
(1960) 12 MP CK 0019
In the Madhya Pradesh High Court
Case No : L.P.A. No. 140 of 1958

Gowardhan Baxiram

APPELLANT

Vs

Bhawani Prasad Dinaram

RESPONDENT

Date of Decision : 14-12-1960

Acts Referred:

Partnership Act, 1932 — Section 16

Citation : (1961) MPLJ 649

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : J.V. Jakatdar, for the Appellant; A.D. Deoras, for the Respondent

Final Decision : Dismissed

Judgement

P.V. Dixit, C.J.

This Letters Patent appeal by the defendant (No. 1) from a decision of Tare J. arises out of a suit filed by the respondent Bhawaniprasad for recovery of Rs. 1,290 as damages from the appellant Gowardhan and two other persons Ratansingh and Uwarajsingh.

The plaintiff's case was that under an oral lease given by one Dwarkabai on 20th October 1949 he obtained the right to extract lac from the lakh palsadi standing on certain occupancy lands of Dwarkabai for a consideration of Rs. 500 for two crops of 1949-50; that the appellant entered into a partnership with him in this lease of lac extraction; that on 25th December 1949 he extracted some lac from the palsadi and this was shared by him and the appellant Gowardhan in the agreed proportion; that on 26th December 1949 when his labourers were bringing the extracted lac the defendants Ratansingh and Uwarajsingh forced the labourers to take the lac to their own bada; and that the appellant Gowardhan assisted the other two defendants in the wrongful removal of the lac. On these allegations the plaintiff claimed that he was entitled to recover as damages the value of his share of lac, after deducting the cost of collection. The plaintiff

valued his share of lac at Rs. 1,290 and accordingly claimed a decree for the amount.

The appellant Gowardhan (defendant No. 1) admitted that he was a partner of the plaintiff in the lac extraction business. He, however, denied the allegations about the forcible removal of lac and about his assisting in any way Ratansingh and Uwarajsingh in taking away the lac. He raised the objection that the plaintiff's suit as against him was not maintainable and the only course open to the plaintiff was to file a suit for accounts of the partnership business.

Ratansingh and Uwarajsingh pleaded that Dwarkabai had no right to give the lease, and that in the lakh palsadi leased out they had a right of extracting lac. The plaintiff's claim was decreed to the extent of Rs. 833-5-0 against the appellant Gowardhan and Uwarajsingh. Gowardhan alone then appealed to the District Judge, Chhindwara. The appeal was partly allowed and the plaintiff's claim was decreed to the extent of Rs. 716-10-0, the appellant being held liable only to the extent of Rs. 597. Gowardhan then preferred a second appeal in this Court, which was dismissed.

The only ground that was urged on behalf of the appellant before the learned single Judge and has been pressed before us is about the maintainability of the plaintiff's suit as against the appellant. While rejecting the contention of the appellant that the suit was not maintainable the learned single Judge recognized that no suit could be maintained by one partner against another except one for dissolution of partnership and accounts or for accounts of an already dissolved partnership. He, however, took the view that the appellant Gowardhan (defendant No. 1) had a dual capacity. He was a partner of the plaintiff in the lac extraction business and, according to the allegations of the plaintiff, a tort-feasor; that the plaintiff's suit as against the appellant was in his capacity as a tort-feasor and not as a partner; and that therefore the general rule about the maintainability of suits as between partners of a firm did not apply.

We do not find ourselves in agreement with this reasoning. The plaintiff's suit is one for damages for the loss of partnership goods. If the plaintiff had sued the appellant alone, then clearly the rule that ordinarily a partner can sue co-partners only with a view to dissolution and accounts would have applied and the suit would not have been maintainable. The rule that a partner can sue his co-partner only for dissolution of partnership and accounts or for accounts of an already dissolved partnership is no doubt not rigid or inflexible. The question whether a suit can be instituted by one partner against another without taking a general account of the partnership dealings and transactions depends on the circumstances of each case. If the suit involves the taking of general accounts of a partnership business the rule will apply, and the suit would not be maintainable. If, on the other hand, the cause of action of the suit is so distinct from the partnership accounts as not to involve their consideration, then the suit would be maintainable. If, as alleged by the plaintiff in the present suit, the extracted lac was partnership property, and the appellant helped the other

