
(1926) 11 MAD CK 0034
In the Madras High Court

Obala Nagendra Aiyar and Another

APPELLANT

Vs

Thumatti Muthia Bhagavathar and Others

RESPONDENT

Date of Decision : 17-11-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 9

Citation : 101 Ind. Cas. 93 : (1927) 52 MLJ 303

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—This second appeal arises out of a suit by five plaintiffs, members of a certain firm called N.A.P. S.R.N. Venkatarama Aiyar

and Co., to recover certain amounts due from the defendants who are the partners of another firm known as T.M.R. S. Muthia Bhagavathar and

Co. The District Munsif gave a decree. On appeal the Subordinate Judge reversed the decree and dismissed the plaintiffs suit. Plaintiffs 2 and 3 are

the appellants before me. The other plaintiffs have been made respondents.

2. The facts of the case will now be stated. One Perumal Aiyar, whose widow is the 4th plaintiff and daughter-in-law is the 5th plaintiff, and the

2nd defendant Rangaiyar are the members of the firm N.A.P. S.R.N. While that firm was going on the 2nd defendant wanted to start another firm.

But as the new firm would require some capital he arranged that the N.A.P. S.R.N. firm should lend up to the limit of Rs. 1,000 to the new firm to

enable it to carry on its business. It was agreed that at the end of three years accounts should be taken of the new firm and the N.A.P. S.R.N. firm

should get one-third of the profits of the new firm. To evidence this arrangement Exhibit I was executed on 10th October 1917. It is conceded

before me that the new firm took shape on 1st Arpisi 1917, that is 17th October. A week before the formation of the new firm the plaintiffs firm advanced Rs. 100 to the 2nd defendant for being used as capital of the new firm. Again on 29th October 1917 the plaintiffs firm advanced cloths to the value of Rs. 653 to be used for a similar purpose. Two days later, on 31st October, a sum of Rs. 400 was similarly advanced. All these items, the moneys and cloths, were handed over to the 2nd defendant who handed them over to the new firm. The present suit is virtually a suit to recover the value of these three sums minus Rs. 185 which was the value of some cloths which were returned out of the cloths advanced by the plaintiffs firm. The defendants plea in the written statement was that there was no dealings between the plaintiffs firm and the defendants firm and that the plaintiffs lent money or sold goods to Rangaiyar, the 2nd defendant, and that the 2nd defendant sold these goods or advanced these moneys to the defendants firm,, or, in other words, there were two distinct contracts, one between the plaintiffs firm and the 2nd defendant and the other between the 2nd defendant and the defendants firm and that there was no privity between the plaintiffs firm and the defendants firm and therefore the suit was not maintainable. It is true that there was a further plea in para. 7 of the written statement in which referring to the notice sent by plaintiffs prior to suit on 25th October 1920 they say that the suit is not also maintainable on the ground that a suit for the capital alone is not sustainable in law. That plea no doubt implies that the plaintiffs firm was a partner in the defendants firm. But they have not actually pleaded that the plaintiffs firm was such a partner. That plea merely amounted to saying that on the facts alleged in the plaintiffs notice, whatever they may legally amount to, the suit is not maintainable.

3. Five issues were framed. We are not concerned with the first and the fourth issues as there is no dispute about them. The second issue is ""If so, is the present suit as framed not maintainable?"" The third issue is ""Were the amounts referred to in paragraphs 5 and 6 of the written statement advanced by the 2nd defendant only and not by the plaintiffs as alleged by them?"" This was really intended to raise the plea already stated by me. The fifth issue is merely a general issue.

4. On the second issue the District Munsif found that the suit is maintainable and

on the third issue he found that there were not two contracts but that the goods were supplied by the plaintiffs firm to the defendants firm through the 2nd defendant and the 2nd defendant in handing over the money and the goods to the defendants firm acted as their agent and not as an independent contracting party. He therefore decreed the plaintiffs' suit. There, was an appeal by the defendants.

5. The Subordinate Judge stated two points for decision:

(1) Whether the suit as framed is not maintainable?

(2) Whether the items in dispute were advanced to the defendants' firm or to the 2nd defendant alone?

6. These again are the same points as I have set forth above. In paragraph 3 he finds that Exhibit I was genuine. In paragraph 4 he finds on the

main point in dispute against the plaintiffs and in favour of the defendants. But I am unable to follow his reasoning in this paragraph. First he says

that at the time when Exhibit I was executed the new firm had not come into existence and the 2nd defendant was not then an agent of the new

firm. He may be right in this. But I do not see what bearing it has got on the question at issue in the case. After the new partnership was formed the

2nd defendant was one of its partners. As a partner he was an agent of the new partnership and his knowledge is knowledge of the firm. After the

new firm was formed the 2nd defendant regarded himself as its agent as to the money and goods he took from the plaintiffs' firm and delivered

them to the new firm only as agent and not in his individual capacity. This fact presumably known to himself must be regarded as also known to the

defendants' firm. If so, the money and the goods delivered by the plaintiffs to the 2nd defendant were taken by the defendants' firm on the footing

that the money and the goods were advanced by the plaintiffs' firm through the 2nd defendant. The Subordinate Judge gives an illustration at the

bottom of page 2:

A lends money to B and B lends the same sum to C. C is liable to B and B in his turn is liable to A....

7. This illustration is very simple. Nobody can quarrel with it; only it has nothing to do with the case and the giving of that illustration does not

advance the matter any further. I am therefore unable to accept the finding of the Subordinate Judge on the question whether there were two

separate contracts or not.

