(2009) 09 DEL CK 0126

In the Delhi High Court

Case No : Regular First Appeal (OS) 60 of 2009 and CM 9942 of 2009

Alka Gupta APPELLANT

Vs

Narender Kumar Gupta RESPONDENT

Date of Decision : 07-09-2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : (2009) 162 DLT 593 : (2010) 7 RCR(Civil) 1257

Hon'ble Judges : Vikramajit Sen, J;V.K. Jain, J

Bench : Division Bench

Advocate : Sunita Harish, for the Appellant; Rajeev Awasthi, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—This is an appeal against the judgment and decree dated March 13, 2009 whereby CS (OS) No. 302 of 2007, filed by the appellant, has been dismissed. The brief facts, as stated in the pleadings are as under:

2. Vide partnership deed dated April 05, 2000, the appellant / plaintiff and the defendant / respondent entered into a partnership for running an educational institute under the name and style of M/s. Takshila Institute. As per the terms and conditions of partnership, the place of business of firm was to be F-19, LAC, Bhera Enclave, Paschim Vihar, Delhi - 110 087 and / or other place or places as mutually decided by the parties. The fee etc. used to be collected by defendant / respondent, who was also maintaining books of accounts and managing the affairs of the firm. The defendant / respondent had been withdrawing money from time to time, from the accounts of the firm whereas no money, at all, was received by the plaintiff / appellant, as her share of the profit. A Civil Suit for permanent injunction was filed by the defendant / respondent against the plaintiff/appellant, her husband Shri Navindu Gupta and her brother in law Shri Rajan Gupta, which was later on withdrawn on 16.10.2004. As a result of institution of the suit, the partnership being ''At Will'', stood dissolved from the date of institution of the suit and the defendant did not have any right to use the

name, style and goodwill of ''Takshila Institute''. A legal notice dated 8.3.05 was sent by the plaintiff / appellant to the defendant / respondent, requiring him to stop using the name ''Takshila Institute'' or its similar or phonetic variation. He was also called upon to render full and true account of the income and expenditure of the partnership firm. It has been further stated that during the subsisting of the partnership, the defendant / respondent had opened another institute under the name and style of ''M/s. Taxila Institute at C-9/5, Sector-8, Rohini, Delhi using the same photographs of students, logo, pictures etc. According to the plaintiff / appellant, the defendant / respondent is also liable to account for and pay the share of the plaintiff / appellant in the profits earned from ''M/s. Taxila Institute''. It is further stated in the plaint that the defendant / respondent was also using the goodwill of the partnership business to run other institutes in the name and style of ''Takshila Institute'' at Janakpuri, Ashok Vihar and Kalu Sarai, all at Delhi, and also at Dehradoon, Uttranchal, Uttranchal, and Palampur, in Himachal Pradesh. The plaintiff sought a preliminary decree for rendition of accounts, directing the defendants to render complete accounts of all money received and expenditure incurred by him in connection with the business carried out under the partnership agreement dated 5.4.2000 and also all the monies earned by him by using the goodwill of ''Takshila Institute'' at all places including the ''Taxila Institute'' at Rohini. A final decree with costs along with a decree of Rs. 25.28 lacs or a higher amount as per details stated to have been given in Annexure A was also sought.

3. The defendant / respondent filed Written Statement taking preliminary objection that the suit was barred by the principles of res judicata as similar dispute had already been adjudicated between the parties, vide Suit No. 16/06 titled as ''Smt. Alka Gupta v. Shri Narender Kumar Gupta'', decided by the court of Shri Paramjit Singh, Additional District Judge on 25.11.2006. It has been further alleged that during subsisting of the partnership, the plaintiff and Smt. Deepa Gupta, wife of the defendant, jointly acquired immovable properties including second floor of property No. 8, Block C-9 in Sector-8, Rohini, Delhi. Since disputes arose between the parties, it was finally decided that total value of the partnership firm will be made and 50 per cent share of the plaintiff would be calculated and paid to her, and she would relinquish all her rights and claim in the institute, which will then become an absolute property of the defendant. The total value was assessed at Rs. 46.00 lacs and it was decided that the plaintiff will get Rs. 23.00 lacs from the defendant and transfer all her claims in the partnership to him. A Biyana Agreement dated 29.6.04 was executed between the parties. The payment of Rs. 23.00 lacs, agreed to be made to the plaintiff under the Biyana Agreement, included Rs. 21.5 lacs against her 50 per cent share in the institute and also the transfer of her undivided half share in the second floor of property No. 8, in Block C-9 of Rohini, Delhi. The partnership stood dissolved on execution of agreement dated 29.6.04. Since, instead of fulfilling the terms of the agreement dated 29.6.04, the defendant, along with her husband Shri Narender Gupta, tried to put her locks on the institute, a Civil

Suit was filed by the defendant against her. During pendency of the suit, the plaintiff executed a Sale Deed on 13.8.04, in view of the compromise between the parties, after receiving the entire balance consideration of Rs. 14.00 lacs. In view of the terms and settlement of the issues, the suit was disposed of on 16.10.2004.

