

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 25.01.2017
PRONOUNCED ON : 03.02.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.642 of 2011
and
M.P.No.1 of 2011

A.G.Sekaran ... Appellant/Respondent/Plaintiff

Vs.

- 1.M/s.Essaargee Fibro Industries
(Suit dismissed as against 1st
defendant. Hence, notice may
be dispensed with in second appeal)
2. R.Ramaraj S/o. Muthusamy
Partner, ESSAARGE E Fibro Industries
No.3, Ramapuram Road,
Kaikkankuppam Village,
Alwarthirunagar Post,
Chennai - 600 087.
3. R.Rani Thilagam W/o.M.Rengasamy,
Partner, ESSAARGE E Fibro Industries
No.30, T.S.T.Nagar,
Arumbakkam, Chennai - 600 106. Respondents/Appellants/
Defendants 2 & 3

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.358 of 2009 dated 03.05.2010 on the file of the Additional District Judge, Fast Track Court - V, Chennai, reversing the judgment and decree dated 15.12.2006 made in O.S.No.1406 of 2003 on the file of the Court of the XI Asst. Judge of City Civil Court at Chennai.

For Appellant : Mr.R.Abdul Mubeen
For Respondents : Mr.S.V.Jayaraman
Senior Counsel
for M/s.R.Asokan

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 03.05.2010 passed in A.S.No.358 of 2009 on the file of the Additional

District Judge, FTC-V Chennai reversing the judgment and decree dated 15.12.2006 made in O.S.No.1406 of 2003 on the file of the 11th Assistant City Civil Court, Chennai.

2. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

"(i) Whether the suit filed by the appellant inspite of his giving up his claim against the partnership Firm, the 1st defendant in the suit, requires consequential amendment of pleadings and whether suit can be dismissed for misjoinder of party.

(ii) Whether the suit filed by the appellant even having given up the claim as against the partnership Firm is hit under Section 69 Indian Partnership Act, 1935."

3. The suit has been laid by the plaintiff for recovery of money

4. The plaintiff claiming to be the erstwhile partner of M/s.Essaargee Fibro Industries, the first defendant unregistered firm has laid the suit for recovery of money on the basis of the letter of promise stated to have been issued by the first defendant dated 01.04.2002. Now, according to the plaintiff, he has retired from the first defendant partnership firm from 31.03.2002 and pursuant to the same, under the letter of promise dated 01.04.2002, the first defendant partnership firm has promised to pay the sum mentioned therein to the plaintiff towards his capital, share, goodwill as the erstwhile partner of the first defendant firm and inasmuch as the amount had not been paid as promised, according to the plaintiff, he has been necessitated to lay the suit against the defendants. It is stated that the defendants 2 & 3 are the partners of the first defendant firm particularly, the second defendant is stated to be the managing partner.

5. The defence has been taken by the defendants 1 to 3 contending that the plaintiff has not been relieved from the partnership firm from 31.3.2002 as claimed by the plaintiff and further, the letter of promise dated 01.04.2002 has not been issued, as claimed by the plaintiff and according to the defendants, the same had been created by the plaintiff by making use of the letter pad of the first defendant firm contending that as the plaintiff was incharge of the business, he used to obtain the signature of the defendants 2 & 3 in the partnership transactions and accordingly, had misused the letter pad by obtaining the signature of the second defendant and created the alleged letter of promise dated 01.04.2002 and therefore, there

is no question of the defendants promising to pay the plaintiff the suit amount towards his capital, share, goodwill and the further defence has also been taken by the defendants that the suit is not maintainable, in the light of the provisions of Section 69 of the Indian Partnership Act, 1932.

6. Admittedly, the first defendant firm is an unregistered firm. Therefore, it could be seen that as per Section 69 of the Indian Partnership Act, 1932, the suit is not maintainable against the first defendant firm and its partners. The plaintiff, on becoming aware of the defence taken by the defendants 1 to 3 on the question of the maintainability of the suit under Section 69 of the Indian Partnership Act, 1932, it appears, had given up his claim as against the first defendant during the course of evidence and thereby proceeded his case as against the defendants 2 & 3. It is found that without necessary amendment of the pleadings as regards the giving up of the first defendant by the plaintiff, the trial court has also proceeded with the suit and accepting the case of the plaintiff, decreed the suit in favour of the plaintiff as against the defendant 2 & 3. The defendants 2 & 3 preferred the first appeal and the first appellate court, set aside the judgment and decree of the trial court and consequently, dismissed the suit laid by the plaintiff. Challenging the same, the present second appeal has been preferred.

