1934

BANK OF UPPER INDIA (IN LIQUIDATION) v. SRI KRISHAN DAS.

SALE J.

objection which he left undecided. The appellant is entitled to the costs of this appeal.

DALIP SINGH J.—I agree.

P. S.

Appeal accepted; Case remanded.

APPELLATE CIVIL.

Before Tek Chand and Bhide JJ.

1934

July 12.

MADAN GOPAL AND OTHERS (DEFENDANTS) Appellants

versus

SHEWAL DAS (PLAINTIFF) Respondent.

Civil Appeal No. 1912 of 1932.

Indian Companies Act, VII of 1913, section 4 : Pooling contract between certain factories — whether constitutes a partnership — one of the partners to the pool being a firm consisting of more than twenty members—whether suit can be maintained against — Civil Procedure Code, Act V of 1908, Order VI, rule 17 : Amendment of plaint—when not admissible.

The proprietors of certain factories entered into a pooling contract by virtue of which they agreed to work the factories in a certain manner and to share the total profits in certain proportions. The partners were left to manage their own factories, and no partner had any right to interfere with the management of the factories of the other partners. No joint management was set up by the appointment of any managing committee or officers to act on behalf of all the partners. The agreement made no provision for sharing of losses. One of the partners, defendant No.2, however, was a firm consisting of *more* than twenty persons.

Held, that the parties to the pooling contract did not constitute any partnership or association and were not carrying on any business jointly within the meaning of section 4 of the Indian Companies Act and that section, therefore, was no bar to the maintenance of the suit by the plaintiff as against defendants 1 and 3.

Akola Gin Combination v. *Northcote Ginning Factory* (1), distinguished.

Held however, that section 4 of the Indian Companies Act is mandatory and any company, partnership or association formed in violation of the provisions of that section, is an illegal body and its existence cannot be recognised by law. The suit *against* defendant 2 was, consequently, not maintainable.

Palmer's Company Law, 15th Edition, pages 411-12, *Mewa Ram* v. *Ram Gopal* (2), and *Akola Gin Combination* v. *Northcote Ginning Factory* (1), referred to.

Held also, that in the peculiar circumstances of the case, leave to amend the plaint should be refused as the plaintiffs persisted in their contention in the trial Court, and made a request for amendment for the first time in appeal, after the contention had failed in the trial Court, and it was clear that the proposed amendment was likely to give rise to some complicated issues.

Second Appeal from the decree of Sardar *Teja Singh, Additional District Judge, Ferozepore, dated 8th August, 1932, affirming that of* Sheikh *Bashir Ahmad, Subordinate Judge, 2nd class, Fazilka, dated 23rd January, 1932, granting the plaintiff a preliminary decree against defendants Nos. 1 and 3 for rendition of accounts.*

J. L. KAPUR, for Appellants.

SHAMAIR CHAND, for Respondent.

The judgment of the Court was delivered by—

BHIDE J.—Civil Appeal No. 1912 of 1932 and Civil Revision No. 82 of 1932, arise out of the same case and will be disposed of together.

On the 31st July, 1927, the parties to this case who are proprietors of wool factories at Fazilka in the Ferozepore district entered into a pooling contract by

(1) (1915) 26 I. C. 613, 617. (2) (1926) I. L. R. 48 All. 735.

1934

MADAN GOPAL
v.
SHEWAL DAS.

virtue of which they agreed to work the factories in a certain manner and to share the total profits in certain proportions. The contract was for a period of 5 years. Defendant No.1 was to work his factory for the first $2\frac{1}{2}$ years and defendant No. 3 for the next $2\frac{1}{2}$ years. The plaintiff and defendant No.2 had the option of working their factories or not as they pleased, but if they worked the factories, they were bound to share the profits with the other parties to the contract according to the terms thereof. The parties, who worked their factories, were bound to submit their accounts of the earnings to the other parties. The plaintiff alleged that defendants 1 to 3 were working their factories, but had refused to render accounts after the dates specified in the plaint and to give him his share of the profits.

The defendants admitted the execution of the contract. On behalf of the "Om Press Company" defendant No.2, it was pleaded that it consisted of more than 20 members and not being registered, as required by section 4 of the Indian Companies Act, no suit could be maintained against it. Defendants Nos.1 and 3 pleaded that the contract was tantamount to creation of a monopoly and was, therefore, unenforceable. They also alleged that the plaintiff had himself committed breach of the terms of the contract and was not entitled to sue.

