

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

**RSA No.2922 of 2017 (O&M)
Date of Order:06th February, 2019**

Vinod Krishan Khanna and others

...Appellants

Versus

**Siri Krishan Khanna (since deceased) through
LRs and others**

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vikas Bahl, Sr. Advocate, with
Ms. Shubreet Kaur, Advocate and
Mr. Parvinder Singh, Advocate and
Ms. Vedika Gandhi, Advocate,
for the appellants.

Mr. Gaurav Chopra, Advocate and
Mr. Prateek Gupta, Advocate,
for the respondents.

ANIL KSHETARPAL, J.

Plaintiffs-appellants are in the regular second appeal against the judgment passed by the learned first appellate court partly reversing the judgment of the trial court.

In the considered view of this court, questions which require determinations are:-

- (1) Whether the remaining partners on the death of a partner can exclude the legal heirs of the deceased partner from succeeding to his/her share in the assets, properties of the firm and profits earned from use of that property?
- (2) Whether the legal heirs of a deceased partner are entitled

to claim value representing the share of the deceased partner in the immovable properties of the firm on the date of the death of the deceased partner irrespective of the fact that the surviving partners delayed the distribution of the property?

Plaintiffs-appellants are claiming to be heirs of late Smt. Kailash Wati Khanna, who was partner in the partnership firm, namely, M/s Esskay Industries, Batala Road, Amritsar.

Initially she was partner to the extent of 30% when the firm started in the year 1965. However, as per the last partnership before the death she was partner to the extent of 25% vide partnership deed dated 01.04.2003 and on this aspect both the courts have recorded finding which is not subject matter of challenge before this court.

As per the partnership deed dated 01.04.2003 Ex.P7, it was provided that in the event of death of any of the parties, partnership shall not ipso facto dissolve. Clauses 10 and 12 of the partnership deed which are relevant for the decision of the case are extracted as under:-

“10. That in the event of death of any of the parties, the partnership shall not ipso facto dissolve. The remaining partners may admit the legal heirs or representatives of the deceased partner and such legal heirs or representatives shall step into the shoes of the deceased partner.”

“12. That in the event of death or retirement of any of the parties, the surviving partners shall have absolute power to operate upon the Bank accounts and

particularly to withdraw the bank balances and such withdrawals shall be duly accounted for in the books of the firm. The retiring partners or the legal heirs of the deceased partner shall have no right or power to prevent or hinder the operation of the bank account or withdrawals of the bank balances.”

Smt. Kailash Wati Khanna died on 03.05.2005. Plaintiffs claiming to be heirs filed a suit with the following prayers:-

- (1) Order dissolution of the firm M/s Esskay Industries;
- (2) direct the defendants to render the accounts of the said firm;
- (3) partition of the properties with building constructed thereon owned by the firm;
- (4) restraining the defendants from alienating the property.

As per partnership deed dated 01.04.2003, there were 5 partners and late Smt. Kailash Wati Khanna was partner to the extent of 25%.

Defendants who were remaining/surviving partners of the firm contested the suit by pleading that the plaintiffs have no right, title or interest in the business as well as in the properties of M/s Esskay Industries, although, it was admitted that late Smt. Kailash Wati Khanna was partner of 25% share in the business but it was pleaded that as per the alleged Will only plaintiffs No.4 and 5 can claim the amount lying to the credit of late Smt. Kailash Wati Khanna and that to after obtaining probate/succession certificate. It was claimed that the plaintiffs were never the partners at any time, hence, they have no right, title or interest to file the present suit. It was further pleaded that after the death of Smt. Kailash Wati

Khanna, a new partnership deed dated 04.05.2005 has been executed and the defendants are having their respective shares accordingly. It was admitted that the firm is owner of land, buildings situated at Batala Road, Amritsar and the immovable properties of M/s Esskay Industries is let to the tenants since decades.

Learned trial court on appreciation of the evidence found that the plaintiffs are entitled to rendition of accounts and also partition of the properties belonging to the said firm. Accordingly, preliminary decree was passed in favour of the plaintiffs. Decree for injunction was also passed restraining the defendants from alienating property of the firm M/s Esskay Industries till accounts are finally settled with the plaintiffs.

