(1990) 10 DEL CK 0010

In the Delhi High Court

Case No : Interim Application No. 7461 of 1987 and Suit No. 1370 of 1982

Sri Narain Baralia APPELLANT

Vs

Rajeshwar Dayal and Others RESPONDENT

Date of Decision : 31-10-1990

Acts Referred:

Citation : (1991) 20 DRJ 115 : (1991) RLR 75

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Judgement

D.P. Wadhwa, J.

(1) In this suit filed in 1982 for winding up the affairs of dissolved partnership, namely. Regal Theatre, by this order I am to decide an application by Mr. Vinay Kumar filed under Order 22 Rule 10 and Section 151 of the Code of Civil Procedure. This application was filed on 21-9-l987. It is a brief application. It merely states that the applicant has purchased the share of the plaintiff under an agreement dated 10-2-1987 and. thus, having become the absolute assignee of the entire share of the plaintiff, the assignor, he has a right to. tie substituted in place of the plaintiff and to continue the suit. it is also staled, that because of the agreement as such. all rights and interests of the plaintiff in the present suit stand assigned to the applicant.

(2) This application has been opposed by the defendants. It has been denied that there has been any assignment of the share of the plaintiff and further that the deed of assignment date 10-2-1987 purports to transfer and assign the alleged interests of the plaintiff in immovable, ''property and was not a valid document being not properly stamped and not registered. The defendants also denied that the plaintiff could sell or assign his share which is subject-matte of this suit. plaintiff in his reply, though admitting the agreement, stated that the assignee Vinay Kumar had no right to interfere in the management or administration of the partnership business or affairs or to require any account of the partnership or to inspect the partnership books but was merely entitle to receive the share of

profits to which the plaintiff would otherwise be entitled winding up of the firm and for ascertaining that share and to an account as from the date of the dissolution.

(3) Under the agreement in question there has been a reference to the present suit and then it is stated that on a total consideration of Rs. 10 lakh being paid by Vinay Kumar to the plaintiff "the share, rights titles and interests including tenancy rights and obligations of all kinds whatsoever" of the plaintiff in the partnership shall vest in Vinay Kumar. Vinay Kumar, thus. not only. took over the right of the plaintiff bat also his. obligations. Then it is stated that the plaintiff had been in occupation of a flat bearing No. 1/40, Regal Building, and bad been enjoying other benefits on the basis of various courts orders and that his possession of that flat was even otherwise as well. Actual physical possession of this flat was delivered by the plaintiff to Vinay Kumar. One of the terms of the agreement is that from the date of the agreement shall be the sole and entire, responsibility of Vinay Kumar to prosecute and defend the present proceedings or "any other proceedings initiated in the said subject-matter at his own costs". Of course the plaintiff was to assist and help Vinay Kumar in all reasonable manner. The plaintiff also executed an it revocable power of attorney in favor of Shri Vinay Kumar.

(4) On 17-3-1987 defendants filed an application (I.A. 1881/87) under Order 39 Rules I and 2 and Section 151 of the Code praying that plaintiff be restrained from in any manner transferring, assigning or alienating the flat at the first floor of the Regal Cinema premises to any one till the decision of the suit. This flat, it Was stated, was in possession of the plaintiff in the tenanted premises of the .Regal Theatre of the firm Under court''s order plaintiff was continue to remain in possession of this flat till decision, of this suit. This order was made on 30-1 1-1984 by a Division Bench in FA.O. (OS) 10 of 1984 on an appeal filed by the plaintiff against an order made by the Singh Judge of an application of the plaintiff under Order 40 Rule 1 and Section 151 of the Code seeking appointment of a Receiver. When this application was filed, this Court passed order while issuing notice in the application restraining the plaintiff from transferring or pearling with possession of the flat in question to any third person. This order was made on 18-3-1987. on23-31987 plaintiff appeared arid sought two weeks'' time to file reply and the matter adjourned to 1-5-1987 with a direction that interim orders would continue till further orders. On 1-5-1987 again the plaintiff sought time to file reply. Four weeks'' time was granted .for the purpose. Yet again on 23-7-1987 when this application was lifted ,six weeks'' time was granted to the plaintiff to file reply. The plaintiff, it appears, never filed any reply and then the present application (I.A. 7461/87) was filed on 21-9-1987 with the apparent, support of the plaintiff. I may also note that the Division Bench in the aforesaid order dated 30- 11-1984 had also appointed Mr. MuniLal Jain, Advocate and -formerly a Registrar of this Court, and Mr. Rajeshwar Dayal, first defendant, as the Joint Receivers of the partnership business known as Regal Theatre.

