

Brijlal and anr. Vs. hotel Neelam-lodging and Boarding and ors.

Brijlal and anr. Vs. hotel Neelam-lodging and Boarding and ors.

SooperKanoon Citation : sooperkanoon.com/346541

Court : Mumbai

Decided On : Oct-04-1982

Reported in : AIR1983Bom432; 1983MhLJ300

Judge : Deshpande. J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 17

Appeal No. : Civil Reven. Appln. No. 248-A of 1982

Appellant : Brijlal and anr.

Respondent : "hotel Neelam-lodging and Boarding" and ors.

Advocate for Def. : N.N. Kapadia;B.N. Deshmukh,;A.M. Kapadia,;S.L. Kulkarni,
;R.D. Deshpande and;S.M. Siddique, Advs.

Advocate for Pet/Ap. : R.R. Jethlia, Adv.

Judgement :

ORDER

1. Plaintiffs' application for amendment of plaint is rejected by the learned Civil Judge. Senior Division, Aurangabad and that is why the plaintiffs have challenged that order in this Court in Revision under Section 115 of the Civil Procedure Code and it arises out of the following facts.

2. In order to properly decide this question, it is necessary to state a few facts. Plaintiffs are the revision petitioners before this Court. Defendant No. 2 is respondent No. 2 in this Court and defendants Nos. 3 and 4 are respondents Nos. 3 and 4 in this Court. In this revision. I will refer these parties as plaintiff s and defendants. Defendant No. 3 is the wife of and defendant No. 4 is mother of defendant No. 2 On 10-4-1970. a registered partnership deed was executed and a partnership business under the name and style of 'Hotel Neelam-Lodging and Boarding' (respondent No. 1) was started by the plaintiffs and by defendant Nos. 3 and 4. These were the only four partners in the partnership. Defendant No. 2 was appointed by all the partners as a General Power of Attorney on 30-5-1972. Defendant Nos. 5, 6 and 7. who are respondents 5, 6 and 7 in this Court, are the financiers of defendant No. 1 business and they have advanced various loans to defendant No. 1 and necessary documents in that respect have been executed by all the partners.

3. It appears that respondent No. 5, the Maharashtra State Financial Corporation filed an application in the District Court at Aurangabad for putting hypothecated property for sale. and consequently order of attachment, injunction etc. are passed in those proceedings started under Section 31 of the State Financial Corporation Act, 1951. Similarly. defendant No. 6 has started another proceedings at Bombay on the Original Side f this Court against defendant No. 1 for reliefs similar to those claimed by defendant No. 5. There was no repayment of loan.

4. It is on account of this fact that on 12-2-1981. the present plaintiffs cancelled the General Power of Attorney given to defendant No. 2 and they notified this fact duly publicly on 24-2-1981. for general information of the public. It appears that thereafter defendant Nos. 3 and 4 filed a Regular Civil Suit No. 112 of 981 against the plaintiffs for injunction restraining them not to interfere in the day-today working of the business and it appears further that on 6-3-1981. a temporary injunction order was issued in that suit and was served on the present plaintiffs. It appears further that the defendant Nos. 2, 3 and 4 later on converted this partnership into a private limited company and on 1-6-1981. transferred the entire assets and liabilities of the partnership in favour of newly formed private limited company. of which the defendant No. 2 became the managing Director. It is not disputed that

the share of the plaintiffs together was 50% and it is also not disputed that in the Article of Association and in the Memorandum of Association of the Private limited company. plaintiffs do not appear anywhere in the picture.

5. It is in this background that the plaintiffs first of all filed a special Civil Suit No. 55 of 1981 on 20-7-1981 asking for several reliefs. In this plaint, they narrated all the facts relating to the partnership etc. and relating to the conversion of the business etc. and they claimed several reliefs. In this revision, we are mainly concerned with the reliefs in prayer clause A. which runs as follows:--

'That the suit of the plaintiff be kindly decreed against defendant 1 to 4 and the following reliefs be kindly incorporated in the decree to be passed against them and infavour of plaintiffs.

A. That it be kindly declared that the firm of the defendant No. 1 as a registered partnership continues and still subsists with the present plaintiffs and defendant Nos. 3 and 4 are the partners of this partnership firm.

B. to G.

6. In this suit, plaintiffs gave an application Ex. 5 for the appointment of Receiver but the learned Trial Judge rejected this application on 20-1-1982. Against this order. A. O. No. 2-A of 1982 was preferred in this Court but this A. O. was allowed to be withdrawn by this Court and the plaintiffs who were appellants in that A. O. were at liberty to make an application for amendment of the plaint in the Trial Court. This order of this Court was passed on 28-4-1982.

7. Thereafter on 29-4-1982. the present plaintiffs issued a notice under Section 4 of the Indian Partnership Act dissolving the partnership and to this notice, the contesting defendants gave reply dated 25-5-1982. Thereafter the plaintiffs filed in the Trial Court on 10-6-1982 an application for amendment of the plaint at Ex. 77. In this application, the plaintiffs prayed for amendment of the plaint contending that the partnership is now duly dissolved by notice by two partners i. e. the plaintiffs on 29-4-1982 and therefore, they sought for amendment in the plaint consistent with the notice of dissolution and they also prayed for amendment to be in

consonance with the reliefs for dissolution of partnership and they also prayed for the relief that the partnership should be declared as dissolved.

8. This amendment application was opposed by defendants Nos. 1 to 4 and they contended that such an amendment could not be allowed. According to them, this amendment changed the nature of the suit etc. After considering the rival submissions made before him, learned Civil Judge, Senior Division on 28-7-1982 rejected the application for amendment. The learned Judge observed inter alia that the plaintiffs were free to file a fresh suit for dissolution of partnership. Feeling aggrieved by this order of rejection of amendment application plaintiffs have filed this revision application.

