

Vidya Devi Vs. Mani Ram Etc.

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Court : Delhi

Decided On : Mar-01-1974

Reported in : 10(1974)DLT311; 1974RLR346

Judge : Avadh Behari, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 40, Rule 1

Appeal No. : Interim Application No. 482 of 1974 and Suit No. 367 of 1973

Appellant : Vidya Devi

Respondent : Mani Ram Etc.

Advocate for Def. : Mr. K.C. Sharma

Judgement :

Avadh Behari, J.

(1) The plaintiff Vidya Devi has instituted two suits in this court for dissolution of partnership and rendition of accounts.

(2) In or about 1960 Basheshar Nath the husband of the plaintiff started partnership business for printing and block making with his partners. These were two partnerships. One was called Delhi Printers. The other was called Process Syndicate. Process Syndicate is engaged in making blocks. The Delhi Printers are

engaged in printing. During his life time in Delhi printers his Partners were Mani Ram and Raj Narain. In Process Syndicate he had three partners, viz, Mani Ram, Raj Narain and N.C. Dutta. Everything went well during the life time of Basheshbar Nath On March 21,1975 Basheshar Nath died. The plaintiff is his widow. On March 23, 1973 two deeds of partnership were executed one in respect of Delhi Printers and the other in respect of Process Syndicate. The terms of both the documents are substantially the same. Under the new deeds Vidya Devi agreed to carry on the business of her husband in partnership with Mani Ram and Raj Narain in case of Delhi Printers In case of Process Syndicate she agreed to continue the business with Mani Ram, Raj Narain and Shoba Rani the wife of N.C. Dutta. The accounts of both the partnership businesses were settled on March 30, 1972 when Basheshar Nath was alive. In 1973 accounts could not be taken as Basheshar Nath died during the month of March itself and the parties agreed that the accounts will be settled in March, 1974. This is expressly provided in the partnership deed.

(3) Hardly three months passed when plaintiff Vidya Devi found that it was not possible for her to carry on business in partnership. On June 18, 1974 she issued a notice to her partners dissolving the partnership business. The defendants on June 27, 1973 sent a reply to the notice denying the plaintiff's right to dissolve the partnership and contending that the plaintiff, if she desired could retire from the partnership business and offered to refer the matter for settlement to arbitration. It may also be mentioned here that in addition to the notice dissolving the partnership firm the plaintiff gave a public notice of dissolution of the partnership business in the Hindustan Times, Hindi Hindustan and Daily Pratap in Urdu newspapers on June 22, 1973. These notices were in accordance with Section 45 read with Section 72 of the Partnership Act.

(4) On August 27, 1973 the plaintiff instituted the two suits and made applications under Order 40 Rule 1, Code of Civil Procedure in both the suits for appointment of Receiver. These applications came up before me on November 19, 1973 and I passed a consent order. I appointed a chartered accountant to go into the accounts of the partnership businesses from April 1,1972 till June 18, 1973 and to value the assets of the partnerships. The defendants appeared before the

chartered accountant. The plaintiff appeared only on two hearings and then absented herself. The chartered accountant was directed by Chawla, J. to proceed in the absence of the plaintiff if she did not choose to attend the proceedings. The Commissioner went on with his work. He made his report in respect of both the businesses on January 22, 1974.

(5) Apparently dissatisfied with the report of the Commissioner and what had happened before, the plaintiff made two new applications for appointment of receiver. These applications are substantially the same as were made by her earlier at the commencement of the suit. The plaintiff's prayer is that her assets in the partnership business are in danger of being dissipated as she has been excluded from the partnership and therefore a Receiver should be appointed in respect of both the businesses. This is opposed by the defendants. This order will govern the applications made in both the suits.

(6) Mr. K.C. Sharma appearing for the defendants has substantially raised one argument. His submission is that in both the partnership deeds there is a provision for retirement of the plaintiff. She should retire, he says. He further argues that she cannot claim dissolution of the firm as this will destroy the businesses and ruin the partners. If there can be a settlement, says the counsel, of the disputes of the partners by the retirement of the plaintiff and payment to her of her share both in assets and profits then there should not be any order for appointment of receiver. He has also called in aid the provision for arbitration contained in the partnership deeds. The clause about these is :-.....