(5) It is the admitted case of the parties that the plaintiff had 18.75% share in the partnership business. A preliminary decree was passed on 10-5-1985 holding that the partnership stood dissolved on 12-10-1981 and that the accounts thereof had not so far been fully gone into and what was why the suit was filed. Following issues were also framed at that time :-

(1)Was the tenancy of the Regal Theatre brought into the partnership of the parties ? If so, to what effects ? (2) Is plaintiff entitled to share in the tenancy rights of the Regal Theatre after dissolution ?(3) What was the effect of the .preparation of the balance sheet of the affairs of the firm up to the date of dissolution, in September, 1982 and which was signed by all the parties ? (4) To what extent the parties are accountable for business that has been carried on after the dissolution of the firm ? (Note:-The issue is broad based and covers the controversies not only of accounts of the business carried on .subsequently but also the shares in which the profits and losses thereof are to be distributed). . (3) Relief.

(6) It was observed that since the firm stood dissolved and shares of the partners had not been disputed a preliminary decree bad been passed to that extent and further that accounts had to be gone into and the assets and liabilities of the partnership distributed and it was i''n the context that issues bad been framed the business of partnership is still being run for the purpose of winding up and reports of the Joint .Receivers are being ''submitted from time to time.

(7) MR.SWATANTAR Kumar submitted that it. was a settled principle of law that in a suit for dissolution or winding up and rendition of accounts of the dissolved partnership every partner is a plaintiff and has a right to continue the proceedings .He said agreement dated 10-2-1987 under which the plaintiff assigned his interest to the applicant was legal and valid and the agreement clearly showed that the applicant had a definite interest in the affairs of the partnership including in the accounts and shares thereof He said the applicant has every right to be substituted in place of the plaintiff as he was a necessary party inasmuch as his interests were going to be decided in these proceedings. He said objection of the defendants to his application was of no , avail. Mr. Swatantar Kumar referred to the provisions of Section 14 of the Partnership Act (for short ''the Act'') to state that whatever has been assigned to him constituted share of the plaintiff in the property of the partnership firm. He also referred to Sub-section (2) of Section 29 of the Act to support his submission. He also said that it was not necessary that the agreement dated 10-2-1987 should have been registered.

(8) Bawa Shiv Chara Singh, learned counsel for the plaintiff, submitted that under Order 22 Rule 10 of the Code discretion lay with the court to implead the applicant or not and that the applicant could not demand as of right that he should be imp leaded. He objected to substitution of the applicant in his place and said that he would not have objection if the applicant is added as a-co-plaintiff along with him to safeguard- his interest under the agreement.

Countering the argument. Mr. Shyam Kishore for the defendants submitted that the present suit was merely for accounts and this right could not be transferred it being a mere right to sue. He referred to Section 6(e) of the Transfer of Property Act, 1882. He also said that document required registration as under the agreement plaintiff transferred his tenancy rights in immovable property to the applicant. It cannot be disputed that under clause (c) of Section 6 of the Transfer of Property Act a mere right to sue cannot be transferred. Section 14 of the Act specifies as to what the property referred to would include. Section 14 of the Act specifies as to what the property referred to would include Sections 29 and 46 of the Act, which appear to be relevant, arc as under:-

"29.(1) A transfer by a partner of his interest in the firm, either absolute or by imortgage,or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm to interfere in the conduct of the business ,or to require accounts, or to to inspect the books of the firm, but entitles the transferee only to receive the share of benefits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners. (2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the .remaining partners to receive the there of the assets of the firm to which the transferring partner is entitled,and,for the purpose of ascertaining that share, to an account as from the date of dissolution".

"46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partner or their representatives, to have the properly of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

(9) Then Rule 10 of Order 22 of the Code is as under :

"10.Procedure in case of assignment before final order in suit.- (1) In other cases of an assignment, cleation or devolution or any interest during the pendency of a sait, the suit may, by leave of the Court, be continued, by or against the person to or upon who such interest has come or devolved. (2) The attachment of a decree pending an appeal there from. shall be deemed to be an .interest entitling the person who procured such attachment to the benefit of sub-rule (2)."

