

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.11.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

A.No.8888 of 2018

in

O.A.Nos.793 and 794 of 2018

in

C.S.No.598 of 2018

- 1.Shaik Ismail & Son
No.6, Ramanuja Iyer Street,
Old Washermenpet, Chennai - 600 021.
Represented by its Managing Committee.
- 2.S.A.Mohamed Ehsanullah Saheb,
S/o.Late Hajee S.Abdul Azzez saheb,
Partner, Shaik Ismail & Son
- 3.S.A.Mohamed Habibullah Saheb,
S/o.late Hajee S.Abdul Azzez Saheb,
Partner, Shaik Ismail & Son
- 4.S.A.Mohamed Saleemullah Saheb,
S/o.late Hajee S.A.Mohamed Amanullah Saheb
Partner, Shaik Ismail & Son.
- 5.S.A.Mohamed Razullah Saheb,
S/o. Late Hajee S.A.Mohamed Abdulla Saheb,
Partner, Shaik Ismail & Son
- 6.S.A.Mohamed Nasrullah Saheb,
S/o. Late Hajee S.A.Mohamed Abdulla Saheb,
Partner, Shaik Ismail & Son.
- 7.S.A.Mohamed Sayeedullah Saheb,
S/o.late Hajee S.A.Amanullah Saheb
Partner, Shaik Ismail & Son
- 8.S.A.Mohamed Sallamullah Saheb,
S/o.late Hajee S.A.Amanullah Saheb
Partner, Shaik Ismail & Son
- 9.S.H.Mohamed Faizullah Saheb,
S/o.S.A.Mohamed Habibullah Saheb

Partner, Shaik Ismail & Son

10.S.H.Mohamed Hamidullah Saheb,
S/o.S.A.Mohamed Habibullah Saheb
Partner, Shaik Ismail & Son.

11.S.H.Mohamed Inamullah Saheb,
S/o.S.A.Mohamed Habibullah Saheb
Partner, Shaik Ismail & Son

12.S.E.Mohamed Irfanullah Saheb,
S/o.S.A.Mohamed Ehsanullah Saheb,
Partner, Shaik Ismail & Son

13.S.E.Mohamed Salman Saheb,
S/o.S.A.Mohamed Ehsanullah Saheb,
Partner, Shaik Ismail & Son.

14.S.K.Mohamed Shafiullah Saheb,
S/o.late Hajee Kaleemullah Saheb,
Partner, Shaik Ismail & Son
..Plaintiffs

(2 to 14 residing at No.5, Mottai Garden 10th Lane,
Old Washermanpet, Chennai - 600 021.)

Vs.

1.S.E.Mohamed Rizwanullah Saheb,
S/o.S.A.Mohamed Ehsanullah Saheb
Partner, Shaik Ismail & Son,
No.4, Mottai Garden 10th Lane,
Old Washermanpet, Chennai - 600 021.

2.S.A.Mohamed Azmathullah Saheb,
S/o.Late Hajee S.A.Mohamed Amanullah Saheb
Partner, Shaik Ismail & Son
No.5, Mottai Garden 10th Lane,
Old Washermenpet, Chennai - 600 021.

3.S.S.Mohamed Fahed Saheb,
S/o.Late Mohamed Sowkathullah Saheb
Partner, Shaik Ismail & Sons,
No.4, Mottai Garden 10th Lane,
Old Washermanpet, Chennai - 600 021.

.. Defendants

This application is preferred, under Order XIV Rule 8 of OS Rules Read with Order 8 Rule 9 of CPC as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, praying to permit the applicants to file Additional counter in O.A.Nos.793 and 794 of 2018 in C.S.No.598 of 2018; and for costs.

For Applicant : Mr.T.K.Ramkumar

For Respondent : Ms.Jayalakshmi of M/s.Paul
and Paul for R1
Ms.R.Ramya for R2 and R3

ORDER

This application turns on a very narrow compass. Prayer in this application is one seeking permission to file additional counter affidavit in aforesaid interlocutory applications being O.A.Nos. 793 and 794 of 2018. This application has been taken out by some of the defendants in the suit and I will refer to the same in greater detail infra. सत्यमेव जयते

2. Though this application turns on a very narrow compass, considering the unique and important question it raises with regard to pleadings, it has become necessary to give a short factual matrix and write a speaking order with some elaboration and elucidation.