7. It is mainly contended by the plaintiff's counsel that inasmuch as the plaintiff has given up the first defendant, there is no need for amending the plaint pleadings consequentially and even sans the amendment, the suit is maintainable as against the defendants 2 & 3 and accordingly, it is argued that the trial court has rightly decreed the suit in favour of the plaintiff as against the defendants 2 & 3. The letter of promise dated 01.04.2002 is the basis of which the suit has been laid by the plaintiff. Admittedly, the said letter of promise has been executed only by the first defendant unregistered partnership firm signed by the second defendant as the managing partner. Therefore, it could be seen that the defendants 2 & 3 being the partners of the first defendant firm have not personally undertaken to pay any amount to the plaintiff under the above said letter of promise. In such view of the matter, when the plaintiff's suit is obviously barred as against the defendants 1 to 3 under Section 69 of the Indian Partnership Act, 1932, the plaintiff, if at all, wants to give up the case as against the first defendant, should have as a consequence thereof given notice of the same to the defendants concerned and after inviting their objections to the same, if any, should have proceeded further with the case. However, it is found that only during the course of evidence, the plaintiff has given up his case as against the first defendant, without effecting consequential amendment of the plaint pleadings. When

the defendants have in their written statement specifically pleaded that the suit is hit by Section 69 of the Indian Partnership Act, 1932, the plaintiff on giving up his case as against the first defendant, should have given due notice of the same to all the defendants. The plaintiff seems to have not adopted the said procedure. That apart, the plaintiff has also after giving up the case as against the first defendant did not make any effort to take further steps to have the pleadings amended accordingly. It is specifically pointed out by the defendants counsel in this appeal and according to him, in the absence of the consequential amendment after giving up the case against the first defendant, the plaintiff's suit is not maintainable and that apart, it is also argued by the defendants counsel, the plaintiff's right of abandonment of the suit is not absolute and he cannot play a fraud on the parties viz., the defendants as well as the court by unilaterally giving up his case as against the first defendant without due notice to the parties concerned and also without effecting consequential amendment of the pleadings with reference to the same. It is argued that the plaintiff is prevented in law from abandoning his case as against a particular party or the parties behind his/their back and it is contended that the court should not be a silent spectator to such manoeuvres and manipulations of the plaintiff amounting to gross abuse of the judicial process. In this connection, strong reliance is placed upon the decision reported in AIR 1995 MADRAS 42 (Registrar, Manonmaniam Sundaranar University V. Suhura Beevi Educational Trust and others), wherein, it has been held as follows:-

(A). Civil P.C.(1908),O.23, R.1 -
Abandonment of suit or part of claim - Right of plaintiff, is not absolute - Cannot be used to play fraud on parties as well as Court.

Though liberty may lie with the plaintiff in a suit to withdraw or abandon at any time after the institution of the suit, the whole of the suit or part of his claim, yet, it cannot be considered to be so absolute as to permit or encourage or ratify an abuse of process of court or fraud to be played upon parties as well as Court. The so-called abandonment ought not to be a ruse to get rid of a party but yet to get the same relief prayed for earlier. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself is no licence to the plaintiff to claim a right to do so to the detriment of the legitimate rights of a party-defendant behind its back and with ulterior motive and oblique purpose

and courts could not be held to be powerless to prevent such onslaught on the institute of administration of justice.

(B) Civil P.C.(1908), O.23, R.1; O.1, R.9 - Abandonment of party to suit - cannot be done without consequential amendment of pleadings - Party defendant who has filed written statement- Cannot be abandoned behind his back.