However, in appeal, learned first appellate court while relying upon Section 37 of the Indian Partnership Act, 1932 (hereinafter referred to as 'the Act') has held that the plaintiffs (heirs of late Smt. Kailash Wati Khanna) are entitled to money value of the share of the deceased partner in the assets of the firm M/s Esskay Industries on the date of her death which shall be computed according to the provisions of law. Heirs have also been held entitled to rendition of accounts of the firm in which late Smt. Kailash Wati Khanna was partner and the defendants shall release the amount of share of late Smt. Kailash Wati Khanna to the heirs of the deceased partner as per the Will of the deceased.

This court has heard learned senior counsels for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

Learned senior counsel appearing for the appellants submitted that the order passed by the learned first appellate court is perverse as the

learned first appellate court has failed to look into the fact that Section 37 of the Act deals with the rights of outgoing partner in certain cases to share subsequent profits and it does not deal with the distribution of the assets of the firm which shall be governed by Section 48 of the Act. The learned first appellate court has further erred in ordering that the value of the assets shall be determined on the date of death of late Smt. Kailash Wati Khanna, although, the distribution of the assets and profits, if any, have been delayed by the defendants. Such direction would be inequitable as the prices of the immovable property held by the firm as on the date of death have increased since then many fold and therefore, the court should have ordered proportionate distribution of the property or its value on the date when the property is to be physically distributed or the proportionate value thereof is handed over to the plaintiffs-appellants.

On the other hand, learned senior counsel appearing for the respondents submitted while referring to Sections 35 and 37 of the Act that on the death of a member/partner of the firm, the heirs are only entitled to value equivalent to the share of the property of the deceased partner on the date of death along with 6% per annum interest on the amount of his share in the property of the firm.

The partnership is a joint effort of two or more persons who decide to come together for doing their business which includes every trade, occupation and profession. Section 14 of the Act provides that the property of the firm would include all property and rights or interests in the property originally brought into the stock of the firm, or acquired, by purchase or otherwise. Section 35 of the Act deals with liability of the estate of deceased partner, whereas Section 37 of the Act deals with rights

of outgoing partner in certain cases to share subsequent profits. Dissolution of the firm is governed by Chapter VI of the Act. Section 42 provides that one of the contingency for dissolution of the firm is on account of death of a partner, however, i.e. subject to contract to the contrary between the partners. Further various modes of dissolution of a firm of have been provided. Section 48 of the Act deals with mode of settlement of accounts between the partners. For convenience, Sections 14, 35, 37, 42 and 48 of the Act are 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 interest 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.

Section 35-LIABILITY OF ESTATE OF DECEASED PARTNER.

Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

**Section 37- RIGHT OF OUTGOING PARTNER IN CERTAIN CASES
TO SHARE SUBSEQUENT PROFITS.**

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm : Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner of his estate, as the case may be, is not entitled to any further or other share of profits, but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Section 42-DISSOLUTION ON THE HAPPENING OF CERTAIN CONTINGENCIES.

Subject to contract between the partners a firm is dissolved (a) if constituted for a fixed term, by the expiry of that term; (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof; (c) by the death of a partner; and (d) by the adjudication of a partner as an insolvent.

Section 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 careful reading of the provisions of the Act, it is apparent that Section 35 of the Act provides that estate of deceased partner is not liable for any act of the firm done after his death in case the firm is not dissolved on the death of a partner. Section 37 of the Act is dealing with rights of outgoing partner or heirs of a deceased partner in absence of final settlement of accounts, their entitlement to share profits made by the firm after the death of a partner or to interest @ 6% per annum on the amount of his share in the property of the firm. However, section 37 of the Act nowhere lay down that this is the only entitlement of the heirs of a deceased partner.

In fact, learned first appellate court committed material irregularity in overlooking the provisions of Section 48 of the Act. It is Section 48 which deals with mode of settlement of accounts between the partners after dissolution. No doubt, in the present case, there was no ipso facto dissolution of the firm. However, for the settlement of accounts of the heirs of a deceased partner, there has to be a deemed dissolution particularly when it is the case of the defendants themselves that they have constituted a new partnership deed without adding the legal heirs of a deceased partner. Once a new partnership deed has been constituted, the previous firm came to an end.

Section 48 of the Act deals with mode of settlement of account between the partners which would obviously include heirs of a deceased partner.

In view of the above, the learned first appellate court clearly committed an error while recording that Section 37 of the Act would apply in such situation.

Still further, this matter can be examined from another angle. Late Smt. Kailash Wati Khanna died on 03.05.2005. On the date of death, her legal heirs were entitled to settlement of the accounts including share in the assets of the firm or its equivalent value. There can be a situation where the remaining partners or surviving partners do not wish to give the movable and immovable property of the firm to the extent of deceased partner in physical form. In such situation, the share of the deceased partner in the profits, his capital as well as share in the immovable property can be valued on the basis of market price and, thereafter ordered payment.

