

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.06.2017

DELIVERED ON : 13..07..2017

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

A.S.No.494 of 2010
and
MP.Nos. 1 and 2 of 2010

N.A.Xavier Julien
Son of NX Augustine
C8, Dr.Radhakrishnan Salai
Block, 12, Neyveli, rep.by
power agents E. Wenceslas ... Appellant/Plaintiff

Vs.

N.X. Thomas ... Respondent/defendant

Prayer:- This Appeal suit has been filed under Section 96 of CPC,
against the judgment and decree dated 09.12.2005 made in
O.S.No.9 of 2005.

For Appellant : Mr.Srinath Sridevan

For Respondent : Mr.R.Parthasarathy,
Senior Counsel for
M/s. V.R. Venkatesan

J U D G M E N T

For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

2. This is a plaintiff's appeal in a suit for dissolving the partnership business. The plaintiff N.A. Xavier Julian represents the estate of N.X.Augustine deceased. According to the plaint Augustine and the defendant, N.X.Thomas, who is none other than the brother of the deceased Augustine, were partners of a firm named 'India Watch Company' and 'Karg Engineers' and Optical. The partnership was started on 01.4.1996 and N.X.Augustine died on 06.8.2002. The defendant, as the surviving partner, however, carried on the business of the firm. He made large profits from the business. By reason of death of the father of the plaintiff Augustine, the share of the plaintiff rose to 75% and the share of the defendant remained at 25%. The defendant in order to swallow the entire income and share, started to maintain double accounts. When the plaintiff

questioned the same and asked to render accounts, the defendant refused to do so. The plaintiff, therefore, prayed for a declaration from the Court dissolving the partnership of the Firm and a decree for rendition of accounts of the partnership Firm. It is scarcely necessary to mention that the plaintiff also claimed reliefs regarding the appointment of an Advocate Commissioner and the costs of the suit.

3. The defendant resisted the plaintiff's claim and pleaded that in the partnership business, the Optical section was being looked after by the father of the plaintiff till his demise and after that, the plaintiff started running the business on his own without disclosing the sales and business to the defendant. One of the eldest sister of the plaintiff and also wife of the power agent of the plaintiff filed a suit, being O.S.No.256 of 2003, against the plaintiff for disclosing true and proper accounts. In the said suit, the defendant has paid a sum of Rs.82,755/- towards his share. In view of the said payment, 50% of the share of the deceased was allotted to the defendant. Thus, the total share capital provided by the defendant would be 75%. The defendant also

denied the allegations of the plaintiff about maintaining of double accounts and not rendering accounts. It is stated that only the plaintiff has not disclosed the business accounts relating to Optical Section for the past 2½ years and that he is bound to render accounts. The suit has been filed only to grab the entire business. The plaintiff by his own conduct, spoiled the reputation and the good Will of the business. The plaintiff has engaged henchmen and threatened the defendant and the defendant is in a position to go to the shop only with the help of policemen. The plaintiff is only responsible for the loss occasioned in the business. Hence, the defendant prayed for dismissal of the suit.

4. On these pleadings the trial Court framed the following issues:

1. Whether the plaintiff is entitled to 75% share in the partnership business on account of demise of his father Augustine?
2. Whether the defendant is entitled to 75% of share on account of himself having deposited Rs.82,755/- in the suit in O.S.No.50 of 2004

pending on the file of the District Munsif-cum
Judicial Magistrate Court, Neyveli?

3. To what relief if any is plaintiff entitled to?

5. On behalf of the plaintiff, the plaintiff examined himself as P.W.1 and Exs. A1 and A2 were marked. On behalf of the defendant, the defendant examined himself as D.W.1 and Exs. B1 and B2 were marked.

6. On the basis of the evidence and materials available on record, the Trial Court, besides passing the decree of dissolution of partnership, has allotted 50% of the share of the deceased Augustine to the defendant. Aggrieved over the same, the present appeal came to be filed by the plaintiff.

