(1968) 03 MAD CK 0011

In the Madras High Court

Case No : S.A. No''s. 1700 of 1962 and 121 of 1963

V. Palaniappa Chettiar and others APPELLANT

Vs

P. Vaidyanatha Iyer and others RESPONDENT

Date of Decision : 04-03-1968

Acts Referred:
Partnership Act, 1932 — Section 29, 29(2)

Citation : (1968) 03 MAD CK 0011

Hon'ble Judges : Ismail, J

Bench : Single Bench

Advocate : A. Sundaram Ayyar, N. Sivamani, K. Sarvabhauman and T.R. Mani, for the Appellant; R. Gopalaswami Ayyangar, for the Respondent

Judgement

Ismail, J.—The appellant in S.A. 1700 of 1962 are defendants 1 and 2 and the appellant in S.A. 121 of 1963 is the third defendant in O.S.

47 of 1959 on the file of the Court of the Subordinate Judge of Erode, while the plaintiff in the suit is the contesting respondents in both the second

appeals. O.S. No. 47 of 1959 same to be filed under the following circumstances:--

2. The plaintiff and defendants 1 and 2 executed a deed of partnership, Ex. B-1,on 25th June, 1945, for the purpose of carrying on a business in

the name of Erode Handloom Textiles with effect from 24th May, 1945. Under that document, the share of the plaintiff and the second defendant

was four annas each and the share of the first defendant was eight annas in the profits and looses and assets of the partnership. On 26th April,

1946, six persons including the first defendant, the second defendant and the three partners of the present third defendant and one Kesavlal

Kalidas Sait entered into a partnership, Ex. B. 24, for the purpose of carrying on business under the name and style of Erode Bleaching and

Finishing Co. Subsequently, Kesavlal Kalidas Sait ceased to be a partner and therefore the other five persons executed a fresh partnership deed

on 13th March, 1951, Ex. B. 4. Meanwhile in 1946 a sum of Rs. 50,000 forming part of the assets of the Erode Handloom Textiles was invested

in this partnership of Erode Bleaching and Fining Co., in the names of defendants 1 and 2 who were partners of this firm. It appears that there was

an arrangement between the defendants 1 and 2 and the plaintiff that the profits and losses referable to this Rs. 50,000, deposited in Erode

Bleaching and Finishing Co., in the names of defendants 1 and 2 should be shared by the plaintiff, first defendant and second defendant equally and

two-fifths share in the assets representing the interest of the first defendant and the second defendant in the firm will also belong to all the three

parties in equal shares. It is seen that though this Erode Bleaching and Finishing Co., was started in 1946, it began effectively to function only in

1951. Under these circumstances, on 15th October, 1951, a document called a partnership deed was executed between the plaintiff and

defendants 1 and 2. Under this document, the arrangement referred to above by me with regard to the sharing of the profits and losses in the

Erode Bleaching and Finishing Co., preferable to the interest of defendants 1 and 2 in the company was reduced to writing. It is also stated that the

Erode Bleaching and Finishing Co., made profit only during the first year, that is, 1950-51 and subsequently it suffered only losses. On 31st

March, 1956, the first defendant retired from the Erode Bleaching and Finishing Co., allowing the other four partners to continue the business.

When the plaintiff heard about the retirement of the first defendant from the partnership, he sent notices to the parties stating that the first defendant

and the second defendant represented the interest of the plaintiff as well in the Erode Bleaching and Finishing Co., and nothing should be done,

adverse to the interests of the plaintiff, and the first defendant should not be allowed to retire from the business and thereby affect the interests of

the plaintiff. Notwithstanding that, on 27th May 1955 the first defendant executed a document releasing all his rights and interests in the firm in

favour of the other four partners in return for a sum of Rs. 18,400 received by him, Ex. B. 2, It is thereafter the plaintiff instituted O.S. No. 47 of

1959 on the file of the Subordinate Judge, Erode, praying for the following reliefs:--