FACTUAL MATRIX:

3. In the main suit there is a sole plaintiff and there are 16 defendants.

4. Entire lis pertains to a partnership firm which goes by the name M/s.Shaik Ismail & son (hereinafter referred to as 'suit firm' for the sake of convenience and clarity).

5. Sole plaintiff is one of the partners in the suit firm. Likewise, defendants 2 to 16 are also partners in the suit firm. In other words, there are 16 partners in all in the suit firm. To be noted, the suit firm has been arrayed as first defendant.

6. The shares held by the plaintiff and defendants 2 to 16 in the suit firm are as follows:

a) The plaintiff	-	5/110 share
b) The 2 nd respondent	-	4/120 share
c) The 3 rd respondent	-	10/120share
d) The 4 th respondent	-	10/120share
e) The 5 th respondent	-	4/120share
f) The 6 th respondent	-	12.5/120share
g) The 7 th respondent	-	12.5/120share
h) The 8 th respondent	-	4/120share
i) The 9 th respondent	-	4/120share
j) The 10 th respondent	-	5/120share
k) The 11 th respondent	-	5/120share
l) The 12 th respondent	-	5/120share
m) The 13 th respondent	-	5/120share
n) The 14 th respondent	-	5/120share
o) The 15 th respondent	-	25/120share
p) The 16 th respondent	-	4/120share'

7. Main suit has been filed *inter alia* under Section 44 of the Partnership Act primarily with a prayer for dissolution of suit firm. Incidental and ancillary prayers for appointment of receiver have also been made in the plaint.

8. Pending main suit, plaintiff took out the aforementioned two applications being O.A.Nos. 793 and 794 of 2018 with the following prayer:

Prayer in O.A.No.793 of 2018:

'Ad-interim injunction restraining the 2nd respondent, his men agents and any person acting on his behalf from in any way interfering with the administration and business of the 1st respondent firm by taking unilateral actions for withdrawal of money, from the 1st respondent's account, appointment, dealing with the staff unilaterally, giving unilateral directions to the employees and sending his representatives to the head office or any branches without the consent of the other members of the Managing Committee'

Prayer in O.A.No.794 of 2018:

'To appoint the respondents 3,6,12 & 15, the other members of the Managing Committee who are the partners of the 1st respondent/1st defendant as receivers to take charge of the administration of the 1st respondent/defendant and to jointly manage the affairs of the 1st respondent/1st defendant on such terms as may be directed by this Hon'ble Court.'

9. A temporary interim order was granted by this Commercial Division in O.A.No.793 of 2018 on 28.08.2018. The same has now been extended until further orders and it is now operating.

10. Under the aforesaid circumstances, when O.A.Nos.793 and 794 of 2018 were taken up for hearing after respondents therein entered appearance and completed pleadings, an issue that is pivotal in the instant application is cropped up.

11. To be noted, defendants 2 and 16 in the main suit filed a common counter affidavit in O.A.Nos.793 and 794 of 2018. Under such circumstances, defendants 1 and 3 to 15 wanted to file an additional counter affidavit which was opposed by defendants 2 and 16. To be noted, plaintiff did not oppose this additional counter affidavit being filed by defendants 1 and 3 to 15.

12. In the light of the opposition, defendants 1 and 3 to 15 have taken out the instant application arraying sole plaintiff as the first respondent and defendants 2 and 16 as correspondents in the instant application with a prayer for seeking permission to file additional counter in O.A.Nos. 793 and 794 of 2018, which I have already alluded to supra.

13. From hereon, in the instant application i.e., A.No.8888 of 2018, parties shall be referred to by their

respective ranks in the main suit for the sake of convenience and clarity.

