

(1957) 09 KL CK 0008
In the High Court Of Kerala
Case No : A.S. No. 186 of 1955 (T)

Veeria Perumal Pillai Padmanabha Pillai	APPELLANT
Vs	
Avukkarummal Muhammad Pathummal and Others	RESPONDENT

Date of Decision : 02-09-1957

Acts Referred:

Contract Act, 1872 — Section 251
Negotiable Instruments Act, 1881 (NI) — Section 27
Partnership Act, 1932 — Section 18, 45(1)

Citation : AIR 1958 Ker 257

Hon'ble Judges : T.K. Joseph, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : T.N. Subramonia Iyer and P. Sankaranarayana Kulillaya, for the Appellant; M.N. Parameswaran Pillai, for Respondent 1, N. Krishnaswamy Iyengar, for Respondent 2 to 7, S. Easwara Iyer and G. Balagangadharan Nair, for Respondent 9 and 10, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit for money. The plaintiff claim was based on a loan of Rs. 16,000/- which, the plaintiff alleged, he had advanced on 3-4-1948 to a partnership business conducted by defendants 1 and 2, and which, according to him, was secured by a promissory note (Ext. A) and agreement (Ext. B) executed by defendant 1 in his favour on the same date and was used for discharging an earlier debt due from the firm to the South India Bank Ltd. Defendant 1 admitted that there was a partnership between him and defendant 2 and stated that they had been conducting a wholesale ration shop in Nemom Pakuthy.

But he contended that he had not received any amount from the plaintiff and he was caused to execute Exts. A and B by the agent of the South India Bank, that defendants 1 and 2 were equally liable for the debt due to the said Bank, that on account of defendant 2's default to make the necessary contribution for discharging the debt due to the Bank he himself had paid the entire amount to

the agent of the Bank and when he pressed defendant 2 to make good to him his share of the amount defendant 2 had caused the plaintiff to file this suit, and that in the event of the court finding that the plaintiff was entitled to recover the plaint amount, plaintiff should be directed to proceed in the 1st instance against defendant 2 for the decree amount and to take out execution against him only for such amount as could be realised from defendant 2.

Defendant 2 denied that there was a partnership between defendants 1 and 2 and contended that the ration shop business belonged to defendant 1 alone and it was not in existence at the time of the alleged loan and no money had also been borrowed by defendant 1 for that business, and that the promissory note relied upon by the plaintiff was one executed by defendant 1 in his individual capacity and not in his capacity as a partner or for the partnership business, and that for all these reasons the plaintiff was not entitled to get a decree against him.

2. The lower court found that there was a partnership between defendants 1 and 2, that a sum of Rs. 16,000 was advanced by the plaintiff for discharging a debt due from the partnership business to the South India Bank, that this amount was advanced by the plaintiff at the instance of both defendants 1 and 2, and that both defendants 1 and 2 were therefore liable for the plaint claim. Consequently, that court gave the plaintiff a decree to recover the plaint amount with interest and costs from defendant 2 and the assets of defendant 1 (Defendant 1 had died during the course of the trial in the lower court) and his family property in the hands of his legal representatives. Defendant 2 has filed this appeal against the above-decree, while the legal representatives of defendant 1 have acquiesced in it.

3. According to defendant 2, there was no partnership between him and defendant 1 and the relationship between them was merely that of a principal and surety in connection with the amount which defendant 1 had in the South India Bank for the purpose of conducting his wholesale ration shop. The wholesale ration shop, according to defendant 2, belonged solely to defendant 1 and was being conducted by him alone. This contention is belied by Ext. VI which is an agreement executed by defendants 1 and 2 on 21-11-1122 M. E.

It was expressly stated in that agreement that although the licence for the wholesale ration shop was in the name of defendant 1 the business belonged to both of them and was being conducted also by both of them and that, both of them were liable for the amounts due to the South India Bank under the overdraft account opened for the purpose of conducting the above business. It was also provided in Ext. VI that defendant 1 was to operate the overdraft account for the purpose of the business and realise the amounts due to the business and deposit the same in the Bank and attend to the management of the concern.

