

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

RSA No.724 of 2003 (O&M)
Date of decision : 04.02.2019

Surender Singh and others

...Appellants

Versus

Pankaj Gautam and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Dr. Anmol Rattan Sidhu, Sr. Advocate with
Mr. Arun William, Advocate for the appellants.

Mr. Rajinder Goyal, Advocate for respondent Nos.2 and 6.

ANIL KSHETARPAL, J.

Defendants-appellants are in the Regular Second Appeal against the judgments passed by the Courts below decreeing the suit filed by the plaintiffs-respondents for declaration that they are owners of land measuring 11 kanals and 18 marlas, detailed whereof were given in the plaint, with consequential relief of possession.

In the considered opinion of this Court, following substantial questions of law arise in the present case:-

- 1) Whether in the facts of the case, defendants-appellants are entitled to protect their possession under Section 53-A of the Transfer of Property Act i.e. in part performance of agreement to sell?
- 2) Whether a partner after having brought in his individual immovable

property in the fold of partnership firm, can claim individual right in the immovable property?

The plaintiffs-respondents filed a suit for declaration claiming that they are owners of land measuring 11 kanals and 18 marlas and entry in the jamabandi recording that Sohan Singh as a vendee, is wrong and the agreement dated 20.03.1979 is forged. The plaintiffs consequently also prayed for a decree for possession.

The defendants contested the suit and pleaded that the predecessor of plaintiff Nos.2 to 5 was not owner of the property as their predecessor Rameshwar was adopted by Kundan Lal. Late Rameshwar had also inherited the property from Kundan (his adoptive father). Sohan Singh, their predecessor was never inducted as a servant, rather he was tenant under plaintiff No.1. Plaintiff No.1 thereafter, entered into a partnership with predecessor of the defendants-Sohan Singh by a written contract dated 20.03.1979, according to which a partnership came into being in which predecessor of the defendants-Sohan Singh had 99 shares out of 100 and Sham Sunder had 1 share. Sham Sunder had also received ₹5,000/- in cash from Sohan Singh.

Learned trial Court decreed the suit by passing a non-speaking judgment. The trial Court held that only issue which requires determination is “whether adoption has any effect upon the inheritance”. Since the property previously belonged to Gram Panchayat, therefore, adoption of Rameshwar (predecessor of plaintiff Nos.2 to 5) has no effect. Execution of the agreement dated 20.03.1979 is proved and Sohan Singh was not inducted as a servant. Thereafter, the Court held that Sohan Singh had

surrendered his tenancy as per agreement dated 20.03.1979 and since no sale deed has been registered in favour of Sohan Singh, therefore, Sohan Singh cannot claim any right. The suit filed by the plaintiffs was thus decreed.

First appeal was preferred by the defendants. Before the First Appellate Court, an additional issue was framed with respect to entitlement of the defendants to protect their possession in terms of Section 53-A of the Transfer of Property Act. However, the learned First Appellate Court has recorded the following reasons to dismiss the appeal:-

- i) Sham Sunder alone (plaintiff No.1) was not competent to enter into the agreement with respect to the entire property.
- ii) The agreement was required to be compulsorily registered as value of the immovable property was more than ₹100/-.
- iii) Defendants have failed to prove that there was any valid contract.
- iv) Sohan Singh had surrendered his tenancy.
- v) Defendants are not entitled to protect their possession under Section 53-A of the Transfer of Property Act.

In the present case, evidence is required to be discussed. Sant Ram @ Shana Ram was having two sons, Sham Sunder (plaintiff No.1) and Rameshwar (predecessor of plaintiff Nos.2 to 5). It is the case of the defendants that Rameshwar (predecessor of plaintiff Nos.2 to 5) was adopted by Kundan Lal and, therefore, severed his connection in the family of Sant Ram @ Shana Ram. Death Certificate of Rameshwar has been filed in evidence by the defendants in which name of father of Rameshwar has been recorded as Sh. Kundan Lal. Further, Ex.DC is copy of mutation

sanctioned on 30.12.1935 after the death of Kundan Lal in favour of Rameshwar. In the order, it is recorded that Rameshwar has produced a testament from Kundan, in which it is recorded that Rameshwar is adopted son of Kundan Lal who has bequeathed his property in favour of Rameshwar. Still further, son of Rameshwar i.e. Brij Mohan while appearing in evidence as PW1 has admitted that late Sh. Rameshwar, his father, had received the property from Sh. Kundan but it was claimed that since Sh. Kundan Lal was maternal grandfather of late Sh. Rameshwar, therefore, the property has been inherited. On pointed question as to whether any property was received by Sham Sunder from Kundan, he stated that he had received the property at Baahia but on further cross-examination, he admitted that there is no writing or proof to prove that aspect.