(7) The foundation of Mr. Sharma's argument is the clause for retirement. In the first place he says that the partnership is not at will. In the second place he submits that there is a complete machinery provided in the deed for the retirement of a partner. He says that if the plaintiff is not willing to work in partnership with the defendants she can be paid her share after the accounts have been made up. Further he urges that the right to dissolve the partnership business is not available to the plaintiff in view of the clear provision as to retirement. Lastly it is submitted that if there is any dispute between the partners with regard to the construction of the deed or as to the meaning of the clause as to retirement the matter should be

referred to arbitration. The defendants have made two applications under Section 34 of the Arbitration Act praying for stay of suit on the basis of the above arbitration clause.

(8) Right to retire conferred on the partners by the deed is not in derogation of their right to dissolve the partnership business. This will turn on the question whether partnership is at will and this appears to me to be an important question in this case. The deeds expressly say that the partnerships are at will. If no duration of partnership is fixed the partnership is said to be at will. Where no time is fixed as to the period of a partnership any partner may put an end to the partnership at any time This is provided in Section 43(1) of the Partnership Act. Mr. Sharma contends that since the clause provides for retirement it is not a partnership at will. Section 7 of the Partnership Act is as follows : - '7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is 'partnership at will,'

(9) There are two exceptions to a partnership at will : (1) when there is provision in the contract for the duration of the partnership and (2) where there is provision for the determination of the partnership. In either of these cases the partnership is not at will. The defendants' counsel submits that here there is a provision for determination of the partnership by the retirement of a partner and therefore the partnership is not at will. I do not agree. The partnership deeds do not provide for the determination of the partnerships. Retirement is a severance of the interest of a partner from the partnership business. It is not a determination of the partnership as a whole. Other partners continue to carry on business of the firm. The dissolution of a partnership between all the partners of a firm is called the dissolution of the firm (Section 39). This is what is meant by determination.

(10) To a partnership at will Section 43 of the Partnership Act is at once attracted. Firm may be dissolved by any partner giving notice in writing to all the partners of his intention to dissolve the firm. The plaintiff has given such a notice. She has also given a public notice. In terms of Section 43 the partnership stands dissolved by notice As has been said by the Supreme Court in Thiagarian Vs . Muthuppa. : [1961]3SCR998 : 'The essence of a partnership at will is that it is open to either

partner to dissolve the partnership by giving notice.'

(11) The right to dissolve a partnership at will is the inherent right of a partner. It is a legal right. It is not an equitable right see *Ram Singh v. Ram Chand* Air 1924. Pc 2. The plaintiff has exercised that right and there is nothing in the partnership deeds to prevent her from doing so.

(12) The question is: can the plaintiff be compelled to retire Under Section 32(1)(c) of the Partnership Act a partner may retire where the partnership is at will by giving a notice in writing to all other partners of his intention to retire. The clause regarding retirement in the partnership deeds is nothing more than an embodiment of law as contained in Section 32(1)(c). It gives an option to a partner to retire which the law gives to him. It is a misreading of this clause to say that it takes away the right of a partner to claim dissolution in the case of partnership at will. A partner has both the rights. He may withdraw from the firm and let the remaining partners continue to carry on the business of the firm without dissolution, if he does not want to retire he may claim dissolution. Where a partner withdraws from a firm by dissolving it, it is properly called a dissolution and not as a retirement. S. 32 of Act is : (...)

(13) For the sake of argument I will assume that Mr. K.C. Sharma is right and I am wrong in my conclusion. I will assume that the plaintiff has a right to retire and that she can be compelled to retire by the defendants, though in my opinion this is not the law. If she can be forced to retire the Partnership Act does not provide any machinery for winding up, settlement of accounts, payment of debts etc. The Act makes no provision for the separation of the share of a retiring partner and the intention may be that this shall be determined by agreement between the parties. A partner who has not obtained the agreement of other parties to the severance of his share can only secure separate possession of his share by seeking dissolution and in such a case the rules laid down in Section 46, 48 and 49 become applicable : see *Ajudhia Pershad Ram Peshad v. Sham Sunder and others*, Air 1947 Lah 13. Whatever view one may take of the clause as to retirement there is no escape from the conclusion that in order to separate the plaintiff's share from the partnership businesses there must be a dissolution and that the affairs of the

partnership will have to be wound up in accordance with Sections 46, 48 and 49 of the Partnership Act.

(14) The defendants' counsel cited *Abbott v. Abbott* (1936) 3 All E.R. 823 in support of his submission that the plaintiff can be compelled to retire and the court can refuse dissolution. In that case there was a clause to the effect that the death or retirement of any partner should not terminate the partnership. Clauson J. held that the partnership was not a partnership at will but one to continue (unless dissolved by the court or some other event) so long as two of the partners were still living and had not retired. In my opinion this case is of no help to the defendants. The decision in that case turned on the articles of partnership. Here the provision for retirement is differently worded. The clause under consideration gives no compulsive power to other partners to retire out the plaintiff. She may, if all the partners agree, retire by amicable settlement. If partners do not agree the plaintiff has the right to dissolve the firm.