The income from the business, after meeting the necessary expenses and also

paying a monthly remuneration of Rs. 250/- to defendant 2, was to be divided equally between defendants 1 and 2. This document proves conclusively that there was a partnership between defendants 1 and 2 and that the agreement between them was that defendant 2 was to get a larger share of the income of the partnership business than, defendant 1.

The original plaintiff is now dead. But he was examined as P. W. 1 before his death. He also was conducting a ration shop business in the same locality as defendants 1 and 2, and he has deposed as P. W. 1 that defendants 1 and 2 were conducting the ration shop as partners and that for the purpose of the partnership business they had an overdraft account with the South India Bank and he gave the cheque Ext. E 1 for discharging the balance of Rs. 16,000 due from the partnership business to the Bank under the said overdraft account.

According to P. W. 1, he gave this cheque at the request of both defendants 1 and 2 and defendant 2 himself had told him that the ration shop business was being conducted by both defendants 1 and 2 as partners. P. W. 1's evidence is corroborated by the Bank records. Ext. V is the agreement executed by defendants 1 and 2 for opening the overdraft account in the Bank for Rs. 75000 and Ext. III the promissory note executed by them in favour, of the Bank for the overdraft amount. Ext. IV is the bond executed by defendants 1 and 2 jointly in favour of the Bank on the same date that Exts. III and V are executed. Ext. II is a letter given by the two defendants to the Bank on 6-2-1947. Both of them have signed Ext. II and it is clearly stated therein that they were conducting the partnership business in the name and style of "Mr. V. Subramonia Pillai" (which is the name of defendant 1). In neither Exts, II to V nor in Ext. VI was it stated that defendant 2 was only a surety for defendant 1.

In all of them defendant 2 figures as a partner, and the statements in Ext. VI are of very great importance, for Ext. VI was an agreement executed by defendants 1 and 2 for governing the relationship between them and was not meant for production at the Bank. Therefore, if they were not partners and the relationship between defendants 1 and 2 was only one of the principal and surety defendant 2 would have taken care to make that fact clear in Ext. VI.

It was very clearly stated in Ext. VI that the ration shop belonged to both of them and was being conducted by them. The provision in Ext. VI for paying monthly remuneration to defendant 2 and for division of the balance income from the business equally between defendants 1 and 2 also shows very clearly that defendants 1 and 2 were really partners and not principal and surety. The finding of the lower court that defendants 1 and 2 were partners and were conducting a partnership business is therefore correct and has to be upheld.

4. That the amount of Rs. 16,000 advanced by the plaintiff was borrowed and utilised for discharging a debt of the partnership business of defendants 1 and 2 is also equally beyond doubt. Ext. G is the copy of the overdraft account in the South India Bank standing in the name of "Mr. V. Subramonia Pillai,

Balaramapuram." No doubt that is the name of defendant 1.

But it was in the name of defendant 1 that the partnership business was agreed to be conducted. Ext. II, the letter given to the Bank on 6-2-1947 which is signed by both defendants 1 and 2, begins by giving the names and addresses of defendants 1 and 2 and saying "we two are conducting at Nemom in Neyyattinkara Taluk a business under the name and style of "Mr. V. Subramonia Pillai." The balance due to the Bank under Ext. G account on 3-8-1948 was Rs. 16074-3-3. Ext. E. 1 is the cheque whereby plaintiff made the advance.

It is a self cheque drawn by the plaintiff on the South India Bank and it was endorsed in the first instance by the plaintiff and then by defendant 1. The cheque and the endorsements all bear the date 3-8-1948. Ext. E is the payment slip dated 3-8-1948 whereby the whole amount due under Ext. G was paid and the account closed.

In Ext. G also there is an entry corresponding to Ext. E. P. W. 1 has deposed that he advanced the amount under the cheque for discharging the liability of the partnership, business conducted by defendants 1 and 2 and that both defendants 1 and 2 had requested him to make the advance. Plaintiff 1 also as D. W. 1 has deposed that the amount was borrowed and utilised for discharging the debt of the partnership business to the Bank.

