(1965) 04 P&H CK 0015

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 278-D of 1964

Giani Ram APPELLANT

Vs

Munshi Ram and Another RESPONDENT

Date of Decision : 23-04-1965

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1965) 04 P&H CK 0015

Hon'ble Judges : Mehar Singh, J

Bench : Single Bench

Advocate : D.K. Kapur, for the Appellant; Hari Shanker and Tara Chand, for the Respondent

Final Decision : Dismissed

Judgement

Mehar Singh, J.—The defendant is the applicant in this revision application. The plaintiff and he were partners and the partnership was in possession of the shop that is now in dispute. In the partnership deed, clause (9) reads-"That the partnership is at will and may be dissolved by any partner by giving one month''s notice of his intention to do so. But by mutual consent of other partners the period of this notice may be waived. Provided always that in the event of dissolution of the firm for any reason or circumstance, the good-will and the business premises shall always belong to party No. 1 (plaintiff). The second party (defendant) hereto shall have nothing to do with the same." The plaintiff having given notice of dissolution, according to this clause in the partnership deed, in a subsequent suit for dissolution and rendition of accounts'' of the partnership by the plaintiff, the learned trial Judge on April 16, 1964, found that the partnership is to be deemed to have been dissolved on April 2, 1963. The notice for dissolution had been given on March 2, 1963, and so in the terms of the clause, to which reference has already been made, the partnership came to be dissolved after the expiry of one month from the date of the notice. In the trial Court issue 4 in the suit between the parties read- ''If a preliminary decree is passed, what instructions are to be given to the Local Commissioner ?'' In dealing with this issue the learned trial Judge appointed a local commissioner to go into the accounts of the partnership, but said this, that ''the local commissioner may, however, apply for any further instructions.'' Then the learned Judge proceeded to pass a preliminary decree for dissolution of the partnership and rendition of accounts in favour of the plaintiff against the defendant appointing an advocate as the local commissioner, who has been directed to go into the accounts according to the instructions given in issue 4. It-appears that the local commissioner has entered into the proceedings of taking accounts. In the meantime the plaintiff moved an application u/s 151 of the CPC pointing out that in the terms of the partnership deed, clause (9), upon dissolution of the partnership, he alone is entitled to the good-will and the business premises of the partnership, and that the local commissioner be directed to deliver possession of the same to him. On that the learned Judge after saving that ''the partnership firm has been dissolved in accordance with the terms of partnership deed, Exhibit P. 4. Condition 9 of this partnership deed is to the effect that in the event of dissolution of the firm for any reason or circumstances, the good-will of the business and the business premises shall always belong to party No. 1 (plaintiff)'' has directed the local commissioner to take possession of the business premises as receiver from the defendant and band over the possession of the same to the plaintiff Of course the learned Judge has found that the plaintiff is entitled to the possession of the business premises, according to the terms of partnership, forthwith. This order was made on July 29, 1964. The final decree has so far not been passed. It is this order against which this revision application has been made by the defendant.

2. There are two arguments urged by the learned counsel for the defendant. The first argument is that before final decree in the suit is passed, even in-spite of the preliminary decree, which the learned counsel points out, in any case, is never executable, the trial Court had no jurisdiction.to order ouster of the defendant from the business premises and delivery of possession of the same to the plaintiff. As an illustration, the learned counsel says that in an ordinary suit for possession, during the pendency of the suit and before the decree is made, the Court has no jurisdiction to order dispossession of a defendant to deliver the property to a plaintiff, an illustration which in itself is correct enough, but the question is, has it any application to the facts of a case like the present," which obviously is not a suit for possession of property. In support of this argument the learned counsel further refers to rule 15 of Order 20 of the CPC which says, among other matters, that when the Court passes a preliminary decree fixing the date of dissolution of a partnership, or the taking of accounts, then it has power ''directing such accounts to be taken, and other acts to be done, as it thinks fit'', and the learned counsel says that the words ''and other acts to be done'' have been used ejusdem generis with reference to the preceding words ''such accounts to be taken'', but if this is correct, it means that the other acts to be done have to be something of same or similar type as ''accounts to be taken''.

When asked what could be the type of such arts, the learned counsel has made reference to section 48 of the Indian Partnership Act, 1932 (Act 9 of 1932), which starts in this manner-48. In settling the accounts of a firm after dissolution, the following rules shall subject to agreement by the partners, be observed:-

and then follow the rules. But this section is not helpful to this argument on the side of the defendant because the rules given in the section are no more than a statement of the manner and the method of ''settling the accounts'', which does not show that there are ''other acts to be done'' as those words are used in rule 15 of Order 20 of the Code of Civil Procedure, which are akin to taking of accounts. In reply the learned counsel for the plaintiff has referred to Order 40, rule 1, of the CPC which deals with the power of a court to appoint a receiver of any property and that power may be exercised whether before or after the decree is made. His position is that the order that is now being questioned in this revision application has been made by the learned trial Judge in exercise of his powers under this rule appointing the local commissioner a receiver to take possession of the business premises of the dissolved partnership of the parties and to deliver possession of the same to the plaintiff. In this manner his contention is that the order of the learned trial Judge is within jurisdiction.

