

(2000) 03 AHC CK 0117
In the Allahabad High Court
Case No : C.M.W.P. No. 13998 of 1998

Nigam Das and others

APPELLANT

Vs

Additional District Judge, I, Jaunpur and others

RESPONDENT

Date of Decision : 16-03-2000

Acts Referred:

Civil Procedure Code Amendment Act, 1978 — Section 115
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 115
Constitution of India, 1950 — Article 226, 227
Partnership Act, 1932 — Section 43, 46, 47, 48
Specific Relief Act, 1963 — Section 36, 37, 38, 39, 40
Civil Procedure Code Amendment Act, 1978 — Section 115
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 115
Constitution of India, 1950 — Article 226, 227
Partnership Act, 1932 — Section 43, 46, 47, 48
Specific Relief Act, 1963 — Section 36, 37, 38, 39, 40
Civil Procedure Code Amendment Act, 1978 — Section 115
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 115
Constitution of India, 1950 — Article 226, 227
Partnership Act, 1932 — Section 43, 46, 47, 48
Specific Relief Act, 1963 — Section 36, 37, 38, 39, 40

Citation : (2000) 2 AWC 1675

Hon'ble Judges : J.C. Gupta, J

Bench : Single Bench

Advocate : Umesh Vats and B.P. Singh, for the Appellant; D.P. Singh, R. G. Padia, P. Padia and S.C., for the Respondent

Final Decision : Allowed

Judgement

J.C. Gupta, J.—This is defendants petition for quashing the order dated 31.3.1998 passed by respondent No. 1 in Misc. Civil Appeal No. 47 of 1996 whereby the respondent No. 1 has allowed the appeal after setting aside the order dated 16.1.1996 passed by the trial court rejecting plaintiffs application for

ad-interim injunction. The lower appellate court has restrained the petitioners from causing any interference in plaintiffs carrying on the business of the firm M/s. Baiju Sav Nigam Das and M/s. Shanti Sahu and others in the disputed shop till the disposal of suit and has also directed them to open the lock of the shop.

2. Respondent Nos. 2 and 3 filed Suit No. 310 of 1994 against the petitioners for permanent injunction restraining the defendants from causing interference in plaintiffs right of carrying on their business in the shop in question and not to lock the same. The case of the plaintiff in short was that the shop in question was the ancestral property of the parties : that respondent No. 2 Anirudh Kumar and petitioner No. 1 Nigam Das by their mutual agreement and for the purposes of income tax and sales tax "incorporated a partnership firm for carrying on the business of manufacturing and selling silver ornaments in the name of M/s. Baiju Sav Nigam Das. Plaintiffs Anirudh Kumar and Anil Kumar, respondent Nos. 2 and 3 with petitioner No. 3 Vinod Kumar were carrying on business of money lending in the name of M/s. Shanti Sahu and sons whose karta was Anirudh Kumar, respondent No. 2. Both the firms were also registered in income Tax and Sales Tax Departments. The plaintiff alleged that defendant No. 1 Nigam Das under the influence of petitioner Nos. 2 and 3 wanted to close down the said partnership business in an illegal manner for which he has no right and with that end in view he was threatening to put his lock over the shop in question.

3. The defendants filed written statement and their case was that in a family settlement, the disputed shop and the house fell into the exclusive share of defendant No. 1 and he is the exclusive owner and in possession thereof and a memorandum of partition was also reduced into writing on 10.1.1983. Both the businesses of money lending and silver ornaments were being carried on by defendant No. 1 who on account of his old age got the name of plaintiff No. 1 entered into a partnership firm and was paid Ra. 500 per month for looking after the business. The said partnership firm was at will terminable at any time at the instance of defendant No. 1. Since plaintiff No. 1 was not performing his duties well and had started misappropriating the income, it became impossible for defendant No. 1 to carry on partnership business, hence he decided to dissolve the partnership firm and accordingly, he dissolved the same by giving notice dated 1.9.1994 which was duly served upon the said defendant. After the dissolution of partnership, the plaintiff had no right or title to carry on business or to make use of the shop in question.

