
(2011) 09 KL CK 0051
In the High Court Of Kerala
Case No : F.A.O. No. 178 of 2011

A.V. Joseph

APPELLANT

Vs

Joshy T. Joseph

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Partnership Act, 1932 — Section 4, 43, 47, 48, 5

Citation : AIR 2012 Ker 56 : (2012) 1 BC 542 : (2011) 4 CivCC 591 : (2011) 4 KLJ 285 : (2011) 4 KLT 290

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Surendra Mohan, J

Bench : Division Bench

Advocate : K. Jayakumar and John Joseph Vettikad, for the Appellant; V.R. Venkatakrishnan (Sr.), Rajeev V. Kurup and Alex M. Scaria, for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—The plaintiff in a suit for directing the winding up of a partnership firm; for settlement of accounts and for direction to the defendant to render accounts, is the appellant. He sued alleging that he and the defendant are partners of a firm run with a firm name, engaged in quarrying and stone crushing business activities. According to the plaintiff; that is a partnership at will and he and the defendant have equal shares, with right to share the profit and loss of the partnership equally. The plaintiff pleaded that the unit was initially commenced by the defendant as a proprietary concern and thereafter, he was brought in on negotiations. He pleaded that the partnership business stood dissolved as on 25.2.2011, when a notice of termination was issued; Along with the plaint, among other things, Ext.A1, the agreement (in original) dated 16.4.2000, Ext.A2, a copy of notice dated 22.2.2011 and Ext. A3, defendant"s reply (in original) dated 15.3.2011 were produced. With these materials, the plaintiff applied for appointment of a receiver to take possession of all assets of the firm, particularly those described in plaint "C" schedule, along with stock in trade, books of accounts etc.

2. The defendant objected to that application contending that the Ext.A1 agreement does not, by its terms, create a partnership or regulate mutual rights and liabilities arising out of a duly constituted firm. He took the stand that in terms of clause 3 thereof the parties have to execute a deed of partnership and such a deed having not been executed, no partnership has come into being. According to him, it is only after executing such a deed would all assets referred to in Ext.A1 agreement have to be conveyed to the partnership firm; otherwise, there would be no partnership since the intention was that the partnership will come into existence only on the execution of a deed following Ext.A1 agreement. Though he admitted having issued reply notice, he tried to explain off some of its contents.

3. The court below dismissed the application for appointment of receiver holding that the allegations in the plaintiff's affidavit contain complaint only that the defendant is not allowing the plaintiff to participate in the business, but not of mismanagement or of any damage to the property, so as to preserve the same. Hence, it took the view that no injury is shown to have been caused to the plaintiff, because it was admitted that "B" schedule property purchased for the partnership firm is now in the possession and enjoyment of the plaintiff. The court below viewed that the plaintiff wants to have a receiver appointed only to take possession of the property that belongs to the defendant alone and that the case is not a fit one for appointment of receiver. The court below noted that Ext.A1 agreement is challenged by the defendant on the ground that it is not a deed of partnership and that the conditions mentioned therein have not been fulfilled. The court below did not decide, either way, as to whether, at least prima facie, there is material to hold the existence of a partnership and if so, what would be the legal incidences flowing therefrom.

4. Learned senior counsel appearing for the appellant/plaintiff argued that the court below has wholly misconceived the effect of Ext.A1 agreement. According to him, that document evidences the existence of a partnership and the clause therein, to have a partnership deed drafted, does not in any manner, takes away the quality of Ext.A1 as itself being the evidence of partnership. He argued that in cases of partnerships terminable at will, termination by one of the parties ipso facto gives rise to a situation where the other party is bound to account and no transaction could be had thereafter, except for the purpose of preserving the partnership or to carry out and discharge obligations incurred before the termination. He further argued that going by the facts of the case in hand, the notice of termination not having been denied, nothing remained except for the court below to appoint a receiver paving way for the availability, in custodia legis, of the assets, books of accounts, stock in trade etc., for the purpose of settlement of accounts..

5. Per contra, learned senior counsel for the defendant argued that the transaction is more in the nature of lending, though Ext.A1 agreement, on its face, does not categorically show that. He pointed out that the transaction

between the parties, reflected by Ext.A1, contains the clear requirement that they will enter into a formal partnership deed and such condition should be treated as of the essence of the agreement as contained in Ext.A1 and hence Ext.A1 by itself, cannot be treated as constituting the partnership. Thus, it is argued that there is no question of a non-existing partnership being dissolved and the so called notice issued on behalf of the plaintiff is worthless.

