

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Appellate Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

R.F.A. No. 04 of 2020

Surja Narayan Pradhan
S/o Late Kedar Nath Pradhan,
R/o 51A, Cart Road, Rose Bank,
P.O. and P.S. Darjeeling,
District Darjeeling-734101
West Bengal.

..... **Appellant**

Versus

1. Mrs. Jumden Lepcha,
W/o Shri O.T. Lepcha,
R/o Bhojoghari Fatak,
Below Denzong Gumpa,
Near SBI Bank, P.O. Bojoghari,
P.S. Gangtok, East Sikkim.
2. Shri. O. T. Lepcha,
S/o Late Phintso Lepcha,
R/o Bhojoghari Fatak,
Below Denzong Gumpa,
Near SBI Bank, P.O. Bojoghari,
P.S. Gangtok, East Sikkim

..... **Respondents**

**Appeal under Order XLI, Rule 1 and 2 of the Code of Civil
Procedure, 1908.**

Appearance:

Mr. J. B. Pradhan, Senior Advocate with Mr. Bhusan Nepal, Mr. D.K. Siwakoti and Ms. Prathana Ghataney Advocates for the Appellant.

Mr. Sudesh Joshi and Mr. Sujan Sunwar, Advocates for the Respondents.

Date of hearing : 27.04.2022

Date of Judgment : 11.05.2022

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The regular first appeal seeks to challenge the judgment and decree dated 19.12.2019 passed in Money Suit No.279 of 2017 by the learned District Judge, Special Division-I Sikkim at Gangtok (learned District Judge) dismissing the suit.

2. The plaint was filed by the appellant-Surja Narayan Pradhan (the plaintiff) against the respondents-Jumden Lepcha (defendant no.1) and O.T. Lepcha (defendant no.2). The plaint alleged that the plaintiff had taken on lease a property owned by the defendants for running a hotel. According to the plaint it was agreed between the plaintiff and the defendant no.1 that the plaintiff would construct and extend further one and half stories to the existing residential building, renovate the premises and convert it into a hotel at the cost of the plaintiff. It was the case of the plaintiff that, he had, during the course of construction deposited money in the loan account of defendant no.1 maintained in the State Bank of India towards payment of loan availed by the defendant no.1 in the name of the hotel. It was further averred that the plaintiff deposited money in the account of defendant no.2 as well in the State Bank of India and Axis Bank India Ltd. On completion of the construction, extension and renovation in the year 2010 he

started running the hotel on mutual consent without drawing any lease agreement. It is averred that, thereafter, in the year 2013 a lease deed dated 18.03.2013 (exhibit-12) was drawn between the plaintiff and defendant no.1 for a period of eleven months commencing from 01.05.2013 to 31.03.2014 at an annual lease rent of Rs.13 lakhs excluding water and electricity charges. The construction and renovation work on the premises was calculated by the parties jointly and it was found that the plaintiff had incurred Rs.55 lakhs which was acknowledged in the lease deed. In fact the defendant no.1 had also undertaken to pay back the said amount between 21.03.2014 to 31.03.2014. The plaintiff further avers that on the expiry of the stipulated period and when the defendant no.1 was unable to repay the sum of Rs.55 lakhs, an agreement dated 15.10.2014 (exhibit-13) was drawn between the defendant no.1 and the plaintiff whereby the defendant no.1 agreed to pay a sum of Rs.13,75,000/- in cash on 17.07.2014, a further sum of the same amount in cash on 27.09.2014 and pay the remaining amount of Rs.27,50,000/- by two post dated cheques. It is stated that the defendant no.1 made payment of Rs.27,50,000/- in two instalment i.e. 17.07.2014 and 27.09.2014 and informed the plaintiff that she would pay the remaining amount of

Rs.27,50,000/- by two cheques payable from the account of defendant no.2. On 15.10.2014 the defendant no.2 issued two post dated cheques for a sum of Rs.13,75,000/- each, both drawn at State Bank of Sikkim, towards payment of outstanding amount of Rs.27,50,000/-. It is averred that before presentation of the first cheque bearing No.070618 dated 30.12.2014 the defendant no.2 paid Rs.13,75,000/- in cash and resultantly the cheque was not presented for payment. On 17.04.2015 the plaintiff presented the second post dated cheque bearing No.070619 dated 30.03.2015 which was however, returned by i.e. Axis Bank Ltd. on account of insufficient funds. The cheque was re-presented on 09.05.2015 which was once again returned unpaid due to insufficient funds. Legal notices dated 25.05.2015 and 06.07.2015 were thereafter issued which was followed by a proceeding under section 138 of the Negotiable Instrument Act, 1881 which was ultimately withdrawn. Ultimately, the suit was filed in the year 18.12.2017 against the defendants seeking a decree of Rs.15,40,000/- inclusive of interest calculated @ 12 % per annum with a further prayer for pendente lite and future interest @ 12% per annum.