3. In this case the Court finds that when the parties came before it, the partnership had already been dissolved by a notice by the plaintiff in the terms of the contract of partnership between the parties, and although it gives a decree for dissolution of partnership, it, in substance, is a decree for accounts of a dissolved partnership But in accounting what has to be taken into consideration is the whole contract between the parties. According to sections 48 and 55 of Act 9 of 1932, in the matter of how the accounts are to be settled after dissolution, the property of the partnership as also the good will of business of the partnership have to be taken account. Obviously this is subject to the contract between the parties. In the present case the contract is unmistakable that in the event of dissolution of the partnership the good-will of the business and the business premises of the partnership are to go into the possession of the plaintiff.This is unqualified. The defendant in such a contingency has no right to the same. So that the trial Court when passing the preliminary decree and declaring the right of the partners should have stated so a little more clearly what its direction was with regard to the good will of the business and the business premises of the partnership. Instead of doing it clearly under issue 4 it left in to the Commissioner to ask for further instruction. It was not actually the Commissioner who applied for instructions but it was the plaintiff who moved for the same.

4. Now in the preliminary decree it is not clearly stated that the decree is subject to the terms of the partnership or, in particular, it is subject to clause 9 of the partnership deed with regard to the possession of the good-will and the business premises of the partnership, but in the nature of things it must be read in the

light of the terms of partner between the parties. In any case, the learned trial Judge reserved to himself the right to issue further instructions to make the decree effective in the terms of the contract of partnership between the parties. He has issued those instructions and in my opinion in the circumstances of this case, those instructions are within the scope of the decree, though perhaps the decree could have been more happily worded. On this conclusion, the order made by the learned trial Judge giving further instructions to the local commissioner pursuant to the terms of the preliminary decree to take possession of the good-will and business premises of the partnership and to deliver the same to the plaintiff in accordance with clause 9 of the contract of partnership between the parties, is an instruction issued within jurisdiction. I have already referred to rule 15 of Order 20 of the Code of Civil Procedure, and as I read the last line of that rule which has been reproduced in my opinion the words and other acts to be done in this rule are directions with regard to the doing of other acts then the talking of account and in the circumstances, it is not possible to apply to the rule of ejusdem generis in this case, because it is apparently not conceivable what type of other act can be directed to be done which are somewhat of the same type or nature as the taking of accounts. Even under this rule the trial Court while passing the preliminary decree could have given the type of direction that it has given in its order that is being questioned in this revision application. However, the learned counsel for the defendant points out that it actually has not done so in the decree. To that I have already given the answer that as I read the nature of the dispute between the parties the con-trace of partnership between the parties, the decision of the learned trial Judge on issue 4 and the form of the preliminary decree. I am of the opinion that the learned trial Judge reserved to himself to issue further instructions to the Local Commissioner and he has exercised that power in issuing the instructions in the order in question. So the first argument on the side of the defendant dose not succeed.

5. The second argument of the learned counsel for the defendant is that the order in question cannot possibly be passed under the law of partnership. He says that the relationship between partners of a partnership is fiduciary and apparently the business promises of a partnership between the parties are property of the partnership, and in the term of section 48 of Act 9 of 1932 and so also section 47 of same Act, while taking accounts the property of the partnership has to be dealt with, and during the pendency of dissolution the mutual right and obligations of the partnership continue, in other words, the rights and obligations to square up the accounts continue which includes the disposal or the property of the partnership in the settlement of the same. The learned counsel also refers to section 46 of the same Act which says that the property of the partnership is to be applied in discharging the debts and liabilities of the firm. All this is correct, but it again is subject to the express terms of the contract, between the parties, which in this case upon the dissolution of the partnership give possession of the good-will and of the business premises to the

plaintiff unconditionally and the only liability that remains with the plaintiff is, as detailed in clause 9 of the partnership deed to make certain payments of money. The learned counsel considers that for whatever might be found doe to the defendant, he has a lien on the partnership property, and normally this may be so but when the defendant has a greed in so many words that in the event off dissolution this property shall go in the possession of the plaintiff and his only claim will be to certain amounts detailed in clause 9 of the partnership deed, there is no question of any lied attaching to such property for the payment of those payments. No doubt, while the partnership continued, the business premises were included in the capital asset of the partnership and no doubt ordinarily is taking accounts the value of the capital assets must necessarily come in and further when actual accounts are squared the rights and liabilities of the parties have to be adjusted taking into accounts any such capital assets, but when by express contract the parties themselves exclude from the manner and method of taking accounts certain property of the partnership then how that property is to be handled on dissolution is determined in no other manner by the manner provided in the contract between the parties. It is according to that manner that the learned trial Judge has directed that the property in question be deal with in view of the contract between the parties in clause 9 of the partnership deed. So that this argument does not carry the matter further to assist the case of the defendant

6. The learned counsel for the defendant has pointed out that the plaintiff may proceed to dispose of the business premises in question before the defendant can have recourse to any other remedy to have his claim, if any satisfied from this particular property, and in this respect the learned counsel for the plaintiff has given an undertaking that the plaintiff shall not alienate the good will and the business premises in question until after the final decree in the suit be board by this undertaking of his counsel.

7. The revision application fails and is dismissed but in the circumstances of the case the parties are left to their own costs.

