THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Appeal Suit No.866 of 1998

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908 ['the Code', for short], by the unsuccessful 2nd plaintiff is directed against the order/final decree, dated 18.08.1997, passed by the learned I Additional District Judge, Nellore, in OS.No.126 of 1976.

2. I have heard the submissions of Sri B. Damodar Reddy, learned counsel appearing for the appellant/2nd plaintiff, and of Sri P. Ganga Rami Reddy, learned counsel appearing for the contesting respondents 12 to 14, who are the legal representatives of the deceased 2nd respondent. I have perused the material record.

3. The facts, which lead to the filing of this appeal, in brief, are as follows:

The sole plaintiff (since died) originally brought the afore-mentioned suit against the defendants 1 to 6 for dissolution of the partnership firm- 'Vijayamahal', between the sole plaintiff and the defendants 1 to 6, and for settlement of accounts. The said suit was preliminarily decreed, on 26.05.1979, and a preliminary decree was passed directing the dissolution of the partnership firm, 'Vijayamahal', constituted under the original partnership deed, dated 15.08.1962, with effect from 07.10.1974 and declaring the shares of the partners/parties as follows: 'plaintiff-25%; 1st defendant-20%; 2nd defendant-10%; 4th defendant-30%; and, 5th defendant-15%. Under the said preliminary decree, the defendants 1,2, 4 & 5 are held liable to render accounts to the plaintiff from 01.04.1962 till the date of dissolution and pay to the plaintiff, after such settlement of accounts, the amount found due, if any, with interest at 6% per annum from the date of final decree till payment. Under the preliminary decree, the plaintiff was also awarded costs to be recovered from the assets of the firm. However, the suit against the defendants 3 & 6 was dismissed, as they were found to be not partners under the original partnership deed. Pursuant to the preliminary decree, a Commissioner was appointed and the matter was posted for deposit of Commissioner's fee. Aggrieved of the same, some of the defendants preferred A.S.No.481 of 1979 before this Court. A Division Bench of this Court, by judgment, dated 24.11.1983, while setting aside the decree for dissolution of the Firm passed by the trial Court, passed a preliminary decree - 'directing the defendants 1 to 5 to render accounts to the plaintiff from 05.04.1971 and pay to the plaintiff the value of the plaintiff's share of 25% in the assets of suit Firm'. It was also held that the Court below should determine the value of the share of the plaintiff. Pursuant to the said directions of this Court, the trial Court appointed a Commissioner for the purpose of ascertaining the value of the share of the plaintiff and also the profits to which he would be entitled to from 05.04.1971. Be it noted that during the pendency of the suit, defendants 7 to 11 were added, they being the legal representatives of the deceased 1st defendant; and, the minor grand son of the deceased sole plaintiff, (represented by his father) was added as 2nd plaintiff. The 2nd plaintiff filed IA.No.270 of 1987 praying to decide the date on which the valuation of the sole plaintiff's share has to be made. In that application, the trial Court passed an order holding that the date on which the Commissioner values the property is the relevant date for ascertainment of the value of the plaintiff's share in the assets of the partnership firm. Aggrieved thereof, the 3rd defendant filed CRP.No.3210 of 1993 before this Court. This Court, by orders, dated 15.06.1994, held that since the plaintiff retired from the partnership firm, on 05.04.1971, and agreed to sell his share to one M. Subba Reddy, and as the plaintiff ceased to be a partner from 05.04.1971, the said date is the relevant date. Pursuant to the orders of this Court, the said M. Subba Reddy was also impleaded as party - 12th defendant/respondent. Further, by orders, dated 19.09.1994, this Court also held that the amount of Rs.98,000/- paid during the pendency of the suit by the partnership firm to the plaintiff has to be taken into account while determining the amount payable to the plaintiff. The Commissioner (earlier appointed) in his report, dated 04.09.1982, recorded a finding that the sole plaintiff during his lifetime has overdrawn from the firm Rs.8,324.88 ps in all as on 31.12.1979 and that on the amounts thus drawn interest will run separately from 04.01.1980 and accordingly found that the 2nd plaintiff, the legal representative of the deceased sole plaintiff, is liable to deposit the said amount of Rs.8,324.88 ps with interest thereon upto 31.12.1979 as stated in the statement. Subsequently, Sri Syed Shakeel Ahemad, advocate-Commissioner was appointed to determine the share of the plaintiff. Eventually, as on 05.04.1971, the total value of the assets, that is, the value of the structure of 'Vijayamahal' theatre, the cost of the land and the value of the machinery were together estimated at Rs.1,94,029/-. The share of the sole plaintiff was accordingly determined at Rs.56,832.13 ps (Rs.48,507.25 ps being the 1/4th of the total value of the asset above plus Rs.8,324.88 ps, the share of the plaintiff as per the accounts and as per the report of the Commissioner, dated 04.09.1982). Since this Court directed that an amount of Rs.98,000/- paid during the pendency of the suit to the plaintiff by the partnership firm should be taken into consideration while determining the amount payable to the plaintiff, the same was taken into account and after deducting Rs.56,832.13 ps from the above said amount of Rs.98,000/-, the trial Court held that there cannot be a direction to the defendants to pay any amount to the plaintiff and initially directed the plaintiff to return the remaining amount of Rs.41,167.87 ps and accordingly passed a final decree. Subsequently, the defendants filed IA.No.792 of 1997 under Section 152 of the Code to correct the arithmetical mistake in the afore-said order of the trial Court. The trial Court by orders, dated 20.08.1997, amended the operative portion of the order. From the amended operative portion of the order, the following aspects are discernable: 'The plaintiff's 1/4th share out of

