

Kali Ram(*) Vs. Ram Rattan**

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Court : Delhi

Decided On : May-26-1976

Reported in : 13(1977)DLT250

Judge : D.K. Kapur, J.

Acts : [Partnership Act, 1932](#) - Sections 7 and 40

Appellant : Kali Ram(***)

Respondent : Ram Rattan

Advocate for Pet/Ap. : S.L. Bhatia and; V.B. Andley, Advs

Judgement :

Dalip K. Kapur, J.

(1) The parties to this appeal are brothers who had entered into a partnership on 11th January, 1964. The business was to be carried on under the name and style of M/s. Gupta Handloom Stores on certain terms and conditions which will be analysed later to the extent necessary in this appeal. Ram Rattan, the respondent in this appeal instituted a suit for dissolution of partnership and rendition of accounts stating that he had become a T.B. patient and had not been able to look after the business of the firm and, the defendant had taken some illegal steps to expel him from the business and had fabricated books of account and removed a

major portion of the assets. Further, it was alleged that disputes had arisen between the parties and a reference was made to arbitration, but the arbitrators were unable to reach any decision. The plaintiff wanted a decree for dissolution of partnership and rendition of accounts. Kali Ram, the present appellant resisted the suit and claimed that he had served a notice on the plaintiff on 4th November, 1966, intimating that the partnership stood dissolved. He also contended that the capital investment of the plaintiff had been withdrawn and in fact, about Rs. 2,800.00 was due from the plaintiff to the defendant. Only two issues were framed by the court which were :--

'1. What is the period of accounts Opp. Parties. 2. Relief.'

It is surprising that the court did not frame any issue regarding the contention of the defendant that the partnership already stood dissolved. In fact, suit being a suit for dissolution of partnership required a decision whether the partnership was already dissolved or not. In any case, in dealing with the question as to what was the period of accounting, the trial court did give a finding to the effect that the partnership was not one at will and was to be dissolved by the court under Section 44 of the [Partnership Act, 1932](#). It was held that the partnership would stand dissolved from the date of the judgment. It was further stated that the partnership started on 11th January, 1964, and the period of accounts was from 11th January, 1964, to 11th March, 1970. This latter date is the date of the judgment of the Subordinate Judge. I have gone through the judgment of the trial court very carefully and cannot find from there what is the ground for dissolving the partnership. A partnership at will can be dissolved by one of the partners giving a notice to the others, but other partnerships can only be dissolved by the consent of all the partners or by the death or insolvency of one of them. Undoubtedly, such a partnership can also be dissolved by the Court under Section 44 of the [Partnership Act, 1932](#). Although, the trial court held that the partnership was being dissolved by the court under Section 44, it has not at all disclosed on what ground the partnership was being dissolved. As a matter of fact, Section 44 of the [Partnership Act, 1932](#), is analogous to the provisions of the Companies Act regarding the winding up of companies. A partnership can only be dissolved on the specific grounds mentioned in Section 44 of the Act. I do not find from the

judgment that there was any issue relating to the existence of a ground for dissolving the partnership and nor do I find any material on record to show that either party alleged or proved any of the grounds mentioned in Section 44. In fact, strictly speaking, if the court came to the conclusion that the partnership was not at will, then the partnership could only be dissolved on a finding that one of the grounds mentioned in Section 44 was proved. The court has no general power of dissolving partnerships. and could not dissolve a partnership without a finding in accordance with Section 44 of the [Partnership Act, 1932](#). This is one of the defects in the judgment of the trial court which I mention in passing before I deal with the questions of law which have arisen in this appeal.

(2) On appeal to the Additional Senior Subordinate Judge by the present appellant it was held by the court that there was no error in the conclusion arrived at by the learned Subordinate Judge and accordingly the partnership was not one at will. The learned Additional Senior Subordinate Judge then proceeded to analyze whether the notice given by the present appellant on 4th November, 1966 was a valid notice and came to the conclusion that the notice was a had notice and did not dissolve the partnership. Having reached this conclusion, the learned, Additional Senior Subordinate Judge should have held that the partnership was not dissolved and could not have come to the conclusion that the accounting period was from 11th January, 1964 to 7th March, 1970.

