

(2008) 04 CAL CK 0088

In the Calcutta High Court

Case No : C.O. No. 975 of 2007 and CAN 9788 of 2007

Sri Gaur Karuna Dey and Others

APPELLANT

Vs

Sri Nemai Dey and Others

RESPONDENT

Date of Decision : 09-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 227
Partnership Act, 1932 — Section 32, 32(1), 32(2), 32(3), 32(4)

Citation : (2008) 2 CALLT 537 : (2008) 3 CHN 590 : (2008) 2 CLT 537 : (2008) 2 ILR (Cal) 724

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : P.B. Sahoo and Sudhakar Biswas, for the Appellant; S.P. Roy Chowdhury and Krishanu Banik, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—This Revisional application under Article 227 of the Constitution of India is directed against an order dated 28th February, 2007 passed by the learned Additional District Judge, 1st Fast Track Court, Paschim Midnapur in Misc. Appeal No. 89 of 2006 reversing the order being No. 11 dated 27th July, 2006 passed by the learned Civil Judge, Senior Division, 3rd Court, Paschim Mindnapur in Title Suit No. 76 of 2005.

2. The defendants in a suit for declaration and injunction filed by the plaintiffs/opposite parties, are the petitioners before this Court.

3. Let me now consider as to how far the learned Appeal Court was justified in reversing the order passed by the learned Trial Judge on the plaintiffs' application for temporary injunction in the facts of the instant case.

4. The plaintiffs/opposite parties filed the said suit inter alia praying for declaration that the plaintiffs have lawful title over the assets and properties of M/s. Bankim Cold Storage and for injunction for restraining the defendants from transferring and/or encumbering the properties and assets of M/s. Bankim Cold

Storage without settlement of accounts and distribution of assets thereof in favour of the plaintiffs.

5. Admittedly, the plaintiffs and the defendants were all partners of the partnership firm which is still being carried under the name and style of Bankim Cold Storage. The said cold storage was constructed on a very small portion of the entire land lying at plot Nos. 1525, 1523 and 1537. Rest portion of the land in said plots, is lying fallow. The said cold storage business was started by availing loan accommodation from various banks, financial institutions apart from investment of a considerable amount from the fund/asset of Bankim Chandra Dey, the predecessor-in-interest of the parties to the suit. Since from the very beginning the plaintiffs were not allowed to participate in the management of the said business bitterness had grown up amongst the said two groups and ultimately the plaintiffs had to execute some documents on 31st December, 1994 as per the instruction and direction of the defendants without getting any opportunity to go through the contents thereof. Since the defendants assured that they will furnish detail accounts regarding valuation of the assets as well as liabilities of the cold storage, the plaintiffs believed them and waited till 1995 but when the plaintiffs found that the defendants failed to honour their assurance and were trying to dispose of the said cold storage with all its plants, machineries as well as entire landed properties belonging to the parties to the suit by wrongly claiming such properties to be their absolute properties, the plaintiffs sent a legal notice dated 15th November, 2005 requesting the defendants to assess the market value of the assets and other properties of the cold storage and to distribute their share, accordingly. The defendants, however, did not pay any heed to the said request and as such the instant suit was filed by the plaintiffs for the above reliefs.

6. Immediately after filing the said suit the plaintiffs/opposite parties filed an application under Order 39 Rule 1 and 2 of the CPC inter alia praying for an order of temporary injunction for restraining the defendants from transferring and/or encumbering the properties and assets of M/s Bankim Cold Storage in any manner with others till the disposal of the suit.

