
(2010) 03 SHI CK 0112

In the High Court Of Himachal Pradesh

Case No : Regular First Appeal No. 120 of 1998

Himalaya Timber Company

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 20-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 3, Order 20 Rule 5, Order 6 Rule 2, 151
Partnership Act, 1932 — Section 31, 42

Citation : (2010) 2 ShimLC 118

Hon'ble Judges : V.K. Ahuja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—This is an appeal filed by the appellant u/s 96 of the CPC against the judgment and decree of the Court of learned District Judge, Shimla, dated 7.7.1997, vide which the suit of the plaintiff for recovery of Rs. 2,41,695/-, alongwith future interest, was dismissed.

2. Briefly stated the facts of the case are that the appellant (hereinafter also referred to as the plaintiff) filed a suit for recovery of Rs. 2,41,695/- alongwith interest, against the respondents (hereinafter also referred as the defendants). It was alleged by the plaintiff that the plaintiff firm was a registered firm. On an auction held, in the year 1980, the plaintiff firm purchased lot No. 6, Shimla Divisional for a sum of Rs. 2,40,000/-. The plaintiff was to be charged sales tax on the aforesaid amount of money and the total amount, inclusive of sales tax, which it was supposed to pay was Rs. 3.06 lacs. An agreement was executed in between the parties on 16.4.1980. The charge of the forest, in which the trees of the lot purchased by the plaintiff stood, was taken by the plaintiff. After taking the charge, the plaintiff noticed some illicit feiling in the said area and wrote a letter to the Range Officer. The plaintiff firm also asked for marking of the stumps of the trees which had already been illicitly felled and removed so that it was not

made liable for the said trees. The plaintiff completed the work by 31.7.1980 and informed the Range Officer Kotkhai to take back the charge of the forest. The plaintiff was also liable to pay royalty in three installments. The plaintiff firm paid the first installment and permit was issued in its favour on 19.12.1980 valid upto 15.1.1981. After the issuance of the permit, the plaintiff firm approached the Range Officer to get the timber marked for export, but it was not done. Resultantly, the export permit lapsed. The Range Officer informed the plaintiff, even before the lapse of "the permit, that the permit stood cancelled on the basis of some telephonic instructions received from the Divisional Forest Officer, Shimla. The plaintiff again wrote to the Divisional Forest Officer requesting him to direct the Range Officer to hammer mark the timber sought to be exported followed by several reminders, but to no avail. The second and third installment of royalty also became due and the Divisional Forest Officer started charging interest on, the royalty and the proportionate amount on sales tax. A sum of Rs. 3,90,741.75 was charged from the plaintiff against the agreed amount of Rs. 3.06 lacs. Out of this, a sum of Rs. 2,40,000/- was on account of the royalty and Rs. 66,000/- on account of the sales tax. The plaintiff was conveyed the break-up of the amount by the Divisional Forest Officer, Shimla. The plaintiff claimed that defendants were not entitled to charge any interest either on the royalty or on the sales tax since the plaintiff firm was not able to pay subsequent installments of royalty and sales tax on account of omission and commission of the Divisional Forest Officer, Shimla. The plaintiff had claimed the sum, including a sum of Rs. 32,759.25, on account of the damage bill, which had been wrongly added to the royalty of the plaintiff. The plaintiff firm claimed that it has not been paid the value of the lot and has accordingly claimed a sum of Rs. 1,56,944.77 alongwith interest amounting to Rs. 84,750/- at the rate of 18%.

3. The defendants took up the plea of limitation, non-issuance of notice u/s 80 CPC etc. They admitted that the lot was sold to the plaintiff for Rs. 2,40,000/-. It was denied that there was any illicit felling in the lot prior to this sale to the plaintiff. They also pleaded that the plaintiff had not taken over the possession of the lot of its own. They denied their liability to pay the amount in question.

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

1. Whether the suit is within limitation? OPP
2. Whether the plaintiff is entitled to the amount claimed in the suit? OPP
3. In case issue No. 2 is decided in favour of the plaintiff, whether he will be entitled to interest as claimed and if so at what rate and how much? OPP
4. Relief.
5. An application was filed by the defendants that the suit was not competent and was not maintainable due to death of its partners and the said application was allowed by this Court, where the matter was pending, and following additional issue was framed by this Court on 3.3.1994:

What is the effect of the death of two partners, namely, Chander Shekhar Negi and Dhani Ram Negi, who died in the year 1979 and 1983, respectively, on the maintainability of the suit? OP Parties.

6. The parties led their evidence and the learned trial Court vide its impugned judgment held that the plaintiff was entitled to a sum of Rs. 50,092.94 on account of interest on the delayed payment of installments of royalty and sales tax and the plaintiff was held entitled to only interest which was worked out at Rs. 23,547/-. However, under additional issue, as detailed above, it was held that the suit was not maintainable and the same was accordingly dismissed.

7. I have heard the learned Counsel for the parties and have gone through the record of the case.

8. In so far as findings of the learned trial Court under Issues No. 1, 2 and 3 are concerned, these are not under challenge since no cross-appeal has been filed by the respondents. The submissions have been made by the learned Counsel for the appellant on the findings recorded under additional issue, under which it was held that the suit was not maintainable due to the death of its partners. The only question which arises, therefore, for consideration is as to whether the suit was not maintainable due to the death of two of the partners of the plaintiff firm and that whether this plea was open to the defendants without amending their pleadings, as submitted by the learned Counsel for the appellant/plaintiff, during the course of arguments. The plea taken by the learned Counsel for the appellant was that this objection was not available to the defendants since they had not amended their written statement. It was also submitted that the plaintiff cannot be taken by surprise since there were no pleadings and no additional issue could have been framed.

