

Mohar Singh Vs. Deen Dayal Gupta

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Court : Delhi

Decided On : Oct-11-1996

Reported in : 1996VAD(Delhi)704; 65(1997)DLT1; 2003(39)DRJ760

Judge : R.C. Lahoti and; S.N. Kapoor, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 40; [Indian Contract Act, 1872](#) - Sections 23; [Delhi Rent Control Act, 1958](#) - Sections 14(1); [Transfer of Property Act, 1882](#) - Sections 108; [Evidence Act, 1872](#) - Sections 91

Appeal No. : First Appeal No. 136 of 1996

Appellant : Mohar Singh

Respondent : Deen Dayal Gupta

Advocate for Pet/Ap. : Valmiki Mehta and; M.L. Lonial, Advs

Judgement :

R.C. Lahoti, J.

(1) Plaintiffs have come up in appeal feeling aggrieved by an order dated 22.3.96 passed by. a learned Single Judge of this Court whereby the plaintiff's application (IA 3862/95) under Order 39 Rules I & 2 Civil Procedure Code has been directed to be dismissed and the defendant/respondent's application under Order 39 Rule 4 Civil Procedure Code seeking vacating of the orders dated 5.5.95 and 22.5.95 has

been allowed.

(2) Vide is No.3862/95, the plaintiffs had sought for the following reliefs :-

'A) Restrain the defendants from in any manner using the properties, goodwill and name of the partnership firm Shri Giriraj Trading Company and carrying on similar business in the firm's name Shri Giriraj Trading Company. b) Restrain the defendants from in any manner, selling, transferring, alienating or otherwise disposing of the assets of the partnership firm Shri Giriraj Trading Company. c) Appoint a receiver with respect to the assets and properties of the firms with the direction to take charge of the accounts of the firms. d) Ex parte orders in terms of prayer a) and b) be also granted.'

2.1 On 5.5.95, the court made the following order :-

'DEFENDANTS restrained in terms of prayer (a) and (b) of the I.A. till the next date.'

2.2 On 26.5.95, the order dated 5.5.95 was modified permitting sale of some perishable goods and depositing the amount of sale proceeds in the Court.

(3) The two plaintiffs have filed a suit for declaration of shares of the plaintiffs in the profit and loss and net assets of the dissolved partnership firm Shri Giriraj Trading Company w.e.f.31.10.94. According to the plaintiffs they have 15% and 10% shares respectively. They have also sought for a preliminary decree for rendition of accounts, appointment of a commissioner to go into the accounts of the firm and incidental reliefs.

(4) According to the plaintiffs, they had entered into a partnership with the defendants as evidenced by the deed of partnership dated 17.1.82 to carry on commission agency business in kiriyana goods. The share of profits was in the ratio of 15% and 10% for the two plaintiffs and 40%, 10% and 25% for the three defendants. Earlier similar partnership was being carried on w.e.f. 17.6.78 between Prabhu Dayal, the late father of the plaintiffs, and the defendants. Prabhu Dayal died on 16.1.82. On 17.1.82 a deed of dissolution was entered into between the plaintiff No.2 and the defendants and a fresh deed of partnership was

simultaneously entered into between the two plaintiffs and the three defendants. On 1.4.94 another deed of partnership was entered into between the parties wherein substantially the terms and conditions remained the same except for a few changes introduced keeping in view a few amendments governing partnership brought in the Income Tax Act. The partnership was at will which has been dissolved w.e.f. 30.10.94 by the plaintiffs' legal notice dated 27.7.94.

(5) It does not appear to be in dispute that the premises in which the business is being carried on belongs to the plaintiffs. The defendant No.1 who has the requisite experience in the commission agency of kiriyana business has been in actual control and possession of the business as also the books of accounts. According to the plaintiffs, the defendants are carrying on the business in the name of the partnership firm inspired by the partnership having been dissolved w.e.f. 31.10.94. They are dealing most illegally and arbitrarily with the accounts and the business. They have not settled their accounts with the plaintiffs, not paid the plaintiffs their just and due share of the assets and profits of the firm. The defendants are not only liable to render accounts but they are also bound to stop the use of the premises, of the goodwill, and trade name of the partnership firm. However, they are committing a continuing breach of their such obligations.