7. The defendants/petitioners contested the plaintiffs' said application for temporary injunction by contending inter alia that when the entire loan which were taken from the bank and other financial institutions for establishing and/or running the said cold storage were fully paid up, the plaintiffs decided to install a separate cold storage of their own and for implementing their said desire they received the value of their shares in the said partnership business and retired from the said partnership business by giving up their right, title, interest and possession in respect of movable and immovable properties of the said partnership business along with its goodwill in favour of the other partners namely the defendants/petitioners herein. A deed of retirement was accordingly executed on 31st December, 1994 wherein it was declared that the plaintiffs would retire by mutual consent on and from 1st day of May, 1995 and the said

business will be carried on by the defendants exclusively under the name and style of Bankim Cold Storage. The defendants further alleged that the plaintiffs have accepted the value of their share in the partnership business after proper accounting which was also confirmed by them. The defendants, thus, claimed that the plaintiffs cannot claim any interest either in the said partnership business or in the assets and/or movable or immovable properties of the firm, after their retirement from the said partnership business. The defendants, thus, prayed for dismissal of the plaintiffs' said application for temporary injunction.

8. The learned Trial Judge rejected the plaintiffs' said application for temporary injunction by holding inter alia that the plaintiffs have failed to make out a prima facie case to go for trial. Since the execution of the deed of retirement has not been disputed by the plaintiff and further since no declaration has been sought for avoiding the said deed of retirement in the plaint, the learned Trial Judge held that the plaintiffs are presently no more partners of the said partnership business. The learned Trial Judge further held that since admittedly the plaintiffs are out of possession and also out of management of the suit property, the injunction as prayed for cannot be granted particularly when the plaintiffs are not interested to maintain and/or claim their status as partner of the firm. The learned Trial Judge further held that the long unexplained delay in filing the suit in 2005 though the cause of action of the suit arose in 1995 also stands in the way of granting any relief by way of temporary injunction inasmuch as the plaintiffs admittedly are out of possession of the suit property and have also lost control over the affairs of the said partnership business since 1995. Considering the balance of convenience and inconvenience of the parties, the learned Trial Judge thus rejected the plaintiffs' application for temporary injunction.

9. Being aggrieved by and dissatisfied with the said judgment and order of the learned Trial Judge, the plaintiffs/opposite parties preferred an appeal being Misc. Appeal No. 89 of 2006 before the learned Appeal Court. The learned Appeal Court, however, allowed the said appeal on contest by modifying the judgment and order of the learned Trial Judge by appointing receivers over the said partnership business for its proper management. Two learned Lawyers of the local Bar were appointed as receivers over the said business who were directed to take charge of the firm on and from 1st March, 2007. The receivers were directed to maintain proper account and bank accounts etc. in the presence of the all the partners so that inconvenience is not caused to any of the parties. The receivers were directed to visit once in a week preferably on Sunday or on any holiday without hampering their profession and submit a report within three months about the accounting, the profit and loss, in the Trial Court after giving copies to both the sides. The remuneration of the Receivers was also fixed by the learned Appeal Court in the said order.

10. While disposing of the said appeal the learned Appeal Court held that the retirement of the plaintiffs from the partnership business was neither effected as per the provision contained in the partnership agreement nor was effected in

terms of the provision contained in Section 32 of the Indian Partnership Act as public notice regarding such retirement was not given. The learned Appeal Court held that when admittedly the cold storage business was started after taking loan from the bank and other financial institutions, public notice should have been issued notifying such retirement of the plaintiffs for making such retirement valid and effective. Thus, the learned Appeal Court held that there was no valid retirement of the plaintiffs from the said partnership business. The learned Appeal Court further held that when both the parties admittedly inherited the immovable property from their common ancestor namely Bankim Chandra Dey, the plaintiffs are also co-sharers of the suit property and as such the defendants cannot dispose of the suit property and the assets of the said business by treating the said business and the assets thereof and/or the movable and immovable properties thereof as their exclusive property.

11. The learned Appeal Court, thus, found that the plaintiffs have share in the partnership business and as such the defendants cannot be allowed to misappropriate the income received out of the business.

12. Holding as such the learned Appeal Court thought it fit to appoint receiver over the said business for proper management and running of the said business under the receivers. Accordingly the impugned order was passed by appointing receiver over the said business in the manner as aforesaid.