4. On 17.1.2006, a Civil Suit being Suit No. 16/06 was filed by the plaintiff alleging that a sum of Rs. 12.00 lacs was still due to her towards the sale consideration. The suit filed by the plaintiff was decreed. The stand taken by the defendant is that in view of earlier suit No. 16/06, filed by the plaintiff for recovery of money, the present suit was hit by the principles of res judicata and was otherwise not maintainable as all her claims in ''Takshila Institute'' stood satisfied in terms of agreement dated 29.6.04.

5. The Biyana Agreement dated 29.06.2004 has been reproduced in the judgment of the learned Single Judge Material parts of the agreement read as under:

1. That the Property/UNDIVIDED HALF SHARE SECOND FLOOR (WITHOUT ROOF RIGHTS) OF BUILT UP PROPERTY BEARING No. 8, POCKET & BLOCK C-9, SECTOR-8, ROHINI, DELHI-110085, BUILT ON A PLOT OF LAND AREA MEASURING 158.98 SQ. MTRS. AND 50% Share of M/s.Takshila Institute, established in the above said property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including, passages, easements, facilities, privileges etc. which are attached thereto or connected therewith.

13. That the Property hereby sold includes the Goodwill of the firm M/S.Takshila Institute, having its office at C-9/8, Sector-8, Rohini, Delhi-85, in which the first party is also the partner of 50%. Moreover it is specifically agreed by the first party that the property includes all rights interest, claims, title, furniture, fitting and all furniture, fixture and all equipments of M/S. Takshila Institute.

6. Admittedly a receipt was also executed by the plaintiff/appellant on 29th June, 2004. The relevant portion of the receipt read as under:

RECEIPT

I/We, SMT. ALKA GUPTA W/O. Dr. NAVINDU GUPTA R/O. H. No. 81, DEEPALI, PITAMPURA, DELHI; do hereby acknowledge and confirm that I/We have received from SH.NARENDER GUPTA, S/O. SH. S.P.GUPTA R/O. E-20/63, SECTOR-3, ROHINI, DELHI-110085, a sum of Rs. 7,50,000/-...being advance/bayana towards the sale of UNDIVIDED HALF SHARE SECOND FLOOR (WITHOUT ROOF RIGHTS) OF BUILT UP PROPERTY BEARING No. 8, POCKET & BLOCK C-9, SECTOR-8, ROHINI, DELHI-110085, BUILT ON A PLOT OF LAND AREA MEASURING 158.87 SQ.MTSR. and 50% Share of M/S. Takshila Institute, established in the above said property which is includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including passages, easements, facilities, privileges etc. which are attached thereto or connected therewith in this premises.

7. Paras 4, 5, 6, 8 & 9 of the plaint in Civil Suit No. 16/2006, to the extent they are relevant, filed by the appellant/plaintiff read as under:

4. That an Agreement to Sell dated 29.06.2004, called the ''Bayana Agreement'' had taken place between the defendant and the plaintiff at Delhi in respect of undivided half share of the plaintiff in respect of the Second Floor of the built up property, without roof rights, bearing No. 8, Pocket & Block C-9, Sector-8, Rohini, Delhi 110 085. The said agreement has been annexed herewith this plaint.

5. That under the said Agreement, in consideration of the sale of the half share of the plaintiff in the said property, including the goodwill, rights, interest, claims, title furniture, fixtures, fittings and equipment of the Partnership Firm doing business from the said address under the name and style of M/s.Takshila Institute, the defendant had agreed to pay to the plaintiff a sum of Rs. 21.5 lacs. The defendant admitted this fact at para 10 of the plaint dated 30.7.2004 of his suit No. 438/2004, which is reproduced as follows:

10. That the defendant No. 1 executed a BAYANA Agreement dated 29.06.2004 for the sale of her rights, title and interest in the built up premises in which the Takshila Institute is housed at present, that is, 2nd floor of the property bearing No. 8, Pocket and Block C-9, Sector-8, Rohini, and also the goodwill, title, interests in the Takshila Institute, in favour of the plaintiff No. 1, true copy of the said Agreement is annexed hereto and marked as Annexure XIV, and received Rs. 7.5 lacs has advance money for which she executed a proper receipt copy whereof is annexed hereto and marked as Annexure XV. That under the above said agreement the residue amount of Rs. 14 lacs is to be paid to the defendant No. 1 on or before 29.8.2004.

