

M.C. Sharma Vs. B.C. Sharma and ors.

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Court : Allahabad

Decided On : Aug-28-1985

Reported in : AIR1986All69

Judge : O.P. Saxena, J.

Acts : [Partnership Act, 1932](#) - Sections 37

Appeal No. : F.A.F.O. No. 562 of 1985

Appellant : M.C. Sharma

Respondent : B.C. Sharma and ors.

Advocate for Pet/Ap. : P.N. Saxena, Adv.

Disposition : Appeal dismissed

Judgement :

O.P. Saxena, J.

1. Heard the learned counsel for the parties, perused the affidavits exchanged and the Annexures thereto,

2. The parties were carrying on a partnership business in the name and style of M/s. Amber Guest Business House. On 1-4-1985 the appellant filed Suit No. 89 of 1985 on behalf of the firm against respondents Nos. 1 and 2. The appellant prayed

for permanent injunction restraining the respondents from creating obstacles in the partnership business. An ad interim stay order was granted. On 19th April, 1985 the respondent No. 1 served a notice dissolving the firm. The interim injunction granted earlier was vacated. The respondents 1 and 2 moved an application for temporary injunction restraining the appellant from carrying on his own business in the disputed premises. The application was allowed on 13th May, 1985. The appellant filed an appeal against the aforesaid order which was dismissed by this Court on 21st May, 1985. Earlier the appellant had filed Suit No. 120 of 1985 for a declaration that he is the owner of the disputed premises which he purchased Benami in the name of respondents Nos. 1 and 2. He also prayed for a permanent injunction restraining respondents from interfering with the user of the premises for the business of the appellant. The application for temporary injunction was rejected on 13-5-1985. The appellant filed an appeal against the order. The appeal was admitted on 24-5-1985. The respondents Nos. 1 and 2 have been restrained from interfering with the possession of the appellant as a partner.

2A. The respondents Nos. 1 and 2 filed Suit No. 184 of 1985 against the appellant and respondent No. 3 for a permanent injunction restraining them from carrying on any business in the disputed premises. The injunction application has been allowed and in the present appeal the said order has been challenged.

3. Learned counsel for the appellant submitted that in view of the offer made by him in para 19(iv) of the counter affidavit filed by him to the affidavit in support of the application for temporary injunction before the trial Court and also in view of the provisions of Section 37 of the Partnership Act, the trial Court should have considered his offer and should have permitted him to carry on the business on such terms as it deemed fit and proper. He further submitted that whereas the appellant will suffer irreparable injury as he will be deprived of his livelihood if he is not permitted to carry on his business, while respondents Nos. 1 and 2 will not suffer any loss which cannot be compensated in terms of money. He also referred to Section 53 of the Partnership Act and submitted that he does not want to do business for his own benefit and the trial Court has rejected his offer to share the profits.

4. Learned counsel for respondents Nos. 1 and 2 submitted that Section 37 of the Partnership Act has no application to the facts of the case. As far as Section 53 of the Act is concerned, he contended that a partner can carry on business for his own benefit only subject to a contract to the contrary and this Court cannot permit him to do so.

5. Section 37 of the Partnership Act provides as below ; --

'Right of outgoing partner in certain cases to share subsequent profits.-- Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then in the absence of a contract to the contrary, the outgoing partner or his estate is entitled to the option of himself or his representative to such share of the profits 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 six per cent per annum on the amount of his share in the property of the firm :.....'

6. Section 53 of the Partnership Act provides as below : --

'Right to restrain from use of firm name or firm property. After a firm is dissolved, every partner or his representative may in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit until the affairs have been completely wound up.'

7. I have carefully considered the submissions made before me, I accept the contention of the learned counsel for the respondents that Section 37 applies only in two contingencies, namely : --

(a) Where any member of a firm has died or otherwise ceased to be a partner; and

(b) the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate.

8. Section 42(C) provides for a dissolution of a firm on the death of a partner.
9. Sections 32, 33 and 34 of the Partnership Act provide for other contingencies whereby a partner ceases to be a partner.
10. Section 37 does not contemplate the dissolution of a firm by a notice as provided in Section 43 of the Act.
11. It is not a case where a partner may have died, nor a case where a partner has ceased to be a partner. The business in this case is not sought to be continued by all the remaining partners, but by the appellant alone. He cannot claim the benefit of Section 37 of the Act.
12. As far as Section 53 is concerned, there is a total blanket on the carrying on of a similar business in the firm's name or using of the property of the firm for his own benefit by a partner, except subject to a contract to the contrary.
13. The respondents Nos. 1 and 2 are entitled under the law to restrain the appellant and respondent No. 3 from carrying on a similar business in the firm's name or from using any of the property of the firm for their own benefit until the business of the firm is wound up.
14. I am unable to accept the contention of the respondents that the respondents would not suffer any irreparable injury if the injunction is not granted. Where there is a breach of a mandatory provision of law, irreparable injury follows.
15. The learned counsel for the appellant submitted that the arbitration proceedings regarding the settlement of accounts may take considerably long period for determination and the appellant will be deprived of the use of the property and will also be deprived of his livelihood. It is open for the appellant to persuade other partners to agree that the premises may be leased out to some other person and the rent may be shared by all the partners. This Court cannot allow in the name of equity what law forbids.
16. The appeal is dismissed. There will be no order as to costs.

17. Learned counsel for the appellant made an oral request for permission to file a special leave petition before the Supreme Court. No substantial question of law of general importance is involved. Nor is the matter such which needs to be decided by Supreme Court. The prayer is refused.

18. A copy of the order may be given to the parties on payment of usual charges by tomorrow.

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