4. The trial court while rejecting the plaintiffs application for ad- interim injunction came to the finding that partnership was at will which could be terminated by any partner by giving at least one month's notice to other partners. It also came to the conclusion that in the present case defendant No. 1 communicated his intention to dissolve the partnership firm and had also communicated the same to the Sales Tax Office and Income Tax Office. The notice was given to the plaintiff on 1.9.1994 stating that the partnership firm would stand dissolved after 45 days. Before the said period could expire, the

plaintiff filed the present suit on 12.9.1994 and since the period of 45 days expired during the pendency of suit the partnership firm stood dissolved and the plaintiffs were left with no right to carry on partnership business in the shop in question. In short the trial court concluded that once the partnership firm stood dissolved, no partner could be compelled to continue the partnership business and accordingly, no such interim injunction could be granted in favour of the plaintiffs permitting them to carry on partnership business in the shop in question. The trial court also recorded a finding that after the partition the shop in question became exclusive property of Nigam Das defendant. The trial court with the findings that the plaintiffs have no prima facie case and the balance of convenience was also in favour of the defendant, refused to grant any interim injunction as was asked for by the plaintiffs.

5. Against the order of the trial court, the defendant filed appeal before the District Judge which after transfer has been allowed by the 1st. Addl. District Judge, Jaunpur, by the impugned order dated 31.3.1998.

6. Learned counsel for the parties have been heard at length.

7. Sri Umesh Vatsa, learned counsel for the petitioner contended before this Court that the lower appellate court has travelled beyond its jurisdiction by setting aside the order of the trial court and has committed a manifest error of law in ignoring the fact that the partnership was at will, and the same was dissolved by the defendant by serving notices dated 1.9.1994 and 16.10.1994 upon the plaintiff and thereafter the respondents had no right to carry on business of the partnership firm nor they are entitled to make use of the shop in question which has fallen in the exclusive share of the defendant-petitioner. At best they could lay a claim for accounting. It has also been submitted that the finding of the lower appellate court that the notice dated 1.9.1994 is not proved to have been served upon the respondent as the seal affixed on the postal receipt is not decipherable, is perverse. It was further submitted that the lower appellate court has committed an apparent error in holding that notice dated 16.10.1994 was not sufficient to dissolve the firm as it has been given by the petitioner through lawyer only. On the other hand Dr. R.G. Padla, learned counsel for the respondents contended that the writ petition is not maintainable in view of the Full Bench judgment of this Court in the case of Ganga Saran v. Civil Judge, Hapur, Ghaziabad. 1991 AWC 213, which was followed in several other decisions of this Court. He further tried to support the Judgment of the lower appellate court by urging that the order impugned is concluded by findings of fact, hence this Court should not interfere in exercise of its writ jurisdiction.

8. Before a Full Bench of this Court in the case of M/s. Jupitar Chit Fund (Pvt.) Ltd. v. Dwarika Dheesh Daya. 1979 ALJ 685, the question that arose for consideration was whether u/s 115. C.P.C. as amended by U. P. Amendment Act No. XXX of 1978, a revision would lie against the order passed in appeal or revision by the District Judge and the Full Bench answered the said question in negative and held that only original orders passed in suits having valuation of

more than Rs. 25,000 (as then the limit of pecuniary jurisdiction was) are amenable to revision before High Court, but no order passed by a District Court in exercise of appellate or revisional Jurisdiction can be questioned u/s 115, C.P.C. as amended in State of U. P.

9. This Full Bench decision was affirmed by the Supreme Court in the cases of Sundari and Others Vs. Laxmi and Others, and Vishnu Autar v. Shin Autar AIR 1980 SC 1575.