In view of the aforesaid overwhelming evidence including the admission of the plaintiff, Brij Mohan who is only witness examined on behalf of the plaintiffs, it is proved that Rameshwar had been adopted by late Sh. Kundan Lal. In fact, both the Courts have overlooked this evidence while deciding the case, therefore, Sham Sunder being only heir of Sant Ram @ Shana Ram was competent to execute the agreement dated 20.03.1979.

Second reason given by the First Appellate Court is also patently erroneous as the agreement to sell evidencing delivery of possession in part performance of the contract, has been made compulsorily registrable for the purposes of Section 53-A of the Transfer of Property Act w.e.f. 24.09.2001 by Act No.48 of 2001 i.e. The Registration and Other

Related Laws (Amendment) Act, 2001. In the present case, the agreement in question is of the year 1979 i.e. before the amendment. The amendment in the year 2001 has not been made retrospective in operation. Hence, the First Appellate Court erred in ignoring the agreement dated 20.03.1979 as it is not registered.

The First Appellate Court has also erred in recording that the agreement dated 20.03.1979 is not proved. First of all, the agreement is signed between plaintiff No.1-Sham Sunder and predecessor of defendants-Sohan Singh. Plaintiff No.1 has not appeared in evidence to deny the execution of the agreement dated 20.03.1979. In fact, this suit was filed by Brij Mohan on the strength of power of attorney of Sham Sunder. Brij Mohan when appeared in evidence has stated that Sh. Sham Sunder is unable to walk because of injury in his leg. He further deposed that he cannot speak. When Brij Mohan in the cross-examination was confronted with the agreement, he admitted that the agreement is signed by Sham Sunder. In fact, in the present case, it was necessary for the plaintiffs to examine Sham Sunder who had signed the agreement, failing which adverse inference ought to have been drawn against the plaintiffs. Brij Mohan has not produced any evidence to prove that Sham Sunder is either unable to walk or is unable to speak. Further, once Brij Mohan has admitted the signatures of Sham Sunder, the execution of the agreement dated 20.03.1979 stands proved.

Next reason assigned by the First Appellate Court while dismissing the appeal is equally erroneous. On the one hand, the First Appellate Court is recording a finding that no valid contract dated

20.03.1979 is proved whereas on the other hand, the First Appellate Court has recorded that Sohan Singh (predecessor of the defendants) had surrendered his tenancy rights on execution of the agreement dated 20.03.1979. Both the findings are contradictory. If there was any valid agreement only then it could be assumed, if such an inference was possible, that there was surrender of the tenancy rights. In view of the finding that the agreement is not valid, the tenancy rights would continue.

The First Appellate Court has examined the plea of the defendants for protecting their possession under Section 53-A of the Transfer of Property Act. However, the Court held that since the agreement is not registered, therefore, the defendants cannot protect their possession. In the present case, the trial Court held that the agreement dated 20.03.1979 is proved. The reasons given by the First Appellate Court are erroneous in view of the discussion made above.

Now it is to be examined as to whether the defendants are entitled to protect their possession under Section 53-A of the Transfer of Property Act or not. The original agreement dated 20.03.1979 is in Urdu language, Hindi translation whereof was produced before the trial Court. However, since, there was dispute with regard to the correctness of the Hindi translation, therefore, the document was got translated into English from the Official Translator attached to this Court. Photocopies of the translation were provided to the counsel for the parties with request to cross check the correctness. Both the counsels have admitted that the translation by the official translator is correct. The agreement dated 20.03.1979 is a partnership deed between Sham Sunder and Sohan Singh. It is recorded that

Rameshwar was adopted by Kundan Lal 45 years back. Kundan Lal died 40 years back and Rameshwar having been adopted as a son by Kundan Lal, remained in possession of moveable and immoveable property of Kundan Lal. Rameshwar died at Thanesar 9 years back. It is further recorded that Sham Sunder is owner for the last 45 years and Sohan Singh predecessor of defendant Nos.1 to 5 is cultivating the land as a tenant for the last 14 years. It is further recorded that Sham Sunder has now given 99/100th share out of the land measuring 11 kanals 18 marlas (suit land) after receiving a sum of ₹5,000/- in cash. Continuous possession of Sohan Singh is admitted for the last 14 years. It is further recorded that Sohan Singh would have all rights which are being enjoyed by Sham Sunder. It is further recorded that Sohan Singh would have right to cultivate the said land or to get it cultivated through any other person by giving it on tenancy. Sham Sunder has got written in the contract that neither he or his heirs are left with any concern whatsoever in the land nor they would have any right in future. Sham Sunder has further got recorded that he is partner to the extent of 1/100th share and he would have right to produce of 1/100th share only after paying proportionate expenses of cultivation.

