

## PATNA HIGH COURT

Firm Ram Sahay Mall Rameshwar Dayal

Vs

Bishwanath Prasad

A.F.O.D. No. 212 of 1958

(Kanhaiya Singh and Ramratna Singh, JJ.)

30.11.1962

### JUDGMENT

#### **Ramratna Singh, J.**

1. This appeal by the defendants arises out of a suit for recovery of Rs. 41,500/-, said to have been advanced through hundis and bank drafts to a firm known as Ram Sahay Mall Rameshwar Dayal (Defendant No. 1), besides compensation at 1 per cent. per month from the different dates, respectively, of the hundis and the bank drafts. The case of the plaintiff, as made out at the time of hearing, was that the said amount was advanced as loan. It was further alleged that defendants 2 to 7 were members of a joint Hindu family governed by the Mitakshra School of Hindu Law, and the said firm Ram Sahay Mall Rameshwar Dayal, which is located at Konch in Uttar Pradesh, belonged to them. Defendants 8 and 9, who are alleged to belong to another joint Hindu family, are said to be partners, along with the aforesaid defendants 2 to 7, of an Ice Factory for which the loan in question is alleged to have been advanced.

2. Defendants 1, 5 and 8 filed one written statement, and denied all the allegations made by the plaintiff. They said that the plaintiff negotiated with these defendants to be a partner in their Ice Factory and also to start a grain business in partnership. It was agreed that the plaintiff would have four annas share in the Ice Factory, which was the sole concern of these defendants, and eight annas share in the grain business to be started in the name and style of Saligram Mohanlal, which was first started in the commission agency of defendant No. 1, as the parties thought it proper to start independently the business of Saligram Mohanlal on an auspicious date, which fell on the 15th April, 1951. In pursuance of the agreement regarding partnership, the plaintiff began to send moneys from time to time through hundis and bank drafts towards his shares to Konch, where the Ice Factory and the grain business were situated. The total amount of advance, namely, Rs. 41,500/-, is admitted; but it is said that, out of the same, Rs. 25,000/- only was credited to the accounts of the Ice Factory against the four annas share of the plaintiff and the balance was credited towards the grain business against his eight annas share. As the lead of the Ice Factory cracked and the Jai Engine failed, the factory was closed. Similarly, on account of restrictions imposed by the U. P. Government on the transport of gram and fear of seizure of stock, the grain business was also stopped by the plaintiff's agents who were in charge thereof. The jurisdiction of

the Patna Court was also challenged. The other defendants filed separate written statements but they substantially supported the case of defendants 1, 5 and 8. All the defendants asserted that defendants 2 to 4, 6, 7 and 9 had nothing to do with either the said firm Ram Sahay Mall Rameshwar Dayal or with the Ice Factory and the grain business.

3. Only the material issue was raised in the suit, namely, whether the plaintiff had advanced any loan to the defendants, and, if so, what amount and from which of the defendants he was entitled to recover. The learned Subordinate Judge accepted the case of the plaintiff that the amount of Rs. 41,500/- had been advanced as loan and that all the defendants were liable to pay the same, besides interest at the rate of 9 per centum per annum simple.

4. Mr. R. S. Chatterji, learned Counsel for the defendant-appellants, challenged both the above findings; and he also pressed the plea of jurisdiction, regarding which no issue was framed in the Court below and which was not touched at all by the learned Subordinate Judge.

5. The first question for consideration is whether the amount of Rs. 41,500/- was advanced as loan or otherwise. This amount was admittedly made up of advances in seven installments of Rs. 5,000/- and one installment of Rs. 6,500/- made through two hundis and six bank drafts. All the bank drafts were for payment to Ram Sahay Mall Rameshwar Dayal; the first hundi, dated the 27th February, 1951, was drawn by defendant Kedarnath on behalf of the said firm; and the last hundi, dated the 2nd April, 1951, was drawn by Tulsi Ram, a servant of the plaintiff, on behalf of Saligram Mohanlal. The first seven instalments were paid during the period 27th February, 1951 to 27th March, 1951 and the last advance of Rs. 6,500/- was made on the 6th April, 1951. Postal charges and bank commission in respect of the hundis and the bank drafts amounted to Rs. 26-9-0 and compensation, as claimed in the plaint from the different dates, amounted to Rs. 14,751-4-0. Thus, the total claim of the plaintiff came to Rs. 56,277-13-0.