(15) In disagreement with the defendant's counsel I am of the view that 1. The partnership is at will; 2. the plaintiff cannot be compelled to retire; 3. the partnership business stands dissolved; and 4. that the affairs of the partnership business have to be wound up in terms of S. 46, 48 and 49 of the partnership Act. On a reading of the partnership' deeds these are my conclusions.

(16) It is not disputed by the defendants that the plaintiff is their partner. In *Delni Printers* her share in profits and losses is 36% Mani Ram's Share is 50%, Raj Narain's share, 14% This is clause 4. About her share in assets and liabilities the deed provides: 'present assets and liabilities of the firm were in the ratio of 50% to late Basheshar Nath, 40% of Shri Mani Ram and 10% to Shri Raj Narain. They shall remain in the same ratio as on this date. Future increase in assets and liabilities shall be in the ratio as given in para 4 above.'..... Previously Basheshar Nath's share was 50%. When new deed was executed it was provided: 'As the first partner being a woman is unable to take part In the working of the business, in future the business shall be carried on the mutual consultation of the remaining partners to the benefit of all.'

(17) In Process Syndicate plaintiff's share is 25 per cent Shoba Rani's shares is 5 percent. Mani Ram's share is 40 per cent. Raj, Narain's share is 10 percent. This is clause 6. As regards assets and liabilities it is provided : 'The present assets and liabilities of the firm were in ratio of 32% to Late Shri Bashes Nath, 30 per cent to shri Mani Ram, 35% to Shri N.C. Dutta and 5 per cent to Shri Raj Narain. They shall remain in the same ratio as on this date. The future increase in assets and liabilities shall be computed in the ratio as given in para 6 above.'

(18) It would therefore appear that plaintiff has got a substantial interest in both the businesses. In one she has interest to the extent of 50 per cent in the assets. In the other she is entitled to 32 per cent. It is also not disputed that the defendants are in possession of both the businesses and are carrying on the same as before inspire of the plaintiff's public notice.

(19) Another aspect of the dispute between the parties is that there are creditors of both the firms The plaintiff's relatives have advanced loans to both the firms on the plaintiff's faith. Her one daughter Usha Rani has advanced nearly a sum of Rs. 90,000.00 to the two firms. That she is a creditor in the vicinity of 80,000 to 90,000 of rupees is not disputed by the defendants. There are several other creditors who have invested money at the asking of the plaintiff. Their amounts are also not disputed. The plaintiff has to her credit admittedly about Rs. 54,434 in her current account in the Delhi Printers and Rs. 52,000 in Process Syndicate. Similarly the two defendants in Delhi Printer and three defendants in Process Syndicate have their investments. In both the firms the amount in their current account is Rs. 96,000.00 according to the defendants. Then they have their own relations who have made advance to the firms on the faith of the defendants. Those creditors are also for substantial amounts as are the plaintiff's relations-creditors. If the firms are not dissolved how are these creditors to be paid A creditor is not obliged to wait. He can immediately call for payment of his debts. The liability of all the partners is joint and several. Mr. Sharma has suggested that if one month's time is given the defendants will make payment to all the creditors. I do not think that it is feasible proposition. A creditor may not forbear to sue. The plaintiff's own daughter may sue for the recovery of Rs. 90,000.00. Then the plaintiff is herself entitled to claim that her share may immediately be separated so that she does not incur any

further liability either in business or in relation to the creditors. Once I come to the conclusion that the partnership is at will and the plaintiff has an indefeasible right to dissolve the appointment of a receiver appears to be the only answer.

(20) Mr. Sharma then argues that if time is given he is prepared to pay off the plaintiff's share. The question is: can that be done? If the partnership has been dissolved the conclusion is inescapable that the assets of the firm must be collected and converted into cash and be applied to the payment of debts and liabilities of the firm and the surplus distributed among the partners according to their shares. The partnership firm is already at an end. Only the distribution of its assets and winding up remains to be done. The mode of settlement of accounts is provided in Sections 48 and 49.

