Sr. No. 312 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 2602 of 1988(O&M)
Decided on: 14.03.2018

Banarsi Dass(deceased) through LRs and another ....Appellants

versus

Ramji Dass and others ....Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Amit Jhanji, Advocate
for the appellants.

None for the respondents.

<u>Rajbir Sehrawat, J.(Oral)</u>

<u>CM No. 13938-C of 2010</u>

This is an application for impleading the legal heirs of appellant No. 1 Banarsi Dass.

For the reasons mentioned in the application, the persons mentioned in para No.2 of the application are ordered to be brought on record as legal representatives of appellant No. 1 subject to just exceptions.

Civil misc. application is allowed.

<u>RSA No. 2602 of 1988</u>

This is a second appeal filed by the defendants in a suit for recovery; challenging the judgment of reversal passed by the lower Appellate Court; whereby the appeal of the plaintiff was accepted and the suit was ordered to be decreed.

For convenience, the parties herein would be referred to as the plaintiff and defendant as they were described in the original suit.

The brief facts of this case are that the plaintiff had filed the suit for recovery claiming that the plaintiff and defendants No. 1 to 3 and 5 were the owners of partnership firm; defendant No. 4, namely M/s Banarsi Dass Ramji Dass Steel Rolling Mills, Amloh Road, Mandi Goobindgarh. The plaintiff had 30 shares out of 100 while the remaining 70 shares were owned by defendants No.1, 2, 3 and 5. Beside this the plaintiff and defendant No. 1 were the owners of another firm known as M/s Gobindgarh Iron Store, Sector 18-C, Chandigarh. In this firm, the plaintiff had 44 shares while defendant No. 1 had 56 shares out of 100. Beside these, there were two other properties, namely M/s Banarsi Dass Ramji Dass; carrying on the business of Commission Agent at Mandi Gobindgarh and two godowns jointly owned by the plaintiff and defendant No. 1, situated at Battan Lal Road. A dispute has arisen between the parties. As a result thereof, the plaintiff agreed to relinquish his share in above said two firms, including the goodwill etc. and defendant No. 1 agreed on 01.10.1966 to pay an amount of Rs. 1 lakh to the plaintiff for the same. In alternative defendant No. 1 further agreed to pay the interest at the rate of 1% per month w.e.f. 1.11.1966 till the amount of Rs. 1 lakh was paid. Defendant No. 1 neither paid the said amount of Rs. 1 lakh nor was any interest paid. Therefore, the plaintiff became entitled to get an amount of Rs. 1 lakh as agreed and the interest thereon upto 30.09.1969 amounting to Rs. 35,000/-. It was claimed that defendant Nos. 1 and 2 are jointly and severally liable to pay the amount. Defendant No. 1 agreed to pay the said amount as per the agreement so he was liable. Defendant No. 2 is liable because he approved the agreement and benefitted from acting upon that agreement. Further it was claimed that on 14.10.1966 the plaintiff and the defendants No. 3 and 5 agreed to retire from partnership firm M/s Banarsi Dass Ramji Dass Steel Rolling Mills, Amloh Road, Mandi Gobindgarh i.e., defendant No. 4 and defendant Nos. 1 and 2 agreed to continue as partners of the said firm from that date onward. Hence defendants No. 1 and 2 became the sole proprietor of the said firm vide agreement dated 14.10.1966. On 14.10.1966 an amount of Rs. 53,522.20 ps.was due to the plaintiff from the said firm M/s Banarsi Dass Ramji Dass Steel Rolling Mills, Amloh Road, Mandi Goobindgarh. The firm was liable to pay the interest on the said amount @12% per annum at the end of the financial year ending on 31st March. Even this amount had become Rs. 75080.50/- ps. upto 30.09.1969. Since the plaintiff Nos. 1 and 2 were the only partners of the firm defendant No.4, therefore, they are liable to pay this amount as well. Accordingly, it was claimed in the suit that by clubbing both these amounts a total of Rs. 2,10,080.55/- ps. were due to the plaintiff from defendant Nos. 1, 2 and 4. They have been evading the payment of same and has refused to pay the same. Hence the suit was filed.