(6) According to the defendants, the original owner of the premises was one Smt. Patashi Bai from whom late Prabhu Dayal was holding shops No.457, 458 and 481 as a tenant @ Rs.137.00 p.m. as rent. Shops No.457 and 458 are located in Khari Baoli; Shop No.481 is situated in Katra Ishwar Bhawan, Khari Baoli, Delhi. The defendant No.1 was earlier broker in challis. In the year 1978 he thought of starting his own commission agency business. Shop No.481 was lying vacant with Prabhu Dayal. The defendant No.1 approached Prabhu Dayal for sub-letting the shop or portion thereof to the defendant No.1 to which Prabhu Dayal did not agree as he could not have legally sub-let the premises without running the risk of eviction. To wriggle out of the rigour of the rent control law, late Prabhu Dayal entered into a partnership with the defendant No.1 by dividing shop No.481 into two portions and handing over the possession of half portion to defendant No.1. The rent of the premises was settled at Rs.2,000.00 per month. The deed of partnership is nothing but outward cloak assigned to the real transaction of sub-

letting. Ever since then the relationship of tenant and sub-tenant has continued between the parties. The deeds of partnership were changed firstly on account of death of Prabhu Dayal and secondly on account of amendments in the provisions of the Income Tax Act. The fact remains that the real relationship between the parties is one of landlord and tenant - tenant and sub-tenant, to be more specific. Ever since the beginning, the bank accounts have been operated by the defendant No.1. The defendant No.1 has been in charge and control of the entire business. Late Prabhu Dayal or the present plaintiffs have never participated in the partnership business, their purpose having been fulfilled by Realizing the arrears of rent due and payable from time to time.

(7) The pleas raised by the defendants have prima facie appealed to the learned Single Judge, who has directed the application filed by the plaintiffs to be dismissed, vacating the ex-parte injunction granted earlier.

(8) MR.VALMIKI Mehta, the learned counsel for the appellant has attacked the legality of impugned order and validity of the discretion exercised by the learned Single Judge in passing the impugned order. His star arguments are based on Section 109 of the Evidence Act and Sections 16(3), 48(2) of [Delhi Rent Control Act, 1958](#) read with Section 23 of the Contract Act. Mr.Mehta has forcefully submitted that under Section 109 of the Evidence Act once it is shown that persons have acted as partners, the burden of proving the nonexistence of such relationship is on the person who affirms the negative. He has further submitted that Section 16(3) of Delhi Rent Control Act prohibits a tenant from subletting the premises except by the previous consent of the landlord in writing. Section 48(2) makes the contravention an offence punishable with imprisonment for a term which may extend to 6 months or with fine or both. If the consideration or object of an agreement is unlawful as having been forbidden by law then it is void under Section 23 of the Contract Act. At the stage of finding out a prima facie case and passing an interlocutory order, the court should not have given any recognition to a plea which projected a void contract. Mr, Mehta has concluded his submissions by submitting that in the facts and circumstances of the case, partnership having been dissolved, issuance of an injunction and appointment of a receiver as prayed for should have followed in ordinary course.

(9) MR.M.L.LONIAL, the learned counsel for the defendant-respondents has supported the impugned order on all possible grounds including those taken up before the learned Single Judge.

(10) Let us first test the weight and validity of the argument based on Sections 16(3), 14(l)(b) and 48(2) of the Delhi Rent Control Act read with Section 23 of the Contract Act. These provisions read as under :-

Delhi rent Control ACT. 1958 16. Restrictions on sub-letting.' xxxxxxxxxxxxxxxx (3) After the commencement of this Act, no tenant shall, without the previous consent in writing of the landlord,- (a) sub-let the whole or any part of the premises held by him as a tenant; or (b) transfer or assign his rights in the tenancy or in any part thereof. xxxxxxxxxxxxxxxx 14. Protection of tenant against eviction (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favor of the landlord against a tenant : Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of 'the premises on one or more of the following grounds only, namely - xxxxxxxxxxxxxxxx (b) that. the tenant has, on or after tile 9th day of June, 1952, sublet, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord; xxxxxxxxxxxxxxxx 48. Penalties xxxxxxxxxxxxxxxx (2) If any tenant sub-lets, assigns or otherwise parts with the possession of the whole or part of any premises in contravention of the provisions of clause (b) of the of Section '14, he shall be punishable with fine which may extend to one thousands rupees. xxxxxxxxxxxxxxxx Contract Act, 1872 23. What consideration and objects are lawful, and what not The consideration or object of an agreement is lawful, unless - it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or ' is fraudulent, oi .involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

(11) Section 23 of the Contract Act provides that the consideration or object of an agreement is-lawful unless it is forbidden by law or is of such a nature that if permitted it would defeat the provision of any law or the court regards it as immoral or opposed to public policy. In each of these cases the consideration or object of the agreement is unlawful and the agreement is void.