3. The defendants filed their joint written statement. They pleaded *inter alia* that the suit was not maintainable;

that there is no cause of action for filing the suit; that the plaintiff had no *locus standi* to file the suit; the suit was barred by limitation and the suit was bad for non-joinder of necessary parties. The defendants while denying that there was any agreement between the plaintiff and the defendant no.1 also pleaded that the agreement was entered by the defendant no.1 with one Saraswati Pradhan, wife of the plaintiff. It was denied that the plaintiff made any deposit in the account of the defendants and stated that lease rent used to be paid by Saraswati Pradhan into the said accounts and not by the plaintiff. It was stated that Saraswati Pradhan was the one who ran the hotel and not the plaintiff. The drawing of the lease deed (exhibit-12) was admitted by the defendants. It was stated that Saraswati Pradhan and her husband had told the defendant no.1 that Saraswati Pradhan had incurred the expense of Rs.55 lakhs for the development of the property of the defendant no.1 which was accepted by the defendant no.1 in good faith; that in terms of the lease deed (exhibit-12) the entire amount of Rs.55 lakhs had been paid by the defendant no.1 to the plaintiff; in reply to paragraph 9 of the plaint, that no amount was payable to the partnership firm "*Kasturi Group of Hotels and Living*" (the partnership firm). It was asserted that the lease deed (exhibit-12) was entered

by defendant no.1 with the plaintiff in his individual capacity and not in the capacity of one of the partners of the partnership firm. It was submitted that the agreement (exhibit-13) is nonest and its terms not enforceable. The defendants admitted that the sum of Rs.27,50,000/- had been paid in two instalments on 17.07.2014 and 27.09.2014. It was further stated that defendant no.1 paid another sum of Rs.27,50,000/- in cash in the month of October, 2014. However, no money receipt had been obtained. It was stated that the post dated cheques issued by the defendant no.2 were not returned by the plaintiff and the defendants did not insist on its return due to the good relationship they shared. It was further asserted that before the said cheques were presented for payment, the defendant no.1 paid the entire dues of the plaintiff by cash in the last week of October, 2014.

4. The learned District Judge framed eight issues for trial. The plaintiff examined himself, his wife Saraswati Pradhan, his son Swaraj Pradhan, Subhadra Pradhan, Devasish Chatterjee, Dipen Pradhan, Ashish Pariyar and Anil Tamang the defendants examined themselves.

5. The learned District Judge took up the issue of the maintainability of the suit and *locus standi* of the plaintiff to institute the suit to examine it together. It was held that

the suit was not maintainable and that the plaintiff had no *locus standi* to file the suit. The argument of the learned counsel for the defendants that the suit was barred under section 69 of The Indian Partnership Act, 1932 was accepted. It was found that the suit was filed by the plaintiff on behalf of the unregistered partnership firm and therefore, barred under section 69 of The Indian Partnership Act, 1932.

6. The learned District Judge also held:-

- (i) that the suit was within time. This finding is not assailed by the defendants.
- (ii) that the suit was bad for non-joinder of necessary parties i.e. the wife of the plaintiff as well as Ajay Subba.
- (iii) that it was unable to conclude with certainty that the defendants had already paid the entire amount as per lease deed (exhibit-12) while examining the issue whether the defendant no.1 and/or defendant no.2 have already paid the entire amount of Rs.55 lakhs to the plaintiff as per lease deed (exhibit-12).
- (iv) that the plaintiff had proved that the defendants had accepted their liability of Rs.55 lakhs but as it had concluded that the plaintiff had no *locus standi* to file the suit it was clear that the defendants were not liable to pay

to the plaintiff the said amount and the plaintiff had no right to receive the same.