7. Learned counsel for the plaintiff/appellant vehemently contended that the deceased Augustine, father of the plaintiff, was holding 50% of share in the partnership business and the defendant had only 25%. It is submitted that the share of the deceased Augustine, cannot be allotted to the defendant herein

and his share shall go to the estate of the deceased. It is further submitted that since the deceased has four children, they are equally entitled to get their respective share from the estate of the deceased. Therefore, the judgment of the Trial Court allotting the share of the deceased to the defendant, taking into consideration some deposit made by him in another suit, is not based on proper appreciation of evidence and law. Hence, it is the contention of the learned counsel that the judgment of the Trial Court requires interference of this Court and the matter shall be remanded back for fresh disposal by the Trial Court after giving opportunity to the parties and after impleadment of the legal heirs of Augustine.

8. Per contra, the learned senior Counsel appearing for the respondent/defendant vehemently opposed the appeal contending that the suit itself is not maintainable. It is contended by the learned counsel that since the suit for rendition of account has already been filed by the plaintiff's sister, accounts should be worked out in the above suit alone. That apart, in the above suit the defendant's share has been valued to

the tune of Rs.82,755/- and the said amount has been deposited by the defendant. The Trial Court taking into consideration the said amount deposited by the defendant has rightly come to the conclusion that the share of the deceased would go to the defendant. In any event, the learned counsel fairly conceded that the Trial Court has not complied with the provision contemplated under Section 37 of the Indian Partnership Act. It is also conceded that if the Court feels that there is no other option except to remand the matter to the Trial Court for fresh disposal, the defendant has no objection for the same.

9. In the light of the above submission now the points arise for consideration are:-

1. Whether share of the deceased partner could be allotted to remaining partner?

2. What relief?

10. It is admitted by both sides that originally, the partnership was constituted between one Augustine, the father of the plaintiff, the plaintiff and the defendant. The said Augustine

originally had 50% of the share and the plaintiff and the defendant each had 25% of the share in the partnership Firm running in the name of Indian Watch Company and "Karg Engineers" and Opticals. It is also not in dispute between the parties that the said Augustine, who had major share in the partnership business, died on 06.8.2002.

11. It is the main contention of the plaintiff that after the death of his father, the defendant, who is none other than the brother of his father, has not rendered proper accounts and therefore, he has filed the instant suit for dissolution of Firm. Whereas it is the contention of the defendant that the plaintiff's sister has filed a suit for rendition of accounts in O.S.No.256 of 2003 against the plaintiff and others and in the said suit, he has also filed a detailed written statement and that he has deposited the share of the deceased Augustine before the Court, which was arrived at Rs.82,755/-. Therefore, if the share of the Augustine is added in the existing share of 25% of the defendant, the share of the defendant in the Firm would come to 75%. The Trial Court, taking into consideration the amount deposited by the

defendant in the aforementioned suit said to have been filed by the sister of the plaintiff, which has been marked as Ex.B1, has allotted the share of the deceased to the defendant and also ordered for dissolution of Firm by invoking Section 37 of the Indian Partnership Act, 1932.

12. It is well settled that if the family members were carrying on a joint business and one of them died and the business was carried on by the surviving partners, the legal heirs of the deceased partner could sue for his /her share of the profits. The right of the heirs of the deceased partner to claim a share in the profits of the partnership business, which is continued by the surviving partners, has been recognised in this country. In this context, it would be useful to extract Section 37 of the Indian Partnership Act, which reads as follows

37. Right of outgoing partner in certain cases to share subsequent profits.—Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the

outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm:

Provided that where, by contract between the partner, an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of the option, does not, in all material respects, comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

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A reading of the above Section makes it clear that upon the death of a partner, the surviving partners carry on the business of the continuing Firm with the property of the Firm without any

final settlement of accounts between them and the outgoing partner of his estate. Then, in the absence of contract to contrary, outgoing partner or his estate is entitled at the option of himself or his estate, is entitled to such profits which had been made since the former partner ceased to be a partner as may be attributable to the use of the share of his property and he must either pay interest or he must pay the profits which have accrued by the use of these assets.

