

(1981) 02 PAT CK 0011
In the Patna High Court
Case No : A.F.O. Decree No. 463 of 1974

Mahendra Prasad Sah and Another		APPELLANT
	Vs	
Maujela Mahto and Another		RESPONDENT

Date of Decision : 02-02-1981

Acts Referred:

Partnership Act, 1932 — Section 4, 5, 69

Citation : AIR 1981 Patna 262 : (1981) 29 BLJR 622 : (1981) PLJR 383

Hon'ble Judges : Chaudhary Sia Saran Sinha, J;B.P. Jha, J

Bench : Division Bench

Advocate : B.N. Agrawal and T.N. Maitin, for the Appellant; Shilesh Chandra Mishra and Om Prakash Ghose, for the Respondent

Final Decision : Dismissed

Judgement

Chaudhary Sia Saran Sinha, J.—This first appeal by the plaintiffs, which arises out of a suit for money based on the hand note Ext. 4 and which has been dismissed by the trial Court on account of the bar created by Section 69 of the Indian Partnership Act, 1932 (Act 9 of 1932), raises a short point, namely, whether in spite of the hand note in suit having been found to be a genuine document for consideration, the trial Court acted legally in dismissing the suit u/s 69 of Act 9 of 1932.

2. One Kishun Chand, who died some time in the year 1968, had two sons namely, Mahendra Prasad Sah and Bhola Prasad Sah, the latter two being the plaintiffs of the suit. The father and the two sons constituted Hindu joint Mitakshara family and possessed properties including certain business. There was a partition among the father and the sons in the year 1962, as a result of a suit for partition which was un-disputedly decreed.

3. On 17-10-1966 defendant No. 1 as Karta of the joint family consisting of himself and his son defendant No. 2 approached the plaintiffs for a loan of Rs. 10,000/-(Rupees ten thousand). This loan was advanced to them under the hand

note Ext. 4 executed by defendant No. 1. Although the hand note was executed only in the name of plaintiff No. 1, the case made out in the plaint was that the sum of Rs. 10,000/- advanced under the said note was the money of the family firm styled as "Kishun Chand Mahendra Prasad". The loan not having been repaid, the plaintiffs filed the instant suit for realisation of the sum of Rs. 10,000/- with interest thereon at the stipulated rate.

4. The defendants contested the suit pleading, inter alia, that no consideration passed under this hand note and it was executed only by way of security on account of the two plaintiffs agreeing to share as partners of a business run by defendant No. 1. The alternative plea taken also was that if this loan was advanced by the firm, above named, the firm not having been registered, Section 69 of Act 9 of 1932 will stand as a bar to the entertainment of the suit. All the relevant findings necessitating the disposal of the suit except one were found by the trial Court in favour of the plaintiffs. The trial Court, however, as stated above, dismissed the suit on account of the has mentioned above.

5. Paragraph 3 of the plaint stated in unequivocal terms that the loan of Rupees 10,000/- was advanced to the defendants by the plaintiffs out of the assets of the firm "Kishun Chand Mahendra Prasad". Section 4 of Act 9 of 1932 defines partnership 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". " Section 5 of Act 9 of 1932 states as follows: "The relation of partnership arises from contract and not from status; and in particular, the members of a Hindu undivided family carrying on a family business such, or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business."

It would appear from Section 5 of Act 9 of 1932 that in order to escape the mischief created by Section 69 of that Act, the persons concerned must be members of a Hindu undivided family and the business being carried on by them must be a family business. It appears that in order to escape the mischief of Section 69 of Act 9 of 1932, the plaintiffs wanted to lead evidence in course of the trial against their own pleadings as contained in para 3 of the plaint, inasmuch as Mahendra Prasad, the deposing plaintiff (P. W. 10), stated that the consideration money of Rs. 10,000/- was not advanced by the firm but was his individual money. Being conscious of the fact that the plaintiffs evidence contrary to the assertion made in the plaint was not fit to be accepted, this submission of Sri B. N. Agrawal, learned counsel for the appellants was that though the father and the two sons partitioned their immovable properties by metes and bounds after the decree for partition obtained in the suit, referred to above, the family business was not so partitioned and the members of the family consisting of the father and the two sons continued to be members of a Hindu undivided family so

far as the said business was concerned. This contention was resisted by Sri Shilesh Chandra Mishra, learned counsel for the respondents. The institution of a suit for partition by members of a joint family is an unequivocal intimation of his intention to separate, and consequently there is a severance of the joint status from the date when the suit is instituted. P. W. 10 admitted about the partition by a suit among the members of the family in 1962. He, however, stated that after the partition meaning thereby the partition decree the lands were partitioned but the business remained joint. He, however, admitted that nothing was written in the partition suit about the business remaining joint, (kar bar ke sambandh me batwar wale muqadma me nahi likha gaya hai). In such a situation even giving face value to What P. W. 10 has stated in his deposition the resistible conclusion would be that this partition suit resulted in the severance of the parties to the suit in status, thereby bringing to an end to the joint family status. Partial partition may not be unknown to Hindu Law, but the crux of the question is whether in the instant case the plaintiffs have succeeded in making out a case and proving that in spite of the decree for partition, the parties agreed to continue their joint status as members of undivided family so far the family business was concerned. No such case has specifically been made out in the plaint nor is there any evidence, satisfactory in nature to substantiate the same. A partnership arises from a contract. Where the severance of joint family takes place by the filing of a partition suit but the family business continues to be conducted as before, a contractual partnership based upon an implied agreement, would be deemed to come in existence, and in such a situation the bar u/s 69 of the Act 9 of 1932 would come into play. Learned counsel for the respondents relied in this connection on a decision of the Rajasthan High Court, reported in 1971 Tax LR 178 (Raj) (Sobhagmal Lodha v. Edward Mills Company Ltd., Beawar) which supports this view. Sri B. N. Agrawal, relying on a decision of the Privy Council reported in 68 Ind. Cas. 451 (Privy Council) , submitted that it was open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family. The facts of this case is distinguishable from the facts of the instant case inasmuch as the severance of the joint family status took place in the instant case not by any amicable partition but by decree of a Court in a suit for partition. Above all the plaintiffs having failed to establish that there was any agreement between the parties to continue the said business as before and to treat them as members of an undivided family with respect to that business, the bar of Section 69 of Act 9 of 1932 will come into play.

6. This being the position the trial Court rightly held that the suit was not maintainable in view of provisions of Section 69 of Act 9 of 1932.

7. The result is that the appeal fails and is dismissed and the judgment and decree of the trial Court are confirmed. In the facts and circumstances of this case there will, however, be no order as to costs of this appeal and the parties shall bear their own costs.

B.P. Jha, J.

8. So far as the proposition of law is concerned, I quote sub-para (8) of Article 328 of Hindu Law of Mulla, which runs as follows :

"Though a partition may be partial by mutual agreement of parties, no coparcener can by suit enforce a partial partition against the other coparceners. The suit must be one for a complete partition."

I agree with my learned brother that the suit is barred u/s 69 of the Partnership Act and is fit to be dismissed without costs.