THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

LETTERS PATENT APPEAL NO.139 OF 1998

JUDGMENT
(per Justice Sanjay Kumar)

This letters patent appeal arises out of the common judgment dated 27.10.1995 passed by a learned Judge of this Court, in so far as it pertained to A.S.No.1373 of 1983. The appellants herein were the respondents in the said appeal.

By order dated 22.07.1998, a Division Bench of this Court granted stay of the operation of the judgment and decree in the said appeal, subject to the appellants depositing the entire decretal amount along with costs within eight weeks. Half of the deposited decretal amount and the costs were permitted to be withdrawn by the respondents without furnishing security and the remaining half was permitted to be withdrawn upon furnishing a bank guarantee to the satisfaction of the trial Court.

During the pendency of this appeal, appellant 2 died and his legal representatives were brought on record as appellants 4 to 7.

Heard Sri V.L.N.G.K.Murthy, learned senior counsel appearing for the appellants, and Sri T.S.Anand, learned counsel for the respondents.

Three suits came to be filed before the learned Subordinate Judge at Rajahmundry. O.S.No.179 of 1970, from which the present letters patent appeal arises, was filed by the respondents herein for recovery of the sum of Rs.46,000/- with subsequent interest. They also claimed a charge over the suit schedule property. Though appellants 1 to 3 herein were shown as defendants in the said suit, the recovery was sought to be effected only against defendants 1 and 2. O.S.No.251 of 1970 was filed by appellants 1 and 2 herein against respondents 2, 3, 4, 5, 6 herein and others for partition of the suit schedule property into five equal shares and for allotment of one such share to them and for future profits. O.S.No.247 of 1971 was filed by appellant 1 herein against respondents 2, 3, 4, 5 and 6 herein for recovery of Rs.2,109.81ps. towards contribution or reimbursement of the loss sustained by him owing to the failure of the defendants therein to pay the maintenance amount due to Pandiri Nagaratnam, the decree-holder in O.S.No.125 of 1936 in E.P.No.29 of 1969 on the file of the District Court, as stipulated in the partition deed dated 28.03.1950. By common judgment dated 28.01.1982, the learned Subordinate Judge at Rajahmundry dismissed O.S.No.179 of 1970 with costs on the ground that it was barred by limitation. In so far as O.S.No.251 of 1970 was concerned, the learned Subordinate Judge passed a preliminary decree for partition of item 1 of the suit schedule property into five equal shares and for allotment of one such share to the plaintiffs. In so far as O.S.No.247 of 1971 was concerned, the learned Subordinate Judge decreed the suit for a sum of Rs.2,109.51 ps. with costs against the defendants, with subsequent interest on Rs.2,059.67 ps. at 6% per annum from the date of the suit till the date of realisation.

Appeals were filed against the said common judgment in so far as it related to O.S.No.179 of 1970 and O.S.No.251 of 1970 only. A.S.No.1372 of 1983 was filed by respondents 2 to 6 herein against the common judgment in so far as it pertained to O.S.No.251 of 1970. A.S.No.1373 of 1983 was filed by the respondents herein aggrieved by the common judgment in so far as it pertained to the dismissal of O.S.No.179 of 1970. These two appeals were heard by a learned Judge of this Court and by the common judgment under appeal, the learned Judge dismissed A.S.No.1372 of 1983 and allowed A.S.No.1373 of 1983.

Parties shall hereinafter be referred to as arrayed in the suit.

Facts, to the extent relevant, are as under: Mandavilli Venkanna had five sons – Viswanadham, being plaintiff 2; late Ramarao, the father of plaintiff 4 and husband of plaintiff 5; Venkatarao, being defendant 1, Jaganmohan Rao and Dharmaraju. They constituted a firm, by name Mandavilli Venkanna Sons, and carried on business in brassware and utensils. In 1954, Venkatarao, being defendant 1, left the firm and it was reconstituted with the rest of the brothers under the name, Mandavilli Venkanna Sons, 1954. The brothers who remained in the partnership firm had the custody of the account books and were required to realise the book debts of the old firm; discharge the debts payable by it; and after three years, settle the accounts amongst the partners. While so, the debts due to the old firm became bad debts and the outstanding creditors started exerting pressure for payment of their dues. The new firm, Mandavilli Venkanna Sons, 1954, advanced monies to discharge these liabilities of the old firm. The partners of the old firm then settled accounts, as per which each of them had to bear the loss of Rs.9,359/- as on 31.03.1958. Further, they were indebted to the tune of Rs.1,21,227.60 ps. to the new firm, Mandavilli Venkanna Sons 1954, towards the principal and interest due on the amounts advanced by the new firm for clearing the dues of the old firm. Each of the partners of the old firm therefore had to pay Rs.24,245.52 ps. towards his share of this liability. Thereafter, Jaganmohan Rao and Dharmaraju transferred all their liabilities in the old and new firms in favour of the remaining partners of the new firm. Therefore, Venkatarao, being defendant 1, alone remained liable to the tune of Rs.9,359/- towards his share of the dues in the old firm and for the sum of Rs.24,245.52 ps. towards his liability to the new firm. In respect of this liability, Venkatarao, defendant 1, along with Mandavilli Viswanadham, plaintiff 2, and late Ramarao entered into an agreement on