(a) for the dissolution of the partnership from Erode Handloom Textiles and directing the defendants 1 and 2 to render true and proper accounts to

the plaintiff regarding the share capital or defendants 1 and 2 in the third defendant firm and the amounts of profits of dividends available on the

said share capital and the particulars of the sums paid to defendants 1 and 2 by the third defendant and further directing defendants 1 and 2 to pay

plaintiff the sums found due in the said account taking and,

(b) directing that the plaintiff be paid this one third share of the profits due to him either by defendants 1 and 2 if they had drawn the amount of by

the third defendant of such amounts as are still retained by them; and

(c) if necessary for appointment of a Commissioner to take accounts and submit a report for the loss and profits.

3. The first defendant in his written statement contended that the suit for dissolution of the partnership was barred by limitation. According to him,

the partnership entered into in 1945 came to an end on 23rd February 1949 and the suit for dissolution of the partnership filed beyond three years

from that date was barred by limitation. He further contended that he had discharged certain debts due by the plaintiff and therefore the plaintiff

could not seek to recover any money from the first defendant. His further case was that he could not be compelled to continue in the partnership,

firm of Erode Bleaching and Finishing Co., contrary to his will. As a matter of fact the first defendant questioned the truth and validity of the

document dated 15th October 1951 Ex. A. 11. The second defendant also put forward similar contentions. But he further claimed that the plaintiff

had given up his interest in the partnership in his favour. The third defendant contended in its written statement that whatever right the plaintiff had

will have to be worked out within the terms of Ex. A 11 dated 15th October 1951 and he could not have any cause of action against the third

defendant.

4. On these pleadings the learned Subordinate Judge struct the necessary issues and came to the conclusion that the suit was barred by limitation.

He pointed out that the common case or the parties was that the business of Erode Handloom Textiles was stopped on 23rd February 1949, that the mere stoppage of the business would not amount to dissolution of the partnership itself, but the other circumstances indicated that the

partnership came to an end on 23rd February 1949. He recorded a further finding that the firm Erode Bleaching and Finishing Co., of five partners

got dissolved on 31st March 1955, when the first defendant retired from the business. In view of this conclusion, he was of the opinion that the

plaintiff could not enforce any right against third defendant which is a different firm altogether from the firm of five partners. Further, he pointed out

that at the most the plaintiff could sue against defendants 1 and 2 personally for accounting on the basis of Ex. A-11 and not for dissolution on the

firm Erode Handloom Textiles as he had done and so the suit as framed was not maintainable. However, after taking into account the profits and

losses sufferer by the Erode Bleaching Finishing Co., he pointed out that the first defendant appeared to have made on excess profit of Rs. 1156

and it was only in that profit the plaintiff claimed a share and the suit itself was the result of refusal of the first defendant to part with such a share.

Though he came to the conclusion that Ex. A-11 dated 15th October, 1951 was true and valid and could be enforced by the plaintiff as against

defendants 1 and 2, he held that the suit not having been filed within three years from the date of that agreement was barred by limitation. He also

recorded a finding that Ex. A-11 dated 15th October, 1951 would not bind the third defendant. In the result, he dismissed the suit by judgment

and decree dated 24th March, 1961. I must point out here that the claim of defendants 1 and 2 that they have discharged certain debts due by the

plaintiff was not investigated into by the learned Subordinate Judge and according to him if the suit was to be decreed, this claim could be

investigated at the stage of the final decree. Against this decree and judgment of the learned Subordinate Judge, A.S. No. 292 of 1961 on the file

of the Court of District Judge of Coimbatore, was preferred by the plaintiff. The learned District Judge, Coimbatore, by his judgment and decree

dated 6th November, 1962 reversed the conclusion of the learned Subordinate Judge and passed a preliminary decree for accounts. The learned

District Judge came to the conclusion that the partnership was not dissolved and therefore the suit, whether treating it as one for dissolution of the

partnership which came into existence in 1945 or the partnership which came into existence under Ex. A-11, dated 15th October, 19(sic)1, was not barred by limitation. He also came to the conclusion that the retirement of the first defendant from the Erode Bleaching and Finishing Co., on

31st March, 1956 did not have the effect of dissolving that firm. He recorded a finding negativing the case of the 2nd defendant that the plaintiff

had given up his rights under Ex. A-11 as against the 2nd defendant. It is against his judgment and decree of the learned District Judge, the present

second appeals have been filed by defendants 1 and 2 and the third defendant respectively.

