

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**RSA No.1345 of 2012 (O&M)
Date of decision:03.05.2018**

Harbans Lal (deceased) through LRs and others ... Appellants

Vs.

Sarla Devi (deceased) through LRs and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. J.S.Lalli, Advocate
for the appellants.

Mr. Bikramjit Arora, Advocate
for the respondents.

AMIT RAWAL J.

The appellant-defendants are in Regular Second Appeal against the concurrent findings of facts and law, whereby, suit for partition of the following properties:-

- i) property measuring 3582 square yards bearing no.H-1 situated at Textile Colony, Industrial Area-A, Ludhiana.
- ii) three shops situated at Chaura Bazar, Ludhiana.
- iii) one shop situated at Gokal Market No.2, Moti Bazar,

Amritsar and rendition of accounts and mesne profit, has been decreed by the trial Court and affirmed by the Lower Appellate Court.

The suit was filed in respect of properties mentioned above on the premise that property at sr. no.(i) was purchased by defendant no.7 -firm M/s Jagan Nath Piara Lal, vide registered sale deed dated 28.11.1960. The property at serial no.(ii) was under the tenancy of defendant no.7 and similarly one shop situated at Gokal Market No.2, Moti Bazar, Amritsar was also under tenancy of defendant no.7 and as such, the said three shops situated at Chaura Bazar, Ludhiana as well as one shop situated at Gokal Market No.2, Moti Bazar, Amritsar were taken on rent by defendant no.7 for carrying on its business through its partners. The partnership deed dated 1.4.1990 consisted of partners Makhan Lal, Madan Lal having 25% share each and Jagdish Chand, Harbans Lal, Om Parkash, Ved Parkash and Padam Kumar having 10% share each. Makhan Lal died on 30.10.1990. During his life time, he executed a legal and registered Will dated 16.4.1990 bequeathing his properties both movable and immovable in the name of his wife-Sarla Devi/plaintiff. Owing to aforementioned Will, plaintiff thus, became of the owner of the property to the extent of 25% share and regarding tenancy of other three shops, landlord was entitled to seek rendition of accounts and also partition in respect of properties referred to above.

The suit was contested by the appellant-defendants by raising various preliminary objections qua non-maintainability, jurisdiction and payment of Court fees. On merit, it was admitted that property at serial no.1 was purchased in the name of firm on 28.11.1960 consisting of 11 partners. The aforementioned firm was dissolved, w.e.f. 10.09.1990 and new

partnership came into existence. In other words, it was averred that Makhan Lal and Madan Lal had resigned from the deed/exited from the partnership deed. The property measuring 63.1/2 square yards out of partner no.1 was sold by the firm through its partners namely Om Parkash, Ved Parkash, Jagdish Chand, Harbans Lal and Tipta Maheswari for a consideration of Rs.1,80,000/- to M/s International Cycle Gear through its partner Bharat Bushan vide registered sale deed dated 21.01.1993 at Ludhiana. The aforementioned sale deed was witnessed by Inder Mohan and Makhan Lal. Another sale deed dated 25.1.1993 was witnessed by Madan Lal son of Piare Lal, outgoing partner. Execution of the sale deed was well within the knowledge of respondent-plaintiff. Inder Mohan had given an undertaking on his behalf and being attorney of Sarla Devi as per the Attorney dated 18.2.1991. As regards the shops under tenancy, it was stated that firm was not doing good business, therefore, was not earning profit, in essence, the firm did not do business since 1977. The Will was emphatically denied. Makhan Lal was left with no interest or title in the property since 10.09.1990 as entire accounts were settled for a sum of Rs.18,077.12 paisa.

Replication was filed controverting the averments made in the written statement. The trial Court framed as many as eight issues including the issue of Relief. The plaintiff examined following witnesses:-

PW1 - Balwinder Kaur-Clerk

PW2 – Manmohan Bamba, Advocate

PW3 – Harbhajan Singh Chawla, Deed Writer

PW4 – Arun Bawa, Clerk

PW5 - Raj Kumar

PW6 - Arun Kumar

PW7 – Rajan Kapoor

PW8 – Inder Mohan

On the other hand, appellant-defendants examined following witnesses:-

DW1 - Madan Lal

DW2 – Srinder Pal, Advocate

DW3 – Ved Parkash

DW4 – Muni Lal Jain

DW5 Satish Kumar

On the basis of evidence, the trial Court decreed the suit and the appeal laid before the Lower Appellate Court also met with the same fate.