6. Though the plaintiff led evidence to show that the amounts were advanced as loans, the averments in paragraphs 5 to 8 of the plaint are to the contrary. It was stated in these paragraphs that, on behalf of the Ice Factory, the defendants sent from Konch their agent named Gurudayal Mall, who approached the plaintiff at Kokamah in the district of Patna for a loan with a view to complete the building and acquire more machineries to give a complete and final shape to the proposed Jai Hind Ice Factory in order to make it a profitable undertaking; the plaintiff, having agreed to advance the loan, "for the purpose eventually to become a partner which was one of the promises given on behalf of the defendants", advanced from time to time the said amounts through hundis and bank drafts; "with a view to obtain the necessary documents of partnership", the plaintiff went to Konch where he was told that the total sum already invested in the unfinished building of the Ice Factory and the acquisition of the land and the machineries, plus the amount estimated to be spent in future, would come up to a lac of rupees; "thereupon the plaintiff asked the defendants to execute necessary documents transferring to him shares in the land, in the building and machineries in regard to the amount advanced by him and the expenses incurred in that connection by the plaintiff ..... and eventually the plaintiff was given a written document on 15th April, 1951, promising to convey to him -/4/- interest in the land, building and machineries of the Ice Factory in question and acknowledging receipt of payment of Rupees 25,000/- as price of the same"; and

"the plaintiff believing in the assurances above mentioned took the document in question

which is filed along with this plaint and relied on the promises regarding the execution of the document and repayment of the rest of the dues to the plaintiff within a short time, but in spite of repeated demands, the defendants have failed to carry out their promises with the result that the entire money of the plaintiff has remained unadjusted and is realisable from the defendants together with damages and compensation at the rate of Re. 1/- per cent per mensem."

In other words, the plaintiff advanced Rs. 41,500/- in all for the purpose of becoming a partner with the defendants and he actually became a partner to the extent of four annas in the Ice Factory, after adjusting a sum of Rs. 25,000/- out of the said amount, and that the defendants promised to repay the balance amount within a short time. That is why damages and compensation, and not interest, were claimed. In evidence, however, the plaintiff made out altogether a new case that he paid Rs. 25,000/- in cash at Konch to the defendants on the 15th April, 1951 for becoming a partner in the Ice Factory and this amount was not a part of Rs. 41,500/- which had been advanced as loan earlier through hundis and bank drafts. The learned Subordinate Judge has tried to overcome the recitals in the plaint by taking aid of the well-known observation that in this country pleadings are extremely lax and unsatisfactorily drawn up; but he missed the fact that in the present case the plaint was drawn up in English by a distinguished lawyer of Patna like the late Shri Nawal Kishore Prasad.

7-12. But even the evidence regarding the amount having been advanced as loan is absolutely unsatisfactory. (Then after discussing evidence (Paras 7 to 12) His Lordship proceeded :)

13. Having taken into consideration all the facts and circumstances of the case, I am of the opinion that originally the defendants started taking money from the plaintiff as loan, but ultimately it was decided that the plaintiff should become a partner; and, accordingly, he became a partner to the extent of four annas share in the Ice Factory and eight annas share in the grain business, and a sum of Rs. 41,500/- advanced by the plaintiff was adjusted as his share capital in the two partnership undertakings. Hence, the case of the plaintiff on the basis of loan must fail.

14. Mr. Lalnarayan Sinha submitted that the plaintiff was entitled to recover Rs. 25,000/- of the Ice Factory as the agreement had failed. In support of this submission, he relied on the term that a registered document was to be executed by the defendants in favour of the plaintiff in respect of four annas share in the land and the machineries of the Ice Factory. He conceded that the agreement dated the 15th April, 1951, was a concluded contract; but he contended that the term regarding the execution of a registered document was an executory term in the contract and the defendants' failure to execute a registered document resulted in the failure of the contract as a whole. But this term was not a condition precedent, because the parties had already become partners to the extent of their respective shares and the registered document was to be executed subsequently to give an additional support to the agreement of partnership. In law, no registered document was required to convey four annas shares in the land and the machineries of the Ice Factory to the plaintiffs. The land and the machineries were bought in the partnership firm by the defendants as their share of the contribution and the plaintiff had paid Rs. 25,000/- as his share capital. Section 14 of the Indian Partnership Act reads thus :-

