

(1978) 09 DEL CK 0010

In the Delhi High Court

Case No : Regular First Appeal No"s. 7 and 42 of 1966

Tara Chand

APPELLANT

Vs

Holkar Mal and Others

RESPONDENT

Date of Decision : 28-09-1978

Acts Referred:

Citation : AIR 1979 Delhi 160 : (1978) 14 DLT 238

Hon'ble Judges : Prakash Narain, J

Bench : Single Bench

Advocate : J.P. Goel and S. Marwaha, for the Appellant;

Judgement

Prakash Narain, J.

(1) Respondent no. 1 in the two appeals before us, filed a suit against Bhani Ram Gupta (appellant in R.F.A. No. 42 of 1966). Tara Chand (appellant in R.F A. No. 7 of 1966) and Kirpa Ram for rendition of accounts pertaining to a portion of property known as Medgunj" on Bahadurgarh Road, Sadar Bazar, Delhi. Tara Chand is the natural son of Holkar Mal but had been adopted by Harbilas, a brother of Holkar Mal. By a sale-deed dated December 15, 1955 registered on December 16, 1955, executed by one Haji Abdul Gani (Exhibit D. 1), two-thirds of the property known as Medgunj was shown as sold to Holkar Mal Tara Chand and one-third to Bhani Ram Gupta, Kirpa Ram and others. The consideration for the sale was Rs 2,50,000.00 out of which Rs. 2,35,000.00 was paid by Bhani Ram Gupta on behalf of the purchasers in the presence of the Sub- Registrar on December 16, 1955 at the time of the registration of the sale-deed. A partition was effected by a registered-deed of partition dated September 8, 1956 between Holkar Mal and Tara Chand on the one hand and Bli-ini Ram Gupta and others on the other of their respective two-thirds and one-third shares. Holkar Mal says in his plain that on July 20, 1957 he and Tara Chand executed a power of attorney in favor of Bhani Ram Gupta and his brother, Kirpa Ram, to manage their property. This power of attorney is stated to have been cancelled some time in 1961. Some portions of the property were sold by the respective or tensible

owners to other parties. Holkar Mal had failed a suit against Tara Chand and others challenging the partition above referred to but this suit was dismissed on May 30, 1964 on the ground that it was not maintainable in the form in which it was filed, being a mere suit for declaration. A first appeal filed against the said judgment and decree by Holkar Mal was dismissed by this Court on July 27, 1975. Holkar Mal then filed the suit out of which the present appeals arise contending that he was the sole owner of two-thirds portion of the property known as Medgunj, Tara Chand being merely a benamidar. As such Bhani Ram and Kirpa Ram were liable to render accounts to him of realisations made by them of the rents of the property being managed by them by virtue of the power of attorney dated July 20, 1957 and any account rendered by them to Tara Chand was of no avail. In this suit Holkar Mal contended that he with his money bought two-thirds share of the property known as Medgunj while Bhani Ram and Kirpa Ram along with their brothers bought one-third of the property. Tara Chand was mentioned as one of the co-purchasers along with Holkar Mal merely as a benamidar because he was the real son of Holkar Mal. Bhani Ram and Kirpa Ram were appointed as attorneys by Holkar Mal for realisation of rents and performing other various acts of management and were liable to render account to him, Bhani Ram and Kirpa Ram had been Realizing rent of the property of Holkar Mal but in collusion with Tara Chand were contending that they have rendered account to him which they were not authorised to do. Therefore, they should be directed to render account to him and after the accounts have been rendered a decree for amounts realised by them on behalf of Holkar Mal be passed in favor of the latter.

