

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.07.2018

Pronounced on: 22.10.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1783 of 2001
and
CMP.Nos.18757 to 18759 of 2001

M.E.Narasimhan ...Appellant/plaintiff

Vs.

1. Messrs. Sri Balaji Chit and Financier's,
rep. By its Managing Partner,

M.T.Sampath Mudaliar

(cause title amended vide order of
court dated 8.08.02 & 16.09.2003 vide
CMP.21736/01 & 12686/02 respectively)

...Respondent/Defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C.,
to set aside the Judgment and decree to set aside the judgment
and decree dated 31.07.2001 passed by the Subordinate Judge,
Ranipet in A.S.No.2 of 1999 confirming the judgment and decree
dated 30.11.1998 passed by the District Munsif, Sholinghur, in
O.S.No.144 of 1997.

For Appellant : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

For Respondent : Mr.V.Chandraprabu
for Mr.M.Venkateswaran

J U D G M E N T

This second appeal has been filed by the plaintiff against
the judgment and decree passed by the Sub-Judge, Ranipet in
A.S.No.2 of 1999 dated 31.07.2001 confirming the judgment and
decree passed by the District Munsif, Sholinghur in O.S.No.144
of 1997 dated 30.11.1998.

2. The appellant herein has filed a suit in O.S.No.144 of 1997 on the file of the District Munsif, Sholingur for permanent injunction restraining the defendants from continuing/carrying on business of Sri Balaji Chit and Financiers at No.71, Post Office street, Sholinghur, Vellore District or any other place until the plaintiff is admitted as partner in the place of his deceased father N.M.Ethiraj Mudaliar and to direct the defendants to include the plaintiff as partner in the place of his deceased father M.N.Ethiraj Mudaliar. The learned District Munsif, by the judgment dated 30.11.1998, has dismissed the said suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.2 of 1999 on the file of the Sub- Judge, Ranipet. The learned Sub-Judge, Ranipet, by the judgment dated 31.07.2001, has dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The plaintiff's father viz., M.N.Ethiraj Mudaliar was one of the partners of the Partnership Firm viz., Sri Balaji Chit and Financiers along with five other partners as per the partnership deed dated 04.01.1992. V.M.Narasimha Mudaliar was nominated as Managing Partner of the said firm. The plaintiff's father M.N.Ethiraj Mudaliar had executed a registered Will dated 14.02.1994 and in the said Will, he had stated that the plaintiff and his brother M.E. Anjaneyan are entitled half of the share and profit each, in Sri Balaji Chit and Financiers and the plaintiff alone was authorised to become a partner in the partnership firm. Thereafter, the said M.N.Ethiraj Mudaliar died on 13.03.1997 and after his death, the Will came into force. Hence, the plaintiff had approached the Managing Partner of the said Financiers and made requests to induct him as partner in the place of his father, but the Managing Partner dragged the matter without inducting the plaintiff as partner. Hence the plaintiff had issued a lawyer's notice dated 14.07.1997 and after receipt of the said notice, the defendant had sent reply notice dated 19.07.1997 with false averments. After receipt of the plaintiff's notice, the remaining partners had created a new partnership deed dated 01.04.1997 by putting anti-date and they refused to induct the plaintiff as partner. Hence, the plaintiff was constrained to file the above suit for the aforesaid reliefs.

4. The averments made in the written statement are, in brief, as follows:

It is true that the plaintiff's father M.N.Ethiraj Mudaliar and five others had entered into a partnership business under

