

Narinder Nath Vs. Mahinder Nath

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Court : Delhi

Decided On : Oct-01-1994

Reported in : 1994IVAD(Delhi)795; 1994(31)DRJ455

Judge : R.C. Lahoti, J.

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

Appeal No. : Suit No. 2610 of 1993

Appellant : Narinder Nath

Respondent : Mahinder Nath

Advocate for Pet/Ap. : S.K. Dholakia,; A.C. Gulati,; M.K. Arora,;

Judgement :

R.C. Lahoti, J.

(1) This order disposes of four IAs.

(2) The facts in brief, in so far as relevant for the disposal of these applications may be noticed. M/S Kedar Nath Mohinder Nath was a partnership firm. There were five partners. The plaintiff and the defendants 1,2 and 3 real brothers held 15% share each. Their mother Smt Krishna Pyari was also a partner holding 40% share.

(3) The plaintiff has filed this suit for dissolution of partnership and rendition of accounts on 18.11.1993. The mother was not joined as a party to the suit. The defendants on being noticed, have on 11.11.93 filed on I.A.No-249/94 under Order 7 Rule 11 Civil Procedure Code seeking rejection of the plaint alleging the suit to be barred by law inasmuch as the mother, a necessary party was not joined in the suit. Faced with this application, the plaintiff became wiser and on 1.3.94, moved an application under Order 1 Rule 10 Cpc (I.A.No.2271/94) for impleading the mother as a party to the suit. However, before the application could be heard on merits, the mother expired on 8.3.94 rendering the plaintiff's application infructuous.

(4) On 4.4.1994, the plaintiff moved an application under Order 6 Rule 17 Cpc (I.A. NO. 3354/94) seeking an amendment in the plaint alleging that the mother having expired, her share in the partnership had devolved upon the plaintiff and defendants 1 to 3, the four brothers in equal shares and hence the suit as originally framed should proceed ahead, the death of mother having cured the defect of her non-joinder in the suit. The prayer for amendment has been contested by the defendants submitting that the suit was bad for non-joinder of necessary party and the plaint being liable to be rejected, the defect could not be cured by seeking an amendment. Reliance is placed on Joginder Singh v. Krishan Lal, . It is also submitted that late Krishana Pyari has left a will bequeathing her share in partnership to defendants No. 1,2 and 3 only excluding the plaintiff from inheritance.

(5) The deed of partnership dated 8.9.1975 is on record. Following two clauses of the deed are extracted and reproduced as they would be of significant assistance in disposing of several controversies posed for being resolved at this stage. Clauses 9 and 10 read as under: '9. That in the event of the retirement of any one partner, the business shall not be dissolved and the continuing partners shall be entitled to carry on the business as before. The retiring partner, however, shall not be entitled to use or exploit the trade name and good will of the firm, which shall in such a case become the exclusive property of the continuing partners. The retiring partner shall, however, be paid his share in the value of the trade name and goodwill of the firm and in such an event, such value shall be deemed to be fie

average of the profits of the business for the two accounting years preceding the date of such retirement.

(10) That the death of the partner shall not dissolve the partnership which shall continue between the remaining partners. The heirs of the deceased partner will have the option to join the partnership on the same terms and conditions under which such deceased was working in the partnership.'

(6) According to the plaintiff, the partnership is one at will and shall be deemed to have dissolved, with the summons in the suit accompanied by copies of plaint having been served on defendants in view of Sections 7 and 43 of the Partnership Act, 1932. According to the defendants, the partnership is not one at will. It is a continuing partnership. Any one intending to retire from the partnership may so retire which would not dissolve the partnership and the business would be continued by the partners other than the retiring partner. Death shall also not dissolve the partnership which shall be deemed to have been constituted by the remaining partners, subject to the option exercisable by the heirs of the deceased partner to join the partnership. The retirement part of the contention of the defendants is sought to be met by the plaintiff contending that the availability of the retirement clause does not compel the unwilling partner to simply retire; he can enforce his right to dissolve the partnership.

(7) In so far as IAs 248/94, 2278/94 and 3354/94 are concerned, they do not pose much problem for decision as the law is very clear and explicit. Indeed, the suit was bad for non-joinder of necessary party on the date of the suit. However, the defect is curable if step is taken before the law of limitation bars the remedy. It is not disputed that dates on which the applications under Order 1 Rule 10 and Order 6 Rule 17 Civil Procedure Code were filed by the plaintiff, limitation time for filing the suit had not expired. Even if the present suit was to be dismissed on account of non-joinder of necessary party, nothing would have prevented the plaintiff from filing a fresh suit for the same relief. If a fresh suit is not barred, nothing debar the plaintiff from seeking an amendment here itself and curing the defect in the constitution of the suit. In view of the mother having expired before she could be impleaded, I.A.No. 2278/94 under Order 1 Rule 10 Civil Procedure Code is

rendered infructuous. is No-3354/94 which is based on the subsequent event of the death of the mother having occurred during the pendency of the suit deserves to be allowed. In so far as the alleged will (will? /Ed.) left by the mother is concerned that will only affect the shares of the parties which is a matter determined in the suit and not now. With that the I.A. 248/94 under Order 7 Rule 11 Civil Procedure Code filed by the defendant would be rendered lifeless.

(8) Punjab & Haryana High Court decision in Joginder Singh's case (supra) has no applicability to the facts of the present case. It was a case where a suit was filed against a dead person and the defect was sought to be cured by moving an application for amendment. The court opined that the prayer for amendment could not be entertained in a plaint which was nullity. Such is not the case here.

(9) For the foregoing reasons, is No. 2278/94 under Order 1 Rule 10 Cpc is dismissed as infructuous. I.A. No. 3354/94 under Order 6'Rule 17 Cpc is allowed. The amended plaint filed by the plaintiff is taken on record. wever, this shall be subject to payment of Rs. 5,000.00 by way of costs by the plaintiff to defendants 1,2 and 3.

(10) The above said two applications having been allowed, as a necessary consequence is 248/94 under Order 7 Rule li Civil Procedure Code is rejected.

(11) By I.A. No. 2279/94 the plaintiff seeks initiation of proceedings for breach of an interim order passed by the Court on 25.11.1993. This Court had directed the defendants to maintain accurate account of the receipts and payments which are made and a statements thereof to be filed by the defendants No. 1 to 3. It is complained that what has been filed by the defendants in the court is merely an excuse of compliance with the Court orders, as the statement and papers filed by the defendants do not give any details or particulars so as to enable the plaintiff to understand the accounts.

(12) In the opinion of this Court, it is not necessary to initiate proceedings at least for the present. Learned counsel for the defendants 1 to 3 has expressed willingness of the defendants and consistently therewith it is directed that within two weeks, defendants No. 1 to 3 shall file a statement of accounts afresh giving

particulars or details of all the receipts and payments so as to present a complete picture of transactions before the plaintiff. If this order is not complied with, the plaintiff shall be at liberty to seek an inspection of the accounts and/or secure copies thereof apart from other remedies which he may have under the law. Such a statement of account shall be filed by defendants No. 1 to 3 month by month, by 10th day of each calendar month, for the previous month till the decision of the suit. I.A. 2275/94 stands disposed of accordingly.

(13) Consideration of I.A. 999A/93 (Order'40 Rule 1 CPC) is postponed till the next date of hearing awaiting compliance by defendants No. 1 to 3 with the order made by this Court today on is 2275 / 94.

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