Though it is the right of the plaintiff to choose the party respondent or defendants to a cause to be instituted or to give up or abandon a party at any stage of the suit or proceedings, such things cannot be allowed to be done without consequential amendment of pleadings. It is preposterous to claim relief against a party or a relief, in terms, which will directly affect the rights of a party, but yet claim a right also either not to implead such a person or authority who may be directly affected as a party or give up or abandon such a person once earlier made a party to the proceedings. In such case, in the absence of consequential amendments and deletion of the relief prayed and relief sought for as well as the allegations pertaining to such a party, who is not impleaded or given up subsequently the proceedings will suffer the vice or not having before the Court the necessary parties and on such ground alone the proceedings will have to fail without there being any enquiry or adjudication on the merits of the claim. The court in such cases cannot also pretend to be either ignorant or oblivious to such patent manoeuvres and manipulations or itself allow it to be made in gross abuse of the judicial process.

A party who has filed its written statement cannot be given up behind its back, depriving its right to insist upon either the costs or even to raise a plea that in consequence of such giving up or withdrawal or abandoning, the suit itself would be rendered futile and cannot be as it has been framed and filed and pursued.

8. A perusal of the above decision, on application to the facts and circumstances of our case, would go to show that the plaintiff by giving up his case as against the first defendant, after the defendants have filed the written statement, behind their back orally and without effecting necessary consequential amendment of the plant pleadings is nothing but a clear manipulation of the court procedures i.e. gross abuse of the judicial process and in such view of the matter, on the above ground alone, it is found that the plaintiff's lis has to fail .

9. In the light of the above decision, the contention of the plaintiff's counsel that inasmuch as he had given up his claim as against the first defendant i.e. Unregistered partnership firm, the plaintiff is entitled to maintain the suit as against the partners i.e. the defendants 2 & 3 is unacceptable. The letter of promise has been issued only by the first defendant firm and on the basis of the said promise alone, the suit has been laid by the plaintiff. When according to the plaintiff, he has given up his case as against the first defendant, it could be seen that he is not entitled to proceed with the suit further as against the defendants 2 & 3, as the defendants 2 & 3 have not given any personal undertaking to pay the suit amount to the plaintiff under the said document. No doubt, the second defendant has signed the above said letter of promise as the managing partner and further, under the said document, the third defendant's properties are shown as security for the said amount. When the above said letter of promise is found to be executed only by the partnership firm and not by the partners as such, the case of the plaintiff that even after giving up his case as against the first defendant, he is entitled to proceed as against the defendants 2 & 3, on the basis of the above said letter, cannot be accepted in any manner and on the above ground, it is found that the plaintiff action should be rejected. It is quite obvious that the plaintiff has given up the first defendant only to set at naught the rigour of the defence of maintainability of the suit raised by the defendants under Section 69 of the Indian Partnerships Act, 1932 by misusing the judicial process.

10. The plaintiff's counsel further contended that inasmuch as the plaintiff has sought the recovery of money in lieu of his capital, share, goodwill as the erstwhile partner of the first defendant firm and the same is also indicated in the letter of promise, the suit is maintainable and not barred under Section 69 of the Indian Partnership Act, 1932 and in this connection, he relied on the decision reported in (2004) 13 SCC 358 (Bhartesh Chandra Jain Vs. Shoiab Ullah and Others). However, as rightly put forth by the defendants' counsel, the issue

involved in the decision above mentioned is for accounting and dissolution of the concerned firm. Accordingly, invoking Section 69 (3) (a) of the Indian Partnership Act, 1932, the Apex court has held that the provisions of Section 69 (1) & (2) would not affect such a suit. However, in so far as the case at hand is concerned, it is the suit based upon the letter of promise dated 01.04.2002, which is stated to be issued by the first defendant firm promising to pay certain money to the plaintiff. It is therefore clear that the suit has been laid by the plaintiff arising out of the said promise i.e. Contract / right conferred by the Indian Partnership Act, 1932 and in such view of the matter, it is found that the lis laid by the plaintiff is barred by Section 69 of the Indian Partnership Act, 1932.