(10) A bare reading of Sub-section (2) of Section 29 of the Act gives the impression that the assignment of his interest by the partner has to be during the continuance of the pannership. Section 46 falls under Chapter Vi dealing with dissolution a firm and the word "representative" used therein. has to be given its natural meaning and it Therefore, doesn''t refer to a "legal representative" only. The word "representative" is wider in meaning than the words "legal representatives" Inasmuch as it would include not only a legal representative but any representative in interest , i.e. any transferee of interest of a partner whether by assignment. succession or otherwise.

(11) During the continuance of the parnership, an assignee or transferee cannot interfere in the management or administration of the partnership or requiring the partnership accounts or requiring the parnership accounts or inspecting, the partnership books. He is bound to accept the. account of profits agreed to by the partners, but upon dissolution of the partnership firm an assignee or the transferee is entitled to have an account taken as from the date of dissolution for the purpose of ascertaining and receding the assignor''s share in the partaership.This right of the assignee to an account from the date of dissolution is a statutory right. Moreover though the Partnership Act does not deal with the ''case of a transfer or assignment by an ex-partner in a firm after the dissolution of the partnership but there appears to be no reason .why the right of such a transferceor assignee to claim an account of the partnership from other ex-partners after the dissolution of the partnership should not be there as contained in Sub section (2) of Section 29 of the Act. It is, Therefore, not a mere right to account or mere right-to sue as suggested by Mr. Shy am Kishore.

(12) In the present case, however, different consideration arise as stated by Mr.Bawa. In Sukhdip Singh Vs. Arjan Singh Mihan Singh and Another, , it was observed that the courts must in exercising the discretionary power under Order 22 Rule i0(l) consider the prima facie equities among other things. It was also held that under this provision it was discretionary and not obligatory .for the court to grant leave to an applicant to continue the suit. An assignee was, thus. held not entitled as a matter of right to continue the proceedings. The person acquiring the interest of a party to legal proceedings may continue the same, but it does not by it self incapacitate the original party from continuing the proceedings and the former is both. bound by, and can enjoy the benefit oi, the steps taken by the latter. The court relied upon a decision of the Calcutta High Court in, Lakshan Chunder Dey Vs. Sm. Nikunjamoni Dassi and Others, In this case It was held that an applicant who invoked the aid of Rule 10 of Order 22 was no.t entitled, as a matter of right, to an order in his favor, regardless of delay or laches The court undoubtedly has a discretion in the matter which must be judicially exercised. In this case an application under Order 22 Rule 10 was allowed to avoid multiplicity of litigation. Supreme Court decision in Razia Begum Vs. Sahebzadi Anwar Begum and Others, . which was also referred to, was principally concerned with the provisions of Order 1 Rule 10 (2): It was observed that the question was one .of Judicial discretion, which had to be exercised in view of all the facts and circumstances of a particular case. One of the considerations could-be for addition of party where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy.

(13) In this Case I do not find bow I would-be in a better position to effectually and completely adjudicate the controversy between the parties in the presence, of the applicant. His presence will rather open another front. plaintiff says he has net assigned all his rights to the applicant and whatever rights, he says, he has assigned he refers to the agreement. I am not going to decide the controversy

between the plaintiff and the applicant as to what rights have been assigned and what not. plaintiff does not want to be substituted He is in a better position to assist the court in adjudicating the disputes between the parties ,be being himself .a partner of the dissolved partnership plaintiff can safeguard the right of the applicant as well Further, I find that for filing this application under Order 22 Rule 10 of the Code the applicant has not come to the court with any expedition. It is only after the defendants had filed an application (I.A. 1881/87) seeking restraint on the plaintiff that present application has been filed after obtaining many adjournments and at no point of time it was ever brought to the notice of the "court that possession of flat on the first floor of Regal Cinema has already been : transferred to the applicant. If this is the same fiat to which the order of the Division Bench in P.A.O. (OS) 10/84 applied, the transfer was certainly unauthorised and in breach of the court''s order. Such an illegal and unauthorised assignment or parting with possession of tenanted premises has serious consequences under the rent control laws. It cannot be permitted. There are already Joint Receivers appointed respecting the business of the dissolved partnership. I am separately issuing a show cause notice to the plaintiff as to why the Joint Receivers should not be asked to get back the possession of Sat bearing No. l/40,Regal Building, New Delhi, which. belonged to the partnership. In this view of the matter I do not have to consider the objection of Mr. Shyam Kishore that the agreement required any stamp duty or registration under the Registration Act. I may also note that in case I allow the application I will be having two plaintiffs with two different counsel and not always speaking in one voice. That is going to embarrass and delay the fair trial of the suit.

(14) This application is, Therefore, dismissed. There will be no order as to costs.

