

(1998) 04 DEL CK 0063
In the Delhi High Court
Case No : F.A.O. (OS) No. 93/96

Mohinder Nath and Others

APPELLANT

Vs

Sh. Narender Nath and Others

RESPONDENT

Date of Decision : 01-04-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (1998) 3 AD 1 : (1998) 72 DLT 785 : (1998) 45 DRJ 296 : (1998) 1 ILR Delhi 298 : (1998) RLR 333

Hon'ble Judges : Mahinder Narain, Acting C.J.; S.K. Mahajan, J

Bench : Division Bench

Advocate : Mr. V.P. Singh, Mr. K.K. Jain and Ms. Anju Bhattacharya, for the Appellant; Mr. S.K. Dholakia Mr. A.C. Gulati and Mr. M.K. Arora, for the Respondent

Judgement

S.K. Mahajan, J.—By the impugned order the learned Single Judge while prima-facie holding that the partnership firm M/s Kedar Nath Mohinder Nath was a partnership at will, has appointed an Advocate as the receiver of the firm. Not satisfied with the findings of the learned Single Judge appointing the receiver, the appellants have preferred this appeal.

2. Before the respective contentions of the parties are discussed a few facts which are relevant for deciding the present appeal may be stated as under:

3. The appellants and respondent no.1 are real brothers and were partners in the partnership firm Kedar Nath Mohinder Nath (in short referred to as the firm). Each one of the said parties had 15% share in the firm and the remaining 40% was held by their mother. The plaintiff/respondent no.1 filed the suit for dissolution of the firm and for rendition of accounts. The mother of the parties holding 40% share was not made party in the suit and on objection having been taken by the respondent that the suit was not maintainable, the plaintiff made an application before the learned Single Judge for impleading the mother as one of the defendants. However, before the application could be decided, the mother of

the parties expired. Though there is a dispute between the parties as to who will inherit the share of the mother in the firm, we do not want to go into the same as it is not relevant for deciding this appeal.

4. Learned Single Judge while deciding the application of the plaintiff under Order 40 Rule 1 held that the partnership was at will and the same stood dissolved from the date of service of notice of the suit on the defendants. The Court also held that the entitlement of the plaintiff to the 15% share in the firm was not disputed and the Court was, Therefore, satisfied that the plaintiff was entitled to the appointment of the receiver and consequently an Advocate was appointed the receiver to take charge of the business and all the assets of the firm.

5. It is contended by Mr.V.P.Singh, learned Senior Counsel for the appellants that the findings of the learned Single Judge holding that the partnership was at will, were contrary to the record. The second contention raised by Mr.V.P.Singh is that even assuming the partnership to be at will, it is not in every suit for dissolution of the firm that a receiver has to be appointed as a matter of course but the court had to give a finding that the circumstances warranted the appointment of the receiver and it was just convenient to appoint the same.

6. It is also contended by Mr.V.P.Singh that the plaintiff was even otherwise not entitled to the order appointing the receiver on account of delay and laches. He has also drawn our attention to the order of the Division Bench of this Court dated 2.11.1995 passed in FAO (OS) No.183 of 1993. The learned Single Judge in that case had on 31.7.1995 decided the application of the plaintiff for appointment of a receiver and had appointed an Advocate as the receiver. Against that order dated 31.7.1995 an appeal was preferred by the present appellants and the Division Bench of this Court by order dated 2.11.1995 in FAO (OS) No.183/93 remanded the case back to the Single Judge for going into the factual and legal aspects, prima-facie, arising in the interlocutory applications, and for deciding whether a prima-facie case had been made out for appointment of a receiver and also in case a receiver was to be appointed, whether one of the parties had to be appointed as receiver or whether an Advocate or Chartered Accountant could be appointed to run a going business. The order of the learned Single Judge, Therefore, appointing receiver was set aside and case was remitted back to him for disposal of the application for appointment of receiver in the light of the observations made in that order.

7. It is submitted on behalf of the appellants that while deciding the present application the order of the Division Bench has not been taken into consideration and the Court has not given any finding as to whether a prima-facie case had been made out for the appointment of the receiver and in case a receiver was to be appointed whether an Advocate or a Chartered Accountant could be appointed a receiver to run the running business. It is, Therefore, submitted that the impugned order is liable to be set aside on this short ground alone.

8. To appreciate the rival contentions of the parties this Court has to see as to

what was the agreement between them as contained in the partnership deed and whether it was a case of retirement of the plaintiff from the firm or the plaintiff could ask for dissolution of the firm even when other three partners want to continue the firm and pay to the plaintiff his share on his retirement from the firm in terms of the agreement and further even if it was a partnership at will and one of the partners had a right to have it dissolved whether in the facts and circumstances of the case, a receiver is required to be appointed.