(2) Bhani Ram and Kirpa Ram filed a joint written statement while Tara Chand filed a separate one. According to Bhani Ram and Kirpa Ram they along were not appointed attorneys on July 20, 1957 but two "other persons, Phool Chand and Bindraban, were also appointed attorneys and so, on account of non-joinder of necessary parties the suit was liable to be dismissed. They further pleaded that they had rendered full accounts to Tara Chand, the co- owner with Holkar Mal, who is the real son of Holkar Mal and, Therefore, the suit was not maintainable. According to these defendants Holkar Mal and Tara Chand were co-owners of two-thirds share. They pleaded that they had remitted all amounts recovered by them to Holkar Mal and Tara Chand. It was also contended that Tara Chand who was in Delhi when asked by these two defendants why Holkar Mal had served a notice on them to render account disclaimed all knowledge about such notice and again went through the accounts with them. On scrutiny of the accounts it was found that Rs. 4100/was due to Bhani Ram and Kirpa Ram. As this amount was claimed from Holkar Mal, he, by way of counter-blast, has filed the present suit. The contention that Tara Chand was a benamidar of Holkar Mal was denied.

(3) Tara Chand, defendant No. 3 in the suit, by his separate written statement supported the written statement jointly filed by defendants 2 and 3, namely, Bhani Ram Gupta and Kirpa Ram. He asserted that he was not a benamidar of Holkar Mal and that to Holkar Mal's knowledge two-thirds of the property had

been purchased by him and Tara Chand as equal owners with the money of Holkar Mal and Tara Chand. Instances of sales by Holkar Mal and Tara Chand after partition between the owners of two-thirds and one-third shares of property as well as instances of mortgage were mentioned in the written statement. It was further pleaded that in several suits filed by Holkar Mal this aspect had been admitted by him.

(4) Holkar Mal filed replications in which he reiterated his earlier position and traversed the contentions of Bhani Ram Gupta, Kirpa Ram and Tara Chand.

(5) The case of Holkar Mal, Therefore, as pleaded by him, was that he with his own moneys bought two-thirds share of the property and Tara Chand's name was mentioned as co-purchaser with him only in the capacity of benamidar. At no stage did Holkar Mal plead that the property was purchased by him in any other capacity with any moneys other than his own. According to him Bhani Ram Gupta and Kirpa Ram were bound to account to him for all the rents etc. that they had collected and expenses that they may have incurred in the management of his property. The case of the defendants, the present appellants, was that Tara Chand was not a benamidar but a coowner in equal share with Holkar Mal and accounts had been rendered to Tara Chand.

(6) After the preliminary issue regarding the necessity to implead Phool Chnnd and Bindraban had been decided, the trial Court framed the following issues :- 1. Whether the defendants No. 1 and 2 have rendered accounts of the rents realised as alleged ?-Its effect. 1A. What is the effect of defendant No. 3 's admission of account having been rendered to him ? 2. Whether Tara Chand, defendant No. 3 was a Benamidar, as alleged ? 3. If issue No. 2 is not proved, whether Tara Chand had authority to give a valid discharge on behalf of the plaintiff ? 4. Whether defendant No. 2 has dealt with the property ? 5. Relief,

(7) On an application under Order 14, Rule 5 CPC some more issues were framed. The previous issue No. 5 was numbered as Issue No. 8 and -three additional issues which were framed as Issues 5, 6 and 7 were as under : - "5. Whether the suit is not maintainable in the present form ? 6. Wether the suit is not properly valued for court fees and jurisdiction ? 7. Whether the plaintiff is estopped from filing the present suit as against defendant No. 3, as alleged in para 14 of the written statement."

(8) The parties went to trial on the above issues. At the trial Holkar Mal, the plaintiff, led evidence which was completely contrary to the case set up by him in the plaint. Bindraban was examined by Holkar Mal as his first witness. He deposed that he was a shareholder in the firm, M/s Sita Ram Bindraban & Brothers of Delhi, Akola and Khamgaon as also other firms. He was present in Delhi at the time when the property in question was purchased and had indeed come to Delhi for that purpose. According to him M/s Sita Ram Bindra Ban, a partnership firm, purchased two-thirds share of the Medgunj property in the name of Holkar Mal. Counsel for the defendants/ appellants objected to this