8. In reversing the finding of the Subordinate Judge, I am not dealing with any question of fact, but I am reversing it purely on legal grounds, namely

that the 2nd defendant, being a partner in the new firm, is an agent of that partnership and his knowledge must be taken as the knowledge of that

firm; and as to the footing on which the plaintiffs' firm gave the goods and money to the 2nd defendant himself there is no dispute as the plaintiffs'

account Exhibit A shows. As a matter of fact the learned vakil for the respondent now admits Exhibit I. After that admission there is no question as

to the footing on which the goods were taken by the 2nd defendant from the plaintiffs' firm. The only question is how did they pass from his hands

to the defendants' firm? As to this, on purely legal grounds I reverse the finding of the Subordinate Judge.

9. The question that next arises is whether the suit is not maintainable on the ground that the 2nd defendant is a partner in both the firms. At this day

this question is scarcely capable of argument. The Subordinate Judge has not dealt with this point, but he has really dealt with some other point

which I will deal with later on. I will deal with it as the learned vakil for the respondent has argued it.

10. In *Kashinath Kedari v. Ganesh* ILR (1902) B 739 Crowe and Batty, JJ. referring to *Rustomji v. Sheth Purshotamdas* ILR (1901) B 606

quote from Lindley on Partnership, page 267 thus:

There appears to be no reason why, if two firms have common partners, an action should not be maintained by one firm against the other, not

perhaps in their mercantile names, but by those members of one firm who are not common to both, against the members of the other firm.

11. This is precisely the procedure that has been followed in this case. The plaintiffs have excluded the 2nd defendant and sued all the members of

the new firm. In *Vellayappa Moothan v. Krishna Moothan* (1917) 34 MLJ 32 at 35 Sadasiva Aiyar, J., points out that Jenkins, C.J., himself in

Rustomji v. Sheth Purshotamdas ILR (1901) B 606 modified his first general statement of the law. Phillips, J., at page 40 says the same thing.

Order 30, Rule 9 of the new CPC is practically conclusive on the matter. *Lakshmanan Chetty v. Nagappa Chetty* (1917) 34 MLJ 408 is not

against this view. I therefore think that the suit is maintainable.

12. The learned vakil for the respondent then argued another point which looks like the point dealt with by the Subordinate Judge in paragraph 5

of his judgment. He suggests that the plaintiffs' firm is a sharer in the defendants' firm by reason of Exhibit I and, if so, the suit to recover one of the items of the defendants' partnership is not maintainable. If the premiss is right the conclusion is right. But I am unable to agree with the premiss.

Section 240 of the Contract Act provides that

A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest

at a rate varying with the profits or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him

responsible as such.

13. On reading the terms of Exhibit I carefully I am of opinion that beyond the position of a lender entitled to recover the capital advanced with 14

annas per cent per mensem and one-third of the profits in case the defendants' firm is successful,

14. the plaintiffs' firm has nothing to do with the defendants' firm, nor can it be said that the plaintiffs' firm is represented by the 2nd defendant in

the defendants' firm as a sub-partner. In Exhibit I the 2nd defendant says that it is all his own business and that he carries on the work of that firm

and takes his own salaries. It is not shown that beyond sharing the profits in case that business is successful the plaintiffs' firm has anything to do

with that business. I am therefore of opinion that the plaintiffs' firm cannot be said to be a partner of the defendants' firm. If it is not a partner by

merely advancing capital, it is now entitled to sue for the capital like any outside lender. That being so, the other cases relied on by the learned vakil

for the respondent do not apply. In *Kashinath Kedari v. Ganesh* ILR (1902) B 739 both the plaintiffs were partners in the defendants' firm and it

was on that ground that the suit there was held not to be maintainable. In *Lakshmanan Chetty v. Nagappa Chetty* (1917) 34 MLJ 408 there was a

sole plaintiff who was a partner with the defendants' father and therefore the suit was held not to be maintainable. In *Annamalai Chetty v.*

Annamalai Chetty (1919) 10 LW 67 the plaintiff was a partner in the Mandalay firm along with defendants 1 to 10. The fact that defendants 1 to 7

and 11 formed partners of another firm has no bearing on the point for

discussion. In Subramaniam Chetty v. Lakshmanan Chetty (1923) 18 LW

613 also, the plaintiffs' father was a member of the defendants' firm. In all these cases the suit was by partners for one item of their transactions

with the partnership and such suits were held not maintainable subject to certain exceptions, an example of which we have in Karri Venkata Reddi

v. Kollu Narasayya 19 MLJ 10. In the present case the suit was not by a partner but by a lender. Therefore there is nothing to prevent the suit

being maintainable on the ground that a partner must wait for a general dissolution and cannot sue for a specific item.

15. The result is that the Subordinate Judge's decision is reversed and the District Munsif's decision will have to be restored. But the learned vakil

for the respondent points out that there is no justification in giving a decree for the whole of the decree amount as one-fifth of it belongs to the 2nd

defendant. If the defendants are unwilling that any decree should be passed against them for this one-fifth, I do not see why I should give a decree

for this one-fifth due to the 2nd defendant.

16. In the result I would pass a decree for four-fifths of the decree amount against the defendants to be recovered with the first instance from the

assets of the defendants' partnership and in default from them individually. The plaintiffs will recover proportionate costs on the four-fifths

throughout. The defendants will bear their own costs.

17. The Memorandum of Objections is dismissed with costs.