5. The principal question that was argued on behalf of the appellants was that the partnership entered into in 1945 by the plaintiff and defendants 1

and 2 was dissolved in 1949 and therefore the suit for dissolution of that partnership was barred by limitation. The further contention of the

appellants was that by Ex. A-11 dated 15th October, 1951 no partnership came into existence and therefore there could not have been a suit for

dissolving the partnership. As far as the third defendant is concerned, a further argument was advanced that there could not have been any cause of

action on the part of the plaintiff as against the third defendant in which the plaintiff admittedly was not a partner.

6. As far as the contention that the partnership entered into in 1945 was dissolved in 1949 is concerned, I am of the view that the conclusion of the

learned District Judge is right that the partnership was not dissolved. As has been held by the learned Subordinate Judge, mere stoppage of the

business will not result in the dissolution of the partnership. The facts as pointed out by me above, will indicate that even in 1946 a sum of Rs.

50,000 from the assets of the Erode Handloom Textiles was taken and invested in the Erode Bleaching and Finishing Co., and not withstanding the

taking out of this amount and investing the same in the other partnership, the common case of the parties is that the business went on till 1949. Only

in 1949 the business is stated to have been stopped. But there is absolutely no evidence to show that even though the business was stopped in

1949 the partnership as such was dissolved or accounts settled; between the parties. On the other hand ,the conduct of the parties and the

materials on record clearly show that till the date of the suit, the partnership entered into in 1945 was not dissolved. Ex. A-2 is an order of

assessment passed by the income tax Officer on 30th August, 1956. This is an order under S. 35 of the Indian income tax Act with reference to the Erode Handloom Textiles. This order is significant in two respects. The first thing is that even on 30th August, 1956 everybody proceeded on

the basis that the Erode Handloom Textiles was in existence. The second feature is that with reference to Rs. 50,000 invested in the Erode

Bleaching and Furnishing Co., in 1946, the parties proceeded on the basis that the partnership of Erode Handloom Textiles itself was a partner in

the third defendant firm, though represented by defendants 1 and 2. Therefore, this document will clearly establish that in 1949 there was no

dissolution of Erode Handloom Textiles and further a sum of Rs. 50,000 invested in 1946 in the Erode Bleaching and Finishing Co., represented

the assets of Erode Handloom Textiles in which plaintiff and defendants 1 and 2 were partners. Then there was one other contention that Ex. A. 11

dated 15th October, 1957, did not bring into existence any partnership. As a matter of fact, defendants 2 and 3 conceded before the courts below

that Ex. A. 11 dated 15th October, 1951, brought into existence a new partnership, Mr. A. Sundaram Iyer contended that at any rate as far as the

first defendant is concerned, there was no such concession; consequently, it was open to him to contend that Ex. A. 11 did not bring into existence

a new partnership. In my view, in view of the conclusion. I have come to, that the suit is not barred by limitation, it may be unnecessary to decide

whether Ex. A 11 brought into existence a partnership independent of the partnership of 1945 or not. However, a proper and a reasonable

understanding of the facts as stated above, will show that no independent partnership of 1945 continued to exist. A sum of Rs. 50,000 from the

assets of that partnership was invested in 1946 itself in Erode Bleaching and Finishing Co. But what the parties were doing in 1951 was to put on

record the terms and conditions on which the sum of Rs. 50,000 was taken out of the assets of the Erode Bleaching and Finishing Co., and such a

document was necessary because they were varying the shares of the partners in respect of this investment. I have already indicated that in 1945

when the Erode Headloom Textiles was brought into existence, the shares of the parties were as follows: the plaintiff had a four annas share, the

second defendant a four annas share and the first defendant eight annas share. But when this sum of Rs. 50,000 was taken out of the partnership;

and invested in the Erode Bleaching and Finishing Co., the parties were varying their shares in respect of this asset by providing that they would take the profit and loss referable to the investments in equal shares. Therefore, really speaking, Ex. A 11 dated 15th October, 1951, did not bring

into existence a new partnership but merely indicated a new arrangement that came to between the parties with reference to a portion of the assets,

namely, Rs. 50,000, of Erode Handloom Textiles.