Learned senior counsel appearing for the appellants was correct while making submission that since the defendants who are surviving partners have delayed the distribution of the assets, therefore, there is no justification in assessing the value of the property(movable and immovable) on the date of death of deceased as the value of the immovable properties has increased many fold. It would be inequitable to give premium to the defendants on account of delay in the decision of the case and on the other hand it would not be in the interest of justice if the legal heirs are deprived of the increase in the value of the property because of pendency of the litigation. Once the heirs are entitled to 25% of the movable and immovable property of the firm or its equivalent value, such value has to be assessed on the basis of market value prevalent at the time of actual distribution and not at the time of death. The learned first appellate court has overlooked this aspect while passing the order.

Now let's examine the judgment which has been cited by the learned first appellate court to reverse the judgment of the trial court. First judgment is in the case of **Addanki Narayanappa & another vs. Bhaskara**

Krishtappa and 13 others, AIR 1966 SC, 1300. On careful reading of the aforesaid judgment, it is apparent that question which the court posed itself for answer, is whether the interest of a partner in partnership assets comprising of immovable as well as movable property should be treated as movable or immovable property for the purpose of Section 17(1) of the Registration Act, 1908 . It was in that context, the question was answered and the court held that 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 what is brought in would cease to be the trading assets of the person who brought 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 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. In the considered view of this court, this is not the question which arises in the present case, therefore, reliance on the judgment referred to above was wholly misplaced.

Main judgment which has been relied upon is in the case of **Champan Cane Concern vs. State of Bihar and another, AIR 1963 SC 1737.** In the aforesaid case, the Hon'ble Supreme court was examining the question whether the assessee is a partnership firm or a co-ownership concern. Distinction between partnership and co-ownership concern was very aptly drawn. However, this judgment of the Hon'ble Supreme court does not answer the question which is posed before this court.

Learned counsel for the respondent have relied upon a judgment passed by the Hon'ble Supreme Court in the case of *Pamuru Vishnu Binodh Reddy vs. Chillakuru Chandrasekhar Reddy, (2003) 3 SCC 445*. In the aforesaid case, no doubt the Hon'ble Supreme court has held that valuation of the share of the partner has to be on the date he retires, however, the facts of the aforesaid case are different. In that case, there was a firm Vijay Mahal Tehatre and the plaintiff and 4th defendant retired from the firm in 1971. The court noticed that the plaintiff in the aforesaid case had sold his share in the partnership and once the partnership stood dissolved on 05.04.1971, the court held that for the purpose of ascertaining the value of the share of the plaintiff the relevant date would be the date on which he retired. In that case, the Hon'ble Supreme court was not dealing with a situation where the normal increase in the value of the share of the immovable property representing deceased partner is payable to the heirs of the deceased partner or not. The court addressed the issue with reference to the profits earned by the firm post the retirement of a partner which is not the case here. There are other judgments which have referred to by the first appellate court including a Single Bench of Delhi High Court. The Full Bench of the Andhra Pradesh High Court and certain others, however, none of the judgment is answering the question in the manner it is posed before this court.

Keeping in view the aforesaid discussion, the judgment passed by the learned first appellate court is modified. It is ordered as under:-

- (1) The plaintiffs/heirs shall be entitled to rendition of accounts and entitled to share profit, if any, to the extent of the share of the deceased partner in accordance with

Section 37 of the Act either by opting share in the profit of the firm, if any, or 6% per annum interest on the amount of share of late Smt. Kailash Wati Khanna from the date of her death till payment.

- (2) The immovable properties including machines, stock etc. would either be physically divided by partitioning the property or the Executing Court would get the value of the entire property assessed and order payment to the extent of 25% in favour of the plaintiffs/legal heirs on the date of such distribution. However, the plaintiffs-appellants/legal heirs would not be entitled to insist on physical division of the property, if the remaining partners opt to continue with the same particularly in view of Clause 10 of the partnership deed.
- (3) Till the time actual distribution takes place, there shall be a decree for injunction against the remaining partners from alienating the property of the firm or creating any charge on the property to the extent of share of the deceased partner.

In view of the aforesaid, both the questions framed earlier are answered in favour of the plaintiffs-appellants.

Appeal allowed.

06th February, 2019
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No