

(1971) 04 OHC CK 0015
In the Orissa High Court
Case No : First Appeal No. 76 of 1966

Maliram Chowdhury

APPELLANT

Vs

Jagannath Modi

RESPONDENT

Date of Decision : 27-04-1971

Acts Referred:

Partnership Act, 1932 — Section 4, 69

Citation : AIR 1972 Ori 17

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : B. Pal and D.P. Mohapatra, for the Appellant; L.K. Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—The plaintiff who sued for recovery of Rs. 7690.72 paise as unpaid price of goods supplied on credit to the defendant is the appellant against the judgment of the learned Subordinate Judge, Sambalpur who has dismissed his claim.

2. Admittedly the plaintiff runs a wholesale and retail business in cloth. The main place of business is at Calcutta but there is a branch at Sambalpur. The defendant is a dealer in cloth and had certain purchases made from the plaintiff on four different dates in the month of April, 1964. The total price of the goods taken on these four dates came to Rupees 7453.21 paise. The plaintiff claimed that these transactions were on credit and the memos on the respective dates were signed by the defendant in token of receipt of the goods and it was stipulated that the defendant would pay up the money. The defendant omitted to pay the amount. Hence the suit.

3. The defendant contended that the plaintiff Maliram Chowdhury was not the proprietor of the firm Maliram-Gourishankar. But Maliram Gourishankar was a firm consisting of Maliram. (P. W. 2) and Gourishankar (P. W. 1). Since the firm

was not registered under the Partnership Act the suit was hit u/s 69 thereof. He next contended that while the transactions did take place on the dates indicated and to the extents specified, they were all on cash basis and thus the defendant owed no money to the plaintiff.

4. The learned trial judge found that the plaintiff's claim for the price of goods was justified and had been established. He, however, sustained the defendant's objection u/s 69 of the Partnership Act and held that the suit was not maintainable.

5. Mr. Pal, learned counsel for the appellant contends that the learned Subordinate Judge is clearly in error in holding that the suit is hit u/s 69 of the Indian Partnership Act. According to him, since that is the only count on which the suit had been dismissed, if it is held that the bar u/s 69 of that Act does not apply, the appeal should be allowed. Mr. Dasgupta on the other hand contends that the finding of the learned Subordinate Judge that the plaintiff is entitled to recovery of the price of goods is bad and cannot be sustained.

6. In the circumstances, both the aspects require examination. I shall first proceed to examine whether the suit is hit u/s 69 of the Partnership Act.

The plaintiff alleged in paragraph 1 of the plaint that he is the proprietor of the firm Maliram-Gourishankar having its head-office at Calcutta and branch at Barapali. The defendant pleaded in paragraph 1 of the written statement that "the plaintiff and one Gourishankar are partners. Maliram-Gourishankar is a partnership firm. The same having not been registered under the Partnership Act and the goods having been purchased on cash the suit is not maintainable in law. The dealings are with the firm Maliram-Gourishankar. The other partner Gourishankar having not been joined. the suit is bad for non-joinder of parties." On these pleadings, the learned trial judge raised issue No. 2 to the following effect:

"Is the plaintiff's firm a partnership firm or a proprietary firm? Is the suit maintainable for want of registration and for defect of parties?"

As already indicated, he found that Maliram Gourishankar was a partnership firm and in view of the admitted position that there is no registration under the Indian Partnership Act. the suit was bad.

There is no documentary evidence to show that the plaintiff Maliram and one Gourishankar constituted a partnership firm under the name and style of "Maliram-Gourishankar". Nor is there any agreement of partnership produced. The plaintiff as P. W. 2 and Gourishankar as P. W. 1 have denied the allegation of partnership. It was suggested by the defendant that Gourishankar was the son-in-law of the plaintiff and they were carrying on business together on partnership basis. The plaintiff put forward the story that his son Sitaram is also otherwise known as Gourishankar. That fact does not appear to be correct. At any rate, no importance has been attached to the plaintiff's explanation.