(v) that the suit had been filed by the partnership firm against the defendants as the plaintiff had affirmed an affidavit in support of the plaint on behalf of the partnership firm. It was held that the suit filed by the plaintiff against the defendant was a frivolous suit. It was accordingly dismissed.

7. The plaint has been filed by the plaintiff. Besides an averment that the plaintiff is a partner in the partnership firm there is no indication in the pleadings that the suit was filed on behalf of the partnership firm. However, the affidavit in support of the plaint states:

“i. That I am one of the partner of “Kasturi Group of Travel and Living” having its office at 51 A, Cart Road, Rose Bank, P.O. and P.S. Darjeeling, District Darjeeling and I being one of the partner of the partnership firm and I am duly authorised to affirm this affidavit by the present partners on behalf of the partnership firm.”

8. It was because of this affidavit the learned District Judge concluded that the plaint had in fact been filed on behalf of the partnership firm. In order to examine the correctness of this finding it may be relevant to examine certain provision of the Code of Civil Procedure 1908 (CPC). The provisions relating to pleadings generally are contained in Order VI CPC. It is well settled that in the absence of

pleading, evidence, if any, produced by the parties cannot be considered and no party should be permitted to travel beyond its pleadings. The object of pleading is to enable the opposite party to know the case it has to meet. In construing a pleading court must read the petition as a whole. Order VI Rule 14 provides that every pleading shall be signed by the party and his pleader (if any). Order VI Rule 15 provides that every pleading shall be verified in the manner prescribed. Sub-rule 4 thereof provides that the person verifying the pleading shall also furnish an affidavit in support of his pleadings. In ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India***¹ the Supreme Court held that the affidavit required to be filed under Order VI Rule 15(4) has the effect of fixing additional responsibility on the deponent as to the truth of facts stated in the pleadings. It was however, made clear that such an affidavit would not be evidence for the purpose of the trial.

9. Mr. Sudesh Joshi, learned counsel for the defendants submitted that it was not only the affidavit which contained the assertion indicating that the suit had in fact been filed on behalf of the partnership firm but the plaintiff had also exhibited the partnership deed as well as produced his wife

¹ AIR 2005 SC 3353

Saraswati Pradhan (P.W.1) and Swaraj Pradhan his son (P.W.2) to prove that the plaintiff was in fact a partner in the partnership firm. As noted earlier the plaintiff had pleaded that he was a partner in the partnership firm. In that view of the matter exhibiting the partnership deed (exhibit-1) would be only to prove that he was a partner in the partnership firm as pleaded by him. The evidence of Saraswati Pradhan and Swaraj Pradhan does not also state that the suit was filed by the plaintiff on behalf of the partnership firm. The averments in the plaint make it clear that the plaintiff had sued the defendants in his individual capacity and not on behalf of the partnership firm. The affidavit in support of the plaint cannot be taken as evidence as was done by the learned District Judge. The affidavit itself merely states that the plaintiff was a partner in the partnership firm and he was authorised by the other partners to affirm the affidavit on behalf of the partnership firm. It did not indicate that the plaint was filed by the partnership firm. Consequently, the finding of the learned District Judge that the suit was filed by the partnership firm is found to be incorrect and hence set aside. Section 69(2) of The Indian Partnership Act, 1932 would come into play only when a suit to enforce a right arising from a contract is instituted in any court *“by or on behalf of a firm*

against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.” As it is seen that the suit was filed by the plaintiff in his individual capacity section 69(2) of The Indian Partnership Act, 1932 is not attracted and consequently the fact that the partnership firm was unregistered would have no consequence in the suit.

10. On the issue of *locus standi* of the plaintiff to file the suit the agreement (exhibit-13) entered between the partnership firm and the defendant no.1 becomes relevant.