defendants in wrongfully taking it away, then the plaintiff would not recover the goods or the value thereof without afterwards being required to account for the goods to his co-partners. The suit as against the appellant cannot, therefore, be said to be one as raising a question independent of partnership accounts. It has been stated in *Lindley on Partnership*, 11th Edition, at page 671 that the question whether if one partner wrongfully sold the goods of the firm he could or could not be sued at law by his co-partners turns on whether their demand in respect of the wrongful sale could or could not be regarded as independent of any question of account. The same principle was applied in *Malakar v. Girish Chandra* 11CWN 311. In that case one partner sued a customer for recovery of price of jewellery sold and also made his co-partner a defendant praying that if the latter had received the money a decree might be passed against him. It was held by the Calcutta High Court that one partner could not sue another in this manner and that if the plaintiff-partner thought that his co-partner had not been treating him properly his proper remedy was to apply for dissolution of partnership and for accounts.

In holding that the suit was maintainable the learned District Judge as well as the learned single Judge was influenced mainly by the fact that the plaintiff's suit was for damages for tortious acts of Ratansingh and Uwarajsingh, which had been abetted by the appellant. Even if the appellant helped Ratansingh and Uwarajsingh in the removal of the extracted lac, that would not make the plaintiff's suit sustainable as against the appellant. The true position is that a suit for recovery of goods of the firm or for damages for their loss or injury has to be brought in the name of the firm or by all its members. If any partner declines to join in such a suit, he is then made a pro forma defendant. The plaintiff's suit is clearly not one on behalf of the partnership-firm, and the appellant was not made in it a pro forma defendant. If a partner retains any partnership property for himself contrary to the terms of partnership agreement, then he is bound u/s 16 of the Indian Partnership Act to account for it to the firm, and this accounting can be done only in a suit for accounts.

The learned single Judge placed reliance on *Hari Shankar v. Firm, Rai Bahadur Bansilal Abirchand* 1946 NLJ 215 : AIR 1946 Nag. 266 : ILR 1946 Nag. 301 and *Shriram Shaligram, Shop v. Laxmibai* 1950 NLJ 250 : AIR 1951 Nag. 143 : ILR 1950 Nag. 519 in support of his conclusion. These cases do not touch the point that arises in the present case. In *Hari Shankar's* case 1946 NLJ 215 : AIR 1946 Nag. 266 : ILR 1946 Nag. 301 it has been held that where a partner has a dual capacity, viz. that of a partner and that of a creditor there is nothing in law to prevent him as creditor from suing some of the partners for recovery of what is due from them without asking for the relief of dissolution of partnership. In the other Nagpur case, it was laid down that if an agreement between the partners created a right capable of enforcement independently and without resort to general accounts, then a suit for enforcement of such a right is not barred as the plaintiff-partner cannot be then described as one suing as a partner. Both these cases proceeded on the basis that the claim in the suit was isolated and

independent of the general partnership account. In Sarbupal Vs. Vishalchand, also it has been held that once a partner gives a promissory-note to another for advances or for a capital contribution binding himself to pay the amount on demand, then the demand in respect of which the note is given is isolated from the general partnership account and a suit on the basis of the promissory-note is maintainable without taking final accounts and whatever the state of accounts between the partners may be. In the absence of a specific contract between the partners, the relationship of creditor and debtor as between them does not come into existence until the concern is wound up or until there is a binding settlement of the accounts. Here, no accounting was done at all, and it is altogether erroneous to say that the appellant by taking away the extracted lac became a debtor to the firm for the value of the lac.

In our judgment, the plaintiff's suit as against the appellant for the recovery of his share of the value of the extracted lac and damages is not at all maintainable. The result is that the decision of the learned single Judge is set aside and the plaintiff's suit as against the appellant Gowardhan is dismissed with costs throughout.