(3) I may mention, that although the scope of the suit was a very limited one, a very important question of law had arisen before the Subordinate Judge and the Senior Subordinate Judge which they have completely over-looked. This question was as to how a partnership- can be dissolved. If it is a partnership at will, then section 43 of the: Partnership Act applies. This Section states that where a partnership is at will, the firm may be dissolved by any partner by giving a notice in writing to the other partners and the firm is dissolved with effect from. the date mentioned in the notice. Thus, if this partnership was a partnership at will, this firm would be dissolved by the giving of the notice by the present appellant. Such a notice was in fact given on the assumption that the partnership was one at will. The date of that notice is 4th November, 1966. If I accept the finding of the two courts below to be correct and hold that the partnership is not one at will, then

section 43 of the Act does not apply.

(4) The other Sections which deal with the dissolution of firms are Sections 40, 41, 42 and 44. Under Section 40, a firm may be dissolved with the consent of the partners or in accordance with the contract between the partners. If this Section applies then we have to find out what was the contract between the parties and further determine whether the partnership was dissolved in accordance with the contract. This is called a dissolution by agreement. By virtue of Section 41, a firm may be dissolved on the insolvency of a partner as mentioned in the Section or on the happening of events which make the business unlawful, this section does not apply. Section 42 provides that the dissolution may be-(a) if there is a fixed term, by the expiry of the terms; (2) if there are certain adventures or undertakings, by the completion thereof, (e) by the death of a partner and (d) by the adjudication of a partner as an insolvent. None of these contingencies arises in this case. Section 44 sets out seven separate grounds on which the court may dissolve a firm. These grounds must be proved in the suit before a firm can be dissolved. As I have already indicated, neither court below has given any finding on the existence of any ground on which a firm may be dissolved. In my view, if the court came to the conclusion that the partnership was not at will, then it had to give a finding that one at least out of the grounds mentioned in Section 44 existed ; otherwise, the firm could not be dissolved and no decree could have been passed. therefore, in no event can the judgments of the two courts below be affirmed. I have now to examine whether the partnership is one at will and if it is not such a partnership the suit may have to be remanded back to the trial court to determine whether there are any grounds for dissolving the partnership.

(5) Having stated these facts. I now set out the factual dispute between the parties which arises from the terms of the partnership agreement in this case. There are certain contradictions in the partnership deed which have given rise to the present dispute and an interesting question of law arises concerning the nature of the partnership. The partnership deed, which has been marked as Exhibit C-2 in pencil is not properly exhibited as it is neither an original nor a signed copy and does not even bear the exhibit mark in the manner prescribed by the Code of Civil Procedure. I think, the Court should insist on the proper proof of documents before

they proceed with the decision of suits of this type, but, in order to save a remand only for proving this document. I have referred to the un-attested and unproved document which is admitted by both sides to be at least a correct copy of the deed.

(6) It is stated in this document in paragraph No. 3 : -

'THATthe partnership business under this deed shall commence w.e.f. 11th January, 1964 and shall continue unless determined by the parties. The partnership is at will.'

NOWwhen it is provided in a partnership document that it is at will, I would have thought that the partnership is one which the parties have themselves stated to be one at will and it is not open to the court to easily say that it is not one at will. The conflict between this clause and clause 16 has been the subject-matter of adjudication by the courts below. That clause read:-

'THATany partner of any time by three months notice in writing to the other partners may dissolve the partnership shall stand dissolved.'

Though the language of this clause seems to be incorrectly worded from a grammatical point of view, its meaning appears to be that the partnership may be dissolved by giving three months notice. There is a clash between this clause and clause No. 3 because under the Partnership Act, a partnership at will may be dissolved simply by giving a notice in writing. It is not necessary under Section 43 to give a notice of any length of time. In fact, a firm stands dissolved under Section 43(2) from the date mentioned in the notice and if no date is mentioned from the date of communication of the notice. The terms of clause 16 make a departure from this by stating that the dissolution will be by a three months notice. In other words, the parties had agreed that the partnership might be dissolved by giving a three months notice which seems to be different from the notice contemplated by Section 43 of the Act. thereforee, it has been held by the courts below that this is not a partnership at will.