Upon notice, the defendants filed written statement. Besides taking routine preliminary objections, it was averred in the written statement that the dissolution of the two firms took place on 14.10.1986 and for that purpose a regular dissolution deed was executed by the parties on a stamp paper. It was further averred that writing dated 1.10.1966 is a spurious document and on the face of it is is an inchoate document and no claim can be based on it. Moreover, after execution of the regular dissolution deed on 14.10.1966; this writing, even if assumed to have been executed; would be deemed to have been rescinded by the regular dissolution deed dated 14.10.1966. It was further averred that any writing dated 01.10.1966 Ex:P-6 was invalid for want of consideration and registration. Therefore, the same was inadmissible in evidence. Further it was claimed by the defendants that plaintiff was exclusively using the immovable property jointly owned by the plaintiff and defendant No. 1; for the last 5 years and he has not paid anything to defendant No. 1 for its user charges. Therefore, defendant No. 1 is entitled to recover an amount of Rs. 50,000/- on that score from the plaintiff.

On the pleadings of the parties, the Trial Court framed the following issues:-

> "1 Whether the suit is within time? OPP
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> 2. Whether this court has jurisdiction to try this suit? OPP
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> 3. Whether defendant No. 1 executed agreement deed dated 1.10.1966 in favour of the plaintiff and agreed to pay Rs. 100000/- alongwith interest at the rateof Rs. 12% per annum? OPP
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> 4. Whether the other defendants are liable to pay the above amount?OPP
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> 5. Whether amount of Rs. 53522-20ps was due on 14.10.1966 from the defendants to the plaintiff and the former is entitled to recover it? OPP
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> 6. Whether the suit is bad under O2 R2 CPC? OPD
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> 7. Whether the disputed agreement is without consideration? OPD
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> 8. Whether the suit is violative of the provisions of money Lender's Act and Regulations of Accounts Act? OPD
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> 9. Whether the defendants are entitled to get off as pleaded? OPD
>
> 10. Whether the suit is bade for multifaviour-ness? OPD
>
> 11. Relief."

Parties led their respective evidence.

After hearing the parties, the Trial Court dismissed the suit filed by the plaintiff. While dismissing the suit the Trial Court held that the plaintiff has failed to prove the due execution of the claimed writing dated 1.10.1966. Moreover, the said document can not be treated as a valid document. For arriving at this conclusion, the Trial Court recorded that one of the attesting witnesses Milkhi Ram has not been examined by the plaintiff. Although another witness, Ram Parshad, was examined as PW-3; who deposed having written the document Ex:P-6 as per the dictation of the parties, however, in the cross-examination this witness deposed that no partition had taken place between the parties in his presence nor any firm was dissolved. Besides the attending circumstances disclosed by this witness at the time of writing of this document clearly show that no agreement was entered into between the parties. The Court further observed that this agreement dated 01.10.1966 is stated to be arrived at in the presence of the father of the parties. However, he is not a signatory to this agreement. This show that the said document is a suspicious document. The Trial Court further recorded that there had been a regular dissolution deed between the parties dated 14.10.1966, EX:D-4. This document is executed by the parties subsequent to the earlier claimed document dated 01.10.1966, Ex:D-6. Despite that there is no mention of document Ex:D-6 in the dissolution deed Ex:D-4. Had there been any writing dated 01.10.1966 involving inter se liabilities of partners then the same would definitely have found mention in the regular dissolution deed dated 14.10.1966, which finally decided the rights and liabilities between the parties. The Trial Court further held that since in the partnership firm, defendant No. 4, the plaintiff and defendant No. 3 were not the only partners and there were other partners as well, therefore, no agreement could have been validly executed between the plaintiff and defendant No. 1 without the consent of the other partners in the firm. However, other partners in the firm are not signatory to the alleged agreement dated 01.10.1966 Ex:D-6. Hence that agreement has got no legal value. Referring to the evidence the Trial Court recorded that although the plaintiff appeared as PW-5 and he deposed that although his brother-in-law Mohan Lal was present at the time of execution of the agreement, however, his signatures were not obtained on that writing; whereas; PW Mohan Lal while appearing as PW-4; has deposed that no writing had taken place in his presence. Still further the Trial Court held that the alleged agreement, statedly, was only one copy. Had defendant No. 1 agreed to any such transaction then atleast he would have been given a second copy. Further the Trial Court observed that the writing/agreement dated 01.10.1966, Ex: P-6; is not found attached with the income tax return filed by the plaintiffs. Hence the entire transaction is spurious transaction and not proved as per the requirement of law. The Trial Court further relied upon the fact that no hand writing expert was examined by the plaintiff to prove the signature of defendant No. 1 on the said document Ex:P-6. Regarding the amount of Rs. 53,000/- relating to the second transaction; upon which other part of the recovery suit is based, the Trial Court held that balance sheet does not show any such amount being due to plaintiff from the firm. Balance sheet for the 1970-71 does not show any amount was due from the plaintiff. Still further the Trial Court held that income tax record of earlier years also show no such amount to be due to plaintiff from the firm. Hence the Trial Court dismissed the suit. Aggrieved against the judgment and decree the plaintiff filed the appeal before the lower Appellate Court.