26.05.1958 (Ex.A1), whereby Venkatarao, defendant 1, acknowledged his liability and agreed to pay interest upon the outstandings. The agreement further recorded that Viswanadham and late Ramarao alone should receive the assets of the old firm and discharge its liabilities and that Venkatarao, defendant 1, shall not have any concern or liability towards the same. By consent of the parties, the monies owed by Venkatarao, defendant 1, to Viswanadham and late Ramarao were accordingly debited in the accounts of the new firm by opening an account in the name of Venkatarao, defendant 1, and the said account was being operated since then. It was on the strength of Ex.A1 agreement and the account opened in the new firm that O.S.No.179 of 1970 was filed for recovery of money.

Before the learned Subordinate Judge, it was contended by the plaintiffs that Venkatarao, defendant 1, acknowledged his liability on 10.01.1967 by making an endorsement in the new firm's account books. However, the ledger of 1967 was not produced. The learned Subordinate Judge found that the circumstances stated by the plaintiffs as to how the ledger was lost appeared to be highly artificial and could not be believed. The learned Subordinate Judge accordingly held that the plaintiffs failed to establish that Venkatarao, defendant 1, acknowledged the debt on 10.01.1967. In consequence, the learned Subordinate Judge held that Article 23 of the Limitation Act, 1963 would be applicable and as the suit had to be filed within three years in accordance therewith and as there was no acknowledgement by Venkatarao, defendant 1, as to any liability after 19.03.1964, upon eschewing the alleged acknowledgement on 10.01.1967, the period of limitation expired long ago. The suit was accordingly held barred by limitation.

In appeal, the learned Single Judge agreed with the finding of the learned Subordinate Judge that the so-called acknowledgement by

Venkatarao, defendant 1, on 10.01.1967 was not proved. The learned Judge categorically held that such acknowledgement by Venkatarao, defendant 1, on 10.01.1967 could not be accepted even by inference. Having stated so, the learned Judge surprisingly went on to state that despite the lack of such acknowledgement, the plaintiffs were entitled to a decree on the ground that an agency coupled with interest was created and therefore, it could not be terminated to the prejudice of the interest of the plaintiffs and as such termination had taken place, Venkatarao, defendant 1, was liable to discharge the debt that was due to the firm, Mandavilli Venkanna Sons, 1954.

It is as to this reasoning of the learned Judge that Sri V.L.N.G.K.Murthy, learned senior counsel, addressed arguments. He would point out that no issue was framed in O.S.No.179 of 1970 as regards the question as to whether Ex.A1 dated 26.05.1958 constituted a deed of agency and contend that in the absence of such an issue being framed in that suit, it was not open to the learned Judge to conclude so.

Sri T.S.Anand, learned counsel, would fairly concede that though the learned Subordinate Judge at Rajahmundry drew up as many as 15 issues in O.S.No.179 of 1970, none of them touched upon the question as to whether Ex.A1 agreement dated 26.05.1958 constituted an agency.

Perusal of the record also reflects that the issue as to creation of an agency was framed only in O.S.No.247 of 1971. Significant to note, the finding on this issue by the learned Subordinate Judge at Rajahmundry was that there was no such agency. Further, the judgment of the learned Subordinate Judge in so far as it pertained to this issue was not even the subject matter of the appeal before the learned Single Judge. In any event, once no issue was framed in O.S.No.179 of 1970 as to the existence of any agency in consequence of Ex.A1 agreement dated

26.05.1958, it was not open to the learned Single Judge to come up with a new issue and render a finding thereon, contrary to the record, to the effect that such an agency existed. Having confirmed the finding of the learned Subordinate Judge that there was no acknowledgement of the debt by Venkatarao, defendant 1, on 10.01.1967, the learned Judge ought to have confirmed the consequential finding of the learned Subordinate Judge that the suit in O.S.No.179 of 1970 was barred by limitation.

The Letters Patent Appeal is accordingly allowed setting aside the judgment and decree of the learned Single Judge in so far as it pertained to A.S.No.1373 of 1983. In consequence, the appellants are entitled to restitution in the context of the interim order passed by this Court allowing the respondents herein to withdraw the decretal amount along with costs. The respondents shall accordingly refund the said amount along with interest thereon at 6% per annum from the date of the withdrawal up to the date of realisation. No order as to costs.

SANJAY KUMAR, J

J. UMA DEVI, J

6th DECEMBER, 2017
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