evidence being led as it was contrary to the pleadings. Without deciding the objection the evidence was recorded by the trial Court. This witness went on to say that the consideration in respect of two thirds share of the property was paid by M/s Sita Ram Bindra Ban & Brothers of Khamgaon. The payment was made at Delhi by the branch of that partnership firm. Accounts books were produced and relevant entries regarding the purchase of the property were proved as Exhibits P. I to P. 5. He also deposed that out of this property three shops were sold for a consideration of Rs. 44,000.00 which was credited to the books of the firm. About Tara Chand he deposed that he had not paid any amount for the purchase of the property. The witness asserted that the property belonged to the firm, M/s Sita Ram Bindra Ban, of which there were five partners, namely, Holkar Mal, Sita Ram, Jugal Kishore, Bindra Ban and Mussadi Lal. According to the witness personal accounts of the various partners were maintained in the books of the partnership and no debit was made to Holkar Mal's account regarding the purchase of the property.

(9) Rattan Lal appeared as Holkar Mal's second witness. He was a partner in M/s Amar Chand Rattan Lal and knew the firm M/s Sita Ram Bindra Ban. According to him his firm had received a telegraphic transfer from Akola branch of M/s Sita Ram Bindra Ban, which was paid to Holkar Mal, for registration of the property at Medgunj.

(10) Sunder Lal appeared as Holkar Mal's fourth witness. He is the Muneem of M/s Sita Ram Bindra Ban. He deposed what the first witness, Bindra Ban, had said. He also proved the entries in the account books.

(11) Holkar Mal himself appeared as his fifth witness. He deposed in his examination-in-chief that the property in question was purchased by him and Tara Chand for the five partners of the firm, M/s Sita Ram Bindra Ban and Brothers. He also admitted that the firm had a branch at Delhi and the money for the purchase of property was paid by that branch. Indeed, he asserted : "Bhani Ram, defendant, and Kirpa Ram, defendant, knew that the property is of our firm." Regarding Tara Chand is claimed that he knew from the beginning that he was merely a benami owner. We need not refer to any other evidence. The trial Court while deciding Issue No. 2 came to the conclusion that the property was purchased by the firm, M/s Sita Ram Bindra Ban and Brothers of Khamgaon through its Delhi Branch and Holkar Mal with the money belonging to the firm and so, the property belonged to the firm and Tara Chand was merely a benamidar. It is not necessary to comment on any other finding in the view that we have taken in this case.

(12) The suit filed by Holkar Mal was for rendition of accounts to him to the exclusion of Tara Chand as he claimed to be the exclusive owner of the property. The evidence led by him shows, and indeed it is admitted by him that the property belonged to a partnership firm. In our opinion, the suit as filed was, Therefore, not competent. Apart from the fact that evidence contrary to the pleadings could not be led or taken, in our opinion, the very basis of the suit

stands contradicted. In fact it is contradicted by Holkar Mal himself. If the property belonged to the partnership then Bhani Ram Gupta and Kirpa Ram were liable to render account to partnership or to a nominee of the partnership, at least that is how the claim should have been made. Holkar Mall could not himself claim accounts nor could he be allowed to blow hot and cold.

(13) Order 30, rule 1 CPC permits that any two or more persons claiming to be partners and carrying on business may sue in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. Alternatively, all the partners have to bring the suit as plaintiffs. Holkar Mal pleaded sole ownership and purchase by his own money but stated in the witness box that the property belong to the firm was purchased by the money provided by the firm. His suit was thus liable to be dismissed for two reasons. First, that he had failed to prove the case, as pleaded. Secondly, it transpired in evidence that not he but the partnership firm was the owner of the property. Rendering of account by Bhani Ram Gupta and Kirpa Ram to Holkar Mal would not have absolved them qua the other partners if the property belonged to the partnership firm. Holkar Mal could not be allowed to put the defendants in that position.

(14) As was held in *Chotelal Ratanlal and another V. Rajmal Milapchand and others*, AIR 1951 Nagpur 448, where a sum of money is due to a partnership firm, such a sum can be recovered either in a suit brought by all the partners of the firm or in a suit filed in accordance with Order 30, Rule 1 B.P.C. in the name of the firm. Suit by one partner alone in his name was not maintainable. So, the suit as brought was not maintainable on Holkar Mal's own testimony.