(12) What is opposed to public policy' is not defined in the Contract Act.

(13) Section 108 of the Transfer of Property Act which provides for rights and liabilities of the Lesser and lessee contemplates vide clause (j) thereof, the lessee transferring by way of sub-lease his interest in the property wholly or in part. Thus, under the general law sub lotting is lawful in the absence of contract or usage to the contrary, as provided by the opening words of Section 108 of the Transfer of Property Act.

(14) We may now examine the scheme of [Delhi Rent Control Act, 1958](#) in the matter of subletting. This Act also does not forbid or prohibit subletting. It nowhere says that subletting would be an act opposed to public policy.

(15) Vide Section 16 subletting was permissible and lawful until before the 9th day of June, 1952. With effect from 9th day-of June, 1952 sub letting became unlawful if done without obtaining the consent in writing of the landlord. Sections 17 and 18 of the Act provide for notice of creation and termination of sub-tenancy and sub-tenant to be tenant in certain cases. Under Section 14(l)(b) sub letting on or after 9th day of June, 1952 without the consent in writing of the landlord is a ground for the tenant being sued by the landlord for recovery of possession of the premises.

(16) Section 48(2) of the Act renders a tenant sub-letting premises in contravention of Section 14(l)(b) punishable with fine which may extend to Rs. 1000.00 . In short, sub-letting is not an act forbidden or prohibited bylaw. The tenant may sub let the premises depending on the terms of the contract between him and the landlord or the consent of the landlord to the tenant to sub let the premises. It is only the absence in writing of the consent of the landlord .pa which makes the sub letting by a tenant a ground for ejectment and also an offence. Contravention of Section 16(3) is not.a punishable offence. Landlord is not

prohibited from permitting or consenting his tenant to sub-let. The prohibition is not in law; it emanates from the act or refusal of a private individual - a landlord not agreeing to or refusing to consent in writing to the tenant before he sub-lets the premises.

(17) We may now examine a few decided cases wherein contravention of the provisions of the rent control law or acts or transactions of similar nature came to be examined in the light of the principles of public policy and hence Section 23 of the Contract Act. -

(18) In *Lachoo Mal vs. Radhey Shyam* : [1971]3SCR693 , during tenancy governed by the Rent Control Act, the landlord entered into a private agreement with the tenant whereby the latter agreed to vacate the premises for construction and landlord was to redeliver the same after construction. Section 15 of the Uttar Pradesh Temporary Control of Rent and Eviction Act, 1947 came into force which protected the landlords from compliance with such agreements. Question arose whether the benefit conferred on the landlord by the law was capable of being given up. Their Lordships held:

'THE general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus, the maxim which sanctions the non observance of the statutory provision is *cuiuslibet licet renuntiare juri pro se* introduce to (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 and 376)...., If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's laws of England, Vol 8, Third Edition, it is stated in paragraph 248 at page 143 : As a general rule, any person can enter into a binding contract to waive the benefit conferred upon him by an Act or Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory

conditions may, however, be imposed in such terms that they cannot be waived by agreement and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void. In the footnote it is pointed out that there are many statutory provisions expressed to apply 'notwithstanding any agreement to the contrary, and also a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for breach of covenant (Law of Property Act, 1925) Section 23 of the Indian Contract Act provides: (not reproduced) It has never been the case of the respondent that the consideration or object of the agreement which was entered into in June 1963 was forbidden by law. Reliance has been placed mainly on the next part of the section, namely, that it is of such a nature that it would defeat the provision of any law and in the present- case it would be Section is of the Act. ' Their Lordships further held that Section I-A was meant for the benefit of owners of buildings and if a particular owner did not wish to avail the benefit of the Section; there was no bar created by it in the way of his waiving or giving up or abandoning the advantage or the benefit contemplated by the section. No question of policy much less public policy was involved and .as such benefit or advantage could also be waived.