13. The propriety of such an order is under challenged in the Revisional application at the instance of the defendants/petitioners.

14. Mr. Sahoo, learned Advocate appearing for the petitioners, submitted by drawing my attention to the plaint as well as the injunction application that the plaintiffs never disputed their retirement from the said partnership business.

15. Drawing my attention to the legal notice given by the plaintiffs on 15th November, 2005, Mr. Sahoo submitted that retirement from the business was admitted by the plaintiffs in the said notice. By the said notice the defendants were requested to assess the value of the shares of the plaintiffs as per the market rate of the suit properties and the other assets of the said business and for payment of the plaintiffs' share accordingly. Mr. Sahoo, thus, submitted that though retirement of the plaintiffs from the said business was never disputed by the plaintiffs in the pleadings but unfortunately the learned Appeal Court misunderstood the pleadings of the plaintiffs and proceeded to dispose of the said appeal under a wrong impression that as if the plaintiffs are still partners of the said business.

16. By drawing my attention to the various clauses of the deed of retirement Mr. Sahoo pointed out that not only retirement of the plaintiffs from the said business is proved but also transfer of the plaintiffs' interest in the said business as well as in the assets and all movable and immovable properties of the firm, in favour of the defendants/petitioners herein is admitted by the plaintiffs in the said deed of retirement. It was further submitted by Mr. Sahoo that from the

date of such retirement, the defendants became entitled to carry on the said business in the name and style of Bankim Cold Storage after reconstituting the firm with the defendants as partners thereof. The said deed also provides that all the liability of the retiring partner both before such retirement and after such retirement will be borne by the partners of the reconstituted firm likewise all the assets and outgoings of the partnership business as on 31st December, 1994 will pass on to the partners of the reconstituted firm namely the defendants/petitioners herein.

17. By drawing my attention to the receipts granted by the retiring partners, Mr. Sahoo submitted that the retiring partners even accepted the value of their share after proper accounting by granting those receipts on 20th February, 1995.

18. Mr. Sahoo, thus, submitted that the said deed of retirement and the receipts showing payment of value of the share of the retiring partners to the plaintiffs will prove with all certainty that the plaintiffs ceased to be partners of the said business with effect from their date of retirement i.e. 1st January, 1995.

19. Mr. Sahoo further submitted that the learned Appeal Court wrongly construed the provision of Section 32 of the Partnership Act. Referring to a decision of the Hon'ble Supreme Court in the case of Pamuru Vishnu Vinodh Reddy Vs. Chillakuru Chandrasekhara Reddy and Others, Mr. Sahoo submitted that retirement of a partner from a partnership firm and dissolution of a firm are not synonymous concept. According to Mr. Sahoo once a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them, such action of the partner amounts to retirement within the meaning of retire u/s 32 of the Partnership Act. On the contrary, when a partner withdraws from a firm by dissolving it, it shall be dissolution and not retirement. Thus, Mr. Sahoo contended that retirement only severs the partnership between retiring partners and continuing partners leaving the partnership amongst the later unaffected and the firm continues with the changed constitution comprising of the continuing partners. If, however, the continuing partner fails to pay the value of the share of the retiring partners as agreed upon, it has become a debt on the continuing partner and the retiring partners is only entitled to recover the same with interest but in any event the retiring partners cannot claim any interest in the partnership business and/or its assets and/or properties after their retirement.

20. By relying upon another Privy Council decision in the case of K. Gopal Chetty and Anr. v. L.G. Vijayaraghavachariar reported in AIR 1922 115, Mr. Sahoo submitted that even assuming though not admitting that due to non-payment of the value of the share of the plaintiffs on their retirement, a debt was created in favour of the plaintiffs but still then since such debt became barred by limitation, the plaintiffs cannot realize the same from the defendants as on date. As such the plaintiffs have failed to make out a prima facie case in support of their claim for temporary injunction.