The trial Court upheld the objection that the suit was not maintainable as against the "Om Press" and directed its name to be struck off from the defendants; but it decided the other issues in favour of the plaintiff and granted him a preliminary decree for accounts against defendants Nos.1 and 3. From this decree both parties appealed to the District Judge,

who affirmed the decision of the trial Court. Defendants 1 and 3 have now come up to this Court in Second Appeal, while the plaintiff has filed a petition for revision of the order of the trial Court holding that the suit was not maintainable against defendant No.2.

As regards the plaintiff's petition for revision, the contention of his learned counsel was that the suit as framed was maintainable against the " Om Press," though that association admittedly consisted of more than 20 persons and was not registered, as required by section 4 of the Indian Companies Act. In support of this contention the learned counsel relied on the provisions of Order 30 of the Civil Procedure Code relating to suits by and against " firms." But those provisions evidently assume that the so-called " firm " is legally constituted and do not seem to have any bearing on the question of the maintainability of a suit against an " illegal " association. Section 4 of the Indian Companies Act is mandatory and lays down, *inter alia*, that no partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business other than banking, unless it is registered as a Company under that Act. There is ample authority for the proposition that any company, partnership, or association formed in violation of the provisions of section 4 is an " illegal " body, and its existence cannot therefore be recognised by law—[*cf.* Palmer's Company Law, 15th edition, at pages 411-12, *Mewa Ram* v. *Ram Gopal* (1), *Akola Gin Combination* v. *Northcote Ginning Factory* (2), *etc.*]. The learned counsel for the plaintiff was not able to cite a single authority to the contrary. I have, therefore, no hesitation in holding that the suit as framed was not maintainable as against the " Om Press." The next

(1) (1926) I. L. R. 48 All. 735. (2) (1915) 26 I. C. 613, 617

1934

MADAN GOPAL v. SHEWAL DAS.

point urged by him was that the individual members of the association at any rate could be sued and the plaintiff should have been allowed to amend the plaint so as to bring these members on the record. It will be convenient to deal with this question after dealing with the points raised in the appeal filed by the defendants.

The first point raised in the defendants' appeal was that the four proprietors of wool factories, who entered into the "pooling" contract, dated the 31st July, 1927, were themselves an "illegal" partnership or association within the meaning of section 4 of the Indian Companies Act, and hence no member of the partnership or association could sue the others on the basis of that contract. This point was not raised in the Courts below; but it was urged that it was patent on the record, and being a point of law could be entertained even at this stage. The point being a novel one and of some importance the learned Judge in Chambers, before whom this Second Appeal first came up for hearing, has referred the appeal to a Division Bench.

The decision of the above point must rest on the terms of the contract between the parties. The main question for consideration is whether the four parties to the contract formed any "partnership" or "association" for "carrying on business" within the meaning of section 4 of the Indian Companies Act. Now it is true that the deed speaks of the parties to the contract as "partners;" but this fact by itself is of little or no significance; for what we have to see is the legal effect of the terms of the deed and this cannot obviously be affected by the loose phraseology used in the document. Section 4 of the Indian Partnership Act defines "partnership" as a relation between

persons who have agreed to share the profits of a ' business ' carried on by all or any of them acting for all. In the present instance the parties certainly agreed to share the profits, but it does not appear that there was any " business " carried on by all or any one of them acting for all. The four partners were left to manage their own factories and no partner had any right to interfere with the management of the factories of the other partners. It is true that certain restrictions were imposed on the running of the factories. For instance, it was incumbent on defendant No.1 and defendant No.3 to keep their factories running for certain periods and so forth; but this fact by itself cannot, in my opinion, convert these factories into a joint business carried on by all. There was no attempt whatsoever to set up any joint management by the appointment of any managing committee or officers to act on behalf of all the partners and in this aspect the present case is clearly distinguishable from *Akola Gin Combination* v. *Northcote Ginning Factory* (1), on which the learned counsel for the appellants mainly relied. In that case there was a syndicate consisting of 18 factories the object of which according to the Memorandum of Association was to work the ginning factories of the members jointly for the benefit of all. The agreement contemplated meetings of the association being called from time to time and a Secretary and a Treasurer were appointed to manage its affairs. The suit itself was instituted on behalf of the Syndicate.

The learned counsel for the defendants-appellants urged that the four parties to the contract even if they did not constitute a " partnership " in law, might be looked upon at least as an " association " within the

(1) (1915) 26 I. C. 613.

1934

MADAN GOPAL v. SHEWAL DAS.

meaning of section 4. But this will not help the appellants to any extent, for section 4 of the Indian Companies Act is as follows :—

"(1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or of Royal Charter or Letters Patent."