Rs.1,94,029/-, which is the total value of the assets of the partnership firm, works out to Rs.48.507.25 ps as on 05.04.1971. The amount overdrawn by the plaintiff was Rs.8,324.88 ps as per the report of the Commissioner, dated 04.09.1982. If the latter amount is deducted from the former amount, the net amount payable to the plaintiff comes to Rs.40,182.37 ps. No direction need be given to the defendants to pay any amount to the plaintiff since the plaintiff has already withdrawn Rs.98,000/- and as the amount payable to the plaintiff is less than the said amount.' Accordingly, by the amended order, the plaintiff was directed to return the remaining amount of Rs.57,817.63 ps to the defendants and accordingly the final decree was passed. Aggrieved thereof, the 2nd plaintiff filed this appeal before this Court.

4. Learned counsel for the appellant-2nd plaintiff contended as follows: - "The trial Court completely ignored the part of the decree of this Court which deals with accounting from 05.04.1971. The relief of accounting granted by the Court shall be in terms of Section 37 of the Indian Partnership Act, 1932. The trial Court erred in passing final decree directing the plaintiff to pay to the defendants a sum of Rs.57,817.63 ps. The total amount of Rs.98,000/- deposited by the defendants and withdrawn by the plaintiff represents the amount payable to the plaintiff as per the afore-stated Section of law. The defendants by running the firm continued the business without any final settlement of the accounts of the plaintiff; and, the amount of the plaintiff was utilised for running the business and the business was run with the use of the property of the firm in which the plaintiff had a share. This aspect was not taken into account by the trial Court. The trial Court ought to have taken into account the above said aspect and should have then considered the issue as to whether any amount is refundable by the plaintiff or not. The direction to return the money is erroneous, in the absence of a direction in the preliminary decree in that regard. When there is no direction in the preliminary decree, the question of passing final decree in favour of the defendants does not arise.