"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 firm, or acquired, by purchase or otherwise, by or for the firm, or 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 interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm." It will be noticed that all property and rights and interests which the partners may have brought in the common stock as their contribution to the common business are parts of the partnership property. Even if a property contributed by one partner be an immovable property, no document, registered or otherwise, is required for transferring the property to the partnership. There are similar provisions in the English Partnership Act and the Partnership Act of the U. S. A. In volume I of the second edition of Rowley's book on Partnership in America, it is stated at page 190 :-

"A lease of premises occupied by the firm business, procured by one partner before formation of the partnership may become firm property out formal assignment, if it is not understood partners regard it as such". At page 184 of the book, it is stated :

"Property originally owned by one or more partners, and used in the business of the partnership, may be joint or separate estate, as the partners agree. Originally separate estate, it may be converted into joint estate without formal conveyance, even without any writing, by a parol agreement made between the partners, without any other act. The oral agreement need not be express. It may be proved by a course of conduct e. g., by entries upon the partnership books".

The position obtaining in England is stated thus :-

"The only statutory enactment now applicable to ordinary partnership is the Law of Property Act, 1925, Section 40. This section forbids any action to be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized". (See Lindley on Partnership twelfth edition, page 121).

It was held, with respect to the said section 40 and section 4 of the Statute of Frauds relating to lands, that, if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land (page 122 of the same book). The learned author has referred to an observation of *Lord Chancellor in Forster v. Hale*<sup>1</sup>, In that case, a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property, and it was objected that there was no signed writing, such as the statute required. The Lord Chancellor observed :

"If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be

found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership". (Page 122 of the book).

At page 123 of the book, the learned author has said that the law on the point laid down by the Lord Chancellor was treated as binding authority in the most recent cases. In *Robinson v. Ashton*<sup>2</sup>, the facts were these : On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to R, one of the partners; and R was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to and improvements in the mill; and to the yearly balance-sheets the mill was entered at the original value, increased by the amount so expended, but less a certain amount of depreciation; and the partners were allowed interest on the sums from time to time standing to their capital accounts. And it was held that in the absence of any special agreement the mill was an asset of the partnership, and that on a sale of the business, under which the purchase money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale. The legal position, therefore, appears to be that no written or registered document is necessary for an individual to contribute any land or immovable property as a contribution against his share of the capital of a new partnership business. The same view was taken by a bench of the Calcutta High Court in *Prem Raj Brahmin v. Bhani Ram Brahmin*<sup>3</sup>, It was held that a written document, and, consequently registration, is not necessary to bring in the separate properties of the partners into the partnership stock, and by virtue of Sections 14 and 46 of the Indian Partnership Act and certain provisions of the Indian Contract Act, they become the properties of the firm as soon as the partners intend to so bring them in and treat them as such. It was further laid down by their Lordships that this sort of contribution or transfer is not prohibited by the Transfer of Property Act, 1882 or the Indian Registration Act, 1908. Hence, in view of the fact that the land on which the Ice Factory stood was given in the present case by the defendants' firm as a part of their contribution to the capital, I am of the opinion that no registered document was necessary in pursuance of the agreement constituted by the two documents, namely, Exhibits F and 8. Even assuming for the sake of argument that a registered document was necessary, the plaintiff could not treat the contract as rescinded without giving a reasonable time to the defendants to execute the requisite registered document. There is nothing on the record to indicate that the defendants ever refused to execute the registered document. It is admitted that no notice was given by the plaintiff to the

<sup>1</sup>(1800) 5 Ves. 308

<sup>3</sup>ILR (1946) 1 Cal 191

<sup>2</sup>(1875) 20 Eq 25

defendants to execute such a document; and there is no evidence to show that the plaintiff or his men even verbally asked the defendants to do so at any time after the 15th April, 1951. It is well settled that disclaimer or renunciation of a contract to be effective must be communicated to the other party to the contract. See *Dhanraj Mills Limited, Liability Co. v. Narsingh Prasad*<sup>4</sup>, and in the present case it is admitted that neither party made such a communication to the other. The real fact is that there was no occasion for the defendants to execute a registered document within a reasonable time, as the lead of the Ice Factory plant cracked and the engine failed and they required complete replacement of the plant to run the factory. That is the case of the defendants in paragraph 22 of the written statement; and P. W. 5 Belas Rai stated that the factory worked for about a month and a half only, because the machine gave way and the factory was closed. The plaintiff also said that the Ice Factory functioned for about two months and then closed down. To the same effect is the evidence of Minaram (D. W.

15) according to whom also the Ice Factory worked for two months only. Hence, the contention of Mr. Lalnarayan Sinha that the contract failed on account of the failure of the defendants to execute a registered document must be rejected.