In view of the aforesaid contents of the document, this Court is to examine that whether it can be treated as an agreement to sell or not. Through, contract dated 20.03.1979, ₹5,000/- was paid to Sham Sunder. Continuous possession of Sohan Singh was admitted. As per Section 53-A of the Transfer of Property Act, if there is a contract in writing between the parties for consideration and terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has, in part

performance of the contract, taken possession of the property or the transferee being already in possession, continues in possession in part performance of the contract and has done same act in furtherance of the contract, then he is entitled to protect his possession. In the present case, the terms necessary to constitute the transfer can be ascertained with reasonable certainty from the agreement dated 20.03.1979. Transferee being already in possession has continued in possession in part performance of the contract.

Section 53-A of the Transfer of Property Act provide that the defendants-appellants have to prove that their predecessor-in-interest took step in furtherance of the contract and he was ready and willing to perform his part of the contract which is missing in the present case. Further there is no evidence that the defendants are willing and ready to perform their part of contract. Accordingly, question No.1 is answered against the defendants-appellants.

However, that is not the end. The contract between the parties has been proved, provide that the cultivation would be done by the parties in partnership. The document is a deed of partnership. Section 2(b) of the Indian Partnership Act, 1932 (hereinafter to be referred as the 'The Act of 1932') defines business which includes every trade, occupation and profession. Section 2(b) of the Act of 1932 is extracted as under:-

“2. Definitions

(a) xxx xxx

(b) business includes every trade, occupation and profession;”

Section 14 of the Act of 1932 deals with the property of the firm. It provides that subject to contract between the partners, the property

of the firm includes all properties and rights and interests in the property originally brought into the fold of the firm or acquired, by purchase or otherwise, by or for the firm. Section 14 of the Act of 1932 is extracted as under:-

“Section 14 THE PROPERTY OF THE FIRM.

Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm.”

It is clear that the rights in immovable property (agricultural land) were brought in by the partner i.e. plaintiff No.1 in the fold of the partnership firm. Plaintiff No.1 had also received ₹5,000/- from predecessor of the defendants-Sohan Singh. Once the property had been brought to the fold of the firm/concern, plaintiff No.1 thereafter had no individual right in the property except the rights which are available to a partner on continuation of the partnership and thereafter on dissolution. In this case, neither of such right is being claimed by the plaintiff. The Clauses in the contract between the parties are specific wherein plaintiff No.1 Sham Sunder has admitted that he is left with no right, title or interest in the immovable property individually. Such being the position, suit filed by the plaintiffs could not be decreed. Hence, question No.2 is answered in favour

of defendants-appellants. The rights of individual partner after the property has been infused into the fold of partnership concern have been very appropriately laid down by the Hon'ble Supreme Court in para 7 of **Addanki Narayanappa and another Vs. Bhaskara Krishtappa and 13 others, AIR 1966 SC 1300**. Hon'ble the Supreme Court while interpreting the rights of partner after he had brought his asset in the fold of partnership concern has held as under:-

“7. It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the trading asset of the person who brought it in. It would be the 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. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get

would be only that which is permitted by Section 29(1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. There are not many decisions of the High Courts on the point in the few that there are the preponderating view is in support of the position which we have stated. In Joharmal v. Tejrani Jagrup which was decided by Jardine and Telang JJ., the latter took the view that though a partner's share does not include any specific part of any specific item of partnership property, still where the partnership is entitled to immovable property, such share does include an interest in immovable property and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under the Registration Act. In coming to this conclusion he mainly purported to rely upon an observation contained in the fifth edition of Lindley on Partnership at p. 347. This observation is not to be found in the present edition of Lindley's Partnership nor in the 9th or 10th editions which were brought to our notice. The 5th edition, however, is not available. The learned Judge after quoting an earlier statement which is that the "doctrine merely amounts to this that on the death of a partner his share in the partnership property is to be treated as money, not as land" says : "This obviously would not affect matters either during the lifetime of a partner-Lindley, L.J.", says in so many words that it has no practical operation till his' death (p. 348)- or as against parties strangers to the partnership,' e.g., the firm's debtors." While it is true that the position so far as third persons are concerned would be different it may be pointed out that in Forbes v. Steven James, V.C., has, as quoted by the learned Judge, said : "It has long been the settled law of this Court that real estate bought or acquired by a

partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary), is, as between the partners and as between the real and personal representatives of a partner deceased personal property, and devolves and is distributable and applicable as personal estate and as legal assets." Telang J., seems to have overlooked, and we say so with great respect, the words "as between the partners" which precede the words "and as between the real and personal representative of the partner deceased" and to have confined his attention solely to the latter. We have not found in any of the editions of Lindley's Partnership an adverse criticism of the view of the Vice-Chancellor, But, on the contrary, as already stated, the view expressed is in full accord with these observations. Jardine J., has discussed the English authorities at length and after referring to the documents upon which reliance was placed on behalf of the defendant stated his opinion thus:

"To lay down that the three letters in question, which deal generally with the assets, movable and immovable, without specifying any particular mortgage or other interest in real property require registration, would, incline to think, in the present state of the authorities, go, too far. It may be argued that such letters are not instruments of gift of immovable property but rather disposals of a share in a partnership of which the business, is money lending, and the mortgage securities merely incidental thereto."

The view, of Telang J., was not accepted by the Madras High Court in Chitturi Venkataratnam v. Siram Subba Rao. The learned Judges there discussed all the English decisions as also the decisions in Sudarsanam

Maistri v. Narasimhulu Maistri and Gopala Chetty v. Vijayaraghavachariar and the opinion of Jardine J in Joharmal's case held that, an unregistered deed of release by a partner of his share in the, partnership business is admissible in evidence, even where the partnership owns immovable property. The learned Judges pointed out that though a partner may be a co-owner in the partnership property he has no rights to ask for a share in the property but only that the partnership business should be wound up including, therein the sale of immovable property and to ask for his share in the resulting assets. This decisions was not accepted as laying down the correct law by a Division Bench of the same High Court in Samuvier V. Ramasubbier. The learned Judges there relied upon the decision in Ashworth v.Munn in addition to the opinion of Telang J., and also referred to the decision Gray v. Smith in coming to a conclusion contrary to the one in the earlier case. It may be pointed out that the learned Judges have made no reference to the decision of the Privy Council in Gopala Chetty case though that was: one of the decision relied upon by Phillips J., in the earlier case. In so far as Ashworth case is concerned that was a case which turned on the provisions of the Mortmain Acts and is not quite pertinent for the decision on the point which was before them and which is now before us. In Gray. v. Smith Kakewich J., held that an agreement by one of the partners to retire and to assign his share in the partnership assets including, immovable property, is an agreement to assign an interest in land, and falls within the statute of Frauds. The view of Kekewich J. seems to have received the approval of Cotton L.J., one of the Judges of the court of Appeal, though no argument was raised before it challenging its correctness. It may, however, be observed that even

according to Kekewich j., the authorities (Foster v. Hale and Dale v. Hamilton establish that one may have an agreement of partnership by parol, notwithstanding that the partnership is to deal with land. He, however, went on to observe:

"But it does not seem to me to follow that an agreement for the dissolution of such a partnership need not be expressed in writing, or rather than there need not be a memorandum of the agreement for dissolution when one of the terms of the agreement, either expressly or by necessary implication, is that the party sought to be charged must part with and assign to others an interest in land. That seems to me to give rise to entirely different considerations. In the one case you prove the partnership by parol; you prove the object, the terms of the partnership, and so on. But in the other case it is one of the essential terms of the agreement that the party to be charged shall convey an interest in land, and that seems therefore to bring it necessarily within the 4th section of the Statute of Frauds".

In the case before, us also in Samuvier's case the document cannot be said to convey any immovable property by a partner to another expressly or by necessary implication. If we may recall, the document executed by the Addanki partners in favour of the Bhaskara partners records the fact that the partnership business has come to an end and that the latter have given up their share in "the machine etc., and in the business" and that they have "made over same to you alone completely by way of adjustment. There is no express reference to any immovable property herein. No doubt, the document does recite the fact that the Bhaskara family has given to the Addanki family certain property. This however,

is merely a recital of a fact which had taken place, earlier. To cases of this type the observations of Kekewich J, which we have quoted do not apply. The view taken in Samuvier case seemed to commend itself to Varadachariar J., in Thirumalappa v. Ramappa but he was reversed in Ramappa v. Thirumalappa.”

Resultantly, the judgments passed by the Courts below are set aside and the suit filed by the plaintiffs shall stands dismissed.

Regular Second Appeal is partly allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

04.02.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No