the name and style of Sri Balaji Chit and Financiers as per the partnership deed dated 01.04.1992. The averment that the plaintiff's father died on 30.03.1997 is admitted. But the defendant is not aware of the execution of any Will by the plaintiff's father. One Jayavelu who is the son of M.N.Ethiraj Mudaliar born through his first wife had sent a letter dated 26.06.1997 stating that the joint family funds of M.N.Ethiraj Mudaliar and others had been invested in Sri Balaji Chit and Financiers and hence the defendant should not disburse any amount due to the said late M.N.Ethiraj Mudaliar, without his consent to anyone and the said objection was brought to the notice to the plaintiff through the reply notice dated 19.07.1997 and inspite of the said notice, the plaintiff had chosen to file the suit against the defendant without establishing his right under the said Will and also without impleading the said M.E.Jayavelu as a party. Further, there are also other legal representatives of the said M.N.Ethiraj Mudaliar and they have not been impleaded as parties. So, this suit is bad for non-joinder of necessary parties. As per the partnership deed, after the death of anyone of the partners, his legal representatives can become partners only if the remaining partners agreed for the same and if the remaining partners do not agree for the same, the legal representatives of the deceased partner are not entitled to become partners and that they are only entitled to receive the benefits of the deceased partner. Hence the allegation that the plaintiff has got a legal right to become a partner of Sri Balaji Chit and Financiers as per the said Will and as per the Clause 18 of the Partnership Deed is not valid and enforceable against the defendant. The interpretation given by the plaintiff in respect of Clause-18 of the partnership deed is incorrect. After the death of M.N.Ethiraj Mudaliar, the remaining partners had entered into a fresh partnership deed dated 01.04.1997 and carrying on the business in the name and style of Sri Balaji Chit and Financiers and that the plaintiff was not taken as a partner in the place of his deceased father since the remaining partners are not agreeing for the same. But the defendant and other partners are ready and willing to settle the benefits due to the said late M.N.Ethiraj Mudaliar till 31.03.1997 and that the plaintiff should establish his right over the said benefits by filing a suit for declaration against the other legal heirs since the dispute was raised by one of the legal heirs namely M.E.Jayavelu. Therefore the defendants prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined two more witnesses as PW2 and PW3. He has marked Exs.A1 to A6 as exhibits. On the side of the

defendant, the Managing Partner of the defendant namely V.M.Narasimha Mudaliar examined himself as DW1 and one M.E.Jayavelu was examined as DW2. Exs.B1 to B8 were marked as exhibits on the side of the defendant.

6. The learned District Munsif, after considering the materials placed before her found that as per the Clause 18 of Ex.B1/partnership deed only with the consent of other partners, the legal heir of the deceased partner can be inducted as a partner. She further found that in this case, the other partners did not agree for inducting the plaintiff as a partner and hence, the plaintiff cannot compel the other partners to induct him as a partner in the aforesaid Financiers Firm. Accordingly, she dismissed the suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.2 of 1999 on the file of the Sub-Judge, Ranipet. The learned Sub-Judge has dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law.

"1. Whether the courts below have properly considered the material evidence in the case, particularly Exhibit B1 and Clause 18 of Ex.B1, while dismissing the suit of the plaintiff?

2. Whether the courts having held that the Will Exhibit A1 is true and valid (under which the plaintiff is the sole legal heir of his father) are right in law in dismissing the suit?"

8. Heard Mr.S.Mukunth for M/s.Sarvabhauman Associates, learned counsel for the appellant and Mr.V.Chandraprabu for Mr.M.Venkateswaran, learned counsel for the respondents.

9. Q.Nos.1 and 2: सत्यमेव जयते

It is an admitted fact that the plaintiff's father M.N.Ethiraj Mudaliar and five others carried on a partnership business under the name and style of Sri Balaji Chit and Financiers as per the partition deed dated 01.04.1992 (Ex.B1). It is also an admitted fact that the plaintiff's father expired on 30.03.1997.

10. According to the plaintiff as per Clause-18 of the partnership deed dated 01.04.1992 (Ex.B1), in the case of death of any of the partners, the firm shall continue after including the legal representative of the deceased partner as partner. His further case is that, his father had executed a registered Will dated 14.02.1994 in respect of his properties

and in the said Will, it was stated that the plaintiff and his brother M.E.Anjaneyan are entitled half of the share and profit each in the partnership firm viz., Sri Balaji Chit and Financiers and the plaintiff was authorised to become a partner in the said partnership firm. His further case is that after the death of his father on 30.03.1997, the said Will came into force. His further case is that after the death of his father, based on the aforesaid Will, he approached the defendant and made a request to induct him as partner in the place of his father, but the defendant refused to induct him as partner.

11. The case of the defendant is that the plaintiff's father during his life time has not informed to the defendant with regard to the execution of Ex.A1 Will and as such, the Ex.A1 will not bind upon the other partners. Their further case is that as per Clause - 18 of Ex.B1 partnership deed, in the case of death of a partner, only with the consent of all the partners, the legal representative of the deceased partner can be inducted as a partner, but in this case, the other partners have passed a resolution to the effect that the legal heirs of the deceased partner viz., M.N.Ethiraj Mudaliar should not be inducted as partner and hence the plaintiff's request could not be considered.