11. On facts, as adverted to earlier, the claim of the plaintiff that he has been relieved from the partnership from 31.03.2002 is seriously controverted by the defendants. Now, according to the plaintiff, submitting his option to get relieved from the partnership from 31.03.2002, he has also written a letter to the first defendant on 20.02.2002. However, the alleged letter dated 20.02.2002 has not seen the light of the day. If really, the plaintiff had been relieved at his option by a letter dated 20.02.2002 from the first defendant firm with effect from 31.03.2002, the plaintiff would have produced the said letter. However, the said document is not forthcoming. Further, as seen above, it is the specific case of the defendants that the plaintiff still continue as the partner of the first defendant firm and he has not been relieved from 31.03.2002. In this connection, the plaintiff who was examined as PW1 has also admitted that till 2002, he had been attending the office of the first defendant firm and conducting business. It is therefore, found by the first appellate court that inasmuch the plaintiff himself has admitted to have been part of the first defendant firm till the end of 2002, his case that he had been relieved from the firm with effect from 31.03.2002 is unacceptable. That apart, the evidence adduced in the matter would go to show that even after 31.03.2002, the plaintiff had been taking part in the business of the first defendant firm by signing in various communications and one such communication has been marked as Ex.B6, which is the quotation of the first defendant firm to the Tamil Nadu State Construction Corporation. The plaintiff has signed in the document dated 12.04.2002. The plaintiff during the course of his evidence has admitted his signature in Ex.B6. However, it is stated that no seal of the firm is found. When it is admitted by the plaintiff that his signature is available in Ex.B6 and when Ex.B6 is found to be a document of the first defendant firm dated 12.04.2002, as rightly argued by the defendants, inasmuch as the plaintiff had not been relieved from the firm with effect from 31.03.2002 and inasmuch as he has been transacting the business of the firm even thereafter, it is found that the plaintiff has signed in

Ex.B6 and therefore, merely on account of the absence of the seal, it cannot be construed that the document Ex.B6 has been created by the defendants for the purpose of this case.

12. On the above reasonings also, the first appellate Court, has rightly found that the plaintiff is not entitled to maintain the suit. As seen earlier, the plaintiff has laid the present suit as against the defendant on the footing that he had got himself relieved from the partnership firm 31.03.2002 and only on account of the same, the letter of promise dated 01.04.2002 has been written by the first defendant. When the above said fact has not been established by adducing the best evidence particularly the letter of option said to have been issued by the plaintiff on 20.02.2002 and when the document Ex.B6 strikes against the case of the plaintiff, it is found that the contention of the plaintiff that the first defendant firm had agreed to pay the suit amount in lieu of his capital, share, good will as the erstwhile partner of the first defendant firm as such cannot be accepted. The first appellate court has rightly on the proper appreciation of the evidence on record held that the plaintiff's suit is factually as well as legally not maintainable and no infirmity is found as against the findings and conclusions of the first appellate court for rejecting the plaintiff's case.

13. In the light of the above discussions and following the decision reported in AIR 1995 MADRAS 42 (Registrar, Manonmaniam Sundaranar University V. Suhura Beevi Educational Trust and others), the plaintiff suit is not maintainable by unilaterally giving up his claim against the first defendant partnership firm without due notice and also without effecting consequential amendment of pleadings and therefore, the suit laid by the plaintiff is bad for mis joinder of necessary party. Further it is found that even if the plaintiff has given up his claim as against the first defendant partnership firm, inasmuch as the plaintiff has laid the suit based upon the letter of promise dated 01.04.2002 alleged to have been issued by the first defendant partnership firm and as the defendants 2 & 3 are not personally liable under the above said letter of promise, it could be seen that the suit laid by the plaintiff is hit by Section 69 of the Indian Partnership Act, 1932. Accordingly, the substantial questions of law formulated in this second appeal are answered against the plaintiff and in favour of the defendants.

In conclusion, the second appeal fails and accordingly, dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sms

To

1. The Additional District Court,
Fast Track Court - V, Chennai.
2. The XI Asst. Judge of City Civil Court,
Chennai.
3. The Section Officer
VR Section
High Court Chennai

+1 cc to M/s.R.Ashokan Advocate sr 7695
+1 cc to M/s.R.Abdul Madeen Advocate sr 6821

S. A.No.642 of 2011
and
M.P.No.1 of 2011

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