21. Mr. Sahoo further submitted that if the petitioners are not permitted to raise seasonal loan for running their business like every year by mortgaging its assets and properties, the petitioners will suffer irreparable loss and injury and as such the balance of convenience and inconvenience is wholly against grant of such injunction.

22. Mr. Sahoo ultimately submitted that when the plaintiffs did not pray for any receiver, the learned Appeal Court ought not to have appointed receiver over a running business suo motu. In support of such submission Mr. Sahoo relied upon a decision of the Hon"ble Supreme Court in the case of Mahendra H. Patel Vs. Ram Narayan Singh, .

23. Mr. Sahoo, thus, prayed for setting aside the impugned order passed by the learned Appeal Court.

24. Mr. Roy Chowdhury, learned Senior Counsel appearing for the plaintiffs/opposite parties, submitted that prima facie case does not mean full proof case. Mr. Roy Chowdhury contended that prima facie case means an arguable case. Thus, Mr. Roy Chowdhury contended that while considering an application for temporary injunction, the Court is required to find out as to whether an arguable case has been made out by the party who is seeking such injunction in his application for temporary injunction or not. If the party seeking injunction is able to make out an arguable case, the Court will pass an order of injunction subject to satisfaction of the other two tests for grant of injunction namely balance of convenience and inconvenience of the parties and the irreparable loss and injury.

25. According to Mr. Roy Chowdhury, the plaintiffs in the instant case has successfully made out a case that the value of their share in the assets and properties of the partnership business both movable and immovable at the market rate was neither settled by the parties nor the plaintiffs were paid the value of their share accordingly till date. As such according to Mr. Roy Chowdhury, the plaintiffs have right in the share of subsequent profits of the said business until such accounts are settled and value of the plaintiffs' share are paid in view of Section 37 of the Indian Partnership Act, 1932.

26. Mr. Roy Chowdhury further submitted that since admittedly the partnership business was started by raising loan from bank and various financial institutions, public notice notifying retirement of the plaintiffs should have been issued so that the plaintiffs could have been absolved of their liability arising out of various dues of such partnership business to any third party creditor; such as bank and other financial institutions etc. According to Mr. Roy Chowdhury since such notice was not served, the plaintiffs can be held liable for any debt of the said partnership business due to the third party and as such the plaintiffs have every right to seek such injunction so that the assets of the business including the landed properties thereof are not parted with and/or encumbered until their retirement is effected by publication of public notice in accordance with the provision contained in Section 32 of the said Act.

27. By referring to the deed of retirement and the receipts granted by the plaintiffs Mr. Roy Chowdhury submitted that those receipts will show that only the profit and loss accounts of the business as on the date of retirement was settled between the parties and the plaintiff were paid their share in the profit and loss accounts of the said business accordingly. Mr. Roy Chowdhury thus contended that those receipts do not prove that the assets and properties of the partnership business was valued according to the market rate as on the date of retirement and the plaintiffs were paid the value thereof according to their share.

28. Thus Mr. Roy Chowdhury contended that when the learned Appeal Court by taking note of the aforesaid circumstances held that the interest of the plaintiffs should not be jeopardize further, the learned Appeal Court did not commit any illegality in passing the impugned order.

29. Mr. Roy Chowdhury ultimately submitted that instead of maintaining the impugned order, the interest of all the parties can be protected sufficiently if the interim order which was passed by this Court while entertaining this Revisional application on 23rd July, 2007, is extended till the disposal of the suit. The interim order which was passed by this Court on 23rd July, 2007 is as follows:

The operation of the impugned order will remain stayed until further order of this Court, provided the petitioners maintain a true and proper account of the profit and loss of the partnership business and submit the same in every three months before the learned Court below during the pendency of this Revisional application. The defendant/petitioner is also restrained from transferring and/or encumbering any of the assets of the partnership business until further order of this Court.

30. Mr. Roy Chowdhury, thus, invited this Court to dispose of this Revisional application by modifying the impugned order in the above manner as suggested by Mr. Roy Chowdhury.

