

Sant Kumar Vs. Ashok Kumar and ors.

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Court : Madhya Pradesh

Decided On : Apr-27-2007

Reported in : 2007(3)MPHT121; 2007(2)MPLJ472

Judge : S.K. Gangele, J.

Appellant : Sant Kumar

Respondent : Ashok Kumar and ors.

Disposition : Appeal allowed

Judgement :

S.K. Gangele, J.

1. Plaintiff filed this appeal against the judgment and decree passed in Civil Appeal No. 51-A of 1994 reversing the judgment and decree passed in Civil Suit No. 94-A of 1979, dated 11-3-1980. The appeal was admitted for hearing on 23-7-1999 on the following substantial questions of law:

(1) Whether appeal of sub-tenant against a decree for eviction against the tenant is maintainable ?

(2) Whether the Lower Appellate Court was justified in reversing well reasoned findings about the bona fide need of the appellant ?

2. The plaintiff appellant filed a suit for eviction initially against the defendant Ashok Kumar. He pleaded that the defendant had taken the suit premises which was a hall on monthly rent of Rs. 200/- on 1-6-1975 and another land admeasuring 7 feet x 18 feet was rented out to the plaintiff on 10-4-1973 granted by the Municipal Council to the plaintiff on monthly rent of Rs. 15/-. The defendant had been using the aforesaid land also. Hereinafter called the suit accommodation. Plaintiff needed the suit accommodation for the business of match box and cigarette. Hence, there was a bona fide need to the plaintiff. The lease of the defendant was terminated by registered notice dated 5-4-1977 w.e.f. 30-4-1977. Subsequently vide amendment dated 29-6-1978 plaintiff amended the plaint and pleaded that the defendant No. 1 rented out the suit accommodation in favour of the defendant No. 2, who was also added as party. Hence there was subletting. Some amendments were subsequently incorporated in the plaint on 8-4-1983.

3. The defendant No. 1 denied the claim of the plaintiff and pleaded that there was no bona fide need to the plaintiff. He further pleaded that he did not such let the suit accommodation in favour of defendant No. 2. He further pleaded that defendant No. 2 was inducted as partner in the business of hotel. Hence defendant No. 1 and defendant No. 2 both had been doing business of hotel in the name of Neelkamal Restaurant as partners. The same facts have been pleaded by the defendant No. 2 also. He further pleaded that he was a partner in the business of hotel and he and defendant No. 1 both had been running hotel in the suit premises and the possession of the suit premises was with the defendant No. 1.

4. The Trial Court decreed the suit on the findings that the defendant No. 1 sub let the suit accommodation and it was needed bona fide by the plaintiff. On appeal the Appellate Court vide order dated 12-5-1983 remanded the case back to the Trial Court again after framing seven additional issues. Thereafter the Trial Court on 28-8-1984 forwarded its findings on the additional issues to the Appellate Court. Thereafter the Appellate Court allowed the appeal and set aside the judgment and decree passed by the Trial Court. Plaintiff filed a second appeal before the High Court, which was registered as Second Appeal No. 201/96 and it was decided vide judgment dated 19-11-1996 and the High Court remanded the case back to the First Appellate Court. Thereafter a review application was filed

and in the aforesaid review application which was registered as M.C.C. No. 63/97. The High Court further clarified the point on which it had remanded the case back to the First Appellate Court, which is as under:

- (i) Whether, Vijay Raj is a sub tenant or a partner;
- (ii) Whether, Vijay Raj was inducted after filing of the suit;
- (iii) Whether, any compromise was entered into with Ashok Kumar.

If a finding is recorded that Vijay Raj was also a tenant then it would also go into the question of compromise entered into and whether one of the tenants would bind the others or not and if it is found that Vijay Raj is a partner then it would also go into the question whether compromise entered into by one partners would bind the other or not. The Court below would examine the matters which were supposed to go into, in view of the original order of remand and the facts stated in this petition. It is made clear that the judgment and decree passed earlier by the Court below was set aside in its entirety.

5. After the remand the First Appellate Court by the impugned judgment and decree has held that there was no bona fide need to the plaintiff. It has further been held that there was no sub letting because the defendant Nos. 1 and 2 both had been doing business of hotel as proprietors.