10. However. In the case of Qamaruddin v. Rasul Baksh 1990 AWC 308, the Supreme Court set aside the order of the High Court and disposed of the appeal holding that against an order made under Order XXXIX. Rules I and 2, appeal lies under Order XLIII, Rule 1 to the District Judge and the order of the District Judge on such appeal is amenable to revisional jurisdiction of the High Court u/s 115, C.P.C. in that view of the matter, the Supreme Court expressed its surprise as to how the High Court could have entertained a writ petition under Article 226 of the Constitution for issuance of writ of certiorari and mandamus against such an appellate order of the District Judge. This Judgment led a single Judge of this Court to refer the matter to a larger Bench as in the opinion of the learned Judge, the State amendment made in Section 115, C.P.C. was perhaps not noticed in Qamaruddin's case (supra). The matter was then referred to the Full Bench in the case of Ganga Saran (supra) and the Full Bench framed two questions for consideration :

1. Whether the judgment of the Supreme Court in Qamaruddin's case has the effect of overruling the Full Bench decision of this Court in the case of Jupitar (supra) as affirmed by the judgment of the Supreme Court in the cases of Visheshawar Kumar (supra) and Vishnu Autar (supra)?

2. Whether a writ lies against the civil court decision? in short, whether an appellate order passed by the District Court or an order passed by it in exercise of its revisional power conferred upon it by Section 115. C.P.C. as amended by U. P. Amendment Act. 1978 is amenable to writ jurisdiction of this Court?

11. With respect to the first question, the Full Bench held that the decision of the Supreme Court in the case of Qamaruddin (supra) to the extent it holds that revision against a revisional order or appellate order passed by the District Court is amenable u/s 115. C.P.C. (as amended by U. P. Act No. 31 of 1978) to the High Court does not state the law accurately or overrule the decision of the Full Bench of this Court in the case of Jupitar (supra), particularly when the same has specifically been approved by the two earlier decisions of the Supreme Court.

12. Regarding second question, the answer of the Full Bench was that in a situation where revision is barred against the appellate or revisional order passed by the District Court and the said order suffers from patent error of law and further causes manifest injustice to the party aggrieved. It cannot be said that such an order will also be not amenable to extraordinary Jurisdiction of the High Court under Article 226 of the Constitution. It was observed "In our opinion,

although every interlocutory order passed in a civil suit is not subject to review under Article 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further such an order causes substantial injustice to the party "aggrieved, the view taken by the Supreme Court in Qamuruddin's case will not preclude such a writ being issued by the High Court under Article 226 of the Constitution. But only such writ petition under Article 226 or 227 of the Constitution would be maintainable where writ can be issued within the ambit of well established and recognised principles laid by the Supreme Court as well as by the various High Courts in that regard".

13. Thus, as per the holding of the aforesaid Full Bench decision and in view of the amended Section 115. C.P.C., there can be no doubt that in the present case, no revision could be brought before this Court against the order passed by the Addl. District Judge in appeal which was preferred against the order of the trial court refusing to grant ad-interim injunction. Therefore, the petitioner could seek the jurisdiction of this Court under Article 226/227 of the Constitution of India. However, the powers of this Court in such writ petitions are very limited, limited in the sense that it can interfere only if it comes to the conclusion that fundamental principle of law has been violated by the lower appellate court and the impugned order has caused substantial injustice to the petitioner and the Court may then pass a suitable order within the ambit of well established and recognized principles of law laid down by the Supreme Court for issuing writ of mandamus or certiorari. Therefore, the argument of the learned counsel for the respondents that no writ petition is maintainable against the impugned order must be rejected. Of course this Court while exercising writ jurisdiction in such matters has limited powers. It is well-settled that a writ of certiorari can be issued for correcting the errors of jurisdiction committed by the Inferior Courts or Tribunals. Such a writ can, similarly, be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly or where the procedure adopted in dealing with the dispute is against the well established principles of law. While exercising such a power, the Court has only a supervisory jurisdiction and is not entitled to act as an appellate court. Where the findings arrived at by the subordinate courts suffer from manifest error of law, this Court has power to interfere.