5. It was vehemently contended by the appellant's learned counsel that, even if there was a partnership between defendants 1 and 2, defendant 1 had no authority and was not competent to incur a debt binding on the partnership and defendant 2, that even if there was originally a partnership it was dissolved before 3-8-1948 and any authority or competency which defendant 1 had during the time the partnership was being carried on to incur a debt binding on defendant 2 also had ceased with the dissolution of the partnership, and that from the fact that the promissory note Ext. A and the agreement Ext. B were executed by defendant 1 alone it can be clearly seen that the advance made by the plaintiff was a loan to defendant 1 alone in his individual capacity and was not intended to be a joint liability of defendants 1 and 2.

6. The evidence of P. W. 1 and D. W. 1 is, and it is also clear from Ext. VI, that the partnership was conducting a wholesale ration shop. Buying and selling was therefore the main business of the firm, and borrowing money for the purpose of buying or for discharging earlier debts contracted for the business is a thing usually done in carrying on such a business. Very frequently borrowing is necessary for carrying on such a business.

Therefore defendant 1 had authority and was competent u/s 251 of the Contract Act to incur debts binding on defendant 2. The law on the subject is stated in *Saremal Punamchand Vs. Kapurchand Punamchand*, wherein the following passage from the judgment of the Privy Council in *Bank of Australia v. Breillant* (1847) 6 Moo PCC 152 (B) has been quoted with approval:

"Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *prepositus negotiis societatis*, and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature. he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of transfer, negotiate and procure to be discounted promissory notes bills of exchange, cheques, and other negotiable paper in the name and on account of the partnership."

In *Saremal Punamchand Vs. Kapurchand Punamchand*, it was held that a firm would be a trading firm if its business consists in buying and selling and that in a trading firm any partner has an implied authority to borrow money for the purpose of the business on the credit of the firm and the other partners also are liable for the amount so borrowed by him.

This rule of law based on Section 251 of the Contract Act is so well recognised that we do not think it necessary to refer to the numerous authorities cited before us. In the light of Exts. II to VI it cannot be denied that the debt under Ext. G was incurred for the purpose of carrying on the business of the partnership, and this is the evidence of D. W. 1 and P. W. 1 also.

The discharge of Ext. G account with the money borrowed from plaintiff was also beneficial to the firm. Interest had to be paid with quarterly rests to the Bank, and the evidence of P. W. 1 is that the Bank was pressing for the discharge of the debt and that it was when the Bank was about to sue them that defendants 1 and 2 approached him with the request for an advance. We accept the evidence of P. W. 1 which has been believed by the court below and are satisfied that the advance was made by him for the purpose of carrying on the business of the firm, and that the amount has been used for the benefit of the firm. We therefore hold that defendant 1 had the authority and was competent to incur the plaintiff debt on behalf of the firm and defendant 2, the other partner.

7. So far as the argument of the appellant's learned counsel based on the alleged dissolution of the partnership is concerned, it has to be stated that up to the time of the hearing of this appeal defendant 2's case had been not that there was a dissolution of the partnership but that there was no partnership at all. His contention in paragraph 3 of the written statement was that the ration shop belonged to defendant 1 alone, and Ground Nos. 3, 5 and 11 in his appeal memorandum to this court were:

"3. The relationship between defendants 1 and 2 was merely that of a principal and surety to the South India Bank Ltd., Trivandrum. The records filed are only consistent with this fact and the lower court has erred in holding otherwise."

"5. There is no legal evidence of any partnership in fact or in law. The lower court ought to have found that the trade was the sole concern of 1st defendant and

that 2nd defendant had nothing to do with it.

"11. The 1st plaintiff and the 2nd defendant have never had any business or other dealings." Reference was made by the learned counsel during the course of his arguments to paragraph 11 of defendant 2's written statement in support of the contention that he had pleaded in the lower court that the partnership had been dissolved before the date of the plaintiffs advance. There is however no reference in that paragraph to the dissolution of the partnership.

What that paragraph says is that at the time of the advance the ration shop was not being conducted and not that the partnership had been dissolved. The ration shop according to defendant 2, belonged to defendant 1 alone, and so the reference to the closing down of the ration shop cannot be taken as meaning the dissolution of the partnership. There was also no issue in the lower court as to whether the partnership had been dissolved before the date of the advance.