(15) It was urged on behalf of the respondents that what was sought to be enforced was the contract of agency between Holkar Mal and Tara Chand on the one hand and Bhani Ram Gupta and Kirpa Ram on the other and, Therefore, the suit was competent. Reliance was placed on the decision of an Additional Judicial Commissioner rendered in AIR 1933 221 (Nagpur) . In our opinion, this judgment cannot be held to be good law in view of the Division Bench judgment of the Nagpur High Court in the case of *Chhotelal Ratanlal*, referred to earlier. Section 45 of the Indian Contract Act reads as under :-

"45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, "and, after the death of the last survivor. With the representatives of all jointly."

Relying on the above section it has been urged on behalf of the respondents that the right to claim performance of a contract rests, as between them in the parties to the contract and so, the suit was competent. The submission looks attractive but there is a fallacy. The power of attorney may have been executed by Holkar Mal and Tara Chand in favor of Kirpa Ram and Bhani Ram but the rents

realised were paya ie to the owners and not to the executants of the power of attorney. In such a situation the bench decision of the Punjab. High Court in Bholabhai Bhogilal Vs. Rattan Chand and Others, becomes relevant. It was held that Order 30 is introduced in the CPC as an exception to the provisions of Section 45 of the Contract Act. The correct way of bringing a suit was to bring it in the name of the firm as a plaintiff or in the name of all the partners of the firm. This being the state of law and in view of Section 230 and Section 232 of the Contract Act Holkar Mal on his own showing was nothing more than an agent of the partnership firm and so, unless he had proved and pleaded a contract to that effect, he could not personally enforce the right to claim accounts in respect of a property which belonged to the partnership. Indeed, on his own showing when he purchased the property in his name and in the name of Tara Chand or gave a power of attorney to Bhani Ram and Kirpa Ram he made that contract knowing that he was acting as an agent of the partnership firm. The account books make this position quite clear. In his statement Holkar Mal disclosed his principal and so, he could not be allowed to proceed with the suit as brought by him.

(16) Looking at it in another way, Holkar Mal had to be pinned down to his pleadings and lie could not lead evidence contrary to the case pleaded. Such evidence could not be looked into (See Bhagat Singh and others V. Jaswant Singh AIR 1966 S.C. 1861. Therefore, both on account of the evidence being contrary to the pleadings and in fact destructive of the same and that the property belonged to the partnership, the suit had to be held to be not maintainable and could not be decreed.

(17) Relying on Firm. Hardayal Mal Mal Mohri Lal V. Firms Messrs. Rishan Gopal Jhanyi and Sons. AIR 1938 lah 673, it was next contended that where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract. Therefore, the suit for account against Bhani Ram Gupta and Kirpa Ram by Holkar Mal, one of the partners was maintainable. There is no force in this submission. At no time either in his plaint as well as replications Holkar Mal has asserted that he was the sole owner of the property having purchased it with his own money. At no time did he say in the plaint or the replications that he was an agent of the partnership firm. Indeed, the agency of the partnership firm was not even asserted in evidence. Therefore, we have no hesitation :n repelling this contention It was not Holker Mat''s cose that he was a benamidar of the firm, nor was it his case that he was an agent of the partnership firm. Indeed, through contrary to his pleadings Holkar Mal stated in the witness box that in purchasing the property he acted as an agent of the firm of which he was a partner and purchased the property for the firm. Yet he did not say that in giving the power of attorney he was acting as an agent of the firm. So, even this point has no force. We are fortified in coming to this conclusion on the basis of the rule enumerated by a bench of this court in Dwarka Dass Nayar Vs. Dwarka Dass Sehgal, .

(18) In the view that we have taken, it is not necessary to discuss any other issue.

(19) Accordingly, we accept the appeals and dismiss Holkar Mal's suit with costs throughout.