
(1956) 11 KL CK 0006
In the High Court Of Kerala
Case No : A.S. No. 421 of 1955 (E)

Pouloth Paranchu

APPELLANT

Vs

Pappu Francis

RESPONDENT

Date of Decision : 07-11-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : AIR 1957 Ker 21 : (1957) 1 KLJ 1

Hon'ble Judges : T.K. Joseph, J;K. Sankaran, J

Bench : Division Bench

Advocate : T.S. Venkiteswara Iyer and C.S. Ananthakrishna Iyer, for the Appellant; C.J. Antony and P.P. Devassy, for the Respondent

Final Decision : Dismissed

Judgement

T. K. Joseph, J.—This appeal arises out of a suit for recovery of money from two defendants. The suit, as originally framed, was one on the basis of a promissory note, Ext. A, executed by the first defendant in favour of the plaintiff on 30-3-1124. The plaintiff's case was that the two defendants were carrying on business in partnership and that timber was purchased from him by the partnership.

A sum of Rs. 4,500 was due to him as price thereof, and the first defendant, who was the managing partner, executed the promissory note for that amount it was alleged that the promissory note was executed on behalf of the partnership. Several part payments were made by the partnership thereafter, and the suit was for recovery of the balance amount.

2. The first defendant remained ex parte. The second defendant contended that the promissory note was executed by the first defendant in his individual capacity and not on behalf of the partnership and that he could not be made liable on the basis of the promissory note, It was also contended that the partnership was dissolved later when the first defendant undertook liability for

discharging the amount and this was with the concurrence of the plaintiff. In view of this, he disclaimed liability for the plaint amount.

3. During the course of the trial, the plaintiff got the plaint amended so as to make it clear that the suit was one on the original transaction, viz., the purchase of timber. The second defendant filed an additional written statement stating that, even on that basis, the plaintiff was not entitled to recover the amount from him.

4. The Court below held that the plaintiff was not entitled to any relief on the basis of the promissory note as the same was not executed by the partnership but that the defendants were liable on the original cause of action. A decree was accordingly passed making defendants 1 and 2 liable for the plaint amount, interest and costs. The second defendant has preferred this appeal from the decree.

5. It was urged on behalf of the appellant that permission ought not to have been given for amending the plaint. A suit on the original cause of action would have been barred on the date of the application for amendment, and was, therefore, argued that permission to amend the plaint should have been refused. The question whether the defendant would be deprived of a plea of limitation by allowing the amendment is no doubt one of the factors to be taken into consideration in allowing amendment of the plaint, but there is no inflexible rule that in such cases amendment cannot be allowed. Several of the decisions on this point have, been referred to in *Kuppan Chettiar v. T. A. Kesavan*, 1953 KLT 329: AIR 1954 Trav. Co. 30 (A).

It was held in that case that the rule that an amendment should not be allowed which would deprive the defendant of a plea of limitation was not an inflexible rule and that peculiar circumstances may take a case out of the ordinary rule. The plaintiff had made the necessary averments even in the original plaint. It was stated that the defendants were having a business in partnership and that the partnership purchased timber from him for which a sum of Rs. 4,500 was due.

It cannot, therefore, be said that the amendment was even essential to grant relief to the plaintiff. It is not as though a new case totally inconsistent with the one set up in the plaint was sought to be introduced by the amendment. In the circumstances, we hold that the amendment was properly allowed.

6. Another contention put forward is that, at the time of dissolution of the partnership, the first defendant undertook liability for the plaint claim and that the second defendant was exonerated from liability by the plaintiff. There is no reliable evidence to substantiate this plea. The case put forward by the second defendant in his written statement is totally inconsistent with his case at the evidence stage. The contention in the written statement was that it was with the plaintiffs consent that the first defendant undertook to be solely liable for the plaint amount at the time of dissolution of partnership.

He had no case that the timber was not purchased on behalf of the partnership or that the sum of Rs. 4,500 was not its price. The contention referred to above necessarily implies that he was also originally liable for the "amount. However, when the second defendant was examined he stated that he became aware of the transaction only after the dissolution of the partnership. The plaintiff denied the allegation that he had agreed to exonerate the second defendant from liability. In the absence of reliable evidence in support of the defence plea, the finding of the learned Judge on this question must be upheld.

7. It was finally urged that the first defendant who was the managing partner and who had undertaken liability for the plaint claim should be made primarily liable and that the second defendant should be proceeded against only in case the amount is not recovered from the first defendant.

Defendants 1 and 2 are jointly and severally liable under the transaction and, even though the first defendant has undertaken to be liable for the debt, there is no justification for giving such a direction in the decree, as the same would lead to unnecessary complications in execution. The second defendant's proper remedy in case the amount is recovered from him is to institute a fresh suit against the first defendant for appropriate reliefs.

8. In the result, the decree of the Court below is confirmed and the appeal is dismissed with costs.