Mr. J.S.Lalli, learned counsel appearing on behalf of the appellants submitted that suit for partition was not maintainable, for, the property belonging to the partnership firm was governed by Indian Partnership Act, 1932 (in short “1932 Act”), a complete code/statute, i.e., as per Sections 29 and 48 of 1932 Act. The limitation to file a suit for rendition of accounts is three years. However, Makhan Lal died in the year 1990 and suit was filed on 11.1.1997, i.e. after expiry of three years. The Court at Amritsar did not have the jurisdiction as it was tenanted premises, whereas, the main property belonging to firm was situated at Ludhiana. The tenancy rights of the property situated at Amritsar fell to the share of Makhan Lal,

whereas Inder Mohan in evidence admitted the tenancy rights. Dissolution deed, Ex.D1 had been proved on record but was brushed aside on the ground that different version in cross-examination of defendants' witnesses surfaced. In fact, appellants have been able to prove the dissolution deed entered by Makhan Lal and other partners, for, Form 'A' and Form 'C' consisting of remaining partners was brought on record through the testimony of DW3-Ved Parkash, thus, there was compliance of Sections 58 and 59 of 1932 Act. The plaintiff failed to discharge the onus on issue no.4. There was no reference to the cross examination of PW2-Inder Mohan, who unequivocally admitted that he was witness to the sale deed in respect of land belonging to firm sold to third party and thus, prayed for setting aside the findings under challenge.

Mr. Bikramjit Arora, learned counsel for the respondents submitted that dissolution deed, Ex.D1 was not proved on record being forged and fabricated. The property at serial no.1 concededly was purchased in the name of partnership deed in which Inder Mohan alongwith Madan Lal had 25% share. There was no settlement of accounts allegedly refer in the dissolution deed. The plaintiff was not bound by the sale deed affected by the firm as she had no right or title in the property until and unless the same was partitioned. The Will dated 16.04.1990 has been proved by which entire movable and immovable property stood bequeathed in favour of plaintiff. The witnesses of the defendants had not been able to prove the dissolution deed, for, in cross-examination, gave different version, in other words, they were not consistent and coherent as they feigned ignorance with

regard to purchase of the stamp paper for execution of dissolution deed. Makhan Lal was not present at Ludhiana when Ex.D1 was presented. DW2-Srinder Pal denied that dissolution deed, Ex.D1 was written in his presence. No steps were taken by the defendants in getting property mutated in the name of surviving partners, in case the story coined in the written statement was to be accepted. The provisions of Section 68 of Indian Evidence Act, have not been complied with for proving the dissolution deed and urged this Court for upholding the concurrent findings of facts and law which do not suffer from any illegality and perversity.

In rebuttal, Mr. Lalli in support of his contention relied upon the judgment rendered by the Hon'ble Supreme Court in **Addanki Naryanappa and another Vs. Bhaskara Krishnappa (dead) through LRs and others AIR 1996 Supreme Court 1300** to contend that if the property had been purchased in the name of partnership firm, the suit for partition is not maintainable.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as records of both the Courts below and of the view that there is force and merit in the submissions of Mr.Lalli. The reason is not one but many:-

Both the Courts below remained oblivious, much less did not advert to the statement of respondent-plaintiff's witness Inder Mohan PW8, who in cross examination proved the case of the defendants. He stated that he signed as witness in the sale deeds effected by Jagan Nath Piare Lal in

favour of International Cycle Gear and also identified the signatures on the certified copy of DX at point 'A'. The factum of execution of the undertaking Mark A given to the International Cycle was also not denied, much less same also bore the signatures of his sister Kamlesh Kumari which were identified by him. In other words, he admitted that undertaking was given to M/s International Machine Tools of settlement of the accounts regarding both movable and immovable property vide dissolution deed dated 1.4.1990. For the sake of brevity, relevant portion of the statement of Inder Mohan reads as under:-

“It is correct that I had signed the sale deed as a witness which was effected by Jagan Nath, Piare Lal in favour of International Cycle Gear and I signed it as a witness. I identify my signatures on the certified copy of Ex.DX at point 'A'. I had signed this sale deed only as witness and I do not know anything else. It is also correct that I had given an undertaking and the photocopy of the same is Mark A which was given to International Machine Tools. It is correct that the same was also signed by my sister Kamlesh Kumari and I identify her signatures as well as my signatures on document Mark A. It is correct that we had given this undertaking to M/s International Machine tools as referred in the undertaking.”