6. The controversies raised between the parties essentially revolve around the effect of Ext.A1 agreement dated 16.4.2000. It is an agreement between the plaintiff and the defendant Neither party has a case that it is not a contract.

7. The preamble to Ext.A1, among other things, clearly states that the first party, i.e., the defendant, is the licence holder doing business of metal crushing under the firm name "Thazhathuparambil crushers" which is described in the document and that he has agreed to admit the second party, the plaintiff, as a partner to that business so as to bring money to develop and enhance the business. The preamble proceeds to state that "whereas both parties have agreed to conduct the business upon the terms, and conditions herein contained". These terms in the preamble categorically show that what is conceived by the parties at that point of time was the admission of the second party as a partner to the business that the first party (defendant) was carrying on in the name "Thazhathuparambil crushers".

8. Now, let us examine the conditions of that agreement. Clause No. 1 provides for payment of amounts stated therein. Admittedly, such amounts have been paid. Clause No. 2 provides that the first party (defendant) has agreed to hand over to the second party (plaintiff) all the half rights in the above business, both movable and immovable, more particularly detailed in the schedule annexed to the agreement, upon payment of the sum covered by Clause No. 1. Clause 3 contains a statement that both parties have agreed to execute a formal deed of partnership by equal shares, while the argument of the defendant is that no partnership came into being since a formal deed of partnership was not executed in furtherance of this provision in clause 3, we will examine the other provisions of that clause and the subsequent clauses to test that contention. Clause 3 further says that upon payment of the sum covered by the earlier clauses, the first party (defendant) has agreed to register the immovable property referred in the schedule by a valid title deed in favour of the newly constituted firm. The first party (defendant) has also agreed to repurchase two items of lands from other persons and hand over the same to the firm proposed to be constituted Clause 4 provides that all assets referred in the schedule have been agreed to bring into the partnership, including the liabilities outstanding as on 1.3.2000 with Kerala Financial Corporation, Kottayam and with the land mortgage bank, Pala. The amounts that would be treated as liability under those heads are also specifically stated in clause 4 of Ext.A1. Clause 5 of Ext.A1 agreement says that upon the "execution of this agreement the parties have agreed to carry on the business jointly with effect from the above said date in equal shares". The only date

referred to in the clauses which precede Clause 5 in Ext. A1 is 1.3.2000, other than the date of Ext.A1 which is 16.4.2000. Clause 6 says that the second party alone is entitled to collect all granite, sand and powder released on crushing the metal and is responsible to erect required machineries for collecting the above at his own cost, clause 7 inter alia enjoins that all bank accounts shall be operated jointly. Clause 8 says that the second party (plaintiff) shall not have any assets or liability other than those specifically stated in that agreement. This is how clause 8 can be understood, though there appears to be some grammatical jugglery in the manner in which it is drafted. Clause 9 states that the accounts of the unit shall be closed every month and the profit and loss account should be drawn and every profit or loss should be divided among the parties equally at the end of each month and credited to their respective account. Drawings shall be limited to their respective share of profit. No drawings will be allowed from the capital of the business. If there is any loss in any month, the game shall be contributed by the parties forthwith.

9. As noted above, the parties had agreed, going by the clear terms of clause 5 of Ext.A1, that upon the execution of that agreement, they would carry on business jointly in equal shares with effect from "the above said date". The words "the above said date" can be only with reference to 1.3.2000 as on which date the liabilities outstanding to the Kerala Financial Corporation and the land mortgage bank were assessed and pooled into the liabilities of the firm. Even otherwise, Ext.A1 contains all the necessary ingredients that constitute a partnership firm. The relation of partnership arises from a contract and partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all - See Sections 4, 5 and 7 of the Indian Partnership Act We, therefore hold that Ext. A1 itself constitutes a partnership and that the said firm came into being by the act of parties resulting in the contract, terms of which are clearly stated in Ext.A1. The date of effect of that partnership cannot be postponed to any future date merely on the ground that there was a prescription in clause 3 of Ext.A1 that the parties would execute a formal deed of partnership by equal shares. Even by making that statement, the parties can be treated to have meant only the making of a formal deed of partnership which they would have thought necessary for different purposes before authorities relating to taxation, labour etc. The legal incidences necessary to result in a partnership exist in the contract entered into between the parties as per the terms of Ext.A1 and the effect of that partnership runs therefrom and on the basis of the terms of Ext. A1. The operation of the contract between the parties as contained in Ext.A1 can, in no manner, be treated as under any state of suspension or adjournment mainly by saying that a formal deed is yet to be made. That argument of the defendant is hence overruled.