(7) The courts below have referred to Section 7 of the Act which gives a definition of what is a partnership at will. It states:-

'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'.'

THIS Section shows that a partnership at will is a form of partnership in which the parties do not fix a duration of the partnership and do not make any provision as to how the partnership is to be dissolved. therefore, if the partners do not make an arrangement as to how the partnership is to be dissolved the partnership ipso facto ceases to be a partnership at will. This is the argument that has impressed both courts below. They have looked at the terms of section 7, they have looked at the partnership deed and stated that as the parties have agreed as to how the firm should be dissolved, the partnership cannot be at will in spite of the statement to that effect contained in the partnership document. The question to be determined is whether this is correct. And secondly, even if this was so, whether the partnership was dissolved by the notice actually given in this case.

(8) I now turn to the notice in question. Surprisingly, this is also improperly exhibited. However, in pencil the letters Exhibit C-1 and Exhibit C-2 have been written on this document as well as the deed of partnership. Both these documents are being treated as being proved by me, in spite of the fact that they are not properly exhibited in accordance with the Code of Civil Procedure. This document is a notice dated 4th November, 1966, issued by the present appellant to Ram Rattan the plaintiff. It is under the signatures of an Advocate. There are several paragraphs in the notice alleging that the plaintiff was not attending the partnership and had also withdrawn his investment, but the relevant paragraph is the 6th and the last paragraph. It reads:-

'THAT the partnership stand dissolved from to-day. There is nothing due to you from my client in respect of the said firm. You have no right or interest in the assets of the said firm. Please note.'

THE notice thus dissolves the partnership with immediate effect, i. e., from 4th November, 1966. Such a dissolution could be effective if this partnership was at will. If the partnership is not one at will, then the partnership may not stand dissolved from 4th November, 1966. As I have already said the partnership is not one at will because it has a term determining the partnership, but at the same time, the partners have called the partnership one at will. thereforee, either clauses 3 and 16 have to be reconciled or, some other meaning has to be found for justifying the notice of dissolution. Alternatively, it might be held that the partnership is not dissolved at all. I first try to determine if there is any way in which clauses 3 and 16 of the partnership deed can be reconciled with each other. This is possible in several ways. It can be held that either, clause 3 or clause 16 over-rides the other clause and, it can either be held that clause 3 is ineffective and clause 16 is effective or clause 3 is effective and clause 16 is in-effective. In other words the two clauses can be reconciled by excluding one of them. The rule of interpretation of documents which has generally been accepted is that the earlier clause over-rides the later clause. This rule has been noticed in the judgment of the Supreme Court in *Sahebzada Muhammad Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo*, where it was stated:-

'NEXT it is agreed if it does appear that the later clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of the property the earlier clause must prevail.'

Concerning this statement the Court stated:-

'THE correctness of these principles i(r) well established by authorities to justify.'

Thus, am assuming that the rule of interpretation is that if there is a clash between clauses of a document, then the earlier clause prevails. On this rule of interpretation, the partnership must be held to be a partnership at will. There is also another way of reconciling the two clauses. A partnership at will is essentially a partnership which can be dissolved by the unilateral act of one partner. Other partnership cannot be dissolved except with the consent of the other partners or by the occurrence of events outside the control of the partners such as the death of partner or insolvency. The essential element which distinguishes a partnership at

will and other partnerships is that such a partnership can be dissolved by the giving of a notice by one partner. Clause 16 merely states that the partnership shall be dissolved by a notice of three months. In my view this clause in reality emphasises the fact that the partnership under consideration is a partnership at will, because it is only such a partnership that can be dissolved by a unilateral notice. The only departure from the normal rule is that the notice is to be for three months. Again, clause 16 makes it clear that the partnership may dissolve by a notice of three months, The word 'may' is not unnecessarily to be read as the word 'shall'. In my view, this only enables one of the partners to dissolve the partnership by a notice of three months if he wants to. It does not debar him also dissolving the partnership by giving a notice. If the partners had chosen that the partnership could only be dissolved by a notice of three months, there was nothing to prevent, them using such an express and emphatic language. They could easily have said: 'This. partnership shall only be dissolved by giving a notice of three months' duration'. The very fact that the partners have not chosen to use this type of language shows that it was optional to either of the partners to give a notice of three months or, to dissolve the partnership in the manner prescribed by Section 43 of the Act.