The Commissioner, A.Subrahmanyam, earlier submitted a report, on 04.09.1982. He examined the accounts from 1973 to 1979 and found that the plaintiff became liable to pay to the defendants a sum of Rs.8,324.88 ps after duly deducting the amount of Rs.29,000/- withdrawn by the plaintiff during the period from 10.08.1979 to 04.01.1980, as per the orders in AS.No.481 of 1979. The said Commissioner was appointed to take accounts of the partnership firm pursuant to the earliest preliminary decree. The Commissioner took into account the accounts for the period from 1973 to 1979. The said period is not the complete accounting period. The said report, which was based on the dissolution decree earlier granted, shall be abandoned in view of the modified preliminary decree granted by this Court. The trial Court erred in deducting Rs.8,324.88 ps from the value of the plaintiffs share, that is Rs.48,507.25 ps. The accounting should have been done in terms of the preliminary decree. The trial Court ought to have deducted Rs.69,000/- only after taking into consideration the fact that the Commissioner already deducted a sum of Rs.29,000/- out of the said amount while arriving at Rs.8,324.88 ps. The trial Court in any event ought to have directed payment of Rs.28,817.63 ps only. The trial Court ought to have ignored the reports of the Assistant Engineers with regard to valuation of the share of the property as on 05.04.1971, which was made based on the circulars issued by the Roads & Buildings department, as the method adopted by them had no relation to the market value of the property involved in question. The method adopted by the Engineers for assessment of the value of the share of the plaintiff in the theatre-'Vijayamahal' is erroneous. The Engineers who assisted the Commissioner never proceeded to determine the value which is the market value of the theatre, which is at a centrally located place in Nellore town. The adoption of plinth area rates in the absence of availability of rates for the relevant year is erroneous. The lower court ought to have rejected the valuation fixed by the Engineers as being arbitrary and irrational. The lower court ought to have rejected the land value fixed at Rs.67/- per ankanam as there is no evidence in support thereof. The alleged sale deed, dated 02.02.1972, is not proved and cannot form basis for arriving at the market value of the site. The trial court ought to have seen that there is vast variation in the valuations made by the first Commissioner and the second Commissioner and ought to have noted that the first commissioner valued the net assets of the firm at Rs.12,49,500/- whereas the second commissioner valued the same at Rs.1,94,029/-.' Having so contended the learned counsel for the appellant prayed for allowing the appeal and setting aside the impugned order. He alternatively contended that the plaintiff is liable in any view of the matter to refund or to make a payment of Rs.28,817.63ps."

5. Per contra, Sri Ganga Rami Reddy, learned counsel, while supporting the order impugned, first pointed out that this appeal suit is already dismissed for default against respondents 1,3 and 6 to 11 and next urged as follows: 'The appeal suit is liable for dismissal in its entirety without the necessity of going into the merits of the matter as the entitlement of the plaintiff to the relief claimed in the appeal suit cannot be decided without hearing the said defendants against whom the appeal suit is already dismissed for default. Any order varying the impugned order, which adversely affects the rights of the above said respondents, cannot be passed in this appeal suit in view of the fact that this appeal suit was already dismissed for default against the said respondents. Any order passed in favour of the appellant-2nd plaintiff would be of no avail to the 2nd plaintiff as the same would not bind the above respondents as the appeal suit was already dismissed against them. This Court had set aside the preliminary decree insofar as dissolution of the firm and granted a preliminary decree directing the defendants 1 to 5 to render account from 05.04.1971 and also to pay the value of the plaintiff's share of 25% as on 05.04.1971. This Court further directed that an amount of Rs.98,000/- paid during the pendency of the suit to the plaintiff by the partnership firm should

be taken into account while determining the amount payable to the plaintiff. Pursuant to the subsequent orders of this Court, the amount paid to the plaintiff during the pendency of the suit by the partnership firm and the excess amount that was drawn by the sole plaintiff during his life time were duly taken into consideration. On examination of accounts and valuation of the share of the deceased plaintiff in the assets of the Firm, it was found that the deceased plaintiff is not entitled to any refund of the amount from the assets of the Firm. Hence, after giving credit to the value of his share in the assets of the Firm, he was alone found liable to refund certain amount to the defendants. Therefore, a direction for refund of the said amount was rightly given by the trial Court while passing the final decree. In a suit of the present nature including the relief for rendition of accounts, the party eventually found liable can be fastened with liability and can be directed to make good the amount to the other partners of the Firm. Hence, the appeal suit is devoid of merit and is liable to be dismissed.'

