
(1945) 10 AHC CK 0003
In the Allahabad High Court
Case No : Second Civil Appeal No. 350 of 1941

J. Reuben

APPELLANT

Vs

R.R. Sarna C. En. and Another

RESPONDENT

Date of Decision : 09-10-1945

Acts Referred:

Partnership Act, 1932 — Section 69

Citation : (1945) 10 AHC CK 0003

Hon'ble Judges : Walford, J;Kaul, J

Bench : Division Bench

Advocate : H. Husein, for the Appellant; J.K. Tandon, for the Respondent

Final Decision : Dismissed

Judgement

Kaul and Walford, JJ.—This is a defendants' second appeal in a suit brought for recovery of Rs. 2,700 (Rs. 2,500 principal and Rs. 200 interest). The material facts are as follows:

The plaintiff in the suit was J. Reuben, an electrical Engineer. His case was that the appellants, R.R. Sarna and S. L. Chopra, met him at his house in Lucknow between the 15th and 27th of June, 1939, and represented that they were proprietors of the firm known as the Civil Engineering Company, Cawnpore. That they intended to float a limited liability company to be known as the Unao Electric Supply Company Limited for which they had procured a permit from the Unao Municipal Board. It was further represented that they would obtain the managing agency of the Unao Electric Supply Company Limited (which was yet to come into existence) and offered to take him as a partner in the managing agency provided he deposited a sum of Rs. 2,500, with the Municipal Board, Unao, as security for the grant of a license for the company which they intended to float. It was agreed that the partnership agreement between them and the plaintiff would be drawn up later. According to the plaintiff he was given an assurance that the money deposited by him would be returned within two months irrespective of whether the license was granted or refused by the

Government. It was further agreed that he was to bear no share of the expenses incurred in obtaining the license, or bringing the Unao Electric Supply Company Limited into existence. In accordance with this agreement J. Reuben, according to his version, deposited with the Municipal Board, Unao, Rs. 2,500 on the 4th of July, 1939. The U.P. Government, however, declined to grant the necessary license to float the proposed company for supply of electrical energy for lighting and domestic purposes in the town of Unao- Thereupon the security deposit of Rs. 2,500 was refunded by the Municipal Board, Unao, to the Civil Engineering Company, Cawnpore. The plaintiff demanded the return of the sum of Rs. 2,500 and on the defendants' refusal to comply with this request the suit which has given rise to the present appeal was brought.

2. The defence was that R.R. Sarna, who was the sole proprietor of the Civil Engineering Company, Cawnpore, conceived" the idea of supplying electricity to Unao town. A limited liability company was to be floated, and in this scheme he and S. L. Chopra were working together. The requisite license for supply of electricity was to be granted by the U.P. Government on the recommendation of the Municipal Board, Unao. There were a number of applicants before the Municipal Board. It, however, accepted the defendants' application and decided to recommend them to the . Government for the grant of a license. In these circumstances the plaintiff approached the defendants at Cawnpore and asked them to take him as a partner in the enterprise. The defendants agreed to do so on condition that he deposited Rs. 2,500 as security money with the Municipal Board, Unao, on behalf of the Civil Engineering Company, Cawnpore. This according to the defendants case was to be treated as partnership money. But as the Government refused to grant the license the security money deposited was returned by the Municipal Board and was withdrawn by all three partners. It was not disputed that the money was actually received by defendants 1 and 2. It was argued on these facts, among other pleas, that no suit for recovery of the amount claimed was maintainable. The proper course for the plaintiff, it was suggested, was to bring a suit for dissolution o partnership and accounts. Two of the issue framed by the trial Court were :

(2) Is (he suit not maintainable in view of sec lion 69 of the Indian Partnership Act ?

(4) Was there a complete partnership between the parties and is the snit as" framed not maintain able as pleaded in paragraph 19 of the written statement

3. Both these issues were answered by the trial Court against the plaintiff. It held that the parties to the suit were partners.

In a firm of business for electric supply to the Unao Municipality. This firm was not registered as required by Chapter VII of the Indian Partner ship Act. The plaintiff being a partner of the firm was precluded from enforcing his rights to recover any money arising from the contract of partnership as laid down in section 69 of the Indian Partner ship Act except his right to claim dissolution of

the partnership or the accounting.

4. The suit was accordingly dismissed.

5. On appeal to the learned District Judge it was contended among other pleas on behalf of J. Reuben (the plaintiff-respondent in this Court) that he was not the defendants' partner. All that he had agreed to was that he would be their partner in the managing agency of the limited liability company for supply of electrical energy to Unao town which was to be floated : but as the company never came into existence there could be no managing agency business and accordingly no partnership whereof he could be a member. The relation of parties inter se was that of promoters of a company, and inasmuch as the sum of Rs. 2,500, which was deposited with the Municipal Board, Unao, was his money, he was entitled to a return thereof. This plea was accepted by the learned District Judge who allowed the appeal and decreed the claim with costs in both Courts and interest pendente lite and in future till realisation at the rate of six per cent per annum. Dissatisfied with this decision the defendants have preferred this second appeal.

6. The only question argued before us was whether the plaintiff and the defendants were partners as held by the trial Court or if there were only promoters of a company which never came into existence. The facts on which the question falls to be determined are not now in dispute. It was found by the lower appellate Court that on the 28th of June, 1939, the defendants sent a letter marked Ex. 1 to the plaintiff. This was as follows :

Cawnpore 28th June, 1939. JRE. 10. Station Road, Lucknow.

Dear Sir.

With reference to the conversation we had a few days ago and my partner Mr. S. L. Chopra had with you yesterday, in connection with the floatation of the Unao Electric Supply Company, we are glad to take you as a partner in the Managing Agency of the said Electric supply concern for which our firm has procured the permit from the Unao Municipality.