13. On the death of a partner, if the shares of the deceased partner in the partnership business remain and the business is continued, the estate of the deceased partner is entitled to the subsequent profit earned by the business as may be imputed to the use of the estate of in the firm or to have interest on the shares of the deceased partner in the assets of the firm provided there was a final settlement of accounts between the firm and the estate of the deceased partners.

14. It is quite clear that in this case there was no term in the contract whereby after Augustine's death the defendant could

acquire his share and carry on the business of the Firm, nor have any accounts been taken between the partners either before Augustine's death or after, and since the partnership stood dissolved on Augustine's death, Augustine's representative has the right to claim a share in the profits of the firm to the extent of Augustine's share in the property of the Firm.

15. As discussed above, the second part of Section 37 of the Act would indicate that in the absence of any contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his executors or administrators to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at such rate as may be determined by the court. So the legal position is quite clear that unless there is an express agreement to the contrary, 'on the death of a partner, the partnership stands dissolved and the assets of the partnership have to be sold and money so realised is to be distributed amongst the parties according to their share but the position would be different. In short, if there is no express agreement,

the death of a partner will result in the dissolution of firm.

16. Admittedly, in the absence of any legal heirs of the deceased partner the valuation can be arrived at the option of the existing partner. Therefore, the value of the share of the deceased arrived at by the existing partner, in the absence of contract is not at all possible as per Section 37 of the Partnership Act. Such offer is available only when there is a contract between the partners giving option to surviving or continuing partners to purchase the interest of the deceased or outgoing partner.

17. In this case, as discussed above, it is not the case of the defendant that there is a contract between himself and the deceased partner to purchase the interest of the deceased or outgoing partner or giving option to him to value the said property. Therefore, the judgment of the Trial Court holding that the defendant, who has valued the property and deposited the amount, is entitled to deceased's share of 50% is highly erroneous. In fact, the Trial Court has failed to appreciate Section 37 of the Partnership Act. The Trial Court has proceeded

on the ground that Section 37 of the Act enable the defendant to acquire the said share by paying the value of the same to the plaintiff or by depositing the same in the present suit or in the suit which is pending on the file of the District Munsif, Neyveli. The said approach of the Trial Court is not legally correct.

18. At this juncture, it would be useful to refer LINDLEY on the law of the partnership (14th Edition by Ernest H.Scammell), which reads as follows:

“No right to take the share of deceased at a valuation:

In the absence of an express agreement to that effect, the surviving partners have no right to take the share of the deceased partner at a valuation; nor to have it ascertain in any other manner than by a conversion of the partnership assets into money by a sale; not have they any right of pre-emption. Even the goodwill of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from

recommencing business together in the name of the old firm unless the good will has been or is to be sold.”

19. Lindley on Partnership (12th Edition) as well as 15th Edition, in Chapter 26 dealt with the consequences as regards the surviving partners on the death of a partner. It also laid down at page 739 of the 15th Edition that subject to any agreement between the partners, every partnership is dissolved as regards all the partners on the death of any partner and unless all the partners have agreed to the contrary when one of them dies, his executors have no right to become partners with the surviving partners nor to interfere with the partnership business, the executors of the deceased represent him for all purposes of account, and, unless restrained by special agreement, they have the power of bringing an action, to have the affairs of the Partnership wound up in a manner which is generally ruinous to the other partners.

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20. A conjoint reading of the above LINDLEY on the law of partnership and Section 37 of the Indian Partnership Act, it is clear that, in the absence of any specific contract, only at the

option of the estate of the deceased or his representative share of the deceased can be valued and not at the option of the surviving partner. Therefore, the judgment of the trial Court allotting 50% of the deceased's share to the defendant is not sustainable in law.

21. It is also brought to the notice of this Court that the suit filed by the sister of the plaintiff in O.S.No.256 of 2003 is dismissed for default. When that being so, allotting 50% of share of the deceased to the defendant by the Trial Court is without any basis and in fact, the Trial Court has misread the provision of law. Hence, this court is of the view that the judgment of the Trial Court is liable to be interfered.