6. I have given earnest consideration to the facts and submissions.

7. Now the points for consideration are – (1) 'Whether the final decree impugned is unsustainable under facts and in law as being contended by the 2nd plaintiff, who is the legal representative of the deceased sole plaintiff? And, if so, whether the same is liable to be set aside? And, (2) To what relief?

7.1 <u>POINTS:</u>

Dealing first with the contention that the appeal suit is liable to be dismissed in its entirety for the reason that the appeal suit already stood dismissed for default against defendants 1,3 6 to 11 and that the 2nd plaintiff (appellant) is very much aware of the said fact, it is to be noted that during the course of hearing when the said aspect was highlighted, an opportunity was finally granted to the appellant to take steps in that regard, if the appellant so desired. However, no steps are taken and the appellant has not shown any interest to take steps as per procedure established by law and failed to make a request to set aside the order of dismissal of the appeal for default against respondents 1, 3, 6 to 11 and had deliberately kept quiet. In view of the preliminary decree granted by this Court, the firm is now continuing is not in dispute. Some of the respondents, against whom the appeal suit is dismissed for default, are partners of the partnership firm is a fact not in dispute. The final decree insofar as the refund of the amount is in their favour and against the appellant. If the appellant wants to challenge/assail the final order/decree, which is favourable to the said defendants/respondents, some of whom are partners, he should challenge/assail the same in their presence; and, when once the appeal suit is dismissed for default against the said respondents 1,3,6 to 11, some of whom are partners of the firm and are entitled to the relief granted to them by the trial Court, the appellant's request in this appeal cannot be considered as the appeal suit is already dismissed for default against the said respondents. Therefore, as rightly contended by the learned counsel for the contesting respondents, the appeal suit is liable for dismissal in its entirety. Be that as it may.

7.2 I have gone through the order impugned and the material papers filed. By the preliminary decree originally granted, the partnership firm was dissolved. However, in the appeal, a Division Bench of this Court set aside the preliminary decree dissolving the firm and granted a relief of accounting against defendants 1 to 5 from 05.04.1971 and also directed for payment of the value of the plaintiff's share of 25% in the said firm. This Court in the said orders directed the trial Court to determine the value of the share of the plaintiff in the assets of the Firm. A dispute arose as to the date with reference to which the value of the share of the plaintiff shall be ascertained. The matter finally came up before this Court for consideration and eventually this Court held that as the plaintiff retired from the partnership firm on

05.04.1971, and as he agreed to sell his share to the 12th respondent and as the plaintiff ceased to be a partner from 05.04.1971, the said date is the relevant date for ascertainment of the value of 25% share of the plaintiff in the partnership firm. The commissioner appointed examined the accounts and submitted a report. The commissioner, who was appointed for the purpose of ascertainment of the value of the 25% share, assessed the value of the property/Vijayamahal, with the help of qualified Engineers. He had also taken into consideration the value of the property mentioned in a registered sale deed dated 02.02.1972 for arriving at the market value of the theatre. It is admitted that this Court also directed that the amount of Rs.98,000/- paid during the pendency of the suit to the plaintiff by the partnership firm has to be taken into consideration while determining the amount payable to the plaintiff. Therefore, the contention that there is no decree or order in favour of the defendants entitling them for refund of any amount needs no countenance more particularly in view of the nature of the relief of accounting claimed in the suit and the nature of the *lis*. That apart, after ascertainment of the value of the 1/4th share of the plaintiff in the assets of the partnership firm, the value of the said share of the plaintiff was determined at Rs.48,506.25 ps being 1/4th of the total value of Rs.1,94,029/-. Since it was found that the plaintiff has over drawn Rs.8,324.88 ps the same was deducted from the above said share value of the plaintiff. Since this Court directed that Rs.98,000/- paid during the pendency of the suit by the partnership firm to the plaintiff should be also taken into account, the same was taken into account by the trial Court and it was found that the defendants are not liable to render any account and that on the other hand the plaintiff is liable to refund Rs.57,817.63 ps to the defendants and a final decree was accordingly passed. On careful examination of the matter with reference to the admitted & established facts and the Orders of this Court form time to time, this Court, *ex-*

facie, does not find any infirmity in the said finding of the Court below. It follows that the contentions of the appellant do not merit consideration.