It is relying on certain stray passages In the deposition of defendant 1 (D. W. 1) that it is now contended that the partnership had been dissolved before the date of the advance. D, W. 1 has said in certain portions of his deposition that the business had terminated before the advance was made and in certain other portions that it was not so dissolved and was in existence on the date of the advance. No reliance can therefore be placed on the stray passages in his evidence. Ext. VI(a) shows that by 8-8-1123 M. E. defendants 1 and 2 had come to an agreement in pursuance of which defendant 1 had applied before that date for cancellation of the licence in his name for the shop.

The agreement in Ext. VI (a) was that if the licence in defendant 1's name was cancelled and a fresh licence issued in the name of defendant 2, the latter should thereafter conduct the ration shop as his own business and also discharge the debts of the partnership and that if the licence was not given to defendant 2 their relationship should continue to be governed by Ext. VI. At the time of hearing here both sides admitted that the new licence was issued not to defendant 2 but to defendant I.

Therefore under Ext. VI (a) the partnership had to continue, for it was only in the event of defendant 2 getting the licence that he was to take over the business as his concern. It might have been with a view to get over this provision in Ext. VI (a) and for claiming the benefit of the new licence exclusively for himself that defendant 1 said at times that the partnership had been dissolved in pursuance of Ext. VI (a). The provisions in Ext. VI (a) is clear -- the partnership was to continue if defendant 2 could not get the licence.

There is no reliable evidence in this case as to the date of the cancellation of the old licence in defendant 1's name, and in view of the terms of Ext. VI (a) it is clear that the new licence obtained in defendant 1's name was not for his exclusive benefit but for the partnership business of the two defendants. In the circumstances we are not satisfied that the partnership had been dissolved before the date of the advance made by the plaintiff and hold that it was in

existence on that date.

8. Assuming for the sake of argument, that the partnership had been dissolved before the date of the advance, even then in the circumstances of this case, the plaint debt, although incurred by defendant 1 alone, is binding on the firm and defendant 2.

It is clear from Ext. VI that defendant 1 was the managing partner, and we have already found that while the partnership was alive, op in existence, he had the implied authority to incur debts binding on the firm and the other partner. P. W. 1 deposed that no public notice has been given of the alleged dissolution, that defendant 2 who had told him that defendants 1 and 2 were conducting the ration shop as partners had never informed him of the dissolution of the firm, and that he had also no knowledge of the dissolution at the time he made the advance.

There is no allegation and no proof on the side of defendant 2 that public notice of the dissolution was given or that the plaintiff was informed of dissolution before the date of the advance and had knowledge of it, when he made the advance. In the light of these facts it has to be held that the plaint debt is binding on the firm and defendant 2 u/s 45 (1) of the Partnership Act which reads:

"Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution."

Since the debt has been found to have been incurred for the purpose of the business and defendant 1 had implied authority to incur debts binding on the firm and defendant 2, the incurring of the plaint debt would have been an act of the firm if it was incurred before the dissolution, and so u/s 45 it is binding on both the firm and defendant 2. Likewise if there was a dissolution, Section 47 of the Partnership Act would also be attracted. The first part of that section reads :

"After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

We have already referred to the plaintiff's evidence, which we have accepted, that the Bank was pressing defendants 1 and 2 to close the account and that it was when they were taking steps to file a suit that defendants 1 and 2 approached him for the loan and he gave it.

A suit by the Bank when the firm was being wound up would have been disastrous and would have resulted in the winding up affairs being taken away from the hands of the partners. Further, the loan was also calculated to lighten

the actual burden of the firm, for interest was payable on the overdraft account with quarterly rests while there was no provision for such rests in the case of the plaintiff's loan. The incurring of the plaintiff's debt was therefore an act necessary for the winding up, and as such it would be binding on defendant 2 u/s 47 also.

9. Another contention of the appellant's learned counsel was that as the plaintiff had taken Ext. A promissory note he has a cause of action only on that promissory note and that since the promissory note was executed by defendant 1 alone and was not executed in the name of the firm or by defendant 1 in his capacity as a partner the debt must be deemed to be a personal debt of defendant 1 and he alone can be made liable for it.