11. On reading the judgments of the Supreme Court referred to by the learned Senior Counsel for the plaintiff i.e. ***B. K. Muniraju vs. State of Karnataka & Ors.***² and ***Transmission Corporation of Andhra Pradesh Limited & Ors. vs. GMR Vemagiri Power Generation Limited & Anr.***³ it is clear that in order to know the real nature of the document, one has to look into the recitals and the intention is to gather from it, the conduct of the parties and evidence on record. The question of construction of a document is to be decided by finding out intention of the executants, firstly, from a comprehensive reading of the terms of the document itself, and then by looking into, to the extent permissible, the prevailing circumstances which persuaded the author of

² (2008) 4 SCC 451

³ (2018) 3 SCC 716

the document to executed. With a view to asserting the nature of a transaction, the document has to be read as a whole. A sentence or term used may not be determinative of real nature of transaction. It is also certain that the terms of the agreement have to read first to understand the true scope and meaning of the same with regard to the nature of the agreement that the parties had in mind. It would not be safe of exclude any word in the same. When a contract has been reduced to writing we must look only to that writing for ascertaining the terms of agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of a document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law to prevent them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances.

12. The lease deed (exhibit-12) was between defendant no.1 as the lessor and the plaintiff as the lessee. The

original lease deed (exhibit-12) was exhibited by the plaintiff. His as well as the signatures of the defendants were identified by the plaintiff. The defendants did not dispute the execution of the lease deed (exhibit-12). Its execution is therefore, proved. There is no indication in the lease deed (exhibit-12) that the lease was taken by the partnership firm or that the amounts payable therein was payable to the partnership firm. In the lease deed (exhibit-12) the defendant no.1 had acknowledged the fact that the plaintiff had spent a sum of Rs.55 lakhs in renovating the hotel of the defendant no.1 and undertook to pay the entire amount between 21.03.2014 to 31.03.2014. Admittedly, however, this payment was not made which led to the execution of the agreement (exhibit-13) between the defendant no.1 as the lessor and the partnership firm as the lessee. The execution of the agreement (exhibit-13) is also not in dispute and adequately proved by the plaintiff. The agreement (exhibit-13) acknowledged the fact that Rs.55 lakhs was owed by the defendant no.1 to the plaintiff. Mr. J. B. Pradhan, learned Senior Counsel for the plaintiff was absolutely correct while he pointed out how the word "lessee" was used in the agreement (exhibit-13) to describe both the plaintiff as well as the partnership firm. Reading the agreement (exhibit-13) as a whole it is clear

that it was entered between the partnership firm and the defendant no.1. The recitals in the agreement (exhibit-13) also indicate that the plaintiff has been referred to as the lessee. The agreement (exhibit-13) clarifies that it was entered upon as the defendant no.1 had failed to make payment of Rs.55 lakhs to the plaintiff on time as per the lease deed (exhibit-12) and therefore, they had mutually agreed to ease the repayment schedule in the manner provided therein. The terms and conditions enumerated in the agreement (exhibit-13) makes it clear that the defendant no.1 was liable to pay Rs.55 lakhs to the plaintiff; it acknowledges that the defendant no.1 had made two payments of Rs.13,75,000/- on 17.07.2014 and 27.09.2014 to the plaintiff; the defendant no.1 undertook to pay to the plaintiff the remaining amount of Rs.27,50,000/- by two post dated cheques dated 30.12.2014 and 30.03.2015 issued by the defendant no.2 in favour of the plaintiff; and after full and final payment the plaintiff undertook to hand over vacant possession of the two floors which he had taken in possession as a security for the payment. It is the case of the plaintiff that insofar as the first cheque bearing No.070618 dated 30.12.2014 drawn on State Bank of India for an amount of Rs.13,75,000/- is concerned the defendant no.2 paid this

amount prior to its presentation and therefore, it remained in the custody of the plaintiff. The plaintiff has also averred that the second cheque bearing No.070619 dated 30.03.2015 for the amount of Rs.13,75,000/- was presented for payment but was returned unpaid due to insufficient funds. This cheque has been exhibited by the plaintiff as (exhibit-14). It reflects that the cheque was also drawn by the defendant no.2 in favour of the plaintiff and not the partnership firm.

13. Considering the recitals in the agreement (exhibit-13) and the surrounding circumstances including the lease deed (exhibit-12) earlier entered it is evident that the agreement (exhibit-13) merely rescheduled the payment terms and although the agreement (exhibit-13) was entered between the partnership firm and the defendant no.1 the payment was still liable to be paid to the plaintiff and not the partnership firm.

14. Although in the plaintiff's evidence on affidavit he states that the agreement was drawn between the defendant no.1 and the plaintiff, his wife Saraswati Pradhan and also a partner in the partnership firm has clarified in her evidence on affidavit that the agreement (exhibit-13) was in fact drawn between defendant no.1 and the partnership firm.

