Exhibit P-1 dated 7th of October, 1958 only the suit for specific performance could be filed and thus no other suit was maintainable; (ii) The suit was barred by time as it was filed beyond three years from the execution of the agreement Exhibit P-1; and (iii) Exhibit P-1 agreement could not create any title or ownership for the plaintiffs, being unregistered. It may be stated that in the written statement the defendant appellants denied execution of Exhibit P-1 and also denied his signature thereon while appearing in the witness box. It has been concurrently held by both the courts below that the agreement Exhibit P-1 was duly executed between the parties. As regards its admissibility for want of registration, it has been found by the Lower Appellate Court that the plaintiffs have succeeded in establishing that they had interest in the property purchased in the name of the defendant to the extent of 3/4 share. In other words the defendant had 3/4 share of the land in his name as benamidar on behalf of the plaintiff''s. From the contents of Exhibit P-1 it is quite clear that the defendant accepted the plaintiffs to be the owners to the extent of 3/4 share in the property purchased in his name. Admittedly, the property was purchased earlier on 10th of April, 1958 for Rs. 36400/-, whereas this agreement was executed on 7th of October, 1958. Since the property could only be purchased in the name of one person, it was a mutual agreement between the parties that all the four will be owners equally, and therefore, the property had been purchased in the name of

defendant-appellant. Thus the nature of the transaction was a benami one and as such Ex. P1 did not require any registration.

6. As regard the contention raised on behalf of defendant-appellant that the suit for specific performance should have been filed as contemplated in Exhibit P-1 no such plea was taken in the written statement. Rather in the written statement the very execution of the agreement was denied. Moreover no such issue was claimed on this count in the trial court. Therefore, the defendant could not be allowed to agitate this point for the first time in the second appeal.

7. The real controversy between the parties is on issue No. 2. According to the learned counsel for the appellant, the present suit being suit for rendition of accounts filed on behalf of the partners was not competent under the provisions of section 69 of the Indian Partnership Act, 1932 Section 69 reads as under:--

59(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.

(3) The provisions of sub-sections (1)&(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, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

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From the allegations in the plaint in para 7 thereof it is evident that it was not a case of Partnership but of co-owners as found by the lower appellate Court Para 7 of the plaint reads as under:--

7 That as the sale certificate was in the name of the defendant and the auction was sanctioned in defendant''s name the defendant was authorised by the other co-owners to sell the rest of the land with their consent and approval and to realise the sale proceeds and keep an account thereof and distribute 3/4th share thereof to them all three in equal shares, he himself being only as owner of 1/4th.

In reply thereto in the written statement, the defendant never pleaded for partnership as such but only stated that the suit is barred u/s 69 of the Indian Partnership Act 1932 Para 7 of the written statement is reproduced below:

7. That the allegations as made in para 7 of the plaint are not admitted to be correct and are denind. Even assuming that the defendant was authorised as alleged in para under reply, the present suit is barred U/s 69 of the Indian Partnership Act. 1932. The defendant has been selling parcels of the above mentioned land as exclusive owner and the plaintiff No. 1 had attested some of the sale deeds after fully knowing and fully understanding their contents. Plaintiffs are debarred from denying the title of the defendant to the said land.

In the preliminary objection No 4, the defendant also pleaded that on the allegations made in the plaint, the suit is barred under the provisions of section 69 of the Indian Partnership Act, 1932. In the replication filed on behalf of plaintiff/respondents para No. 4 of the preliminary objection was specifically denied. It was pleaded that the Indian Partnership Act does not apply to the present case as parties never formed any firm for business They were co-owners of the land by a single purchase.

8. Reference was also made to Exhibit P.1, by the learned counsel for the appellant where in the last line thereof word ''remaining partners'' has been written. From these pleadings of the parties and the contents of the agreement Exhibit P-1 it was vehemently contended on behalf of the appellant that it was a case of partnership and not of co-owners

9. After hearing the learned counsel for the parties at a great length, I do not find any force in this contention. The difference between partnership and co-ownership has been laid down by the Supreme Court in case Champaran Cane Concern Vs. State of Bihar and Another, head-note ''B'' thereof reads as under:--

The main differences between a partnership and co-ownership are; (1) co-ownership is not necessarily the result of an agreement whereas partnership is; (2) co-ownership does not necessarily involve community of profit or loss, but partnership does; (3) one co-owner can without the cansent of the other, transfer his interest etc., to a stranger, a partner cannot do this, and lastly but prominently; (4) while in a partnership each partner acts as an agent of the other, in a co-ownership one co-owner is not as such the agent, implied or real, of the other.

Two co-owners may appoint a common manager for facility of cultivation and management of their farms without entering into a partnership and the fact that the profits or even the losses are distributed in accordance with the shares of the two owners does not necessarily establish a partnership within the meaning of the Partnership Act, 1932.

Partnership has been defined in section 4 of the Act which provides "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

10. As stated earlier there is nothing in the pleadings of the parties or in the statement of the defendant himself, for holding that the parties agreed to share profits of any business, which the defendant was running on behalf of all the alleged partners. Rather in para 7 of the plaint it was specifically pleaded that the defendant was authorised by all the co-owners to sell the land with their consent and approval. In this situation, it has been rightly observed by the lower appellate Court that there was no agreement of any partnership between the parties. Moreover, the terms of Exhibit P-1 do not at all suggest that there was any agreement between the parties to share the profits of a business carried on by all or any of them acting for all. In fact the terms make it clear that no business was carried on by the parties and as such there was no question of partnership.

11. Apart from that, the use of word ''partner'' or ''partnership'' in the agreement does not necessarily show that there was a partnership, as held in case AIR 1922 67 (Nagpur) . Thus keeping in view of the difference as laid down by the Supreme Court in the judgment in Champaran''s case (supra), I am of the considered opinion that there is nothing wrong in the findings of the lower appellate Court under issue No. 2.

12. As regards the question of limitation, the same issue was never contested in the two courts below. Since it is not a pure question of law and requires determination of certain facts; the appellant cannot be allowed to agitate the came for the first time in second appeal.

As a result of the above discussion, this appeal fais and is dismissed with costs.