10. Where no provision is made in the contract between the partners, as to the duration of their partnership or for the determination of their partnership, it is a "partnership at will". Such a partnership could be dissolved by any partner giving

notice in writing to all the other partners, of his intention to dissolve the firm, on such notice being given, the firm is dissolved from the date mentioned in the notice as the date of dissolution or if no date is so mentioned, as from the date of the communication of the notice. On such dissolution and thereafter, the authority of each partner to bind the firm, and other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. These principles of law clearly emanate from Sections 43 and 47 of the Partnership Act read in that sequence. Though learned counsel on both sides made reference to different precedents, this indisputable legal position discernible on the clear terms of the statute, is in no way shown to have been diluted.

11. Having regard to what is aforesaid, the question would be as to whether it would be just and convenient to appoint a Receiver in the case in hand. As noted, Section 47 leaves nothing more than the requirement to have the transactions essentially to lead to the rendition of accounts. This would be further clear if advertence is made to the provisions in Section 48 which provides for the rules to be observed in settling the account of the firm after dissolution. In suits of such nature and context, it would only be just and convenient to appoint a Receiver for the assets, stock in trade, books of accounts etc. Of the firm and to consolidate the accruals and recoverables, thereby carrying out expeditiously, the exercise of settlement of accounts leading to the preliminary and final decree. Therefore, in our view, the question whether it is the defendant or the plaintiff who is in possession, is not of much relevance. Such an issue would gain predominance where the appointment of a Receiver would be against the right of the defendant to continue to be in possession like in cases of alleged trespass, recovery of property etc. In so far as suits based on partnerships are concerned, rights and liabilities of partners depend on the terms of the partnership. Here, as already noted, the plaintiff and defendant have equal shares. It is a partnership terminable at will. That firm is dissolved by a notice. Both have equal right to insist that accounts are settled and the assets, stock in trade and books of accounts are not to be used for any purpose other than those provided for in Section 47 of the Partnership Act Hence, it is just, proper and convenient that a Receiver is appointed in the case in hand.

12. In so far as the choice of the Receiver is concerned, having regard to the nature of allegations levelled by the parties among themselves, it would be grossly inappropriate to make either of them the Receiver. In the fitness of things, the Official Receiver would be the competent person to be appointed as the Receiver. Until such appointment is made and possession taken over by the Official Receiver, the parties to the litigation are to be enjoined from dealing, in any manner, with the assets, stock in trade, books of accounts etc. of the firm. We hasten to add that the findings in this judgment in relation to the contents of Ext.A1 and on the question of termination of that partnership are being rendered in this appeal arising from an interlocutory order since it has become absolutely

necessary to do so, to decide this appeal. We add that it will be open to the parties to raise all their contentions even in this regard at the final hearing of the suit and the contents of this judgment would not stand in the way of that.

In the result, this appeal is allowed in the following terms:

i. The impugned order is set aside.

ii. I.A. No. 804 of 2011 in O.S. No. 85 of 2011 of the Sub Court, Pala is allowed holding that a Receiver is to be appointed. The court below is directed to issue consequential orders appointing the official Receiver as the Receiver at the earliest on the production or receipt of a copy of this judgment. All further directions to the Receiver as may be found necessary would be issued by that court. The Receiver will act in terms of the direction of that court and would be treated as one appointed by that court for all purposes, including filing of returns, accounting, discharge etc.

iii. Until the Receiver takes possession and custody of all assets, stock in trade, books of accounts etc. of the firm, the parties to this appeal will stand injunctioned from dealing, in any manner, with the assets, stock in trade, books of accounts etc. of the firm.

iv. No costs. v. The parties are directed to appear before the court below on 14.10.2011.

Issue copy on usual terms and communicate to the court below.