12. The plaintiff has produced the original registered Will dated 14.09.1994 said to have been executed by his father and marked as Ex.A1. He also examined one of the attestors as PW2 as contemplated in the Evidence Act. Taking into consideration of the evidence of PW2 and also the fact that the defendant being a third party, they cannot question the validity of the said Will, the trial court has held that Ex.A1-Will has been duly proved.

13. The said fact was not challenged before the first appellate court. The first appellate court also proceeded on the premise that the genuineness of Ex.A1 Will has not been disputed by the defendant. Further DW2 who is another son of M.N.Ethiraj Mudaliar also admitted in his evidence that he had knowledge about Ex.A1 Will, but so far, he has not challenged the said Will. The other legal heirs of M.N.Ethiraj Mudaliar also not challenged the said Will. Under the said circumstances, the defendant being a third party, they cannot question the validity of the said Will. Therefore, the factual concurrent findings of the courts below that M.N.Ethiraj Mudaliar had executed Ex.A1 Will does not require interference by this court.

14. In Ex.A1 Will, it is clearly stated that the plaintiff has to give half share in the share and profit of M.N.Ethiraj Mudaliar in Sri Balaji Chit and Financiers to M.E.Anjaneyan and the plaintiff has to become partner in the aforesaid firm in his place. As already pointed out that challenging the said Will, the other legal heirs of the said M.N.Ethiraj Mudaliar have not

filed any suit. Even DW2 who is one of the sons of M.N.Ethiraju Mudaliar also has not stated in his evidence that he made any request with the defendant to induct him as a partner. On the contrary, he claimed only money which was invested by his father in the said firm. Therefore, this court is of the view that as per the said Will, the plaintiff is entitled to ask the defendant to induct him as partner in the place of his father.

15. The next question that arises for consideration is as to whether the other partners can have a discretion to reject the request of the plaintiff. For deciding this question, it is relevant to refer to Clause-18 of Ex.B1 partnership deed, which reads thus:

"18. DEATH, RETIREMENT, INSANITY OR INSOLVENCY OF ANY OF THE PARTNERS:

In the case of death, retirement, insanity or insolvency of any of the partners, the firm shall continue with the same name after including any other partner or partners. In the case of death of a partner, the deceased partner's legal representative or if there are more than one legal representative, the person mutually decided by all the partners may be taken as a partner."

16. A plain reading of the aforesaid clause would show that irrespective of death, retirement, insanity or insolvency of any of the partners, the firm shall continue with the same name after including any other partner or partners. It is also clear that in the case of death of a partner, the deceased partner's legal representative shall be included as a partner. If there are more than one legal representative, then only the person mutually decided by all the partners may be taken as a partner. If there is only one legal representative, the other partners have no choice except to induct the said legal representative as a partner.

17. It is also to be pointed out that the Section 42 of the Partnership Act deals with the dissolution of a firm on the happening of certain contingencies and provides that subject to contract between the partners, a firm is dissolved.

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings by the completion thereof;

(c) by the death of a partner and

(d) by the adjudication of a partner as an insolvent.

The death of anyone of the partners of a firm operates as a dissolution thereon as between all the members, unless there is some agreement to the contrary. Whether there is a contract to the contrary is to be considered on the construction of the

instrument of partnership. In this case, as already pointed out that as per Clause - 18 of the partnership deed irrespective of death of any of the partners, the firm shall continue after including his legal representative as partner.

18. In Additional Commissioner of Income Tax Vs. Sunder Lal Banwari Lal, 1985 156 ITR 617 Delhi, a Division Bench of the Delhi High Court in paragraph No.10 has observed as follows:

"10.Clause (c) of section 42 of the Partnership Act lays down that subject to contract between the partners, a firm may be dissolved by the death of a partner. There is, however, an exception to the introduction of partners. If there is a contract between the original partners that the partnership should not be dissolved on the death of any of them and is to be continued with the legal heirs of the deceased partner after the death of the said partner, then the firm would continue to exist, otherwise not. The legal heirs of the deceased partner would become partners immediately after the death of the said partner with the result that the continues to remain in existence....."

