
(1985) 01 AHC CK 0032

Allahabad High Court (Lucknow Bench)

Case No: First Civil Appeal No. 47 of 1977

Ram Dayal and anothe

APPELLANT

Vs

Firm Hanoman Prasad
Manohar Lal and others

RESPONDENT

Date of Decision: Jan. 25, 1985

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 3

Citation: (1985) 01 AHC CK 0032

Hon'ble Judges: K.S.Varma, J

Final Decision: Allowed

Judgement

K.S. Varma, J.

This appeal is directed against the judgment and decree dated 551977 passed by I Additional. District Judge, Bahraich, in Regular Suit No. 2 of 74. The plaintiff, Firm Hanoman Prasad Manohar Lal filed a suit for recovery of Rs. 5449/ for price and interest thereon in respect of cloth supplied to the defendants. Plaintiff is a registered partnership firm which carries on wholesale cloth business in Bahraich. The defendants carried on retail cloth business at Bhinga and used to purchase cloth on credit from the plaintifffirm. The plaintiff's case is that it was agreed that interest at the rate of 1 % per month which was also the market rate will be payable. On 20572 there was an accounting between the parties and a sum of Rs. 4660/ was struck as balance. The plaintiff's case is that an acknowledgement to that effect was made in the plaintiff's Bahikhata under the signature of Swami Dayal, defendant No. 1 and his son Ram Gopal, defendant No. 4. Thereafter the defendants paid Rs. 110/on different dates leaving a balance of Rs. 4550/ plus 389/ as interest. In this way the total amount in respect of which the decree was claimed was Rs. 5449/.

2. Defendants 3 and 5 fied a joint written statement and denied that they had concern with this cloth business. They claimed to be separate in mess and business from

defendants 1 and 4. It is stated that Ram Autar was also living separately from defendants 3 and 5. It is also stated that defendants 3 and 5 did not sign the Bahikhata of the plaintiff on 2051972.

3. Defendants 1 and 4 also filed a joint written statement and contended that a sum of Rs. 4660/ was found due on accounting on 20572. It included substantial amount of interest also. On 20572 defendants paid Rs. 2500/ which was not credited by the plaintiff. They also claimed that the amount of interest claimed is penal. On the above pleadings the following issues were framed in the case on 711977 :

1. Whether cloth worth Rs. 11652.63 paise was supplied by the plaintiff to the defendants from 3171970 to 2421971 ?

2. Whether any accounting took place between the plaintiff's firm and defendant nos. 1 and 4 on 20572 in which Rs. 4660/ were found due against the defendants ?.

3. Whether any payment of Rs. 2500/ was made by the defendant BJOS. i and 4 on 20572 ?

4. (a) Is the plaintiff entitled to interest at the rate of 1% per month on the balance price of Rs. 4660/ ?

(b) Was there any oral or written agreement about the rate of interest ?

(c) Was there any market custom to charge interest at the rate claimed ?

5. Whether defendant Nos. 1 and 4 are entitled to any instalments ?

6. Whether defendants 2, 3 and 5 are not liable for the amount as pleaded ?

7. To what amount, if any, is the plaintiff entitled against which of the defendants ?

4. After framing the issues the trial court recorded the following observation

“No other issue arise or pressed.”

5. Under issue No, 1 it was found by the court below that oral and documentary evidence established that the supply of cloth was made to the defendants who carried on a joint family, cloth business under the name and style of Swami Dayal Ram Gopal. Under issue No. 2 it was held that a sum of Rs. 4660/ as balance price of the cloth found due on 20572. Under issue No. 4 it was held that there was ample evidence to show that the plaintiff is entitled to interest claimed at the rate of 1 % per month on the balance price of Rs. 4550/. Under issues 5, 6 and 7 the finding, recorded is that the plaintiff is entitled to a decree for Rs. 5449/ against the defendants. On these findings the trial court by its judgment and decree, decreed the plaintiffs' suit for a sum of Rs. 5449/ with costs against all the defendants. Aggrieved by the decree passed by the trial court defendants 3 and 5