9. The relevant clauses of partnership deed on which the parties are placing reliance are as under:-

"9. That in the event of the retirement of any one partner, the business shall not be dissolved and the continuing partners shall be entitled to carry on the business as before. The retiring partner, however, shall not be entitled to use or exploit the trade name and goodwill of the firm, which shall in such a case become the exclusive property of the continuing partners. The retiring partner shall, however, be paid his share in the value of the trade name and goodwill of the firm and in such an event, such value shall be deemed to be the average of the profits of the business for the two accounting years preceding the date of such retirement.

10. That the death of the partner shall not dissolve the partnership which shall continue between the remaining partners. The heirs of the deceased partner will have the option to join the partnership on the same terms and conditions under which such deceased was working in the partnership.

11. That if on the death of a partner the person or persons entitled to succeed does not or do not elect to become partner, he or they shall be entitled to have the accounts settled in the manner as given in clause no.9 above."

10. It is vehemently argued by Mr.V.P.Singh, Senior Counsel on behalf of the appellants that there was an express agreement between the partners that any one of them could retire from the firm and the firm shall not be dissolved on the retirement of such a partner and the remaining partners shall be entitled to carry on the business as before. It is submitted that to find the intention of the parties the whole deed has to be read and no clause should be read in isolation. According to him, the language used in the agreement clearly suggests that it was not a partnership at will but the partnership was to continue even if one of the partners decided to retire from the firm.

11. Mr.Dholakia, on the other hand, has contended that the only provision about retirement of a partner in the Partnership Act is Section 32 and a partner can retire only in three eventualities, namely; (i) with the consent of all the other partners; (ii) in accordance with an express agreement by the partners; and (iii) if the partnership is at will, by giving notice in writing to all the other partners of his intention to retire. It is submitted by him that the present case was not covered by any of the above three eventualities of Section 32 of the Partnership Act and once a partner decides to have the firm dissolved by filing a suit, he

cannot be compelled to retire from the firm and the court has no other option but to dissolve the firm in accordance with the provisions of the Partnership Act. For this he relies upon Vidya Devi Vs. Mani Ram etc., . It was held in the said case that the right to retire conferred on the partners by the deed of partnership was not in derogation of their right to dissolve the firm and if no duration of partnership was fixed in the partnership deed it will be partnership at will and any partner may put an end to the partnership at any time as provided in Section 43(1) of the Partnership Act. According to this judgment, the partner has both the rights. He may withdraw from the firm and let the remaining partners continue to carry on the business without dissolution. However, if he does not want to retire he may claim dissolution. It was held that in case the partnership was at will there is no escape from the firm being dissolved unless all the parties agree to the retirement of a partner.

12. It is, Therefore, submitted by Mr.Dholakia that in the present case the plaintiff has not agreed for retirement from the partnership and he had a right to have the firm dissolved. It is submitted that as the duration of the firm was not fixed u/s 7 of the Partnership Act, the partnership is at will and in such an eventuality the court has no option but to appoint a receiver.

13. In Suresh Kumar Sanghi Vs. Amrit Kumar Sanghi and others, , the court was concerned with the following terms of the partnership agreement :-

"13. In the event of the death or retirement of a partner his nominee or legal heir shall be admitted as a partner with the same rights and benefits as the deceased or retiring partner.

14. Death or retirement of partner shall not dissolve the partnership but shall be continued with respect to other partners and the nominees or legal heir of the deceased or retiring partner.

15. Any partner desirous of retiring from the partnership shall give six calendar months" notice of his intention to retire and on the expiry of the notice he shall be deemed to have ceased to be a partner.

16. That on the death or retirement of a partner he shall not be entitled to claim revaluation of the assets of the partnership but shall retire on the amount standing to his capital account credited at the foot of his account on the date of his death or retirement being paid immediately or if the amount of his capital is not returned to him immediately the same shall be repaid to him in such a manner and with such interest as may be mutually agreed upon."

14. It was held by this court in the above judgment that a conjoint reading of all these terms it was manifestly clear that the parties never intended that the partnership be dissolved at the sweet will of any of the partners, rather the intention was that business of the partnership should continue as long as possible, notwithstanding, death or retirement of any partner.

15. In Abbott Vs. Abbott, 1936 (3) All E R 823 the clauses which came up for

interpretation before the Chancery Division were as follows:-

"The partnership shall commence as from Oct.11, 1923. The death or retirement of any partner shall not terminate the partnership.