6. That the price of the share of the plaintiff in the above said immovable property had been agreed between them as Rs. 2,00,000/- (Rupees Two Lacs Only), and the balance amount of Rs. 19.5 lacs (Rupees Nineteen Lacs fifty Thousand only) had been agreed by the defendant to be paid to her in lieu of her share of the goodwill of the Takshila Institute, her share in the furniture, fittings, intellectual property in the form of Course Materials developed for the students and her future rights in the Takshila Institute.

8. That the plaintiff executed a Sale Deed in respect of her share of the immovable property mentioned above in favour of the defendant on 13.08.2004 for the sum of Rs. Two Lakh stipulated for it. The defendant promised to pay her the balance of Rs. 12,00,000/- (Rs. Twelve Lakh Only) towards her further rights and interests stated above in Takshila Institute. However, the defendant had apparently had no intention to fully honour the ''Bayana Agreement dated 29.06.2004, and began to avoid the plaintiff and her demands on one pretext or the year.

9. That under the circumstances, the defendant has paid to the plaintiff only Rs. 9.5 Lakh out of the agreed consideration of Rs. 21.5 Lakh, that is, Rs. Two Lakh only for the share of the plaintiff in the said immovable property, and a sum of Rs. 7.5 Lakh towards part payment for her agreed further rights in Takshila Institute leaving the balance of Rs. 12 Lakh due upon him. The further rights of the plaintiff include, but are not limited to her share of the goodwill of Takshila Institute. The plaintiff is entitled to recover the said amount from the defendant with interest and costs.

8. A perusal of the above referred documents would clearly show that the plaintiff/appellant had agreed to sell (i) her undivided half share in second floor of built up property No. 8, Pocket and Block C-9, Sector 8, Rohini and (ii) her 50% share in the partnership firm M/s Takshila Institute, including all her rights, title, interest, goodwill etc., to the defendant/respondent. The contention of the learned Counsel for the appellant that the plaintiff/appellant had sold her right, title and goodwill etc. only in respect of the Institute being run in Rohini and not in respect of her share in the entire business of the partnership firm cannot be accepted. Admittedly, there was only one partnership between the parties. There were no separate partnerships for the Institute in Rohini and Paschim Vihar. The plaintiff/appellant expressly sold her half share in the goodwill of the firm to the respondent. The goodwill can be only of the firm name and there can''t be separate goodwills for different Institutes being run by the firm under the same name and style. The partnership firm was being run under the name and style of M/s Takshila Institute, therefore, the goodwill could be only of Takshila Institute as a whole. The very fact that the goodwill of the partnership firm was also sold by the appellant to the respondent, in addition to equipment, furniture, fixtures etc. is a strong indicator of the fact that what the appellant had relinquished/sold was all her right, title and interest in the entire partnership firm and not only in one of the two Institutes being run by it.

9. The view being taken by us finds support from the specific averments made in para 5, 6, 8 & 9 of the plaint of Suit No. 16/2006 filed by the plaintiff/appellant. In para 6 of the plaint, she specifically averred that the balance amount of Rs. 19.5 lakhs had been agreed to be paid to her in lieu of her share in the furniture, fittings, intellectual property in the form of course material developed for the students and her future rights in the Takshila Institute. In paragraph 8 of the plaint, the plaintiff/appellant specifically averred that the defendant/respondent had promised to pay her the balance of Rs. 12 lakhs towards her further rights and interests in Takshila Institute. In paragraph 9 of the plaint, it was reiterated that the defendant has paid to the plaintiff only Rs. 9.5 lakhs, that is, Rs. 2 lakhs for the share of the plaintiff in the annual property and a sum of Rs. 7.5 lakhs towards part-payment for her agreed further rights in Takshila Institute.

10. The plaint was drafted by a lawyer and not by a layman. Had the Biyana Agreement dated 29th June, 2004 been confined to the share of the plaintiff/ appellant in the business being run by the firm in Rohini and had not included

her share in the business being run by the firm in Paschim Vihar, the appellant/ plaintiff would have specifically stated so in the plaint.