The lower Appellate Court reversed the judgment and decree passed by the Trial Court and ordered that the suit filed by the plaintiff be decreed. While allowing the appeal the lower Appellate Court relied upon the pleading of the party as contained in para No. 4 of the plaint and the written statement. Lower Appellate Court held that since para No. 4 of written statement does not contain a specific denial of execution of the document dated 01.10.1966 Ex:P-6, therefore, the same shall be deemed to have been admitted by the defendants. The lower Appellate Court further held that the Trial Court has wrongly drawn wrong inference against the plaintiff for non-examination of the witness Milkhi Ram because Milkhi Ram already stood expired. Regarding the non-examination of the hand writing expert the lower Appellate Court held that in view of the deposition of the scribe of the deed and the testimony of the plaintiff; it was not necessary to examine any hand writing expert. The report of an hand writing expert is only an opinion. Moreover, the Court can itself compare the signature of the parties from the relevant documents. Accordingly, the lower Appellate Court itself compared the signatures of the parties on the documents available on record and came to the conclusion that Ex:P-6 is a validly executed document. Regarding the non-mentioning of the agreement dated 01.10.1966 in the dissolution deed dated 14.10.1966, the lower Appellate Court recorded that as per the original deed of partner ship of the firm, defendant No. 4, the steel Mill was under construction and at that point of time; only the plaintiff and defendant No. 1 were the partners. In the original partnership deed it was written that the party No. 3 to 5 mentioned in the partnership deed shall be taken as partner after completion of the construction of the mill. Since the construction was in progress when the said agreement dated 01.10.1966 was entered into between the plaintiff and defendant No. 1, therefore, the remaining defendants in the suit has no locus standi qua this property. Hence neither their consent was required nor the factum of agreement dated 01.10.1966 was required to be included in the dissolution deed dated 14.10.1966. Rather the dissolution deed Ex:D-2 is the result of the agreement Ex:P-6. Regarding the observation of the Trial Court that there was no consideration for the transaction, the lower Appellate Court held that since the plaintiff Ramji Dass had relinquished his shares, therefore, the value of the share was a sufficient consideration for the agreement. Still further the lower Appellate Court held that the genuineness of the document Ex:P-6 is further proved by the fact that it is written on the latter pad of the M/s Raj & Company and this paper bears the name of the firm besides telephone number and telegraphic code. Defendant No. 1 Banarsi Dass in cross-examination has admitted that his telephone no. of office and his residence is same as mentioned on the letter pad.

Regarding the second claim qua Rs. 53,522.20 ps the lower Appellate Court held that plaintiff was entitled to recover this amount. It was held by the lower Appellate Court that Mahinder Pal, clerk of Central Bank of India has produced the balance sheets of the firm from their record for the year 1966-68, 1968-69, 1969-70. These balance sheets Ex:P-1 for the year 1967-68 bears the signatures of Banarsi Dass. In the balance sheet of the year 1967-68 there is the entry of the amount as outstanding. No doubt Banarsi Dass has denied his signature on the balance sheet Ex:P-1, the lower Appellate Court held that it appears the he has done so intentionally; because otherwise he submitted the returns along with the balance sheet before the income tax authorities. The returns have been proved by Anoop Singh, clerk PW-2 from the Income Tax office. The lower Appellate Court further held that although the balance sheet of the firm for the subsequent years do not show any liability of the firm due towards the plaintiff, however, it was for the defendants to prove that they discharged their liability as reflected in the earlier entries. However, no such document has been proved by the defendants. Accordingly, the suit was ordered to be decreed by the lower Appellate Court. Aggrieved against the judgment and decree passed by the lower Appellate Court, the defendants have filed the present regular second appeal.