7. If the suit is one for dissolution of the partnership entered into between the parties in 1945, which remained undissolved till the filing of the suit,

certainly the suit could not be said to be barred by limitation. Mr. Gopalaswami Aiyangar, learned counsel for the respondents in both the appeals

sought to sustain this conclusion on a different ground altogether. According to the learned counsel, Ex. A. 11 dated 15th October, 1951, was only

an arrangement of a sub-partnership entered into between the plaintiff and defendants 1 and 2 with reference to the interest in the shares which

defendants 1 and 2 had in the Erode Bleaching and Finishing Co. On this basis, the contention was that the suit in this case really came within the

scope of Sec. 29 (2) of the Indian Partnership Act, 1932, and for which there is no period of limitation prescribed in the statute. Since the courts

below have also relied on the provisions contained in S. 29 of the Indian Partnership Act, on the basis that the plaintiff was a sub-partner of

defendants 1 and 2, with reference to the Erode Bleaching and Finishing Co., it is necessary to examine this position. Sec. 29 of the Indian

Partnership Act is as follows:--

29 (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does

not entitle the tansferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the

books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the

account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, transferee is entitled as against the remaining partners to receive the

share of the assets of the firm to which the transferring partner is entitled and, for the purpose of ascertaining that share to an account as from the

date of the dissolution.

8. As far as Sub-Sec. (1) of S. 29 of Act is concerned, it provides that during the

continuance of the firm, a transferee of a mortgagee has no right

to interfere in the conduct of the business and he is bound by the accounts of profits agreed to by the partners. Sub-Sec. 2 on the other hand deals

with a different situation. It deals with the right of a transferee to get the share of the assets of the transferor .Necessarily the right to get

transferor''s share in the assets can arise only on the dissolution of the partnership and not during this continuance of the partnership. Therefore the

section provide that a transferee is entitled as against the remaining partners to receive the transferor''s share of the assets of the firm and also an

account as from the date of the dissolution for the purpose of ascertaining that share. The argument of Mr. R. Gopalaswami Iyengar, is that the

plaintiff is a sub partner with reference to the Erode Bleaching and Finishing Co., and as a sub-partner comes within the scope of S. 29 of the

Indian Partnership Act, he is entitled to receive one third of the share of the assets of the first defendant in that firm and for the purpose of

ascertaining the share of the first defendant in the assets, he is entitled to an account against the remaining partners of the third defendant. That a

sub partner will come within the scope of S. 29 of the Partnership Act has been accepted by decisions and it was not contended to the contrary

before me.

9. The only other question is in relation to the date with reference to which he will be entitled to ask for accounts against the remaining partners in

the third defendant firm. As already pointed out by me the learned Subordinate Judge came to the conclusion that the Erode Bleaching and

Finishing Co., of five partners was dissolved on 31st March 1956. As a matter of fact, it seems to have been conceded by the defendants in the

suit. Over above and that Ex. A 10 or Ex. B. 2, namely, the release deed dated 27th May 1956 executed by the first defendant makes it clear that

he retired from the partnership with effect from 31st March 1956 giving up his rights in favour of the remaining partners. Again on 1st June 1956

the remaining partners entered into a new partnership with effect from 1st April 1956, Ex. B. 5. Consequently the parting themselves dissolved the

partnership of five partners on 31st March 1956. That a new partnership consisting of the remaining four partners came into existence with effect