It will appear from the above that section 4 also requires that the *association* should be " carrying on a business." As stated above, it does not appear from the terms of the contract, in the present case, that the parties thereto intended to carry on any business jointly. The expression " carrying on business " implies, I think, some continuous control of the business by the association; but the agreement does not seem to provide for any control by the association as such. All that the agreement does is to impose certain restrictions on the business to be carried on by each partner in consideration of his getting a share in the combined profits of all the factories. If the business was intended to be carried on jointly, the parties to the contract would have been liable to share

their losses as well. But it is very significant that the agreement makes no provision for sharing of losses.

In view of all the facts stated above, it seems to me that the parties to the contract did not constitute any partnership or association and were not carrying on any business jointly, and section 4 of the Indian Companies Act is, therefore, no bar to the maintainability of the suit by the plaintiff, as against defendants 1 and 3.

The next point urged by the learned counsel for the defendants-appellants was that as the suit could not proceed against the "Om Press," it was not maintainable against the other defendants also, as the suit was one for an account and the rights and liabilities of the parties in respect of that account were interdependent. But this contention seems to be devoid of force. The agreement between the parties no doubt provides for the sharing of the total profits in certain proportions but this division does not seem to be necessarily dependent on the profits of all the factories being brought together. It is important to bear in mind in this connection that the agreement does not provide for the losses being shared. Consequently the agreement in effect gives each party to the contract a right to a certain share in the profits of the factories belonging to the other parties. The learned counsel for the defendants-appellants was unable to show any good reason why in the circumstances of the case the plaintiff could not be allowed to claim his share in the profits of the factories of defendants 1 and 3 independently of any share in the profits of the "Om Press," to which he may be entitled. I see, therefore, no valid objection to the preliminary decree against the defendants 1 and 3 passed by the Courts below.

1934

MADAN GOPAL v. SHEWAL DAS.

I shall now deal with the remaining question raised by the learned counsel for the plaintiff, *viz.* whether the plaintiff should be allowed to amend the plaint, and to sue the individual members of the " Om Press " instead of suing that press as an association. It is true that the Court has wide powers in this respect, but in view of all the circumstances, I do not think this is a fit case for allowing an amendment at this stage. In the trial Court the plaintiff persisted in his contention that the suit was maintainable against the " Om Press," as an association, and it was only when he had failed in the trial Court, that he made a request for amendment for the first time in the lower appellate Court. Besides, the proposed amendment is likely to give rise to some complicated issues, which do not affect the liability of the defendants-appellants. The " Om Press " is admittedly an illegal association. The contract was with the " Om Press " as an association and it does not give the names of the members of the association, when the contract was entered into. The members of the association have been fluctuating and it would be a matter for consideration whether members who joined subsequently could be held liable. Lastly, although a suit by a third party against the members of an illegal association is maintainable in certain circumstances, it has been held that it would not be maintainable if the plaintiff knew of the illegal character of the association and was himself a *particeps criminis* (*vide* Lindley on *Partnership*, 9th edition, page 140). It will therefore be necessary to see if the plaintiff knew of the illegal character of the association when he entered into the contract. Lastly, it will have to be considered whether the members of the " Om Press " could also claim their share in the profits of the other

1934

MADAN GOPAL
v.
SHEWAL DAS.

parties to the contract by way of a set-off. In view of these facts, it seems preferable that the plaintiff should be left to proceed against the members of the "Om Press" separately, if he is advised to do so.

On the above findings, we would dismiss both the appeal and the petition for revision, and leave the parties to bear their costs.

P. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Dalip Singh JJ.

1934

Oct. 25.

SONEPAT CO-OPERATIVE SOCIETY, LIMITED (PLAINTIFF) Appellant

versus

KAPURI LAL AND OTHERS (DEFENDANTS) Respondents.

Civil Apeal No. 2210 of 1929.

Indian Contract Act, IX of 1872, section 139 : Employer —Negligence in supervision—whether sufficient to discharge sureties for the employee—Liability of sureties—where bond by one is superseded subsequently by a bond by another surety.

K. L. was employed as an accountant by a Co-operative Society and was authorised to receive and disburse monies. On 23rd December, 1925, *S. R.* became surety on his behalf for the faithful discharge of his duties in the amount of Rs.2,000 and was to remain liable to the extent indicated, if *K. L.* showed any neglect or dishonesty in the discharge of his duties. On 27th May, 1927, the Society demanded security to the extent of Rs.5,000 and this was furnished by *R. C.*, the terms of the bond being similar to those undertaken by *S. R. K. L.* embezzled the Society's money to the extent of Rs.5,905-11-0. The Society claimed this amount together with interest from *K. L.* and his two sureties. The two sureties pleaded the Society's negligence in supervision and delay in taking action against *K. L.* who absconded. *S. R.* also