While assailing the judgment and decree passed by the lower Appellate Court, learned counsel for the appellant has submitted that evidence of Mohan Lal, the brother-in-law of the parties; has ruled out the execution of the document P-6; because he has deposed that no writing was done in his presence whereas the plaintiff had deposed that he was present when the writing of the agreement Ex:P-6 was made. Learned counsel further submits that the lower Appellate Court is totally wrong in saying that the averment of the plaintiff regarding the execution of the agreement/writing dated 01.10.1966 has not been specifically denied by the defendant in written statement. This finding is totally perverse and factually incorrect. Learned counsel submits that there is a specific denial to the factum of the agreement by saying that this writing is a spurious document. More over the defendants have specifically challenged the validity and authenticity of this document. Learned counsel further submits that Milkhi

Ram another witness claimed by the plaintiff has not been examined. Learned lower Appellate Court has incorrectly written that this witness had expired. Infact this witness was very much available. There is nothing on record that Milkhi Ram had died, as written by the lower Appellate Court. On the contrary, the record of the case would show that Milkhi Ram was summoned several times. But he did not come present to the Court. Therefore, bailable warrants were issued vide Order dated 06.06.1972. However, the plaintiff did not deposit the expenses and the necessary fees for effecting the presence of Milkhi Ram because the plaintiff did not want that witness to be present before the Court. Hence the Trial Court rightly drew the adverse inference against the plaintiff. Learned counsel further submits that the lower Appellate Court has wrongly singled out one paragraph of written statement to record that there is no specific denial of the document Ex P-6. Learned counsel submits that written statement can not be read in isolation after the evidence has been led on the point. Therefore, the averments, though specific in the written statement, have to be read in context of the evidence which has been led by the parties. Learned counsel next submits that; admittedly; the subsequent document dated 14.10.1966 was a regular dissolution deed; which is signed by all the parties. This document also says that all the disputes between all the parties stand resolved and no claim of any party remains outstanding. Learned counsel further submits that the plaintiff has admitted this document. This shows that there was no claim outstanding against the defendants due to plaintiffs as on 14.10.1966. Regarding the second claim, learned counsel submits that the balance sheet of the firm for the year 1968-69 Ex:D-7 does not show any amount outstanding due to the plaintiff. In the same manner balance sheet of the year 1969-70 does not show anything due toward the plaintiff. Hence the claim of the plaintiff that the amount was due to the plaintiff from the firm is not substantiated from the financial record of the firm maintained in its ordinary course of business. Still further learned counsel submits that vide Order dated 21.05.1983, the Trial Court had ordered the plaintiff to produce the required document. However, the plaintiff failed to produce the same. Hence the adverse inference is to be drawn against the plaintiff. The plaintiff has failed to produce the documents relevant to substantiate his claim.

There is no representation on behalf of the plaintiffs/respondents in this case at the time of the arguments of the appeal. Though at the earlier stages of the appeal, the plaintiff was represented by the counsel. However, thereafter there was no representation by the counsel. Vide Order dated 14.02.2018, it was ordered that intimation regarding the next date of hearing be given to the counsel for the plaintiff/respondent. Notice was duly served upon the learned counsel. However, despite that learned counsel has chosen not to come present to assist the Court at the time of arguments. Faced with this situation, the Court had no alternative but to have proceed further to hear the arguments and to take a final decision.

Having heard the learned counsel for the appellants, this Court is of the considered opinion that the argument raised by learned counsel for the appellants deserve to succeed. Although the plaintiff has examined PW-3 Ram Parshad to prove the alleged agreement dated 01.10.1966, however, that witness has wavered in his deposition. He has further admitted that he has not been present at the time of any partition or any dissolution of the firm. The other witness Milkhi Ram has not been produced by the plaintiff. The defendant had moved a specific application for summoning the said witness Milkhi Ram. He avoided appearance. Thereafter, even bailable warrants were issued. However, the plaintiff did not deposit the necessary expenses for ensuring the presence of this witness Milkhi Ram. Hence the plaintiff has made effort to withhold this witness. Therefore, the Trial Court committed no legal wrong by drawing an adverse inference on account of non-production of this witness.