In support of this contention reliance was placed upon the decisions in *Sheik Akbar v. Sheik Khan* ILR Cal 256 (C); *Parsotam Narain v. Taley Singh* ILR All 178 (D); *Penumatsa Rangaraju Vs. Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and Another*, and Section 27 of the Negotiable Instruments Act. Now, the plaintiff's case is that he had given the loan to the firm of defendants 1 and 2 -- defendant 1 actually borrowing the amount for and on behalf of the firm and acting also as the agent of the other partner -- and he had taken Exhibit A, the promissory note from defendant 1 as security for the loan given to the firm, and not that he had given a loan to defendant 1 in his personal capacity and taken Ext. A for that loan.

The actual debtor and the person executing the promissory note as security were therefore, according to the plaintiff, two different legal persons. For the debt of the firm defendant 1 had given the security, and the plaintiff's suit was based on the debt itself given to the firm. This is clear from the averments in paragraphs 2 to 4 of the plaint. In fact except the statement in paragraph 4 that defendant 1 had given as security the records produced with the plaint there is no reference at all in the plaint to Ext. A promissory note.

This case is entirely different from the cases in ILR Cal 256 (C) ILR All 178 (D); *Penumatsa Rangaraju Vs. Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and Another*, What has been decided in ILR Cal 256 (C) and ILR 26 All 178 (D) is that when a person has lent money to another person under a promissory note or taken a promissory note or a bill from another person in discharge of a claim that he had against the other person or for amounts deposited by him with other person, the cause of action which the holder of the promissory note or bill has against the other person is only upon the promissory note or bill and that he has no independent cause of action on the consideration for the promissory note or bill.

In such cases there is only one transaction --the loan by the lender to the debtor, the promise of the promisor to pay the amount due from him under the claim which was treated as discharged by the creditor when the promissory note or bill was given to him, or the entrustment of the money with the drawer of the promissory note or bill and so there is only one cause of action and not two

independent causes of action one upon the promissory note or bill and the other upon its consideration.

That is not the case here. In the present case there was a loan to the firm, and an independent security for that loan was taken from defendant 1. The enforceability or otherwise of the security cannot affect the plaintiff's right to maintain a suit on the cause of action which he has against the debtors on the loan. Even if the security cannot be enforced or the lender does not choose to enforce it, he has the right to recover the loan from the principal debtors, and it is upon this right of the lender that the cause of action in this suit is based. The plaintiff's evidence also is that he has lent the money to the firm and has taken Exts. A and B only as security.

The contention that the plaintiff has a cause of action only on Ext. A promissory note and that as the promissory note was executed by defendant 1 alone the plaintiff's debt must be deemed to be a debt of defendants 1 and 2 and defendant 2 is not liable for the same cannot therefore be accepted. In the view that we have taken, namely, that Ext. A is only a security taken from defendant 1 for the loan given to the firm, Section 27 of the Negotiable Instruments Act, and the decision in *Penumatsa Rangaraju Vs. Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and Another*, are not applicable to this case. This is not a case in which it has to be considered whether a promissory note has been validly executed for and on behalf of a firm and whether it is binding on all the partners.

10. Lastly, the appellant's counsel urged for a reduction of the rate of interest awarded by the court below for the period from date of suit to date of decree and for a direction that the plaintiff should first execute the decree against defendant 1 and should take out execution against defendant 2 only after that. The rate of interest allowed by the lower court from date of suit to date of decree is 12% per annum, and this rate was awarded because of a specific prayer for the same in the plaint.

In this court the appellant has not paid court fees for his prayer for the reduction of the interest awarded for the period from the date of suit to the date of decree and he has also not taken a ground in the appeal memorandum for the reduction. In the circumstances we are unable to accede to the prayer for reduction of interest. Defendant 1's legal representatives strongly opposed the appellant's prayer for postponement of his liability and we see no justification for directing the postponement asked for. There is no equity for preferring defendant 2 to defendant 1. There is, therefore, no ground for directing the decree-holder to proceed first against defendant 1 and to proceed against defendant 2 only after that.

11. In the result the decree of the lower court is confirmed and this appeal is dismissed with costs to Respondents 1 and 2.