Once there was categoric admission that story coined in the suit filed in the year 1997, after almost 7 years of death of Makhan Lal was nothing but an act of greed/aggrandizement. Concededly, property at serial no.2 and 3 were

under tenancy of the partnership firm. The suit for rendition of accounts can only be filed within a period of three years and not beyond that. Section 48 of 1932 Act deals with mode of settlement of accounts between the partners. For the sake of brevity, Sections 29 and 48 of 1932 Act, read as under:-

29. Rights of transferee or a partner's interest.—

(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

48. Mode of settlement of accounts between partners.—In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:—

(a) losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by

the partners individually in the proportions in which they were entitled to share profits;

(b) the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:—

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due to him on account of capital; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

On conjoint reading of aforementioned provisions of law, it leaves no manner of doubt that no person would resign or exit from the partnership firm without settlement of the accounts and if one of the partners play mischief, remedy is to seek dissolution, appointment of receiver and rendition of accounts. Sub-section 2 of Section 29 of 1932 Act envisages situation where transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. Even if the dissolution deed had not been proved, assuming for an argument sake, fact of the matter is that no sane or prudent person would stand as a witness vis-a-vis property belonging to the partnership firm in

which father of Inder Mohan/PW8 allegedly was a partner alongwith Madan Lal to the extent of 25% share. Signatures of Sarla Devi, Kamlesh Kumari and Inder Mohan on the undertaking had not been denied. For the sake of brevity, undertaking reads thus:-

“We, Smt. Sarla Devi wd/o Makhan Lal son of Kesho Ram, Inder Mohan son of Makhan Lal, Kamlesh daughter of Makhan Lal, residents of Bazar Khoo Suniaryan, Amritsar do hereby give an undertaking that Shri Makhan Lal was a partner in M/s Jagan Nath Pyare Lal vide dissolution deed dated 1.4.1990 after having settled and understood all the accounts. At present we have no right or interest in the estate of the firm including property No.H-1, Textile Colony, Ludhiana as legal heirs of Makhan Lal.

Executants

Sd/- in Hindi

Ludhiana

1. Smt. Sarla Devi

Dated 21.12.1992

Sd/- in English

2. Inder Mohan

Mark X

sd/- in English

Sd/-CJ(JD)ASR

3. Kamlesh.”

There is another aspect of the matter. Through Ex.DW3/3 and Ex.DW3/4, Form A and Form C acknowledge by the registrar of firm with regard to remaining partners i.e. reconstituted firm had been proved on record. No explanation has come forward as to how and in what manner the remanning partners continued or no action was taken for almost 7 years.

Immovable property owned by the partnership firm was located at Ludhiana, whereas, the suit had been filed at Amritsar, for, one of the property taken on rent by the partnership firm was located at Amritsar. The suit that too with a correct relief, in my view, was liable to be filed at Ludhiana.

The whole concept of partnership firm is to embark upon the joint venture and for that purpose to bring in as a capital money or even property including the immovable property. Once that is done, whatever brought in would cease to be exclusive property of the person brought it in. It would be a trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership firm. The person who brought the property would not be able to exercise the right even to the extent of his share in the business of partnership. Though during the subsistence of partnership, a partner may assign his share to another in that case assignee would get only what is permitted by Section 29 of 1932 Act, that is to receive the share of the properties of assigner and accept the accounts of the profit agreed to by the partners. The Partnership Act contemplates liquidation assets of partners as a preliminary to the settlement of accounts between the partners on dissolution of firm. In other words, the entire process would be taken under 1932 Act, irrespective of any agreement between the partners.

The Court below erroneously brushed aside qua the dissolution deed Ex.D1 on the ground that cross-examination of the witnesses was not consistent. However, as a matter of fact, evidence brought on record,

Makhan Lal was ill at the time of dissolution and that was one of the reasons for retiring. His signatures were identified by DW2-Srinder Pal, the Court below has referred his evidence in part by referring it the document was not in writing. There was no cross examination with regard to the signatures of Makhan Lal. If at all, dissolution deed did not bear the signatures of Makhan Lal, nothing prevented the plaintiff to belie his signatures by taking the aid of an expert. In my view, the respondent-plaintiff has played a gamble by examining Inder Mohan PW8. His statement was double edged and in cross examination beans were spilled by ascertaining the factum of execution of undertaking, much less witnesses to the sale deed. All these factors have gravely been ignored nor adverted to, thus, both the Courts below misdirected oral and documentary evidence, much less pleadings.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and**

others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government

of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

In view of such glaring fallacy, judgments and decrees of both the Courts below suffer from perversity being not sustainable in the eyes of law and the same are hereby set aside. The suit of the respondent-plaintiff is dismissed.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

May 03, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No