9. To substantiate his above plea, the learned Counsel for the appellant has placed reliance upon the decision in *Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another*, in which, while referring to the provisions of Order 14 Rule 2 and Order 6 Rule 2 CPC, the following observations were made by their Lordships in para 6, which are relevant and are being reproduced below:

As to the second question the defendant denied that he sub-let the two shops. The Courts below concurrently found that this denial was false and that he sub-let the two shops to his brother-in-law Ram Gopal. There was no pleading nor any issue that the sub-letting of the two shops was made with the permission of the landlord. It was not the case of the defendant at any stage of the trial that he had obtained the permission of the landlord for sub-letting the two shops. In the absence of any pleading and any issue on this point, the first two Courts were in error in holding that the two shops were sub-let with the permission of the landlord. The permission of the landlord for the subletting is not established from the mere fact that the landlord realized rent after the sub-letting in the absence of proof that the landlord had then clear knowledge of the sub-lease.

10. Another decision relied upon by the learned Counsel for the appellant was in

Sita Ram Vs. Radhabai and Others, wherein, while referring to the provisions of Order 14 Rule 3 and Order 20 Rule 5, it was held by their Lordships that trial Judge should not determine an issue not arising out of the pleadings of the parties.

11. A perusal of the record of the case shows that when the matter was pending before this Court, an application u/s 151 of the CPC was filed and after taking reply, this Court had framed the additional issue, as detailed above. It is clear that the reply had been filed by the plaintiff to the said application and the plaintiff had never pleaded or agitated, at that time that no issue can be framed until and unless the defendants amend their written statement. Such a plea was open to the plaintiff, which it could have taken and then this point could have been determined whether the amended written statement is required or this plea could be taken by the defendant by filing an application u/s 151 of the CPC, to which application the reply was filed by the plaintiff and thereafter, the issue was framed. There is no substance in the plea being raised by the learned Counsel for the appellant/plaintiff that the plaintiff cannot be taken by surprise, since it was aware of the application filed, it had also filed the reply and an opportunity was also given to lead evidence on all the issues to the plaintiff including this additional issue framed on an application. Once this was a material issue arising out of the pleadings of the parties, including by way of application, and the plaintiff had the notice of this application, was given an opportunity to lead evidence also, the plaintiff cannot be permitted at this belated stage to take technical objection that since the pleadings were not amended, by getting the written statement amended, the plaintiff was taken by surprise, which plea was not open to the plaintiff.

12. Coming to the plea in question, the learned trial Court has referred to the fact that there was a partnership deed Ext.PX, dated 17.7.1977. According to this deed, there were 10 partners. The fact that one of its partners, namely, Chander Shekhai Negi died in the year 1979 and the second partner, namely, Dhani Ram Negi died in the year 1983, was admitted by the plaintiff in the aforesaid reply as also observed by the learned trial Court. The only plea taken in that reply was that there was an agreement amongst the partners that the firm would not dissolve on account of the death of any partners. No such recital was pointed out in the partnership deed Ext.PX that the partnership firm would not stand dissolved on the death of a partner.

13. Provisions of Section 42 of the Partnership Act provide as under:

42. Dissolution on the happening of certain contingencies.-Subject to contract between the partners a firm is dissolved,-

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

(c) by the death of a partner; and

(d) by the adjudication of a partner as an insolvent.

14. It is, therefore, clear that in case of death of a partner, the partnership firm will stand dissolved except when there is an agreement to the contrary between the parties. There is no recital in the partnership deed Ext.PX in this regard that the firm will not stand dissolved and, therefore, the firm stood dissolved. The learned trial Court had come to the conclusion that in the present case neither there was an agreement nor any of the legal representatives of the deceased partners were brought on the record and it was also observed that there is nothing to show that the partnership firm continued to transact business even after the death of the partners of the firm.

15. The learned Assistant Advocate General for the respondents had placed reliance upon the decision in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills, a perusal of which shows that the provisions of Section 42(c) of the Partnership Act were considered by their Lordships and the observations made in paras 7 and 8 are relevant and are being reproduced below:

Section 42(c) of the Partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand, if one of the two partners of a firm dies, the firm automatically comes to an end and, there is then no partnership for a third party to be introduced therein and, there is no scope for applying Clause (c) of Section 42 to such a situation. Pursuant to the wishes or the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner/but it would be a new partnership. In this light Section 31 falls in line with Section 42. An agreement between the two partners that on death of any of them his legal heir or nominee would take the place of the deceased partner, will not, therefore, have the effect of automatically making such heir or the nominee a partner of the firm.

16. The necessary corollary of this discussion is that the partnership firm stood dissolved and as such the suit of the plaintiff-firm is not maintainable and, therefore, the findings of the learned trial Court under this additional issue are liable to be affirmed and the same are affirmed accordingly.

17. In view of the above discussion, I hold that there is no merit in the appeal filed by the appellant, which is dismissed accordingly. However, the parties are left to bear their own costs.