(19) In *Murlidhar Aggarwal vs State of Up and others* : [1975]1SCR575 , their Lordships have examined the concept of public policy and approved vide para 24 the following statement from Maxwell's Interpretation of Statutes:

'ANOTHER maxim which sanctions- the non-observance of a statutory provision is that *cuilibet licet renuntiare juri pro se* introduce to. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether the Act is one which is intended to deal w kith private rights only or whether it is an Act which is intended, as a matter of public policy, to have, a more extensive operation.. See Interpretation of Statutes', 11th Ed (1962), pp 375-376'

(20) From the above said two decisions of the Supreme Court, it appears that the tenants being weaker section of the society, the protection given to them under the rent control law is not capable of being waived as the protection is based on public policy. However, the protection given to the landlords is not based on public policy. It is for providing benefit to the landlord which the landlord may waive in his own volition.

(21) In Smt Jankibai vs Rattan MUu : AIR 1962 MP117 , Full Bench of High Court of Madhya Pradesh has laid down the following test to be applied :

'WHEN an enactment merely imposes a penalty, without declaring a contract made in contravention of it to be illegal or void, the imposition of the penalty, by itself and without more, does not necessarily imply a prohibition of the contract. In such cases, the question always is whether the Legislature intended to prohibit the contract. This must be decided upon a construction of the statute. If the object of the enactment, or one of its objects, in imposing the penalty is to protect the general public or any class thereof, it will be construed, in the absence, of any other indication of contrary intention expressed in the statute, as implying a prohibition of the contract. On the other hand, if the object of imposing the penalty is merely the protection of the revenue, the contract will not be regarded as prohibited by implication.'

(22) In Shanker Lal Gupta vs . V.Jagadishwar Rao : AIR 1980 AP181 the Rent Control Act prohibited a vacancy in the premises being let out by landlord to a tenant unless the vacancy was notified to the Controller and let out with his permission. A tenancy was created without complying with the above said provisions. It was held :

'THE agreement of lease is perfectly valid and binding inter se between the parties, i.e. landlord and tenant, but as against the rent controller, it is a void agreement.'

The Full Bench further held that the agreement inter se the parties could not be held illegal or void as it was neither forbidden by law nor on the ground that it was opposed to public policy.

(23) A Full Bench of High Court of Allahabad has opined in *P.C.Kapoor v. Commissioner Of Income Tax Lucknow* 2nd 1973 Allahabad 293, that merely because an enactment imposes a penalty without declaring a contract made in contravention of it to be illegal or void, the imposition of penalty by itself and without more does not necessarily imply a prohibition of the contract. An excise contract was secured by a licensee who in contravention of the executive instructions entered into partnership for carrying on business under the licence. For the breach the licensee was liable to pay a penalty. The Full Bench held that the partnership entered into was not illegal under Section 23 of the Contract Act.

(24) *Har Karan Ghai Ram Aggarwal vs Champa Lal* 1962 Mp 22, *Mohd Sayeed Bawa vs Universal Timbers Traders* Air 1976 J& 9 Bhagwat Genuji v. Gangabisan Ramgopal : AIR1940 Bom369 , *Abdulla vs. Mammod*, 26 Mad 156 are the cases in each of which a person had entered into a contract with the Government and contrary to the terms of such contract with the Government had dealt with the subject matter of the contract by entering into some contract or transaction with a third person. It was held that such transaction entered into with a third person though not binding on the Government was. nevertheless binding and enforceable between the contractor/licensee and the third person.

(25) A Division Bench decision of Delhi High Court dealing with Section 14 of the Delhi Rent Control Act is apposite to the case at hand. It is *Banarsi Dass vs Shakuntala* : AIR1989 Delhi184 . The Division Bench has held : 'Section 23 of the Contract Act, 1872 lays down as to what considerations and objects are lawful and what are not. The Legislature did not lay down under Section 23 of the Contract Act the conditions or qualifications as to what is forbidden by law or what would defeat the provisions of any law. One has to go to law itself which is the subject matter of the interpretation to see if the Act complained of is prohibited by law or it would defeat the provisions of any law so as to pronounce it as void. There is no prohibition under the Delhi Rent Act to sub letting. The Act merely regulating the creation of sub tenancies by providing that there should be written consent of the landlord for the sub letting. A contract of subletting entered without written consent of the landlord is therefore not void and unenforceable.'