22. Yet another contention of the learned counsel is that the suit filed by the plaintiff for dissolution of the Firm is not maintainable as other legal heirs have not been included in the suit. It is to be noted that the suit for dissolution of partnership can be filed by any partner in view of the ground set out under Section 44 of the Indian partnership Act. Since the plaintiff himself has sought preliminary decree for dissolution of Firm and also for rendition of accounts, this Court is of the view that all

other legal heirs of Augustine have also to be impleaded as parties to the suit.

23. In any event, for the proper adjudication of rights of the parties and for determination of the share capital of the deceased, necessarily, the other legal heirs of the deceased have to be heard. Therefore, this Court is of the view that the matter has to be decided afresh after impleading all the necessary parties.

In the result, the appeal is allowed by setting aside the judgment and decree of the Trial Court and the matter is remanded back to the Trial Court for re-trial. The Trial court shall decide the suit filed for dissolution of the Firm and also for rendition of accounts, after giving opportunity to the parties concerned to implead all the legal heirs of the deceased Augustine, and dispose of the same, as expeditiously as possible, by conducting trial on day to day basis. However, there shall be no order as to costs. Connected Miscellaneous Petitions are closed.

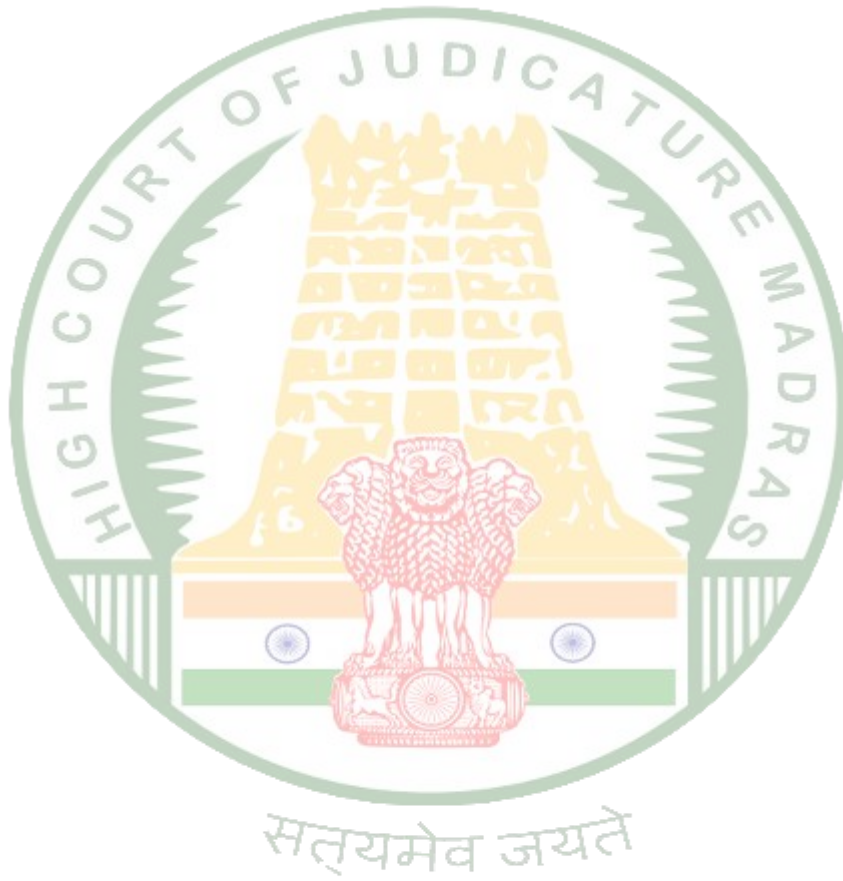
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Index: Yes/No

Internet: Yes

Speaking order/Non speaking order



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N.SATHISH KUMAR, J.

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To
The Additional District Judge (Fast Track Court III)
Vridhachalam.



**Pre-delivery judgment in
A.S.No.494 of 2010**

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