(9) The interpretation I have just given seems to render the definition given in section 7 of the [Partnership Act, 1932](#), ineffective because that definition shows that a partnership is only a partnership at will if no method of determining the partnership is mentioned in the agreement. In as much as the partnership document does mention one way of ending the partnership, it would follow that the partnership is not one at will. I think that such a strict construction of Section 7 is not to be. made. The essential difference, in my view, between a partnership at will and other partnerships is not the nomenclature that is used but the essential element is how the partnership is to end or to be determined, If the partnership is not a partnership at will, it cannot be dissolved by one of the partners. It can only be dissolved by the mutual consent of all the partners or by the death or insolvency of one of them. It can also dissolve on the adventure or undertaking concerning which the partnership has been formed coming to an end. therefore, a parternership at will and other partnerships are essentially different regarding the manner in which they are to be determined. Any partnership which can be

dissolved by giving a notice is a partnership at will. It is a partnership at will because the will of one partner can determine in inspite of the opposition of the others. Thus essentially, clause 16 although it provides for a notice of three months is a clause which classifies the partnership in question as a partnership at will. However, the question still remains as to whether the partnership under consideration could be determined by a notice taking immediate effect instead of a notice which was to be of three months duration. One way of reconciling this difference was to treat this partnership as one which was at will which could be dissolved by giving a notice of three months. This would still leave the question as to whether the notice in this case was valid or not. As I have already mentioned, the notice was to take immediate effect. For reasons I am just going to state it is not necessary to reconcile this difference in very great detail.

(10) The notice under consideration by which the present appellant purported to terminate the partnership was given on 4th November, 1966- The intention of the notice was to dissolve the partnership from the date of the notice, i.e. from 4th November, 1966. Now, what was the reaction of the plaintiff, Ram Rattan on receipt of this notice Did he accept the notice or did he not What did he do to suggest that the notice was not acceptable to him These are considerations which are of the utmost importance interpreting the notice, In my view, the facts established on record show that he never objected to this notice at all. There is not a single document on record or a single suggestion to the effect that the notice was ineffective. Instead of immediately replying to say that you cannot dissolve the partnership because you have to give a notice of three months' the plaintiff was absolutely silent. He waited, in fact, for several years before he decided that here was the opportunity to file a suit for dissolution of partnership and rendition of accounts. The suit was actually filed on 29th November, 1969. This was over three years after the notice had been served. There is nothing at all to suggest that the plaintiff and the defendant continued their partnership for the period between the notice and the filing of the suit which is a period of over three years. In paragraphs Nos. 6 and 7 of the plaint the following averments are made:-

'6. That the partnership business continued smoothly till September, or October, 1966 and in the meantime the defendant also gained much experience of the said

business. This said building (sic) was yielding huge profits to the parties.'

7. That the intentions of the defended became morbid and with a view to become the exclusive owner of the said business, the defendant started illegal activities to expell the plaintiff out from the said partnership business.'

THIS shows that the plaintiff was aware of the fact some attempt had been made to expel him in October, 1966. Why then did he Wait till November, 1969 to bring the suit The season for his inactivity is provided by the pleading in the written statement. It is there stated in paragraph 6, that the plaintiff was actually, concerned with the partnership up to April or May, 1965, and thereafter he had become unwell. The defendant had to employ other person in place of the plaintiff to help him in carrying on the partnership business. 'The plaintiff could not attend to the partnership business even thereafter and so the defendant served a notice dated 4-11-1966 on the plaintiff intimating to the latter that the partnership stood dissolved.' There is further pleading that the plaintiff had withdrawn all his investment and details of this are set out in paragraph No. 9 of the written statement. It is stated in paragraph No. 12 of the written statement that the partnership document was dissolved on the giving of the notice on 4th November, 1966, and thereafter the partnership deed did not remain alive. This is the tenor of the written statement.