14. Mr.T.K.Ram Kumar, learned counsel on behalf of defendant Nos.2 and 3 to 15 (applicants herein), Ms.R.Ramya, learned counsel on record for defendants 2 and 16 (respondents 2 and 3 in the instant application) and Ms.Jayalakshmi, learned counsel on record for plaintiff (first respondent herein) are before this Commercial Division in the instant application.

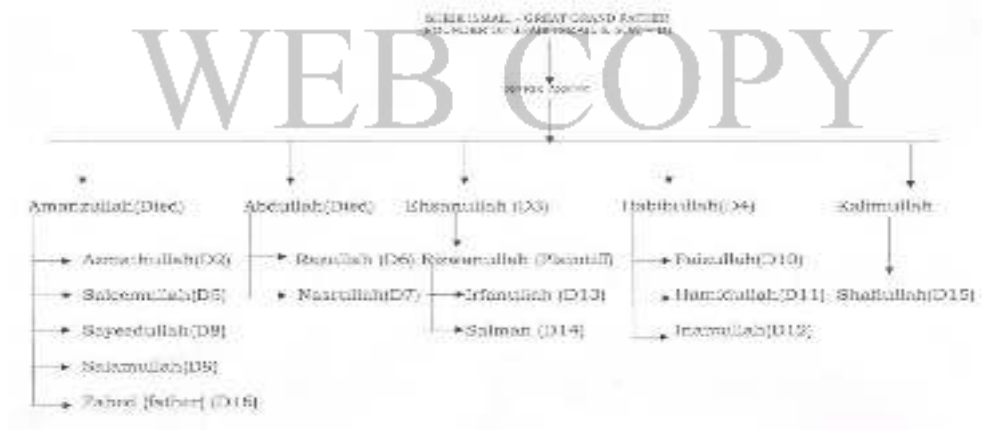
15.As already mentioned supra, learned counsel for plaintiff is not opposing this application.

16. Mr.T.K.Ram Kumar, learned counsel for defendants 1 and 3 to 15 submits that in the counter affidavit filed by defendants 2 and 16 in the aforesaid interlocutory applications, several allegations were made against his clients, i.e., defendants 3 to 15 and therefore, it has become necessary to file the instant additional counter affidavit.

17. Responding and reacting to this, Ms.R.Ramya, learned counsel for defendants 2 and 16 submitted that additional counter affidavit, which is now being sought to be filed by defendants 1 and 3 to 15, raises several issues which travel beyond the plaint. It is her specific stated opposition that defendants 1 and 3 to 15, in the guise and garb of an additional counter in these

interlocutory applications is virtually rewriting the plaint. In the normal circumstances, such a submission would have been construed to be fairly tenable, particularly in the light of the fact that the plaintiff is not opposing these applications. However in the instant case, as mentioned supra, fulcrum of this lis is a partnership firm i.e., suit firm. To be noted, defendant No.1 and all other parties namely defendants 1 and 3 to 15 and defendants 2 and 16 are partners in the suit firm. The quantum of stakes of the partners in the suit firm (as set out in pleadings as a undisputed fact between parties) have already been set out supra.

18. Besides quantum of stakes in the suit firm, an undisputed genealogy (not disputed by three counsel before me) has been placed before me and the same is as follows:



19. From the undisputed genealogy that has been placed before me by Ms.R.Ramya, learned counsel for defendants 2 and 16, it comes to light that plaintiff as well as defendants 2 to 16 are not only partners in the suit firm, but they are also either siblings or first cousins.

20. Under the aforesaid scenario, after giving my careful consideration to the rival submissions and sum totality of the undisputed factual matrix that has been projected before me, I am of the considered view that this suit, being one for dissolution of a partnership firm where the partners are siblings or first cousins, it is in the nature of a suit which is akin to a partition suit amongst coparceners. There is no dispute about the obtaining legal position that there are no defendants/no plaintiffs in partition suits in and all parties to the lis are plaintiffs. In the same spirit, it is also necessary that all partners in the suit firm have their say to take an ultimate call and to take a decision about the dissolution of the suit firm which is the final/ultimate prayer in the plaint.