filed the present appeal in this court. Learned counsel for the appellants, Mr. S. Mirza, has contended that the finding recorded by the trial court that the defendants form a joint Hindu family is incorrect and is liable to be set aside. On behalf of the appellants Mr. S. Mirza submitted that the averment in the plaint is that the defendants carry on business together. The actual words used are: '॥ Ekjai Karobar Karte Hain ॥'. A perusal of the plaint indicates that there is no averment that the business carried on by the defendants is an ancestral joint family business. On the one hand the defendants 3 and 5 have clearly stated in the written statement that they have no concern with the joint family business, Firm Swami Dayal Ram Gopal. Reference was made to the statement of D. W. 1 Makhan Lal. He has stated that they are separate from Swami Dayal and Ram Gopal for the last 25 years. Learned counsel further contends that the trial court committed an error of law in proceeding on the assumption that the business carried on by Swami Dayal and Ram Gopal is an ancestral joint family business of which defendants 3 and 5 are also members. This assumption is absolutely uncalled for. There are families which carry on ancestral joint family business but the mere fact that the defendants were carrying on Karobar (Ekja) does not amount to an averment by the plaintiff that the business carried on by Swami Dayal and Ram Gopal was an ancestral joint family business. There is a clear averment by the defendants 3 and 5 that they have nothing to do with the ancestral joint family business carried on by Swami Dayal and Ram Gopal. In this state of affairs it was the duty of the trial court to have called upon the parties to clarify their pleadings and an enquiry should have been made by the court below under Order X of the Code of Civil Procedure whether business carried on by the defendants is an ancestral joint family business. The court below has observed, relying upon the evidence of Makhan Lal, that partition between the parties took place 25 years ago. The court below has further observed that no independent witness has been examined to prove about the factum of family partition. All these above observations have no relevance on the question whether Firm Swami Dayal, Ram Gopal was an ancestral joint family firm, of which defendants 3 and 5 are members. In this background the finding recorded by the court below that the defendants carried on joint family business under the name and style Swami Dayal Ram Gopal, is without any foundation.

6. It is true that on the date of framing of the issues the parties made statement that no other issue is pressed but that does not absolve the responsibility of the court in not framing proper issues which arise in the case. As stated earlier, the plaintiff's case is that the defendants carry on business (Ekja). This averment does not absolve the court of the responsibility of trying to ascertain whether there was ancestral joint family and that the family had sufficient nucleus to build up the business. On the other hand, defendants 3 and 5 contend that they have nothing to do with the Firm Swami Dayal Ram Gopal. In this state of affairs it was the duty of the court below to have called upon the parties to clarify their pleadings and to require the plaintiff to explain as to what he means by the defendants carrying on business (Ekja). There appears to be some evidence on record but that evidence does not clinch the matter in issue. The evidence has to be judged in the light of the pleadings. Unless the pleadings are clarified the evidence led by the

parties cannot be properly appreciated. P.W. 1 Hanoman Prasad has stated that defendants carried on business together. Even he does not say anything whether the business carried on by Swami Dayal Ram Gopal was an ancestral joint family business. The defendants have come in the witness box and they have denied that the business carried on by Firm Swami Dayal Ram Gopal is an ancestral joint family business, of which they are members. In my opinion the trial court has not conducted the case properly and has proceeded to decide the case without having a clear appreciation of law, how ancestral Joint family business comes into existence. The manner in which ancestral joint family business comes into existence and is carried on has been discussed in detail in Mulla's Principles of Hindu Law, 14th Edition in Paragraph 228, at Page 278. It, however, appears that the court below without keeping in consideration those principles proceeded to decide the case and held that defendants 3 and 5 were members of ancestral joint family business carried on by Firm Swami Dayal Ram Gopal. In my opinion, the decision rendered by the trial court deserves to be set aside.

7. For the reasons stated above, the appeal is allowed. The decree passed by the trial court is set aside. Regular Suit No. 2 of 1974 shall be restored to its original number and shall be decided by the 1st Additional District Judge, Bahraich, in the manner indicated in this judgment. The parties are directed to appear before the 1st Additional District Judge, Bahraich, on 14285.

(Appeal allowed)