

(1935) 08 MAD CK 0038
In the Madras High Court

Dr. S. Muniswami Naidu and Others

APPELLANT

Vs

G. Thandavaraya Mudaliar

RESPONDENT

Date of Decision : 09-08-1935

Acts Referred:

Citation : AIR 1936 Mad 5 : (1936) 43 LW 218

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This is an appeal by the defendants against a decree directing certain accounts to be taken and awarding to the plaintiff

one-third share of the profits which on such taking of accounts may be ascertained to have been earned in connexion with a certain venture. About

the end of 1924, a contract was taken in the name of defendant 1 for the construction of a portion of the Shoranur-Nilambur Railway. The

defendant 2 is defendant 1's son-in-law and was, at the time the contract was taken, employed in the service of the railway company itself. It was

the plaintiff's case that on account of this circumstance the contract was taken in defendant 1's name but it was intended for defendant 2's benefit.

Defendant 2 denied this, but the lower Court has upheld the plaintiff's contention on this point. This finding has not been assailed before us. Having

taken this contract for the construction of the railway line, it is the plaintiff's case that defendants 1 and 2 availed themselves of his services in

connexion with that work and the terms of the arrangement as finally settled are stated in Ex. A as follows:

You should be my substitute at the place of work, look after the work and finish it. As soon as the final bill is made, after deducting all the

expenses I agree to pay you one third of the profits.

2. This document dated 14th January 1925, was signed only by defendant 1. But it was the plaintiff's case that the arrangement with him was

entered into by both defendants 1 and 2, that defendant 2 could not sign it because he still continued in the railway company's service and

therefore wanted to make it appear that it was defendant 1's concern. Defendant 2 admits that the terms were settled by him and also that Ex. A is

in his handwriting, but he would make it appear that he wrote it at Trichinopoly and sent it to Angadipuram where the plaintiff was. In the

circumstances of the case and the probabilities appearing from the evidence, the lower Court rightly came to the conclusion that the arrangement

must have been come to in the presence of all the three persons at Angadipuram. It would therefore follow that it is a contract between the plaintiff

on the one side and defendant 1 and 2 on the other. The learned Advocate-General contended that as Ex. A is signed only by defendant 1, no oral

evidence could be adduced to show that defendant 2 was also a party to the arrangement or was bound by it. This argument is opposed to the rule

laid down by a Division Bench of this Court in Venkatasubbiah Chetty v. Govindarajulu Naidu (1908) 31 Mad 45. Our attention was drawn to an

observation of Beaman, J., in Laxmi Bai v. Keshav 1916 18 Bom L.R. 134 that the wide generalisation adopted in this Madras case ""ignores the

logic of the principle"" as attempted to be shown by the learned Judge in an earlier portion of the judgment. But even that learned Judge has not put

the matter higher than that and we do not feel satisfied that the principle of the decision in Venkatasubbiah Chetty v. Govindarajulu Naidu (1908)

31 Mad 45 ought not to be followed. By way of analogy, the learned Advocate-General relied upon the case in Sornalinga Mudali v. Pachai

Naicker 1914 38 Mad 680. That decision is not analogous. All that was there laid down was that a person who has himself executed a document

cannot be allowed to set up a contemporaneous oral agreement that he should not be held liable on that document.

3. The main argument in the appeal before us related to the question raised by issue 1, namely, whether the action was premature. The facts

relevant to this question are set out in paragraph 54 of the lower Court's judgment. The position taken up by defendant 1 in his written statement

which was substantially adopted by defendant 2 was that it is only after the final bills are passed and paid that the plaintiff could make any claim at

all. There are no words in Ex. A corresponding to the italicised words. The words are final bill "anavudan" which may more accurately be

translated as "as soon as the final bills are ready". In this case, the final bill was prepared by the railway company in October 1927, but as the

contractor took exception to the various items therein it was not passed as such and the disputes between the contractor and the railway company

had to be settled by the Court. O.S. No. 13 of 1929 was accordingly instituted by the contractor against the railway company in 1929 and the

appeal therefrom was decided by this Court in September 1934.

4. The learned Advocate General argues that as the amount out of which the plaintiff could get a one third share could be definitely ascertained

only sifter the disputes between the contractor and the railway company as regards the bill had been finally settled, this suit which was instituted in

January 1928 must be held to be premature. We are unable to accede to this contention. Take, for instance, the familiar case of a partnership. As

soon as a dissolution takes place, any partner can sue for the taking of the partnership accounts and the award of his profits in the partnership

concern. It may take a long time for the ascertainment of the assets of the partnership. There may, for instance, be proceedings by the partnership

against persons indebted to the partnership or proceedings against the partnership by persons having claims thereon. Such proceedings may

considerably postpone the date when the exact state of the partnership assets may be ascertained. But it has never been suggested that a partner's

right to ask for the taking of the accounts of the partnership and for payment of his share of the profits is postponed till after such ascertainment.

The cause of action or right to sue for accounts is one thing and the ascertainment of the amount of the profits to which he will be entitled is another

thing. Once it is found that under the contract between the parties the plaintiff was entitled to a share of the profits that is the cause of action for

him, if only he had fulfilled his part under the contract. The settlement of accounts between the contractor and the railway company is no part of his

cause of action, though till those accounts are settled the exact amount payable to him may not be ascertained. In the interests of all parties,

especially when the plaintiff's right itself has been denied, as in the present case, it will be best that an action of this kind is brought as soon as the work is completed rather than it should be indefinitely delayed pending settlement of disputes with the railway company. If the plaintiff's right had not been denied by the defendants and they had made common cause against the railway company, the position may be different at least on the question of costs.

5. The learned Advocate General referred in this connexion to the decision in *Kitchanna v. Ramachandrayya* (1932) MWN 348. But that related

to a different set of circumstances because the purpose for which the plaintiff's services had been availed of had not been completed in that case.

A similar plea was raised in the present case, but overruled by the lower Court. We are accordingly of opinion that the finding of the lower Court

on issue 1 is correct. The only other point argued before us relates to the form of the decree. On the assumption that defendant 1 entered into a

contract with the plaintiff as agent of defendant 2, the learned Advocate-General argued that according to the decision in *Pootheri Illath*

Kuttikrishnan Nair, Proprietor, Malabar Tile Works Vs. Kallil Appa Nair and Another, the plaintiff could have a decree either against the agent or

against the principal but not against both. But, the assumption that defendant 1 entered into a contract with the plaintiff only as agent of defendant 2

does not correctly represent the position here. The contract was, as already explained, one between the plaintiff on the one side, and defendants 1

and 2 on the other. In this view, it is unnecessary for us to say whether or not Section 233, Contract Act has been rightly interpreted in *Pootheri*

Illath Kuttikrishnan Nair, Proprietor, Malabar Tile Works Vs. Kallil Appa Nair and Another, . The appeal fails and is dismissed with costs.