9. The question for my consideration is very short. I have pointed out that the earlier suit of the plaintiffs was mainly for a declaration that the partnership should be and is continued in spite of the fact that the defendant Nos. 3 and 4 had transferred all the assets and liabilities of the partnership to the newly formed private limited company of defendant Nos. 2, 3 and 4, of which defendant No. 2 was the managing partner. Now the relief that is being sought by way of amendment is for dissolution of partnership with consequential relief based on the factum of dissolution. Mr. R. R. Jethlia appearing in behalf of the plaintiffs urged before me two points. His first point was that on account of the happening of subsequent events after filing of the suit, he is entitled to the amendment and the second ground is even in the absence of the consideration of sub-sequent events, plaintiffs are entitled to an amendment.

10. Taking the first ground first. It cant not be disputed that after the previous suit was filed, the present plaintiffs issued a notice on 29-4-1982 in accordance with the provisions of Section 43 of the Partnership Act dissolving the partnership. A copy of the notice is annexed as Exh. B in this revision petition. Similarly, a copy of reply filed by defendants Nos. 2, 3, and 4 is annexed as Exh. C in this revision. Hence according to Mr. Jethlia after filing of the suit by a subsequent event, the partnership has been dissolved and therefore, this has necessitated the amendment in the suit. Now the principle of that an amendment can be sought for on account of happening of the subsequent events is not and cannot be disputed.

Mr. Jethlia placed reliance upon three rulings. The first is *Ganesh Trading Code. v. Moji Ram.* : [1978]2SCR614 . Head Note B. Similarly, he placed reliance upon another decision of the Supreme Court in *Shikharchand v. Digamber Jain Prababadh Rarini Sabha,* : [1974]3SCR101 . Head Note B. The third ruling is of the Delhi High Court in *Darshan Singh v. S. Jaswant Singh,* : AIR1978 Delhi304 . The last mentioned authority is a direct authority on this point and it is in support of the plaintiffs. In this respect it was urged by Shri A. M. Kapadia, appearing for defendant No. 4 that the subsequent act is an act of volition of the plaintiffs themselves and therefore, the plaintiffs can not take advantages of their own act to seek for amendment in the plaint. At the first sight this submission made appears to be attractive but this does not stand the test of analysis. Now under the Partnership Act it is right and privilege of any partner of the partnership to dissolve a partnership by issuing a notice. In this respect, it was urged by Shri B. N. Deshmukh and Shri Kapadia that, at the time, when the plaintiff s filed the suit earlier, they were aware of the fact that a private limited company was formed by Defendants Nos. 2, 3 and 4 and that, the business of the partnership was transferred to the newly formed private limited company and therefore according to them tin the suit filed earlier. the plaintiffs should have prayed for dissolution of partnership. It might be that at, that time plaintiffs might have thought it fit that, in spite of all this, they should pray for continuance of the partnership. It was fairly conceded by Mr. Kapadia that the recourse to the provisions of partnership Act was not taken by the defendants in respect of the partnership. In this background, if the plaintiffs thought that they should ask for relief of continuance of partnership. there was nothing wrong in that prayer. but subsequently. plaintiffs felt that it was of no use pursuing that relief and therefore. they dissolved the partnership by issuing a notice and prayed for amendment. I do not think that there is anything wrong in this course of action taken by the plaintiffs. In spite of the fact that the plaintiffs were aware in the beginning of conduct of defendants Nos. 2,3 and 4 it was open to them to pray for relief of continuance and when they thought it fit, that it would not be desirable to do so, they thought it fit to once for all dissolve the partnership and so they prayed for an amendment. I do not think that there is anything wrong in this course of conduct.

11. Mr. B. N. Deshmukh vehemently contended that it changes the whole nature of the suit. I am unable to agree with it. There is nothing to show that there is any amendment in the basis structure of the suit, No amendment is sought in the term of partnership in the working of the partnership etc. The only change is that instead of relief of continuance of partnership. they want relief of dissolution of partnership. The present case is on the same footing, where the plaintiffs file a suit for declaration and injunction and subsequently they pray for amendment by seeking the relief of possession instead of relief for injunction and where amendments are allowed and as such I do not see any force in the objection that this amendment changes the nature of the suit. What amendment does is that it changes the nature of relief prayed for in the suit and the basic structure of the plaint regarding main allegations in the plaint remains the same and the only change that occurs is in the relief. I therefore, do not think that it does not change the nature of the suit. There is also no force in the contention that this amended plea is inconsistent with the earlier plea. I therefore, find that the trial Court was totally wrong in rejecting the application for amendment.

12. Mr. Deshmukh then contended that the powers of this Court in interfering with such an order under the provisions of Section 115 of Civil Procedure Code are very limited. I am aware of this fact but the facts of the present case clearly disclose that the Trial Court has acted in its jurisdiction illegally or with material irregularity and I am satisfied that if the order of the Trial Court is allowed to stand as it is. it would occasion in total failure of justice in the instant case. if the plaintiffs are entitled to file a fresh suit. I do not see any reason why they should not be allowed to amend the plaint. In the instant case, the defendants have not even filed their written statement as yet except the defendant No. 5 who is only a formal party and who wants to enforce the recovery of loan given by it to the partnership firm. Hence I am further satisfied that this Court will be justified in the instant case to interfere with the order of the Trial Court.

13. The result is that the revision application is allowed. The order of the Trial Court rejecting the amendment application is hereby quashed and set aside and the plaintiffs application for amendment is allowed. Plaintiffs to carry on the amendment within two weeks from the date of receipt of the record and

proceedings by the Trial Court. Rule made absolute but in the circumstances of the case, no order as to costs of this revision application.

14. Revision allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com