14. It has now to be seen whether the present case is one of those cases which may call for interference by this Court in its writ Jurisdiction?

15. It has been pointed out by the learned counsel for the petitioners that the trial court refused to grant temporary injunction in favour of respondent Nos. 1 and 2 after recording positive findings that partnership between the parties was at will and was liable to be dissolved on any partner giving at least one month's notice for the same to the other partner which in the present case stood dissolved after the expiry of 45 days from 1.9.1994, it also came to the conclusion that from the evidence on record, it was prima facie established that a

memorandum of family settlement was reduced into writing on 10.1.1983 and thereafter Nigam Das became exclusive owner of the shop in question, and since the partnership firm has been dissolved, no injunction could be granted directing any partner to carry on the business of partnership. On appeal filed by the plaintiff against the order of the trial court refusing to grant temporary injunction, the lower appellate court came to the conclusion that service of notice dated 1.9.1994 on defendant No. 1 was not proved and with regard to the notice dated 10.10.1994 which was sent by the lawyer of the defendant No. 1, the appellate court observed that from this notice also it could not be inferred that the partnership has been dissolved as this notice was in continuation of previous notice dated 1.9.1994 whose service has not been established. With these findings, the lower appellate court has restrained the petitioner from causing any interference in the business of the partnership firm and has permitted the plaintiff to carry on the partnership business in the shop in question as a partner of the firm and further directed that the partners shall share the loss and profit of the firm's business.

16. The term injunction is defined in Jemmy's Equity Jurisprudence as follows :

"An injunction is a writ framed according to the circumstances of the case commanding an act which the Court regards as essential to Justice or restraining an act which is esteemed contrary to the equity and good conscience".

In India, the law governing grant of injunction is codified in Order XXXIX, Rules 1 and 2 of the CPC and Sections 36 to 42 of the Specific Relief Act.

17. The law with regard to grant of temporary injunction is well-settled. Grant-of injunction is a discretionary relief, exercise thereof is subject to the following tests :

(1) that there is a serious disputed question to be tried in the suit and that on the facts before the Court, there is a probability of being entitled to the relief asked for by the party ;

(2) that the Court's interference is necessary to protect the party from the species of injuries. In other words, an irreparable injury or damage would ensue before the legal right is established at the trial ; and

(3) that the comparative hardship or mischief or inconvenience which is likely to occur for withholding the injunction will be greater than that would be likely to arise from granting it.

18. In the present case after examination of record, this Court finds that the lower appellate court has acted beyond its jurisdiction in granting the mi-interim injunction in favour of the plaintiff respondents against the aforesaid well established principles of granting temporary injunction.

19. As per the finding recorded by the trial court, the shop in question is exclusive property of petitioner No. 1 which finding has not been specifically

upset by the lower appellate court. A partnership business was of course being carried on in the aforesaid shop by the parties to the suit. It is also not disputed that the partnership was at will and as per the terms of the partnership deed, the firm could be dissolved by any of the partner by giving at least one month's notice of dissolution of partnership firm to the other partner of the firm. As per the Case of the defendant petitioner, it had become impossible to carry on partnership business as plaintiff had started misappropriating money and, therefore, he decided to put an end to the partnership business and accordingly, he gave a notice to the plaintiff on 1.9.1994 which was served on him wherein he had clearly stated that the partnership firm would stand dissolved after expiry of the notice period of 45 days.

20. The manner of dissolution of partnership at will is prescribed in Section 43 of the Partnership Act which provides that such a partnership may be dissolved by any partner by serving a notice in writing to all the other partners of his intention to dissolve the firm and the partnership will stand dissolved as from the date mentioned in the notice or where no such date is disclosed in the notice, then from the date of the communication of the notice. The notice must be in writing and must -show an unequivocal intention to dissolve the firm and the intention must be final.