If any partner shall become physically or mentally unfit to carry out his duties in connection with the partnership or shall do or suffer any act which would be a ground for the dissolution of the partnership by the court then he shall be considered as having retired from the partnership and the other partners shall have the option of purchasing the share of such partner upon the like terms as are set out in the next clause hereof.

If any partner shall die or retire during the partnership the surviving or continuing partners shall have the option of purchasing the deceased or retiring partner's share in the partnership for the amount at which such share shall stand according to the last annual balance sheet.

All disputes which may arise between the partners or their personal representatives whether during or after the termination of the partnership touching the partnership affairs shall be referred to the partnership as a whole and the decision of the majority shall be final."

In *Abbott Vs. Abbott* (supra) one of the partners had filed a suit for declaration that the partnership between him and the other partners had been dissolved and an order was sought from the court for winding up of the partnership. The question for consideration before the court was whether the partnership was at will or a partnership which continues as regards the remaining partners on the retirement of one of the partners. The contention of the plaintiff in that case was that the partnership was at will and as he had given notice of dissolution of partnership, he was entitled to have the firm dissolved. Interpreting the terms of the partnership, the court held that the partners having agreed that the partnership shall continue notwithstanding that one partner goes out or dies, the partnership will continue so long as there were two partners.

16. The terms of partnership in the present case are almost similar to the terms discussed in *Suresh Kumar Sanghi Vs. Amrit Kumar Sanghi & Others* (supra) and *Abbott Versus Abbott* (supra). The partners in this case had specifically made a provision in the partnership deed that notwithstanding the death or retirement of any partner, the partnership shall continue and the firm shall not be dissolved. The outgoing partner was entitled to his share in the value of the trade name and good will of the firm. Prima facie, it appears to us that the intention of the parties by making these provisions in the partnership deed was clear that the partnership will not be dissolved at the sweet will of any of the partners, rather their intention was that the business of the partnership should continue notwithstanding the death or retirement of any one of the partners. The heirs of even the deceased partners have been given the right to join the partnership on the same terms and conditions on which the deceased was a partner in the firm and in case he does not opt to become a partner he is only entitled to have the

accounts settled in accordance with the terms of the partnership but did not have a right to have the firm dissolved. In our view, all these stipulations in the partnership deed prima-facie militate against the concept of "partnership at will".

17. Even assuming that it was a partnership at will and the plaintiff had a right to have it dissolved by filing the suit, we are of the view that no case has been made out for appointment of a receiver. The plaintiff in paragraphs 3,5,8 and 12 of the plaint has stated that the relationship between the partners soured in or about 1985 and that in 1988 the plaintiff was compelled to stop operations and payment from the partnership account. Reference to certain letters stated to have been written by the plaintiff has also been made in the plaint. It is, Therefore, clear that it was the case of the plaintiff himself in the plaint that from 1985 he has almost been ousted from the firm and no Explanation has been given as to why the plaintiff remained silent from 1985 till the filing of the suit in 1993. The firm has been carrying on business although without any objection from any party. Almost eight years after the plaintiff had allegedly been ousted from the firm, an application for appointment of a receiver has been made. The present suit has been filed after the plaintiff had been dispossessed of the house in Golf Links in proceedings pending between the parties in respect of the company Kidarsons Industries Private Limited. Suit, prima-facie, appears to have been filed as a counter blast to the decision in the case relating to Kidarsons Industries Private Limited.

18. In Ganesh Chandra Mukherji Vs. Gopal Chandra Hazra, it was held that where a partner waited for about three years after he had given notice of dissolution of the firm and allowed the other partners to carry on the partnership business by constitution of a new firm, the prayer for appointment of a receiver was liable to be rejected on the ground of delay and laches.

In T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, , it was held that the appointment of a receiver is recognised as one of the harshest remedies which the law provided for the enforcement of right and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty has to be discharged by the court with utmost caution and only when the requirements embodied in the words "just and convenient" in Order 40 Rule 1 are fulfilled by the facts of the case under consideration. Some of these requirements are:-

"1. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

2. Not only must the plaintiff show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration.

3. An order appointing a receiver will not be made where it has the effect of

depriving a defendant of a "de facto" possession since that might cause irreparable wrong. It would be different where the property is shown to be "in medio", that is to say, in the enjoyment of no one. And

4. The Court, on the application made for the appointment of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame.

19. We are not in agreement with Mr.Dholakia that in every case where a partner approaches the court for dissolution of partnership which is stated to be at will a receiver is to be appointed as a matter of course. In our view, a receiver is to be appointed only in cases where it is just and convenient to appoint the same. No positive or unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. It depends on the facts and circumstances of each case. In all these cases, it is necessary to allege and prove some peril to the property and the appointment then rests on the sound discretion of the court. If the court is satisfied upon the material it has before it that the party who makes the application has established a good prima facie title, and that the property the subject matter of the proceedings will be in danger if left until the trial in the possession or under the control of the party against whom the receiver is asked for or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver is delayed, the appointment of a receiver is almost a matter of course.