6. On 24-10-1994 the defendant No. 1 Ashok Kumar and plaintiff filed a compromise application and by the aforesaid application the defendant No. 1 withdrew his appeal and the appeal was prosecuted before the First Appellate Court. Thereafter by the defendant No. 2. The First Appellate Court further held that even though the defendant No. 1 withdrew his appeal but the defendant No. 2 could prosecute the appeal because the suit accommodation was used by the defendant No. 2 being a partner.

7. The learned Counsel for the appellant has submitted that the findings recorded by the First Appellate Court that there was no sub letting by the defendant No. 1 and he had been doing business as partner and suit accommodation was submitted to partnership firm are perverse. There was no partnerships business

between defendant Nos. 1 and 2. Hence, the defendant No. 2 could not prosecute the appeal when it was withdrawn by the defendant No. 1 in pursuance to compromise between defendant No. 1 and plaintiff. He further submitted that there is bona fide need to the plaintiff and findings to this effect recorded by the First Appellate Court are perverse.

8. Contrary to this learned Senior Counsel on behalf of respondent defendant No. 2 has submitted that the judgment and decree passed by the First Appellate Court is as per law. The defendant No. 1 pleaded that accommodation was being used by a partnership firm and both defendant Nos. 1 and 2 had been running hotel business in partnership. Hence, even there was compromise between plaintiff and defendant No. 1 then also defendant No. 2 can individually prosecute the appeal.

9. Plaintiff initially filed the suit against the defendant No. 1 Ashok Kumar on the ground of bona fide need. During the pendency of the suit by way of amendment dated 29-6-1978 he added defendant No. 2 Vijay Kumar as party. He specifically pleaded that defendant No. 1 subletted the suit accommodation in favour of Vijay Kumar. Defendant Nos. 1 and 2 both had filed their written statements separately and admitted the fact that defendant No. 2 had also been doing business in the suit premises along with defendant No. 1 they pleaded that they had been doing business of hotel in partnership. In such circumstances, the burden was on the defendants to prove the fact of partnership. It is admitted fact that the defendants did not file any certificate with regard to registration of partnership firm between them neither any other document. Plaintiff examined himself in support of his case and he deposed that the defendant No. 1 sub letted the suit accommodation in December, 1977 in favour of defendant No. 2 on monthly rent of Rs. 400/-, who had been doing business of hotel in the suit accommodation. The same fact has been deposed by another witness of the plaintiff Ramswaroop (P.W. 2). The defendant No. 1 examined himself as D.W. 1 before the Court and defendant No. 2 has been examined as D.W. 2. He deposed that he had opened partnership firm with Mr. Vijay Kumar Surana and the registration of hotel was in his name. The defendant No. 2 Vijay Kumar in his deposition deposed that he and defendant No. 1 had been running the business of hotel as partners and they had been paying rent of the accommodation fifty-fifty. The other two witnesses D.W. 2, Ratmal and

D.W. 3, Sumatkumar have been examined by the defendants in support of their case, they only deposed that there was no bona fide need to the plaintiff. From the above evidence, it is clear that the defendants only deposed orally and pleaded that they had been running business of hotel in partnership, but they did not produce any partnership deed neither any accounts of partnership firm neither adduced evidence to the fact that they were sharing profits of the partnership firm neither any bank account of partnership firm had been filed by the defendants in support of plea of partnership.

10. Contrary to this plaintiff filed a pamphlet as Exh. P-21. In the aforesaid Exh., it has been shown that Neal Kamal Uphargrah was opened by Mr. Vijayraj Surana.

11. Full Bench of this Court in the case of Mohd. Hafeez Khan v. State Transport Appellate Tribunal and Ors. reported in 1978 MPLJ 351, has held as under with regard to ingredient to show the existence of partnership:

We have first to examine as to what is the legal connotation of 'partnership'. Their Lordships of the Supreme Court in Mrs. Bacha F. Guzdar v. Commissioner of Income Tax, Bombay have observed that partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners, while in the case of a company it stands as a separate juristic entity distinct from its share-holders. In yet another decision in Her Highness Maharani Mandalsa Devi v. Ramnarain Private Ltd., Their Lordships, while considering Order XXX of the Code of Civil Procedure, observed that the legal fiction must not be carried too far and it is for some purposes that the law has extended a limited personality to a firm which is not a legal entity. The persons who are individually called partners are collectively called a firm and the name under which their business is carried on is called the firm name.