31. Heard the learned Advocate of the parties. Considered the materials on record including the order impugned.

32. On perusal of the pleadings made out by the plaintiffs in their plaint as well as in the injunction application, this Court finds that the retirement of the plaintiffs from the partnership business was never challenged in the suit. On the contrary, the pleadings of the plaintiffs show that the plaintiffs, in fact, claimed the value of their unpaid share in the partnership business following the retirement. The plaintiffs further claimed that since the value of their share in the assets and movable and immovable properties in the partnership business has neither been settled between the parties nor the plaintiffs have been paid the value of their share in such assets and properties of their business, the defendants cannot be permitted to deal with and/or transfer and/or encumber the properties and assets of the partnership business by treating the same as their exclusive property inasmuch as the plaintiffs still have interest in such assets and properties of the partnership business as the plaintiffs are not paid

the value of their share in the assets and properties of the said business according to the market value till date.

33. Since this is the foundation of the plaintiffs' claim, this Court cannot hold that the plaintiffs are still partners of the said business and they have right to participate in the management of the said business. That apart if prayer (b) of the plaint is considered carefully, then the Court will have no hesitation to hold that retirement was not disputed by the plaintiff. Prayer (b) of the plaint is set out hereunder:

(b) The defendants be suitably restrained by an order of injunction from transferring and/or encumbering the properties and assets of M/s. Bankim Cold Storage without settlement of accounts and distribution of assets thereof in favour of the plaintiffs.

34. This Court is still at a loss to understand as to why the learned Appeal Court made an attempt to find out the legality of such retirement of the plaintiffs when the plaintiffs have not challenged their retirement at all in the suit. Still then when the learned Appeal Court discussed the legality of such retirement after analyzing the provision contained in Section 32 of the Indian Partnership Act, this Court feels the necessity of assessing the correctness of such findings of the learned Appeal Court herein.

35. For proper appreciation of the provision contained in of Section 32 of the said Act, the provision contained therein is set out hereunder:

Section 32.

Retirement of a partner. ? (1) A partner may retire?

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under Sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

36. Sub-section (1) of Section 32 of the said Act provides various modes of retirement. The said modes are all independent and/or alternative to each other. It is true that one month's notice was not given prior to retirement as per the partnership agreement and as a result retirement may not be effected in terms of Clause (b) of Section 32(1) of the said Act. But here is the case where this Court finds that the retirement was effected by following the mode as prescribed under Clause (a) of Section 32(1) of the said Act.

37. In my view, retirement of a partner is effected when a partner retires by following any one of the modes as prescribed u/s 32(1) of the said Act and such retirement is not controlled and/or subject to the rigor as contained in Sub-section (2) or Sub-section (3) of Section 32 of the said Act. Both Sub-section (2) and Sub-section (3) of Section 32 deal with the liability of the retiring partner after his retirement. Sub-section (2) of Section 32 of the said Act provides that the retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm and such agreement may be implied in course of dealing between such third party and reconstituted firm after he had knowledge of the retirement.

38. Sub-section (3) of Section 32 of the said Act provides that notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement. Provided that a retired partner is not liable to any third party who deals with the firm without knowledge that he was a partner. The said provision thus provides that the liability of a retiring partner to the third party will continue even after retirement until public notice is given of the retirement.

39. The plaintiffs have not made out a case that such public notice was not given and as a result their liability to third party is still continuing.

40. Sub-section (4) of Section 32 of the said Act clearly provides that notices under Sub Section (3) may be given either by the retired partner or by any partner of the reconstituted firm. The said sub section thus casts a duty upon the retiring partner also to serve such notice and if the retiring partners fail to discharge their duty by not issuing public notice notifying their retirement, they may be held liable to the third party but for that the plaintiffs cannot reap any benefit out of the said partnership business for their own default by not issuing such public notice.