20. We find that the plaintiff in the present case has not placed any material on record to justify the apprehension that the property is in the danger of being wasted or that there is some peril to property. Merely, by repeating the words of statute, in our view, will not justify the appointment of a receiver. All that has been stated in the application is that the "defendants will either alter or do away with books, records pertaining to the partnership and will continue to realise money from the constituent of the firm and misappropriate the same. They may also fail to realise money from the constituent that way on friendly terms with defendant so as to allow such items to become time barred". It is for this reason that the plaintiff wants the assets and liabilities of the firm to be administered and discharged under the supervision of an independent person during the pendency of the suit. In our view, the reasons given in the application are hardly sufficient to enable the Court to exercise its discretion in favor of the plaintiff. The court at the time of considering the application for appointment of receiver, besides looking at the material placed before it, has also to look to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. The plaintiff in this case, as already stated, has waited for almost eight years to come to the court after he had been allegedly ousted from the management of the firm. This, in our view, itself is sufficient to refuse the relief of the appointment of receiver to the plaintiff. The fact that the plaintiff has waited for almost eight years clearly show that there is

no emergency or danger or loss demanding immediate action.

21. We also find from the impugned order that there is no discussion whatsoever in it about the plaintiff having a prima-facie case or an apprehension of the plaintiff about the dissipation of the property of the firm by the defendants. Inspire of a specific direction having been given by the Division Bench in its order dated 2nd November, 1995 the learned Single Judge has not given any findings either about the plaintiff having a prima-facie case for appointment of the receiver or in case a receiver is to be appointed whether any partner could be appointed as receiver. These were the two specific directions which had been given by the Division Bench in its order dated 2.11.1995. However, the same appear to have not been taken note of by the learned Single Judge.

22. Having observed that the partnership prima-facie does not appear to be a partnership at will and the firm could not be dissolved after the plaintiff had decided to go out of the partnership, we are faced with the question as to how the interest of the plaintiff has to be protected.

23. The court is placed in a position of very great difficulty in cases where the partnership is continuing, and may continue. If the application for appointment of receiver is allowed, it will put an end to the partnership, which in this case three of the other partners claim a right to have continued. However, if the application is dismissed, it may leave the defendants at liberty to go on with the partnership business at the risk, and probably to the great loss and prejudice of the plaintiff. The court is, Therefore, to select a course so as to protect the interest of both the parties. As we have already noticed above, the plaintiff in this case has kept quiet for almost eight years after he had allegedly been ousted from the firm and the defendants continued to carry on the partnership business without any interference, we at this stage will not like this business to come to an end by appointing a receiver of the same.

24. The plaintiff in this case has only 15% interest in the partnership and even assuming that he can inherit any share from the share of his mother, his share in the firm will not be more than 25%. The other three partners, Therefore, holding not less than 75% share are opposed to the appointment of a receiver. Moreover, the defendants/appellants have also agreed to give an undertaking to indemnify the plaintiff from any liability as partner of the firm with effect from the date of the filing of the suit and have also undertaken not to alienate any part of the Immovable property of the firm till further orders. Not only that the defendants/appellants have agreed to give an undertaking in the above terms and have also agreed to indemnify the plaintiff from any liability as partner of the firm, the appellants are also filing monthly statements of accounts in this court in terms of the orders of the Division Bench dated 3.8.1995. We, Therefore, feel that the interest of the plaintiff will be sufficiently secured and there is no apprehension of the property of the firm being dissipated by the continuing partners. We are, Therefore, of the firm view that it is not a case where a receiver can be appointed to run a going business.

For the foregoing reasons, the order of the learned Single Judge dated 27th February, 1996 is set aside and this appeal is allowed. However, the appellants will file an undertaking within four weeks from the date of this order undertaking not to alienate any part of the Immovable properties of the firm till the matter is finally decided between the parties. The appellants will also indemnify the respondents from any liability as a partner of the firm with effect from the date of the filing of the suit. The appellants shall also continue to file statements of accounts in terms of the order dated 3.8.1995 till the decision of the suit.

25. Any observation made in this order shall not have any bearing on the merits of the suit. In the circumstances of the case, we leave the parties to bear their own costs.