Your share in the Managing Agency will be four annas in a rupee if we take a fourth partner. But if we do not take the fourth partner we shall divide the share equally amongst ourselves. You are therefore requested to deposit the security of Rs 2,500 with this Unao Municipality and we shall arrange for the security which is to be deposited with the Government U.P. for the grant of the license.

A regular agreement will be drawn between us in due course of time. Meanwhile,

We are, Dear Sir,

Yours faithfully, (Sd.) R.R. Sarna

(Sd.) S.L. Chopra. Partners.

7. Ex. A 1 was the plaintiff's reply to this letter. After acknowledging the

defendants" letter the plaintiff said that he "appreciated being a partner of the Unao Electric scheme". On an examination of the entire correspondence between the parties the lower appellate Court came to the conclusion that: the plaintiff was exerting himself to promote the new company in the capacity of a would be partner in the managing agency which was to be created after the company had come into existence. It was according to the view taken by the District Judge, impossible to hold that the plaintiff became a partner in the Unao Electric Supply Company by writing the letter Ex. A1. The defendants, he opined, had agreed to take the plaintiff a partner in the managing agency of the Unao Electric Supply Company and not in any other business.

8. Having heard the learned Counsel for the parties we are of opinion that the learned Judge in the Court below has taken a correct view of the matter and this appeal cannot succeed. Before dealing with the law applicable to the case we should like to observe that on the pleadings of the parties the plaintiff was to be taken as a partner only in the managing agency business. In his statement of the case made before the trial Court on the 21st of February, 1941, it was distinctly stated by the defendants' Counsel that the terms of the partnership were contained in Ex. 1. It is clear from an examination of that document that the defendants had offered to take J. Reuben as a partner in the managing agency of the "Electric Supply Concern", which was to be floated. This offer was accepted by the plaintiff respondent. We, therefore, start on the basis that it was agreed between the parties that they would be partners in the managing agency business of the limited liability company which was to be floated for supply of electricity to Unao. The question, therefore, which arises for determination is whether any partnership actually came into existence.

9. Section 4 of the Partnership Act runs as follows :

"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.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the firm name.

10. According to this definition there must be three elements present before any relation which may be termed "partnership" can come into existence :

- (1) There must be an agreement between a number of persons;
- (2) the agreement must be to share the profits of the business and
- (3) the business must be carried on by all or any of the persons concerned acting for all.

11. All these elements must be present before a number of persons can be called partners. As remarked by Desai in his Law of partnership page 15, the agreement must be to carry on business by way of present partnership. An

agreement to carry on business from a future date will not result in partnership until that date arrives, unless the parties choose to commence business before that date. What is essential to constitute partnership is the actual existence of a business carried on by partners. Therefore so long as the business, whereof the profits the partners agree to share does not exist, there can be no partnership. It may not always be easy to determinate at what stage a business comes into existence, but that is a question of fact to be determined on the circumstances of each case. But so long as the business does not come into existence or something done which may be taken as the commencement of the business, there can be no partnership. As observed by Lindley in his law of Partnership (10th Edn.) page 19 :

Persons who are working together to form a company, although they may intend to become members of the company after its formation, are not partners if this be the only relation between them; they are, it is true- engaged in a common object, and that object is ultimately to acquire profit; but (their immediate "object is the formation of a company, and even if the company is not to be incorporated they are only in the position Of persons who intend to become partners after the company is formed.

12. The relations inter se among the promoters of a company are governed by rules altogether different from those which apply to partners. To call persons associated for the purpose of floating a company, whereof the managing agency they intend to acquire and to carry on in partnership, partners, is to ignore the difference between a contract of partnership and an agreement to enter into such a contract. This is, in Lindley's language, "to confound an agreement with its result".

13. Reviewing the circumstances of the present case in the light of these observations it is clear that the business in which the present parties were to be partners never came into existence. According to Section 2 (9A) of the Indian Companies Act (VII of 1913) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called. Thus there can be no business of managing agency so long as the company, whereof the managing agency is in contemplation does not come into existence. It is conceivable that persons may agree to become partners in a business, whereof the object is to float companies and to acquire their managing agency. It is further conceivable that such an agreement may be entered into with regard to the managing agency of only one company; but in the case last supposed the parties concerned could not be partners in the managing agency business. In this connection it is pertinent to quote Lindley's criticism of an argument which was advanced in the case of *Lucas v. Beach*. The learned Author observed at page 20 as follows :

In Lucas v. Beach it was asked in arguments, "What is there to prevent a number of individuals from entering into a partnership with the , limited object, in the first instance, of procuring an Act of Parliament, and with an ulterior object in view when the Act has passed ? The answer is, that to call persons so associated partners is, to ignore the difference between a contract of partnership and an agreement to enter into such a contract, to confound an agreement with its result.

14. In (the case before us the appellants agreed to take J. Reuben as a, partner in the managing agency business of the Unao Electric Supply Company Limited, which was to be floated. The company never came into existence and it is obvious that there could be no business of managing agency in such a case.

15. Putting it at the highest Sarna, Chopra and Reuben were promoters of a company which was to be incorporated. The relations between them would be governed not by the law of partnership but by the general law of contract. It was contended that Sarna and Chopra had incurred expenses in connection with the floatation of the contemplated company towards which Reuben should be made to contribute. It is possible that the appellants may have a good case for such a claim against the respondent, but the scope of the pleadings in present suit does not justify our expressing any opinion on that matter.

16. We are satisfied that the learned District Judge came to a correct conclusion. The appeal fails and is dismissed with costs. The stay order is vacated.