21. Therefore, in the light of the peculiar facts and circumstances of this case, wherein this suit is akin to a partition suit amongst coparceners, as alluded to supra, this is a case which is an exception to the theory

of plaintiff being Dominus Litis.

22. The plea of defendants 2 and 16 that permitting co-defendants to file additional pleadings travelling beyond the plaint will tantamount to rewriting the plaint, besides amounting to changing the rules of the game in a civil suit / trial, inter-alia by shifting the goal post after defence of defendants is put on paper, is a issue that is left open. In other words, this issue is left open to be decided in a suit which is not a partition suit or a suit for dissolution of a partnership firm amongst partners or any other suit akin to the instant one, if a contest of this nature arises in such a suit which is unlike the instant suit / partition suit in future.

23. With this observation and caution, I deem it appropriate to allow this application but, with a rider that defendants 2 and 16 will be permitted to file rejoinder meeting out all the points that have been raised in the additional counter affidavit. Learned counsel for defendants 2 and 16 undertakes to file such rejoinder by Friday i.e., by 23.11.2018.

24. All the three learned counsel before me undertake that there will be no further pleadings or submissions in these interlocutory applications being O.A.Nos.793 and 794 of 2018. It is agreed by all three

counsel before me that post filing of rejoinder by defendants 2 and 16 by 23.11.2018, the position will be, pleadings are complete in O.A.Nos. 793 and 794 of 2018 and that the same will be heard out in the next listing.

25. Application is ordered on above terms.

Sd./- M.S.J.

20.11.2018

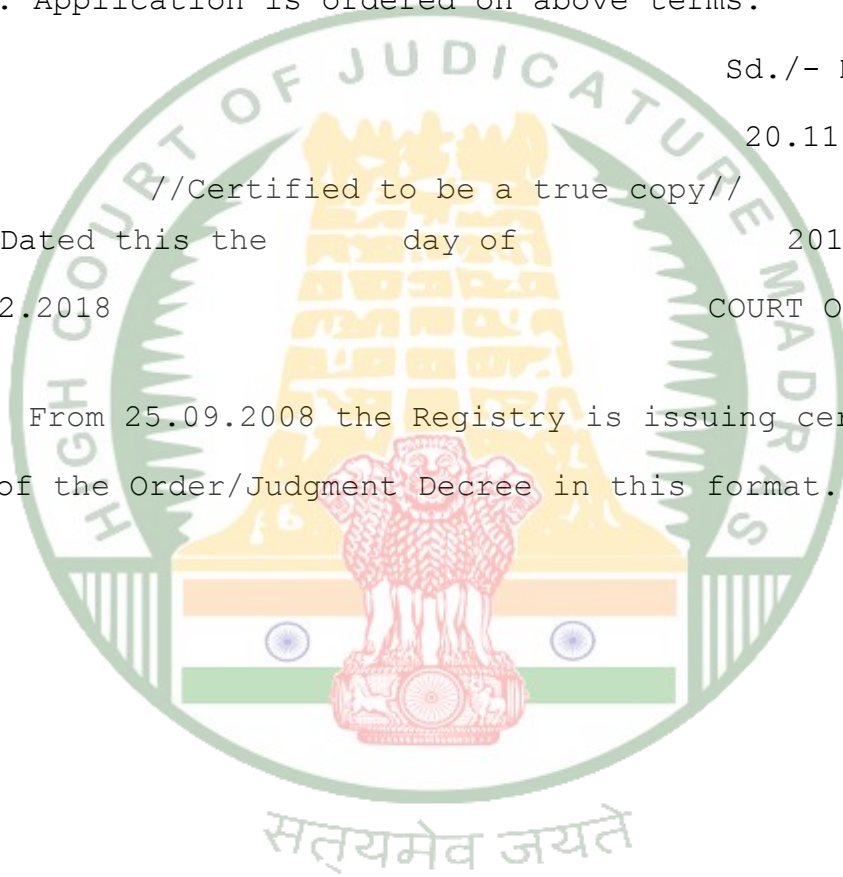
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Dated this the day of 2018.

DL/04.12.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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