11. We find that this has never been the case of the plaintiff/appellant, at any point of time, that vide Bayana Agreement dated 29.06.04 she had sold her right, title and interest only in respect of that business of the partnership firm which was being run in Rohini and she continued to be entitled to the profits earned by the partnership firm from the business which was being run by it at Paschim Vihar. A perusal of the notice dated 8th March, 2005, alleged to have been sent by the appellant to the respondent, a copy of which has been filed by the plaintiff/appellant herself, would show that she did not claim that she had settled only her share in the profits of the business being run by the firm in Rohini and what remained to be paid to her was her share in the profits of the business being run by the firm at Paschim Vihar. Her claim was that she was entitled to rendition of accounts for the entire business of the firm. This is yet another circumstance which shows that the agreement dated 29th June, 2004 related to share of the plaintiff/appellant in respect of entire business of the partnership firm and was not confined to the business being run by it in Rohini.

12. Even in the plaint of Suit No. 302/2007 which has been dismissed by the learned Single Judge vide impugned judgment dated 13th March, 2009, the plaintiff/appellant has nowhere stated that she had sold her right, title and interest in respect of the business being run by the firm at Rohini, and therefore, she was entitled to rendition of accounts in respect of the business being run by the firm in Paschim Vihar. The case set up by her is that she was entitled to but has not been given a share in all the profits earned by the partnership firm.

13. Admittedly, the plaintiff/appellant and defendant/respondent had written a joint letter to the Manager, Punjab National Bank, Paschim Vihar on 13th August, 2004 informing him that they did not intend to continue operation of the bank account which may be closed and the proceeds of the account may be transferred to SB Account No. 2107. This letter is yet another strong indicator that the plaintiff/appellant had sold all her right, title, interest and claims in the entire partnership firm, to the respondent, vide Bayana Agreement dated 29th June, 2004 and that was the reason why the joint account being operated by both of them was closed. Had the accounts in respect of Paschim Vihar business also not been settled, there would have been no occasion for the parties to close the account which was being jointly operated by them.

14. This is not the case of the plaintiff/appellant that the firm was maintaining separate accounts, one for the business being run by it in Rohini and the other for the business being run in Paschim Vihar. Ordinarily, when there is a Settlement between the partners of the firm whereby they agree to part ways, the Settlement effected between them would cover accounts of the entire business being run by them in partnership and it would not be confined only to one part of the business. This is more so when the document executed between the parties at the time of parting ways and setting the disputes does not reserve

any right in favour of the outgoing partner, to receive any further payment from the partner who retains the business of the erstwhile firm. In none of the documents executed between the parties, there is an averment that the accounts of business being run in Paschim Vihar had not been settled or that the plaintiff/ appellant would not, in addition to the sum referred in the document, also be entitled to share of the profit earned by the firm from its business in Paschim Vihar. Vide endorsement made on the receipt dated 29.6.2004, the husband of the appellant recorded that Paschim Vihar Institute Deed would be settled in the name of Dr. Rashmi Gupta for the consideration of Rs. 15 lakhs. This is yet another proof of the fact that the matter relating to Paschim Vihar Institute had also been finally settled between the parties. During the course of arguments before us, it was contended by learned Counsel for the appellant that the endorsement was made by the husband of the appellant without authority from her. Since we noticed a Gentleman giving instructions to the learned Counsel for the appellant, during the course of the hearing before us, we asked her as to who the gentleman was and we were told that he was none other than the husband of the appellant. This leaves no doubt in our mind that the husband of the appellant was acting on authority from her when he made endorsements on the Bayana Agreement and Receipt dated 29.6.2004. The shifting stands taken before him have been noted in detail, by the learned Single Judge.

15. For the reasons given in the preceding paragraphs, we are in agreement with the learned Single Judge in holding that the plaintiff/appellant having sold all her right, title and interest including goodwill of the partnership firm to the respondent/defendant vide Bayana Agreement dated 29th June, 2004, nothing remained for the defendant/respondent to account for to plaintiff/appellant. At this stage, we would like to note that the sale consideration for the share of the plaintiff/appellant in the immovable property was only Rs. 2,00,000/- as is evident from the sale deed executed by her. Obviously, the remaining amount represented her share in the profit, goodwill and assets of the firm. The suit for rendition of account does not lie, in view of settlement between the parties.

As regards claim for rendition of accounts in respect of business carried by the respondent under the name and style of M/s. ''Taxila Institute'', admittedly, the Appellant was not a partner in that business. Her claim for a share in the profits of this firm is based on the allegation that he had used a name identical to the name ''Takshila Institute'', in which both of them were partners. The goodwill of the firm belonged to both the parties till 29.6.2004, when it came to be vested solely in the respondent. The cause of action for using a name similar to the name ''Takshila Institute'' being an altogether different cause of action, requiring different pleading with complete particulars of the alleged business and leading altogether different evidence, it is open to the appellant/plaintiff to file a separate suit in this regard, if such a relief is otherwise available to her in law. In any case, no arguments on this aspect were advanced either before the learned Single Judge or before us.