(11) The failure of the plaintiff in taking action for over three years after the giving of the notice, in my view, shows that he accepted the dissolution of the partnership and the suit for dissolution and rendition of accounts was only after-thought. This seems to be a case in which it is not necessary to refer to Section 43 of the [Partnership Act, 1932](#), to find out whether the notice dissolving the partnership can be treated as a case under Section 40 as being a dissolution by the conduct of the partner. The exact wording of Section 40 is :-

'A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.'

It is note-worthy that there are two ways mentioned in this Section for dissolving a partnership. One way is that the partnership may be dissolved in accordance with

the contract. One of the way for dissolving the partnership was to give a notice of three months. Assuming that was only way in which the partnership could be dissolved, the Section visualises another way in which a partnership can be dissolved which is by the consent of the partners. How is that consent to be brought about? Is writing necessary Do the partners have to do any particular act to signify their consent or can the consent not be made out from their conduct? In my view, in the present case, the defendant (now appellant) gave a clear notice to the plaintiff (now respondent) that he had dissolved the partnership on 4th November, 1966. Following the service of this notice, it was open to the plaintiff to say that I do not accept this notice or, that the notice is invalid. If he had done so, probably, the defendant would have given a notice of three months' duration, or he might have done something else or taken some other steps to dissolve the partnership. The plaintiff never did any of these things, he never made any suggestion and never wrote to the defendant to say that the dissolution was invalid. He accordingly, in my view, accepted the dissolution. The acceptance of the notice in this manner, in my view, amounts to consent. Thus, the partnership was dissolved by consent on 4th November, 1966. There is one very important clause in the partnership deed which I may now mention. That is clause 14. It states :--

'THATthe case of dissolution of the firm, the place of the business at 5633, Nai Sarak, Delhi, and the lease rights of same shall belong to the party of the first part only and that party of the 2nd part shall not have any right or claim whatsoever any kind over the same.'

The party of the first part is the defendant, Shri Kali Ram and the party of the second part is the plaintiff, Shri Ram Rattan. They are brothers, It seems that the elder brother took the younger brother into partnership in respect of the partnership business. The partnership was carried on for several years commencing from 11th January, 1964, till the actual date of dissolution, which was as held by me 4th November, 1966. There after, the premises were to revert back to Kali Ram. In my view, the partnership came to an end with the giving of the notice and the subsequent conduct of the plaintiff in not refuting the notice. Now, if an advantage is given to the plaintiff for the intervening period after 4th November,

1966, it will mean that the plaintiff will get the benefit of the work done by the defendant after 4th November, 1966. The effect of the judgments of the courts below is to fix the accounting period up to 7th March, 1970. This means that the plaintiff has got the advantage of getting a share in the business for the about 3' years after the giving of of the notice of dissolution. Presumably, if the plaintiff had waited for some more years; the courts below would have given him a further advantage. I do not think that this is the proper way to interpret the actions of the plaintiff. He must be taken to have consented to the dissolution by accepting the notice and not doing anything thereafter in respect of either the partnership business or the notice. His failure to do any thing from 4th November, 1966 to 29th November. 1969, in my view, signifies his consent to the dissolution. Even if the consent was not explicit, the acquiescence and consent by conduct can be spelt out from the facts of the case.

(12) In the circumstances, I accept this appeal and hold that the partnership was dissolved on 4th November, 1966, and not on the date of the judgment of the trial court, 7th March, 1970. In the result, the suit will be decreed to the extent that it would be held that the partnership was dissolved on 4th November, 1966, instead of 7th March, 1970, and thus the accounting period would be from 11th January. 1964 to 4th November, 1966. The trial court had appointed a Local Commissioner-cum-Receiver. I upheld that appointment, but direct that he will take accounts only for the period indicated.

(13) As the parties are brothers, I do not make any order as to costs.