'CLAUSE(b) of the proviso to sub- section (1) of Section 14 only provides for the consequences of unlawful sub letting. It does not prohibit the creation of the sub-tenancies. The provisions of Ss. 16 to 18 regulate the creation of sub tenancies and the consequential effect of lawful or unlawful subletting. These provisions do not forbid the creation of sub- tenancies.' 'Under Section 108(j) of the T.P. Act, there is a statutory right of a tenant to transfer absolutely or by way of a mortgage or sub lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. This right is being regulated By providing that it shall not be without the previous consent in writing of the landlord. Section 16(3) does not imply a language containing a prohibition against sub letting.'

(26) That being the position of law, we are of the opinion that sub letting of the premises by the plaintiff to the defendant, if at all .the premises have been so sub let, is a transaction which cannot be said to be one forbidden by law or opposed to public policy. It is a different matter if on account of such subletting, the tenant-plaintiff may incur liability of eviction from the premises.

(27) The first and foremost contention of the learned counsel for the plaintiff-appellant that the transaction pleaded by the defendant-respondent being one which is illegal and void by reference to Section 23 of the Contract Act, cannot be upheld and hence fails.

(28) It was next submitted by Mr.Mehta that once the execution of the deed of partnership was admitted, the plea of the defendant setting up a transaction contrary to the terms of the deed was not entertainable and hit by Sections 91 and 92 of the Evidence Act.

(29) Sections 91 and 92 of the Evidence Act are supplementary to each other. Section 91 propounds a cardinal rule of evidence that a document in writing is the best evidence of its contents and such contents cannot be proved or disproved by oral evidence being adduced for the purpose of varying or contradicting the contents of a deed in. writing unless covered by statutory exceptions. The object of Section 92 is to discom-age perjury by precluding a party from adducing oral evidence to temper with the terms of a document. However, none of the provisions

fetters the power of the Court to determine the true nature and meaning of the transaction between the parties by admitting evidence to show that the written agreement was never intended to operate or to show existence of a real transaction bereft of the whole or part of the correctness of transaction as recited.

(30) In Smt.Gangabai VS. Smt. Chhububai : [1982]1SCR1176 , their Lordships have held :-

'THE bar imposed by sub-sec.(I) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.'

(31) In Krishnabai v. A.T.Nimnbalkar Air 1979 Sc 18 their Lordships have held-

'THERE is ample authority for the proposition that when there is a dispute in regard to the true character of awriting, evidence dehors the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs.'

(32) In Tyagraja Mudliya & Am. VS. Vedathanni , their Lordships have held :-

SECTION 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a

person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter.

(33) In *Baijnath Singh Vs. Hajee Vally Mahomat Najee Abba* Air 1925 Pc 75, the law was so stated :

SECTION 92 merely prescribes a rule of evidence, it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances.

(34) To the same effect is the law laid down in *Abdulla Ahmed v. Amrendra Kissen*, : [1950]1SCR30 and *The Godhra Elec. Co.Ltd. VS. The State of Gujrat*, : [1975]2SCR42 . 34.1 Two Full Bench views of High Courts may also be noticed. 34.2. High Court of Allahabad opines in *Deep Chandra VS. Raknuddaula Shamsheer Jang Nawab Mohammad Sajjad Ah Khan & Ors.* : AIR1951 All93 :-

'THE rule contained in Section 91 applies to the terms and not to the factum of a contract and evidence in disproof of the factum of a contract is not excluded.'

34.3.1 In the opinion of Nagpur High Court as expressed in *Asaram & Ors. VS. Ludheshwar & Ors.*, Air 1933 Nagpur 335 (FB) :-

'SECTION 92 does not preclude a party from the showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. Benami transactions afford a common illustration of this rule. In any case it is always permissible to look to the surrounding circumstances to see in what manner the language of a document was related to existing facts.'