16. Suit No. 16/2006 was filed by the plaintiff/appellant on 17th January, 2006 on the averments that she had entered into a partnership with the defendant/ respondent under the name and style of Takshila Institute and had jointly acquired immovable properties including second floor of built up property No. 8, Pocket and Block C-9, Sector 8, Rohini and that the defendant had not so far rendered accounts and given her share of profits and assets of the partnership firm to her despite her demand for the same. She further alleged that she executed the sale deed in respect of her share of the immovable property believing the promise of the defendant to pay the balance amount of Rs. 12,00,000/- towards her further rights and interest in Takshila Institute. Despite these averments, the plaintiff chose to claim only a sum of Rs. 12,00,000/- from the defendant/respondent alongwith a sum of Rs. 1,53,000/- as interest on the amount of Rs. 12,00,000/-. The plaintiff neither claimed rendition of account nor did she seek leave of the court to sue afterwards, for relief of rendition of accounts.

17. Order II Rule 2 of the Code of Civil Procedure, to the extent it is relevant, reads as under:

2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

The cause of action in the two suits may be the same though the facts alleged may not be exactly identical in the two cases. It is not open to the plaintiff to split up the parts that really constitute the same cause of action and file different suits in respect of different parts. If the foundation of the previously instituted suit and the subsequently instituted suit is one and the same, Order II Rule 2 of the Code of Civil Procedure, would come in to play and preclude the filing of the second suit. A perusal of the Affidavit filed by the plaintiff/appellant in suit No. 16/2006 instituted by her, would show that she did not confine her deposition to the Bayana Agreement dated 29.6.2004. In fact, she started with constitution of partnership firm vide Agreement dated 5.4.2000 and claimed that there was no formal dissolution of the partnership and the defendant had not rendered accounts and given her shares of profits and assets of the partnership, despite her demand for the same.

18. The foundation of action for claiming a sum of Rs. 12,00,000/- as well as for

claiming rendition of account is the same, i.e., partnership deed between the parties to run business under the name and style of M/s Takshila Institute. Had there been no partnership between the parties, there would have been no occasion for execution of Bayana Agreement and receipt dated 29th June, 2004 nor would there have been any occasion for the plaintiff/appellant to claim rendition of accounts. Accepting that the relief of recovery of Rs. 12,00,000/- and relief for rendition of accounts are separate reliefs, the plaintiff/appellant was nevertheless required to claim both the reliefs in the first suit filed by her, as basic cause of action for claiming both the reliefs was one and the same. This is not the case of the plaintiff/appellant that cause of action to seek rendition of account had not accrued to her before she filed suit No. 16/2006. She claims to have given notice seeking rendition of account on 8th March, 2005. In the plaint of Suit No. 16/2006, she specifically stated that she was entitled to rendition of accounts, for which she reserved her right to file a separate suit. Cause of action for claiming rendition of account having already accrued to her at that time, she was obliged, in law, to claim that relief in suit No. 16/2006, unless she obtained leave of the court to sue at a later date, for relief of rendition of accounts. Unilateral reservation of right to sue at a later date does not entitle the plaintiff/appellant to file a fresh suit at a later date, for rendition of accounts. Accepting the contention that the plaintiff/appellant was not obliged to sue for rendition of account while filing of Suit No. 16/2006 and she could, in law, seek rendition of account at a later date, within the prescribed period of limitation available to her for this purpose, would result in multiplicity of legal proceedings which would defeat the very purpose behind enactment of Order II Rule 2 of the CPC i.e. to avoid multiplicity of proceedings.

19. Admittedly, the plaintiff/appellant was a Government teacher when she entered into partnership with the defendant/respondent and she continued to hold that post during subsistence of partnership. It has not been disputed before us that under the rules applicable to her, the plaintiff/appellant could not have entered into partnership to do business. She being a Government servant, applicable rules precluded her from doing any business. The plaintiff/appellant acted in total breach of the Conduct Rules applicable to her by starting a firm in partnership with the respondent. The learned Single Judge has taken the view that the plaintiff/appellant having violated her terms of employment by entering into partnership with the defendant/respondent, the Court would not come to her assistance. Since we have agreed with the learned Single Judge in holding that the suit is barred by Order II Rule 2 of the CPC that the plaintiff/appellant had settled all her claims with the respondent/defendant, under Bayana Agreement dated 29.6.2004, we need not take a view on the question as to whether a partnership Agreement of this nature can be enforced in a Court of Law or not.

For the reasons stated above, we do not find any merit in the Appeal, the same is dismissed. There shall be no order as to costs.