In view of the fact that the plaintiff does not accept Maliram-Gourishankar to be a partnership business, the burden lay on the defendant to establish that Maliram-Gourishankar is a partnership business and thereafter it was the duty of the plaintiff to establish that it has registration in order to avoid the mischief of Section 69 of the Partnership Act. There is no direct evidence of any partnership and even the defendant as D. W. 2 has not stated that he was aware of any such partnership business on the basis of any oral arrangement. The plaintiff clearly stated that Gourishankar was an acquaintance who was being trained up in his shop. He was not being paid any remuneration. Nor had he any interest in the business. He did not share the profits with him. The learned trial judge did not accept this explanation of the plaintiff on account of the fact that Gourishankar (P. W. 1) could not have worked without any interest in the firm or not being paid any remuneration. Merely from the fact that Gourishankar was seen in the shop for a few months or that he had supplied the goods in question to the defendant and other customers or that during the absence of the plaintiff on many occasions, he was receiving outstandings from customers and giving due credit therefor. -- cumulatively or as independent pieces of evidence -- would not justify an inference of partnership:

7. In order that persons may be partners, it is essential that:

(1) There must be an agreement entered into by all the persons concerned:

(2) The agreement must be to share the profits of a business: and

(3) The business must be carried on by all or any of the persons concerned, acting for all.

(See Jaldu Anantha Raghurama Arya Vs. Jaldu Bapanna Rao and Others, .

As was said by the Special Committee with reference to this Act all the essentials indicated above must be present before persons can become partners. The Committee said:

"These three elements may appear to overlap, but are nevertheless distinct. The first element relates to the voluntary contractual nature of partnership: the second gives the motive which leads to the formation of firms, i.e. the acquisition of gain and the third shows that the persons of the group who conduct the business do so as agent for all the persons in the group, and are, therefore, liable to account to all."

In the case of Sk. Kabir and Another Vs. Narayandas Lachman Das Ltd. and Another, . Narasimham. C. J. said

"The partnership arising out of the status of the parties as in a Hindu Joint family is taken out of the purview of the Act and only such partnerships which are based upon agreements between the parties are hit by the provision of Section 69."

Though such agreement may be implied, yet "agreement" is the very foundation

of partnership. The aforesaid Bench decision approved the dictum laid down in the Allahabad High Court in the case of Mirza Najm Effindi Vs. Firm Kohinoor Footwear Co., where it was said:

"In order to apply Section 69. Partnership Act. it has to be determined whether the plaintiffs are partners within the meaning of the Act. u/s 4 in order to create a partnership there must be an agreement entered into by all the parties concerned to share the profits of the business. Hence, where there is not an iota of evidence to show that there was any such agreement or contract between the plaintiffs they cannot be partners as defined in the Act. and cannot be members of a firm. Section 69 would not, therefore, be applicable."

A Full Bench of the Patna High Court in Seth Hiralal v. Sk. Jamaluddin 224 Ind Cas 106 (Pat) emphasised on the need of the partnership business being carried by all or any of the. partners acting for all.

Section 4 of the partnership Act clearly indicates these requirements. In the present case there is no clear evidence to come to such a conclusion. In case Maliram Gourishankar is a firm within the meaning of the Partnership Act. on the conceded position that it is not registered, the suit is bound to be hit u/s 69 of the Act. Since the defendant wants to non-suit plaintiff, the entire burden on this aspect lay on him. I must hold that he has not discharged that burden. The reasoning of the learned trial judge is clearly without appreciation of the legal position. I would accordingly reverse the finding of the learned Subordinate Judge on that count.

8. As I have already indicated. Mr. Dasgupta has challenged the finding on merit. I would, therefore, proceed to examine that aspect now.

In paragraph 2 of the written statement the defendant had stated:

"It is true that the defendant purchased different types of cloths, dhotis and saris etc. from the plaintiff on the dates and for the sums as mentioned in schedule A below but it is denied that the goods were purchased on credit."

There is no dispute between Mr. Pal and Mr. Dasgupta that the transactions as indicated in the plaint and in the written statement completely tally. The sole dispute, however, is as to whether the transactions were on credit or on cash basis -- the plaintiff contending that they were on credit and the defendant contending that they were all cash transactions.

The learned trial judge has found the transactions to have been on credit basis. He has believed the oral evidence of the plaintiff (P. W. 2) and of Gourishankar (P. W. 1). Ext. 3 series are the Rokad entries for the four days on which the sales were effected. It has been explained that Rokad has entries of cash transactions only. These four transactions have not found place in Ext. 3 series since they were credit transactions. The entries in the Nakal and Khata have been found to have tallied so far as these transactions are concerned. The trial court found certain defects in the accounts but accepted the explanations offered by the

plaintiff.