(21) The question is: will it be just and convenient to appoint a receiver? There seems to be no other way except to appoint a receiver in order to protect the interest of the plaintiff. The assets of the partnership have to be collected and preserved. The parties are at loggerheads. There are bitter feelings. In the beginning a Commissioner was appointed to prepare an inventory. The inventory was prepared with great difficulty. The plaintiff has made no secret of the fact that she is not willing to retire and that all that she wants is a dissolution of the firm and a separation of her share. She does not agree that the defendants may be allowed to use the assets of the partnership so long as her share is not paid off. The plaintiff has at no time in the notice or in the suit expressed any intention to retire. She is firm in her claim of dissolution.

(22) In *Kerr on Receivers* (13th edition,) it is said :-

'THE readiness of the court to appoint a receiver in partnership cases depends upon whether the partnership has been dissolved at the time when the application is made. If a dissolution has clearly been effected by the service of the writ, or if the partnership has expired by efflux of time, a receiver will readily be appointed, though the appointment is not a matter of course; it will be enough to show that one of the former partners is delaying the winding up and realisation of the business.'

(23) If the partnership is a continuing one, the court is placed in a position of very great difficulty : If it grants the motion, the effect is to put an end to partnership, which one of the partners claims a right to have continued; while it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk and probably to the great loss and prejudice, of the dissenting party. The case in hand is different. Here dissolution has taken place. The partnership is at will, I have already held. By notice it was dissolved.

(24) In *Taylor V. Heate* (1888) 39 Ch. P. 538 it was held that where there is a clause in the articles of partnership providing for the division of assets on a dissolution, such a clause cannot override the general power of a court to order a sale of the business as a going concern and appoint a receiver and manager.

(25) In *Lindley on Partnership* at page 553 it is observed : If the partnership is already dissolved, the court usually appoints a receiver, almost as a matter of course...the common property has to be applied in paying the partnership debts, and has to be divided amongst the partners, and each partner has as much right as the others to wind up the partnership affairs.'

(26) The courts have found it just and convenient to appoint a receiver where the partners have fallen out and debts and liabilities have to be paid and assets and profits are to be distributed. A receiver may be appointed where there is reasonable apprehension to the partnership property, assets or income and are in danger of being injured, misused or dissipated. See *Nihal Chand V Ram Nivas* . A receiver should be appointed as a matter of course where a partnership has already been dissolved and when the suit is for the distribution of the assets of a dissolved firm : see *Sheonara'm V. Kirpa Shanker*, : AIR1972 Pat75 .

(27) The counsel for the defendants has argued that the appointment of a receiver is the harshest remedy and there are in this case no circumstances for the appointment of a receiver. He has argued that his proposal of payment to the creditors and the 'plaintiff should be accepted and time may be granted for that purpose. I do not agree. In fact the court cannot make any provision for the payment to creditors who are not parties to the suit and who are free to pursue such course as they wish. If suits are brought against the partnership by creditors

it will create difficulties. In my view appointment of a receiver is a beneficial course. A receiver is appointed when the plaintiff's case is clear and strong. In this case I am of the view that the plaintiff's case is both clear and strong. If ever there was a case fit for appointment of receiver I think it is this one.

(28) Another argument was raised. By reason of the order which I made on November 13, 1973 which was an agreed order, the plaintiff is not entitled to reargue for the appointment of a receiver. The applications for appointment of receiver by the plaintiff, the defendant's counsel says, should be deemed to have been disposed of by the order of November, 1973. He submits that on the principles of res judicata fresh applications are barred. I think it is not so. When I appointed the chartered accountant on November 19, 1973 I did not give any decision. Principles of res judicata are attracted to a decision. I find that there is no decision given by me in that order. All that I did was that I appointed a chartered accountant as the parties agreed to that course. My anxiety at the time of making the order on November 19, 1973 was to secure some agreements between the parties as regards the protection of plaintiff's interest in the partnership property and to postpone the appointment of receiver till after the report of the chartered accountant. The intention was to save the partnership if I could. The plaintiff in her subsequent application says that the order dated November 19, 1973 has not protected her interest. I go further. Assume the application for receiver was disposed of on the passing of the agreed order. Is the plaintiff for ever precluded from making a new application I think not. As the Privy Council said in *Rehmalunnissa Begum V. Price*, Air 1917 Pc 116 ; 'No one can exclude himself from the protection of the courts.'

(29) It is indeed painful to order the winding up of a running profitable business but if on further reflection and arguments the law suggests that course then that has to be followed.

(30) The two authorities relied by the counsel *Rameshwar Singh V. Hitendra Singh* Air 1924 Pc 202 and *Sailendra Narayan V. State of Orissa*. : [1956]1SCR72 are not applicable No other point was raised. Applications accepted.