41. Be that as it may, this Court has no hesitation to hold that Sub-section (1) of Section 32 is not controlled by Sub-section (2) and Sub-section (3) of Section 32 of the said Act. Rather Sub-section (2) and Sub-section (3) of the said Act deal with the liability of the retiring partner following their retirement as a

consequence of not issuing public notice.

42. As such this Court cannot hold that the retirement of the plaintiffs is not legal and effective due to non-service of public notice as held by the learned Appeal Court.

43. Section 37 of the said Act deals with the right of outgoing partner in certain cases to share subsequent profits. The said provision suggests that if the surviving partners carry on business of the firm with the property of the firm without any final settlement of accounts as between them, then in the absence of any contract between the parties to the contrary, the outgoing partner is entitled, at the option of himself to such share of profit made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of 6 per cent per annum on the amount of his share in the property. By virtue of the said provision, at best further financial interest may be created in favour of the retiring partners under such a situation but in no way interest in the partnership business and/or in its assets and properties can be created in favour of the retiring partner even where the provision of Section 37 is attracted.

44. The provisions made in the deed of retirement coupled with the receipts granted by the plaintiffs acknowledging the receipts of the value of their share prima facie shows that the plaintiffs retired from the said business with effect from 1st January, 1995 with the clear understanding that the right to enjoy all existing licenses, tenancies, ownership of all movables and immovable assets, permits, tenders, balances with bank deposits with electricity board, banks and other contracts, name and goodwill and all other benefits available to the firm shall exclusively belong to the continuing partners and the retiring partners shall have nothing to do or shall have no interest or concern with the same.

45. Thus, this Court prima facie holds that the retiring partners have no subsisting interest in the partnership business as well as in its assets and properties. Accordingly, this Court does not find any justification to maintain the order of the learned Appeal Court.

46. But, at the same time, this Court cannot brush aside the application of provision of Section 37 of the said Act in the instant case as nothing has been produced before this Court by the defendants to show that the value of the plaintiffs' share in the assets and properties of the partnership business according to the market value was settled between the parties and the plaintiffs were paid accordingly.

47. Though Mr. Sahoo wanted to impress upon this Court by showing the audited balance sheet of the firm that plaintiffs have been paid their share in the assets and properties of the partnership firm according to the market rate as on the date of their retirement but Mr. Roy Chowdhury rightly pointed out that since those documents were not produced either before the learned Trial Judge or before the learned Appeal Court, this Court should not take note of those

documents at this stage without affording any opportunity to the opposite parties to deal with the same appropriately.

48. Thus, in view of the decision of the Hon^{ble} Supreme Court in the case of Pamuru Vishnu Vinodh Reddy (supra), this Court holds that at best some monetary claim may be there but for securing such monetary claim, neither receiver can be appointed nor the defendants can be restrained in such a fashion which may ultimately lead to closure of the business.

49. Considering that the plaintiffs had at best 25 per cent share in the said business, this Court feels that justice will be sub-served if the defendants are restrained from dealing with one of the plots of land till the disposal of the suit as in the event the plaintiffs succeed in establishing their monetary claim they can realize such claim by sell of the said property unless their claim is not otherwise satisfied.

50. Thus, the defendants are restrained from transferring and/or encumbering and/or dealing with one of the suit properties lying at plot No. 1523 renumbered as plot No. 875 area 1.96 decimel within khatian Nos. 242, 241, 248 and 255 at mouja Pargana Bagri under P.S. Chandrakona district Paschim Midnapur till the disposal of the suit. The petitioners are directed to maintain true and correct accounts of the profit and loss of the partnership business and submit the same in every three months before the learned Trial Judge during the pendency of the suit.

51. The impugned order is, thus, set aside.

52. The Revisional application is, thus, disposed of.

Re: CAN No. 9788 of 2007

53. Since the revisional application itself is disposed of by this order, no further order need be passed on the application being CAN No. 9788 of 2007 filed by the petitioner for modification of the interim order.

54. Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.