8-A. The learned Subordinate Judge entered into the discussion of the evidence with a word of caution on the ground that the relationship between the parties had become strained. Mr. Pal is right in his criticism of this approach. The criminal case is said to have arisen in relation to the same matter as constitutes the dispute in this suit. Neither party has produced any material document of the criminal case. If the criminal case is a connected matter, the present stand of the plaintiff not being different from what it was on the earlier occasion, no adverse view of the evidence can possibly be taken.

9. I have already rejected the defence contention that P. W. 1 was either a partner or employee of the plaintiff. There is no reason why P. W. 1 would come forward to perjure himself.

10. Mr. Dasgupta contended that the learned trial judge gave undue emphasis on the "name" in the credit memos and the corresponding entries "name" certainly cannot be taken as the abbreviated form of "Namka Rakam" or "ramkam Namame likhna" and has to be given the ordinary meaning of "in the name of". I agree. Thus this reasoning of the learned trial judge has to be vacated.

11. Mr. Dasgupta next contended that the learned trial judge should not have lost sight of the fact that the defendant's very first deal with the plaintiff could not have been on credit and that again for quite a substantial amount (Rs. 1,785.28 paise). This by itself cannot be a point in favour of the defendant. It is quite possible that the defendant may have had business reputation and being a businessman of the same locality running a sizeable shop, the plaintiff may not have found any difficulty in entering into the very first transaction on credit.

Learned counsel for the respondent also contended that the learned trial judge went wrong in drawing adverse inference against the defendant for non-production of the goods-account. The transaction being admitted the goods-account is bound to contain the entries. Mere entries in the goods account will throw no light on the dispute whether the transactions are on credit or cash basis. I, therefore, hold that no adverse inference should be drawn.

There is, however, an important clue to find out the truth. The defendant (D. W. 2) has stated:

"Ext. C-1 is in the hand-writing of P. W. 1. On 2-4-64. I had talk with P. W. 1 in the matter when he showed me the bilti and asked me if I would take the goods. I agreed to purchase the same on 5-4-64 when plaintiff came. This was an oral agreement. Ext. C-1 was written on 13-4-64 but not earlier. By 13-4-64 the plaintiff had brought the goods to his shop at Baraipali. I had talk that day with plaintiff in presence of P. W. 1. I paid rickshaw fare to bring the goods and entered the expenses in the account. Tata Transport is outside municipal limit. I have not paid octroi duty for the purchase on 13-4-64. Exts. 7 and 7/a are my letters to plaintiff. It is not true that plaintiff was at Calcutta on 13-4-64

when I wrote Exts. 7 and 7/a."

The learned trial judge has rightly held:

"His evidence so far as the dealings on 13-4-64 proves conclusively that he never purchased on cash basis. He says that he purchased on that date from the plaintiff's shop in presence of the plaintiff. But his letters to the plaintiff Ext. 7 and Ext. 7/a indicate that the plaintiff was then at Calcutta. In Ext. 7 he has referred to the goods despatched from Calcutta which by then he had not received and in Ext. 7/a written on 15-4-64. he has mentioned that the goods had been received. The said goods must be the goods which were received on 13-4-64. (Because it is not the defendant's case that he had. any other transaction with the plaintiff apart from the four in dispute). Moreover, in both the letters he had requested the plaintiff to purchase goods on his behalf. This indicates he was making purchases for the plaintiff on credit."

To the reasonings of the learned trial judge I would add the absence of an entry showing the expense incurred for payment of the price of goods in the account book while the transport charges are Indicated and the non-payment of octroi as grounds supporting his conclusion. The fact that the memos in Ext. 4 series are signed by the defendant while many other memos issued to others are not signed is not irrelevant feature. The plaintiff's evidence that the credit memos only are signed by the purchaser appears to be true.

12. Once the transaction of the 13th is found to be on credit, there is not much difficulty in holding that the defence is a false one. The plaintiffs claim that the transactions were on credit has. therefore, to be accepted. I am of the definite view that the learned trial judge was right in his conclusion on his score.

The decision on merit of the trial court is upheld. The conclusion regarding, maintainability of the suit has been reversed.

13. The result, therefore, is that the appeal must succeed. I allow the appeal, set aside the iudgment and decree of the trial court and decree the suit with costs throughout.