Another peculiar aspect of the writing dated 01.10.1966, Ex:P-6 is that it is claimed to be written in the presence of father of the parties. However, his signatures are not there; either as a party or as a witness. Still further Mohal Lal, the brother-in-law of the parties, though deposed that there was some settlement between the parties, however, he has also deposed that nothing was written down in his presence. Similarly, the document Ex:P-6 is dated 01.10.1966 and is claimed to contain certain liabilities on the part of defendant No.1. Another document dated 14.10.1966, Ex:P-4/D-2 is the regular dissolution deed of the firm. This dissolution deed dated 14.10.1966 contains a stipulation that nothing is left to be settled between the parties and that all the claims stands settled inter se the parties. Although the document Ex:P-6 is prior in time and talks of a liability against the defendant No. 1, however, despite that the same does not find mention in the document dated 14.10.1966; which is written just after 14 days of the former document. This means that either there was no such document as Ex:P-6; executed between the parties or the same stood settled/re-conciled before 14.10.1966. Otherwise there was no occasion for the same parties writing on 14.10.1966 that there was no claim outstanding inter se the parties. Therefore, the Trial Court had not committed any legal wrong by drawing inference in view of the subsequent document dated 14.10.1966, that the earlier document dated 01.10.1966; though not proved on record, still can not be deemed to be carrying forward any liability against defendant No. 1. The lower Appellate Court has wrongly reversed these findings recorded by the Trial Court.

Since defendant No. 1 was denying the document, Ex:P-6, therefore, it would have been a natural conduct on the part of the plaintiff to examine the hand writing expert to prove the signatures of defendant No. 1 on the document Ex:P-6. However, the plaintiff has chosen not to take this step. Possibility of the inherent conviction of the plaintiff regarding this document not being genuine; being the basis for not calling the hand writing expert; can not be ruled out. The lower Appellate Court has wrongly gone to the extent of itself comparing the signatures; to conclude that defendant No. 1 had signed the alleged agreement Ex:P-6. Of course, the Court could have recorded the conclusion regarding defendant No. 1 putting his signatures on the document Ex:P-6 on the basis of the evidence, however, it would be inappropriate on the part of the Court to enter into the field of expert; for the purpose of comparison of signatures on two documents; by just a cursory look. This kind of recourse can be taken by the Courts only under exceptional circumstances when there is no other alternative available before the Court, as per the evidence on record, to come to a conclusion regarding the execution of the document. In the present case both the parties have led extensive evidences on the point. Hence the lower Appellate Court should not have ventured into drawing this conclusion just by cursory comparison of the signatures; bereft of appreciation of the relevant evidence led by the parties regarding execution of the document Ex:P-6.

Regarding the other claim of the plaintiff against the firm, defendant No. 4, the statement of the learned counsel for the appellants appears to be legally sustainable. Balance sheet of the firm for the year 1968-69 Ex:D-7 shows nothing to be outstanding and due to the plaintiff. Likewise, the subsequent balance sheet for the year 1969-70 also shows that there is nothing due towards the plaintiff. This confirms the conclusion drawn by the Trial Court that either there was nothing due to plaintiff or the same stood settled between the parties. The lower Appellate Court has wrongly held the burden on defendant to prove that the amount stood paid. Moreover, no balance sheets have been found to be attached with the income tax returns. Therefore, the lower Appellate Court has wrongly held that the plaintiff is entitled to claim the amount of Rs. 75,080.50/- ps. from the firm.

No other argument was raised by learned counsel for the appellants.

In view of the above, the decree, the findings and the judgment recorded by the lower Appellate Court are set aside; being perverse. The appeal filed by the defendants is allowed. The suit filed by the plaintiff is ordered to be dismissed.

14th March, 2018 **[RAJBIR SEHRAWAT]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned *Yes*
Whether Reportable *Yes*