19. From the aforesaid decision, it is clear that if there is a contract between the original partners that the partnership should not be dissolved on the death of any of the partners and is to be continued with the legal heirs of the deceased partner, after the death of the said partner, then the firm would continue to exist, otherwise not. It is also clear that the legal heirs of the deceased partner would become partners immediately after the death of the said partner with the result that the firm continues to remain in existence. In this case, as already pointed out that as per clause-18 of the partnership deed (Ex.B1) in the case of death of a partner, the firm shall continue with the same name after including the deceased partner's legal representative as a partner. Therefore, in view of the aforesaid decision, the plaintiff being the legal representative of the deceased partner M.N.Ethiraj Mudaliar, would become a partner immediately after the death of M.N.Ethiraj Mudaliar.

20. It would also be relevant to refer to the decision in Commissioner of Income Tax, Madhya Pradesh, Nagpur Vs. Seth Govindram Sugar Mills, AIR 1966 SCC. 24, wherein the Hon'ble Supreme Court in paragraph No.7 has observed as follows:-

"7..... Section 42(c) of the partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners

will continue the firm. On the other hand, if one of the two partners of the firm dies, the firm automatically comes to an end and, there-after there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying Clause (c) of S. 42 to such a situation. It may be that pursuant to the wishes or the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner, but that would constitute a new partnership. In this light S. 31 of the Partnership Act falls in line with S. 42 thereof. That section only recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners; it presupposes the subsistence of a partnership; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that event there is no partnership at all for any new partner to be inducted into it without the consent of others."

21. From the abovesaid decision, it is clear that the Section 42 (c) of the Partnership Act will apply to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. It is also clear that the Section 31 of the Partnership Act recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners. In this case, as already stated that as per clause 18 of the Ex.B1 partnership deed in the case of death of any of the partners the firm will not be dissolved. On the contrary, it shall continue after including the legal representative of the deceased partner.

22. As per Section 31 of the Partnership Act, no person shall be introduced as a partner into a firm without the consent of all the existing partners', but if there is a contract to the contrary, a third party can be introduced as a partner without consent of all the existing partner. So, in view of the Clause - 18 of the partnership deed and also in view of the Sections 31 and 42 (c) of the Partnership Act, after the death of M.N.Ethiraj Mudaliar, immediately his legal representatives are entitled to become partners. If more than one legal representatives made nay claim to become a partner, then the other partners have to decide which legal representative to be inducted as a partner in the place of the deceased M.N.Ethiraj Mudaliar. Instead of that, the other partners cannot arbitrarily take a decision that none of the legal heirs of the deceased partner viz. M.N.Ethiraj Mudaliar can be inducted as a partner.

23. In this case, as already pointed out that the deceased M.N.Ethiraj Mudaliar had executed a Will wherein he had nominated the plaintiff as his legal heir to become a partner in the said partnership firm. The other legal heirs have not challenged the said Will. Further, they have not made any claim to induct them as partners. Under the said circumstances, the other partners have to induct the plaintiff as partner in the place of the deceased partner viz., M.N.Ethiraj Mudaliar. In this case, without inducting any of the legal heirs of the deceased partner viz., M.N.Ethiraj Mudaliar, the other partners had re-constituted the partnership firm on 01.04.1997 and executed another partnership deed (Ex.B4). They not even settled the share amount and profit which was due to the said M.N.Ethiraj Mudaliar. Though DW1 has stated in his evidence that they have calculated the share amount and profit of M.N.Ethiraj Mudaliar till his date of death and invested in their name, they have not taken any steps to disburse the said amount. Further, he has admitted in his evidence that a sum of Rs.15000/- has been used for running the partnership business. It is not known, how they can use the funds of the deceased partner without inducting any of his legal heirs as partner.

24. Learned counsel for the respondents has submitted that the courts below have interpreted the clause - 18 of Ex.B1 Partnership deed as only with the consent of other partners, a legal heir of the deceased partner can be inducted as a partner and in the said concurrent factual findings, this court cannot interfere. Further, the learned counsel for the respondents relying upon the decision in Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others AIR 1999 SCC 2213, contended that as per Section 100 of CPC, this court can interfere only where a substantial question of law arises, whereas in this case, no substantial question of law has arisen.

25. In Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others, (supra), the Hon'ble Supreme Court in paragraph No.4 has observed as follows :

"It has been noticed time and again that without insisting for the statement of such substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100, Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish; between a question of law and a substantial question of law. In exercise of the powers under this Section the findings of fact of

the 1st appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal : cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.*, MANU/SC/0056/1962 AIR (1962) SC 1314 held that :-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are wellsettled and there is a mere question of applying those principles or that the plea raised is palpably absorbed the question would not be a substantial question of law."