21. Section 46 of the Partnership Act provides that on the dissolution of a firm, every partner or his representative is entitled, as against all other partners or their representatives to have the property of the firm applied in the payment of debt and liabilities of the firm and to have the surplus distributed amongst the partners or among their representatives according to their rights.

22. Section 47 makes a provision that after the dissolution of a firm, the authority of each partner to bind the firm, and the other mutual rights and obligation of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete the transactions begun but unfinished at the time of dissolution, but not otherwise. It is thus clear that after, the dissolution the partnership comes to an end but continues merely for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners, and not for any other purpose.

23. Section 48 of the Partnership Act provides the mode of settlement of accounts between the partners after the dissolution of the firm.

24. It is thus clear from the various provisions of the Partnership Act that after the dissolution of partnership firm which was at will, no partner can compel other partners to carry on the partnership business or in other words he cannot claim as of right that he is entitled to carry on partnership business for and on behalf of other partners. In the present case, as per the findings of the Courts below, the partnership was at will liable to be dissolved by any partner after giving at least one month's notice of dissolution to the other partner. There is prima facie

evidence that defendant No. 1, the petitioner, had sent the notice to plaintiff respondent on 1.9.1994 by which he had indicated his final intention to dissolve the firm on the expiry of 45 days. This very fact was reiterated by him in his subsequent notice dated 16.10.1994 sent through his counsel. The notice dated 1.9.1994 and 16.10.1994 have been misread by the lower appellate court. The mere fact that before the period mentioned in the notice could expire, the plaintiff filed the present suit would not have the effect of nullifying the provisions of Section 43 of the Partnership Act and it cannot be said that since suit for injunction has been filed before the expiry of the notice period, the partnership would be deemed to continue as only a firm and final intention to dissolve the partnership firm was essential for a valid notice. The partnership firm had come to an end with the expiry of the notice period irrespective of the fact if in the meantime the other partner had filed suit for injunction. The intention to dissolve the partnership firm was again reiterated by the defendant in the subsequent notice dated 16.10.1994 served on the plaintiff through the counsel of the defendant and since that period had also admittedly expired during the pendency of suit, the lower appellate court" exceeded its jurisdiction in compelling the parties to continue with the partnership business. In this view of the matter, when the defendant had specifically pleaded in the written statement that the partnership firm has been dissolved with effect from 1.9.1994 by serving a notice in writing, and the said notice as well as the subsequent notice had been served upon the other partner (the plaintiff), by virtue of provisions of Section 43 of the Partnership Act the partnership in question came to an end by dissolution on the expiry of notice period. At any rate the partnership would be deemed to have been dissolved from the date the copy of the written statement was served upon the plaintiff, if not earlier. In this regard a reference may be made to the Supreme Court decision in the case of Banarsi Das Vs. Seth Kanshi Ram and Others, , in the circumstances appearing in the case the Court had no power to permit any partner much less the plaintiff to carry on the partnership business in the shop in question which has been found prima facie to be the exclusive property of petitioner No. 1 and the lower appellate court exceeded its jurisdiction in granting ad-interim injunction thereby compelling the parties to continue with the partnership business. At best, the plaintiff could ask to have accounts to ascertain his share by filing a suit for accounting. The right to call for an account is mutual and every partner can claim account from the other partner or partners unless he has legally waived and parted with such a right but no Court or authority can compel the partners to carry on the partnership business despite dissolution of the firm under the provisions of Section 43 of the Partnership Act, in this view of the matter, the lower appellate court committed a manifest error of law and jurisdiction in granting the impugned temporary injunction.

25. For the reasons stated above, this writ petition is allowed and the order of the lower appellate court dated 31.3.1998 is set aside and that of the trial court dated 16.1.1996 is restored, in the circumstances of the case parties are directed

to bear their own costs.