35. We may also refer to a Division Bench decision of Gujrat High Court in *Heirs of Late Jatashanker Fulchand Mehta & Ors. VS. Heirs of Late Mavji Trikarn & Anr.*, : AIR1969 Guj169 wherein it has been held :-

'THE bar of Section 92 applies only when it is sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be.'

(36) A direct case relevant to the issue at hand is a Single Bench decision of the Calcutta High Court in *Shew Prasad Agarwalla & Anr. VS. Anil Ganguli & Air*, 68 Cwn 786 wherein plea and evidence were allowed to prove that a partnership agreement entered into by a tenant with sub-tenant: was a hidden sub-lease of premises.

(37) We are, therefore, of the opinion that the plea of the defendants setting up the real relationship between the parties and submitting that in reality not a partnership but a tenant and sub-tenant relationship existed between the parties, is not barred by Sections 91 and 92 of the Evidence Act.

(38) The contention based on Section 109 of the Evidence Act needs a summary and short disposal. Section 109 reads as under :- 109. Burden of proof as to relationship in the cases of partners, landlord and tenant, or principal and agent-When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

'AND it has been shown that they have been acting as such' is the governing expression which would shift the burden of proof. To take advantage of Section 109 of the Evidence Act firstly, the plaintiffs shall have to show by proving that the parties have been acting as partners when alone the burden of proving that that relationship did not exist or had ceased to exist shall shift on the defendants. In the case at hand it is difficult to record a prima facie finding of the parties having been acting as partners. May be after the recording of the evidence adduced by the parties, the trial Judge may be persuaded to record such a finding and then the burden of proof may shift but not for the present.

(39) The plaintiffs had sought for an injunction restraining the defendants from dealing with assets of the partnership firm and also for appointment of receiver to take charge of the assets and the properties of the firm. An injunction has the effect of excluding from the management of the partnership affairs the person against whom it is granted. Appointment of a receiver has the effect of excluding all the partners from the management of the partnership affairs and the court

assuming the same through the person appointed as receiver. Granting such an injunction or appointing a receiver are both serious matters. Though in appropriate cases, the Court is not debarred from issuing an injunction or appointing a receiver. However, care and caution is required to be exercised in as much as a running business is involved.

(40) In the case at hand, the learned Single Judge has formed an opinion against the plaintiffs. During the course of hearing before us, the learned counsel for the respondent has been at pains at demonstrating by reference to the contents of the several other interlocutory applications and their replies and the documents that since very beginning of the alleged partnership, the plaintiffs have never participated in the management of so called partnership affairs. The plaintiffs had never operated bank accounts. They have never maintained accounts or taken active interest in maintaining the accounts. They have never dealt with customers. They are not even aware of the existence, location and details of the alleged partnership property and assets. In such a case it will be ruinous to either grant an injunction or appoint a receiver as is being sought for.

(41) The plaintiffs have not succeeded in making out a prima facie case. The balance of convenience also does not lie in their favour. In such circumstances, there is no case made out for interfering with the impugned order of the learned Single Judge.

(42) While rejecting the applications, the learned Single Judge has put the defendants on terms so as to protect the interest of the plaintiffs. The defendants have been directed to maintain the accounts of the business running in shop No.481 and to file the accounts six monthly in the Court for inspection of the plaintiffs. To protect the interest of the plaintiffs we would like to modify the directions contained in para 14 of the order of the learned Single Judge as under :-

(i) the defendants shall maintain correct and proper accounts of all the dealings of the business run in Shop No.481, have the same audited periodically - at least once in a year - and file the six monthly and annual accounts in the court (the annual accounts having been audited) which would be available for inspection by the plaintiffs; (ii) each of the defendants shall file an undertaking on affidavit in the

Court to the effect that they shall not hold the plaintiffs liable for any loss or financial liability incurred in the above said business in the event of suit being decreed. (iii) with effect from such date as the learned Single Judge may appoint the defendants shall pay to the plaintiffs or deposit in the Court for such payment an amount calculated @ Rs.2000.00 per month or at such other rate as the learned Single Judge may deem fit to appoint, to be adjusted against rent of the shop or plaintiffs' share in profits of business, consistently with the finding recorded in the final judgment. (iv) the above said directions are without prejudice to the rights and contentions of either party subjudice in the suit.

(43) Subject to the above said directions, the appeal is dismissed. No order as to the costs.

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