7.3 In view of the contention raised based on Section 37 of the Indian Partnership Act, 1932, it is necessary to refer to the said Section of law, which reads thus:

> 37. Right of outgoing partner in certain cases 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 percent per annum on the amount of his share in the property of the firm:
> Provided that where by contract between the partners 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.'

The provision of the law itself employs the words 'in the absence of contract to the contrary' and further states that the outgoing partner or his estate is entitled at the option of himself or his representative to such share of 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 the interest at 6% on the amount of his share in the property of the firm. In the case on hand, as per the facts of the case and the orders of this Court, the share of the sole plaintiff (since died), who is an outgoing partner or a retiring partner shall be ascertained on the basis of the value on the date of retirement; and the relevant date, therefore, is 05.04.1971. Further, the Commissioner, on verification of the accounts found that there was an excess drawal of Rs.8,324.88 ps by the plaintiff and this fact is evident from the Commissioner's report, dated

04.09.1981, is not in dispute. Admittedly, Rs.98,000/- was paid during the pendency of the suit proceedings by the partnership firm to the plaintiff and that amount was directed to be taken into consideration while determining the amount payable to the plaintiff. He enjoyed the excess drawn amount as well as the said sum of Rs.98,000/- with interests thereon till eventually he was found liable to refund to the defendants concerned the excess amount. Further, in the final decree, only the excess drawn amount and the said sum of Rs.98,000/- were taken into consideration without reference to the interests on the said amounts and the said amounts bereft of interests earned were deducted while determining the liability of the plaintiff and the plaintiff was thus directed to refund the remaining amount of Rs.57,817.63 ps to the Firm that too without any interest. In that view of the matter and the facts peculiar to the case and the orders of this Court from time to time by which the parties are bound, it follows that the provision of Section 37 of the Partnership Act is of no avail to the appellant.

7.4 Before parting, it is apt to note that the partnership firm is not impleaded as a party to the suit though the relief of dissolution of the partnership firm was sought by the plaintiff as one of the principal reliefs. Further, the preliminary decree directing dissolution of the partnership firm was set aside by a Division Bench of this Court. The directions in the operative portion of the said judgment of the Court are already referred to supra. Therefore, even though the firm is thus continuing, neither of the parties has taken steps to implead the firm as a party to the suit proceedings. The sole plaintiff sought the relief of accounting and there are directions from time to time for evaluation of his 1/4th share in the assets of the partnership firm. Eventually, if it is to be held that the plaintiff is entitled to some amount either on taking accounts or on the evaluation of his share in the assets of the Firm, a issue arises as to whether the said reliefs or any other relief could be granted to the plaintiff in the absence of the partnership firm as a party to the suit. In the considered view of this Court, in the absence of the partnership firm as a party to the suit, the plaintiff is not entitled to any relief more particularly in the light of the admitted fact that this appeal suit was already dismissed for default against respondents 1, 3, 6 to 11, some of whom admittedly are partners of the firm.

7.5 On the above analysis, this Court finds that none of the contentions raised by the appellant-2nd plaintiff merit consideration and that the appeal suit being devoid of merit is liable to be dismissed. The points are accordingly answered against the appellant.

8. In the result, the appeal suit is dismissed. No costs.

Miscellaneous petitions pending, if any, in this appeal shall also stand dismissed.

JUSTICE M. SEETHARAMA MURTI

12.02.2018
Vjl