26. From the aforesaid decision, it is clear that proper test for determining whether a question of law raised in the case is substantial would be established; whether it is of general public importance or whether it directly or substantially affect the rights of the parties. In this case, the courts below have taken a decision against the provisions of Sections 31 and 42 (c) of the Partnership Act and also wrongly interpreted clause - 18 of Ex.B1 Partnership Deed. As per the clause - 18 of the partnership deed, if there are more than one legal representative, then only the other partners can say which legal heir can be inducted as a partner; If there is only one legal representative, the other partners have no choice at all except

to induct the said legal representative as a partner. Because of the erroneous findings of the courts below, the substantial rights of the legal heirs of the deceased partner are affected. Therefore, this court is of the view that a substantial question of law is involved in this case. So, this court can certainly interfere in the findings of the courts below. This court cannot shut its eyes when injustice is done to the legal heirs of the deceased partner and allow the other partners to use the funds of the deceased partner for their benefits.

27. Learned counsel for the respondents further contended that the relief sought for by the plaintiff is to compel the defendant to induct him as a partner and the said relief cannot be granted in view of Sections 14 and 16 Specific Relief Act. In support of the said contention, he relied upon the decision in Indian Oil Corporation Ltd., Vs. Amritsar Gas Service and Others (1991) 1 SCC 533. In that case, the distributorship agreement was made between the Indian Oil Corporation Limited and Amritsar Gas Service. The terms and conditions of the distributorship were specified in the agreement. Clause - 27 of the agreement provided for termination of the agreement by the corporation forthwith on the happening of any of certain specific events. Clause - 28 permitted either party without prejudice to the foregoing provision or anything to the contrary' contained in the agreement to terminate the agreement by thirty days' notice to the other party 'without assigning any reason for such termination. The Indian Oil Corporation, invoking clause - 27 had terminated the agreement. In that case, taking into consideration clause - 28 permits the party to terminate the contract by giving thirty days' notice, the Hon'ble Supreme Court has held that the suit is hit by Sections 14 and 16 Specific Relief Act. But, in this case, the defendant did not dissolve the firm on the ground that one of the partners died. On the contrary, they re-constituted the partnership without inducting any of the legal heirs of the deceased partner, M.N.Ethiraj Mudaliar. Therefore, the aforesaid decision will not be applicable to the facts of the present case.

28. As already pointed out that as per clause-18 of the partnership deed (EX.B1), irrespective of death of partners, the partnership shall continue after including the legal representative of the deceased partner as a party. As per clause (c) of Section 42 of the Partnership Act, after the death of one of the partners, immediately his legal heirs are entitled to become partners; the only choice available to the other partners is to decide which of the legal heirs to be inducted as a partner. In this case, the deceased partner, M.N.Ethiraj Mudaliar himself had nominated the plaintiff as his legal heir through Ex.A1 Will and the said Will has not been challenged by the other legal heirs. Further, the other legal

heirs also not made any claim to induct them as partners. Under the said circumstances, the defendant should have inducted the plaintiff as a partner. In case, the other partners are not willing to run the business along with the plaintiff, after inducting him as a partner, they can take steps to remove him from the partnership by invoking procedures prescribed under the law. Instead of doing so, they cannot reject the request of the plaintiff.

29. For the aforesaid reasons, this court is of the view that the judgments and decrees passed by the courts below are liable to be set aside. Accordingly, the substantial questions of law are answered.

30. In the result, the second appeal is allowed. Consequently, connected miscellaneous petitions are closed. The judgments and decrees passed by the courts below are set aside. The suit filed by the appellant/plaintiff in O.S.No.144 of 1997 on the file of the District Munsif, Sholingur is partly decreed as follows:

(1) That the defendant is directed to include the plaintiff as a partner in Sri Balaji Chit & Financiers within three months in the place of the deceased partner M.N.Ethiraj Mudaliar;

(2) that the suit is dismissed in respect of the relief for permanent injunction and

(3) that the parties are directed to bear their own costs.

gv

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
Ranipet.

2.The District Munsif,
Sholinghur,

WEB COPY

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.M.Venkateswaran, Advocate, S.R.No.71714

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.71654

S.A.No.1783 of 2001
and

CMP.Nos.18757 to 18759 of 2001

Kak(19/03/2019)



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