15. The learned Senior Counsel's submission that the suit was filed not by the partnership firm or on behalf of the partnership firm but by the plaintiff in its individual capacity is correct. As it has been found that the money was payable to the plaintiff as per the lease deed (exhibit-12) as well as the agreement (exhibit-13) it was the plaintiff who had a right to sue the defendants. Therefore, it cannot be said that the plaintiff did not have the *locus standi* to file the suit.

16. This court disagrees with the opinion of the learned District Judge that the plaintiff had no *locus standi* to file the suit since it was filed by on behalf of the partnership firm which was unregistered and therefore, barred by section 69(2) of The Indian Partnership Act, 1932.

17. The learned District Judge has also opined that the suit was bad for non-joinder for both the Sarawati Pradhan and Ajay Subba. The lease deed (exhibit-12) and the agreement (exhibit 13) acknowledged that the money owed by the defendant no.1 was payable to the plaintiff. It has been held that the suit was filed by the plaintiff in his individual capacity. Resultantly, this court is not in agreement with the opinion of the learned District Judge that the suit was bad for non-joinder of Saraswati Pradhan and Ajay Subba. They were not necessary parties.

18. The other issue which was examined by the learned District Judge was whether the defendant no.1 and/or defendant no.2 had already paid the total amount of Rs.55 lakhs to the plaintiff as per lease deed (exhibit-12)? The burden to prove this issue would be upon the defendants as it was they who pleaded so. In her evidence on affidavit the defendant no.1 stated that she had paid the entire amount of Rs.55 lakhs to the plaintiff and nothing remained to be paid. In cross-examination she admitted that the terms and conditions of the lease deed (exhibit-12) was read over and agreed by her as well as the plaintiff and they were valid and enforceable. She also admitted that she had not filed any documents to substantiate the payment of remaining amount of Rs.27,50,000/- to the plaintiff. She admitted that neither in written statement nor in her evidence on affidavit had she mentioned the place, time, the date where the alleged payment of Rs.27,50,000/- was made. She also admitted that she had not filed any documents to substantiate that she had paid the entire amount to the plaintiff in the last week of October. Similar admissions were made by the defendant no.2 during his cross-examination. The defendants have failed to discharge their burden to prove what they alleged in the written statement and therefore, it is held that defendant no.1 and

defendant no.2 had failed to prove that they paid the total amount of Rs.55 lakhs to the plaintiff as per the lease deed (exhibit-12) and nothing further was owed.

19. The learned District Judge examined whether the defendant no.1 and or defendant no.2 are still liable to pay Rs.13,75,000/- to the plaintiff along with interest thereon. The learned District Judge held that the defendants had accepted the liability of Rs.55 lakhs. The learned District Judge considered the issuance of cheque bearing No.070619 for a sum of Rs.13,75,000/- and held that it clearly proved that the defendants had a liability to discharge. However, in view of the learned District Judge's conclusion that the plaintiff had no *locus standi* to file the suit it was held that the defendants were not liable to pay to the plaintiff the said amount and the plaintiff had no right to receive the same. As held hereinabove the plaintiff did have the *locus standi* to file the present suit for realizing the amounts owed by the defendants to the plaintiff as per the agreement (exhibit-13). Therefore, the finding of the learned District Judge that the suit was false and frivolous is also set aside. It is held that the suit was neither false nor frivolous. The impugned judgment and decree of the learned District Judge is set aside. The appeal is allowed.

20. Consequently, it is held that the defendant no.1 was liable to pay the remaining amount of Rs.13,75,000/- to the plaintiff. The defendant no.1 shall also pay interest at the rate of 10.2% per annum on the principal sum from the date of the suit till the date of the decree. Further, defendant no.1 shall also pay in addition an interest on the principal sum @ of 6% per annum from 30.03.2015 till the filing of the suit and from the date of the decree till the date of actual payment. In terms of section 35 CPC the cost of the present appeal shall be paid by the defendant no.1 to the plaintiff.

21. A decree shall be drawn accordingly.

22. A copy of the judgment shall be sent to the Court of the learned District Judge, Special Division-I, Gangtok, East Sikkim for compliance.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting :
Internet :

Yes
Yes

to/