15. In the circumstances, the plaintiff is not entitled to recover any amount as loan advanced to the defendants. The plaintiff could, therefore, bring a suit for rendition of accounts, and not a simple suit for recovery of the amount.

16. On behalf of the defendants, Mr. R. S. Chatterji submitted that the Patna Court had no jurisdiction to entertain the suit, as the cause of action arose at Konch, where the business was carried on and where the two agreements were executed. Though the plea was taken in the written statement and an issue was raised to that effect originally on the 16th April, 1955, this issue was given up when the issues were recast before the hearing. The defendant-appellants cannot, therefore, raise this plea in appeal, in view of the provisions of Section 21 of the Code of Civil Procedure, which read thus :-

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice".

As stated earlier, the issue raised initially was given up at the time of hearing and there is nothing on the record to show that there has been a failure of justice on account of the trial of the suit at Patna. This contention of Mr. Chatterji must, therefore fail.

17. There are two more questions to be considered. The first question is whether all the defendants are liable for the claim of the plaintiff, if any. Defendants 2 to 7 are descendants of one Binjraj who died 30 years ago. He had three sons, of whom two are defendants 2 and 5. The third son, Bhagirath, died about 40 years ago, leaving behind him two sons, who are defendants 3 and 4. Defendants 6 and 7 are sons of defendant No. 5. Kedarnath (defendant No. 8) is the son of one Kanai who died long

<sup>4</sup> AIR 1949 Pat 270

ago, and defendant No. 9 is the minor son of Kedarnath. There is no dispute about these facts. Then, the case of the plaintiff is that Kanhai was a brother of Binjraj, while according to the defendants Kanhai belonged to another family. Further, according to the plaintiff, defendant Nos. 2 to 7 belong to one joint family, defendants 8 and 9 belong to another joint family and all the defendants are the proprietors of firm Ram Sahay Mall Rameshwar Dayal (defendant No. 1), while, according to the defendants, only defendants 5 and 8 are proprietors of this firm. The defendants examined several witnesses of Konch in support of their case; but none of these witnesses is competent to speak on the point. Defendants 2, 3 and 5 who are D. Ws. 11, 12 and 15, respectively, support the above case of the defendants; but they are naturally interested. On the face of it, the case of the defendants is improbable. If the firm had been started by defendants 5 and 8 only after separation from the other defendants of Binjraj, then there is absolutely no reason why the firm would be started in the names of Ram Sahay Mall (defendant No. 2) and Rameshwar Dayal (defendant No. 3) who are alleged to be separate from defendants 5 and 8. It is remarkable that Kedarnath (defendant No. 8) did not come to the witness-box to support the

case of the defendants. Admittedly, Kedarnath (defendant No. 8) and Minaram (defendant No. 5) look after the affairs of the firm, and, therefore, their sons must be interested therein; defendants 2 and 3 are also interested as the firm bears their names. Then remains defendant No. 4 a son of deceased Bhagirath Mall; but it is not the case of the defendants that this defendant only separated from the others. In the circumstances, I agree with the learned Subordinate Judge that all the defendants were proprietors of the firm Ram Sahay Mall Rameshwar Dayal (defendant No. 1), and, therefore, all the defendants would be liable for the account, if any, due to the plaintiff.

18. The next question is whether the claim of the plaintiff for loan is hit by Section 4 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939. The certificate of registration (Ext. 6) as money lender in the name of the plaintiff shows that the maximum amount of loan which could be advanced by the plaintiff is Rs. 20,000/-. In a bench decision of this Court (*Parsuram Sahu v. Sant Saran Lall*<sup>5</sup>), it was held that, if a suit is instituted by a money-lender for an amount exceeding the maximum amount mentioned in the registration certificate, no decree could be passed beyond the maximum amount so mentioned. Hence, according to this decision, if the amount advanced by the plaintiff was a loan, he could not get a decree for more than Rs. 20,000/- as principal. It is however, not necessary to express any opinion on this point, in view of the finding that the amount advanced by the plaintiff was not a loan.

19. In conclusion, it must be held that the plaintiff is not entitled to recover any amount in the suit as framed; and the suit shall be dismissed, without prejudice to his right to sue for rendition of accounts.

20. The appeal is, accordingly, allowed, the judgment and decree of the Court below are set aside and the suit is dismissed with costs throughout.

**Kanhaiya Singh, J.**

<sup>5</sup> ILR 39 Pat 714

21. I agree.

Appeal allowed.