from 1st April 1956 is beyond doubt. If that be the case, the question is, based on S. 29 of the Indian Partnership Act, whether the plaintiff is

entitled to an account against the third defendant for the purpose of ascertaining the share of the first defendant in the assets of the partnership of

the Erode Bleaching and Finishing Co. The contention on the part of Mr. Sivamni learned counsel for the third defendant is that the first defendant

has settled his accounts and taken Rs. 18,400 towards his share and therefore the plaintiff is not entitled to any accounts from the third defendant

firm. On the other hand ,Mr. Gopalaswami Iyengar contended that though the partnership was dissolved on 31st March 1956, no settlement of

accounts with reference to the share of the first defendant was arrived at on that date and such ascertainment was made only on 27th May 1956

when the first defendant received a sum of Rs. 18,400 and executed a release deed and according to the plaintiff that sum of Rs. 18,400 did not

correctly represent the share of the first defendant in the assets of the partnership and that share was really more and consequently he was entitled

to ask for accounts against the third defendant. For this purpose, the learned Counsel relied on the decision in Watts v. Driscose (1901) 1 Ch. 294

and the decision in Veerappa Chetti v. Muthiah Chetti 52 Mad. 509. In Watts v. Driscose (1901) 1 Ch. 294 the question that came up for

consideration was whether the bargain between two partners whereby one of them was to go out of the business and sell all his interest to the other

partner for ï¿½. 300 was binding upon the mortgage of the selling partner''s share. It was held that it was not so binding and the mortgagee was

entitled to have an account for the purpose of ascertaining the real share of the mortgagor. In Veerappa Chetti v. Muthiah Chetti 52 Mad. 509

again the same question cams up for consideration. A Bench of this court took the view that the court is entitled to look into the matter itself and it

could not be said that the settlement of accounts was prima facie binding on the assignee, unless it was shown to be mala fide and on the other

hand such a transaction was prima facie not binding. The learned Counsel pointed out that this suit for accounts as against the third defendant is

based solely on the fact that the third defendant firm was dissolved on 31st March, 1956 and no settlement of accounts was arrived at before the

dissolution so as to make it binding on the plaintiff and since the settlement of account was arrived at only subsequent to the dissolution, within the scope of S. 29 (2) of the Indian Partnership Act, 1932, the plaintiff was within his right to have an account against the third defendant for the

purpose of ascertaining the first defendant''s share in the assets of the third defendant firm. For the reasons already indicated by me, I am of the

view that the plaintiff is entitled to have such a relief against the third defendant firm of the five partnership was dissolved on 11th March, 1955 and

the settlement of accounts between the first defendant and the other four partners effected only subsequently, that is, on 27th May, 1956, which

fact is borne out not only by Ex. A-10 or Ex. B-2 but also by the entries in the accounts of the third defendant firm itself, subsequent to 31st

March, 1956.

10. Apart from this, the right of the plaintiff can be rested on another premises as well. Ex. A-11 dated 15th October, 1951, will really make

defendants 1 and 2 trustees for the plaintiff in respect of the money invested in the Erode Bleaching and Finishing Co. If that be the case, the

plaintiff will be entitled to trace the money in the hands of the third defendant. In Thasneth Scopi v. Abdulla 47 M.L.J. 554 a tavazhi property was

invested in a trade carried on by the Karnavan of the tavazhi in partnership with a third party. The partnership was dissolved and by the agreement

of dissolution, the Karnavan was given a smaller share than that to which he agreed under the original document. The members of the tavazhi sued

for a declaration that the dissolution arrangement was not binding on the members of the tavazhi and for recovery of their rightful share, on the

contention that the surrender of a portion of the interest by the Karnavan was not binding on them. The contention advanced by the defendant was

that the suit itself was not maintainable since the members of the tavazhi were themselves not the partners of the firm. A Bench of this court

observed:

It is obvious that the first defendant as Karnavan had no right to surrender the interest of the tavazhi without any consideration, as this amounts to

an alienation of tavazhi property, and as he was in a fiduciary position the plaintiff representing the tavazhi are entitled to follow the tavazhi property

into the hands of these in whose favour it has been alienated. The objection that this suit will not lie on the ground that the plaintiffs are not members

of the partnership and have no voice in the direction of the partnership affairs is answered by showing that at the time when the suit was instituted

there have been a dissolution of partnership. In Watts v. Driscose (1901) 1 Ch. 294 it was held by the Court of Appeal that the assignor of a share

in a partnership is not bound by any agreement made by the partners themselves on a dissolution of partnership by which the amount or value of

the share is altered. In the English Partnership Act, 1890, S. 31 makes it clear that an assignee can not interfere in the management of the affairs of

the partnership, but upon dissolution, he is entitled to take his assignor''s share of the assets and to have an account from date of the dissolution.

The same principle was followed in Chidambaram Chetti v. Karuthon Chetti 39 M.L.J. 511. That was a case of sub-partners, and the learned

Chief Justice observed that in the absence of any settlement between the partners before dissolution, which, of course, would be binding on the

sub-partner, after dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims, as without such an

account it would be impossible to say that he was entitled to. The objection to the maintainability of the suit thus fails.

11. The principle underlying this decision was applied by another Bench of this court with reference to the manager of a Hindu undivided family

entering into a partnership in Sambasiva Aiyar Vs. Natesa Aiyar and Others, . Consequently, independent of any consideration whether the plaintiff

was a sub-partner of defendants 1 and 2 with reference to their interest in the Erode Bleaching and Finishing Co., or not by virtue of the fact that

defendants 1 and 2 were in a fiduciary position with reference to the sum of Rs. 50,000 taken from the Erode Handloom Textiles and invested in

the Erode Bleaching and Finishing Co., the plaintiff will be entitled to the relief he has asked for against defendants 1 and 2 with reference to the

share of the first defendant''s account in the third defendant firm.

12. I must take it clear that as far as the second defendant is concerned, he still continues to be a partner in the reconstituted firm of Erode

Bleaching and Finishing Co. Consequently, the plaintiff will not be entitled to and in fact does not ask for any account in respect of his share of the

assets in that firm. But, certainly the plaintiff will be entitled to an account against the second defendant with regard to the profits and losses he

derived and suffered with reference to the third defendant firm.

13. In view of these considerations, I am of opinion that both these appeals must fail and the judgment and decree of the learned District Judge are

sustained. However, I may point out that in the first direction contained in paragraph 19 of the judgment of the learned District Judge, he has

stated:--

That a partnership existed between the plaintiff and the first and second defendants in the business mentioned in the plaint as from 10th October,

1951 and they were interested in the assets and profits and liable to the losses of the same in the proportion of one third to the plaintiff, one-third to

the first defendant and one-third to the second defendant.

14. In view of my conclusion that the original partnership entered into between the parties under Ex. B 1, dated 25th June, 1945, with effect from

24th May, 1945, stood undisclosed till the date of the filing of the suit, which was really for the dissolution of that partnership, in the place of the

said clause 1 of paragraph 19 of the judgment, the following shall be substituted:--

That a partnership existed between the plaintiff and the first and second defendants in the business mentioned in the plaint as from 24th May, 1945,

and in relation to the sum of Rs. 50,000, taken from the assets of the said partnership and invested in 1946 in the Erode Bleaching and Finishing

Co., in the names of the first and second defendants, as their contribution to the capital of that company, they were interested in the assets and

profits, and liable for the losses of the shares of the first and second defendants in the said Erode Bleaching and Finishing Co., in the proportion of

one third to the plaintiff, one-third to the first defendant and one-third to the second defendant.

15. For the same reason, in direction 3 of paragraph 19 of the judgment of the learned District Judge, the date 24th May, 1945, will be substituted

for 15th October, 1951. Subject to these minor modifications, the directions given by the learned District Judge in paragraph 11 of his judgment

are also maintained. There will be no order as to costs in these appeals and no leave in any of these appeals.