A partnership contains three elements, viz., an agreement entered into by all the persons concerned; the agreement must be to share the profits of a business; and the business must be carried on by all or any of the persons concerned acting for all. The last element shows that the persons of the group who conduct the business do so as agents for all the persons in the group and are, therefore, liable

to account to all. It is this last element which comes into play to find solution to the problem before us.

12. The Hon'ble Supreme Court in the case of Santiranjan Das Gupta v. Messrs. Dasuram Murzamull reported in AIR 1973 SC 48, has held as under:

In our opinion, the evidence to which our attention was drawn by Shri Nag is wholly inadequate for coming to the conclusion that the plaintiff-appellant and the defendant firm had entered into a contract of partnership as suggested on behalf of the plaintiff. It is inconceivable that the parties should have entered into an oral agreement of partnership without retaining any record of its terms and conditions. This is not the normal course of business. It is equally inconceivable that the partnership business should have maintained no accounts of its own, which would be open to inspection by both parties even though kept secret from the rest of the world. Absence of such accounts is conceded by the appellant before us. Maintenance of separate accounts by the plaintiff and the defendant firm as suggested by the appellant is no substitute for the maintenance of the accounts of the partnership business as such, accessible to both parties and indeed, keeping only separate accounts by the parties would tend to negative rather than support the plea of partnership. Some of the other features which go against the appellant's plea are : (1) no account of the partnership was opened with any bank and mere oral information with respect to the newly created partnership was sent to the bank and (2) no written intimation was conveyed to the Deputy Director of Procurement with respect to the newly created partnership, only oral information having been sent to him. These circumstances further render the story of the partnership more doubtful.

13. The Hon'ble Supreme Court in the case of Champaran Cane Concern (dissolved) v. State of Bihar and Anr. reported in : [1963]49ITR152(SC) , has held as under with regard to finding of partnership firm:

Two co-owners may appoint a common manager for facility of cultivation and management of their farms without entering into a partnership and the fact that the profits or even the losses are distributed in accordance with the shares of the two owners does not necessarily establish a partnership within the meaning of the

Partnership Act, 1932.

14. As the above principle of law laid down by the Full Bench of this Court and Hon'ble Supreme Court, in my opinion, the First Appellate Court committed error of law while holding that defendant Nos. 1 and 2 had been doing business in the suit accommodation as partners. There was no partnership at all. In such circumstances, there was subletting by the defendant No. 1 in favour of defendant No. 2 and after compromise between the plaintiff and defendant No. 1. Defendant No. 2 present respondents who are legal heirs of defendant No. 2 had no right to pursue the appeal. I answer the substantial question of law No. 1 accordingly by holding that the defendant No. 2 was a sub tenant and appeal filed by sub tenant was not maintainable before the First Appellate Court.

15. With regard to bona fide need, plaintiff himself in his deposition deposed that he wanted to start the business of Cigarette and Match box. The First Appellate Court and Trial Court both have stated that earlier the plaintiff was doing business of cigarette and match box in the name of firm named as Rajaram Pannalal. The firm was dissolved subsequently and in such circumstances, it is clear that the plaintiff had experience of doing business of cigarette and match box and only on the basis of dissolving of registered firm, it can not be said that the need of the plaintiff came to an end.

16. Contrary to this, it is clear that there was bona fide need to the plaintiff for running the aforesaid business. The Trial Court has rightly recorded the findings with regard to bona fide need to the plaintiff and that has been reversed without any cogent reasons by the First Appellate Court.

17. It is clear that the findings recorded by the First Appellate Court with regard to bona fide need reversing the findings of Trial Court are perverse. Hence, I hold that the Lower Appellate Court was not justified in reversing the findings of bona fide need. I answer the substantial question of law No. 2 accordingly.

18. Consequently, appeal of the appellant is allowed. The judgment and decree of the First Appellate Court dated 11-1 -1999 is hereby set aside with cost. Plaintiff is entitled cost of both the Courts.

