HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

A.S. No.828 of 1999

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908, by the unsuccessful plaintiff is directed against the judgment and decree, dated 28.10.1998, of the learned Principal Senior Civil Judge, Rajahmundry, passed in O.S.No.74 of 1988.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff – Chit Fund Company. I have perused the material record.

3. The appeal suit against the respondents 3 & 5 was dismissed for default by orders, dated 06.04.2006, of this Court. Respondents 1, 2, 4, and 6 to 9 and10, who are served with notices in this appeal suit, have not entered appearance.

4. As this Court of first appeal is the last Court of fact, it is necessary to refer to the pleadings of the parties.

4.1 The plaint averments, in brief, are as follows:

Plaintiff is a firm registered under Indian Partnership Act, 1932. Challa Sankararao, who is shown in the Register of Firms as its partner and foreman, is entitled to sue on behalf of the firm. Plaintiff has been carrying on business in chit funds and was duly registered, on 25.04.1987,before the Registrar of Chits, Rajahmundry. The plaintiff started a chit of the value of Rs.75,000/-; its daily subscription is Rs.125/-; auctions are to be conducted once in every 20 days; and, the total duration is 600 days. Thus, thirty auctions are to be held. As per the bye-laws, the plaintiff is entitled to a commission of 5% on the chit amount. 1st defendant is a firm; and, the defendants 2 to 10 are its partners. They are carrying on business under the name and style of 'Industrial Packing Corporation', that is, 1st defendant; and, 2nd defendant is its managing partner. 1st defendant joined as a subscriber in lot no.1 of the chit of the value of Rs.75,000/-; it also joined as a subscriber for two more chits in the same lot and has to pay 30 subscriptions each @ Rs.250/- each per day for 600 days. The 1st defendant participated in the 2nd auction conducted, on 06.01.1987, and became the highest bidder for a loss of Rs.25,200/-. Out of the said amount of Rs.25,200/-, an amount of Rs.3,750/- has been deducted towards foreman's commission and the balance amount of Rs.21,450/- was distributed to 30 members towards bonus @ Rs.715/-; and, on 06.01.1987, the prize amount of Rs.49,800/- in respect of ticket no.27 was paid, as per receipt issued by D1 firm, to the 2nd defendant, the managing partner of the 1st defendant; and, the 2nd defendant signed in the chit. As per chit fund bye-laws, the 1st defendant along with the 9th defendant executed a promissory note, on 06.01.1987, for a sum of Rs.70,000/-, after deducting a sum of Rs.5,000/- paid towards the 1st instalment, and has undertaken to repay the same with interest at 18% per annum either to the plaintiff or to its order on demand. At the same time, an agreement was also executed in favour of the plaintiff. The 1st defendant firm also participated in the third auction conducted, on 30.01.1985, and became the highest bidder for a loss of Rs.27,100/- and became entitled to receive Rs.47,900/-. From out of the bid amount of Rs.27,100/-, an amount of Rs.3,750/- was deducted towards foreman's commission and the balance of Rs.23,350/- was distributed towards bonus among the 30 members; and, the 2nd defendant in the capacity of Managing Partner of the 1st defendant firm, received Rs.47,900/- and issued a receipt, dated 30.1.1987, and also executed a promissory note &

a contemporaneous agreement, dated 30.01.1987, in respect of ticket no.28. The bonus accrued to the defendants 1 & 2 was also paid till 15th auction and the said defendants paid subscription in respect of 2 tickets till completion of 15 auctions and committed defaults in payment of subsequent subscriptions from 16th instalment. The total instalments due comes to 15 instalments. Under bye-law 3(8), if a member commits default, the plaintiff becomes entitled to recover not only arrears but also the future remaining instalments or subscriptions with interest @ 12% per annum and the defaulter becomes disentitled to bonus in respect of the future instalments or subscriptions. Thus, the defendants 1 & 2 are not entitled to bonus. On the other hand, they are liable to pay entire amount with interest; and, the plaintiff is entitled to recover the amount due with interest. Inspite of the demands made by the plaintiff, the defendants did not pay the said amounts due to the plaintiff. Hence, the suit is filed.

4.2 The averments in the written statement of the 2nd defendant, in brief, are as follows:

The material allegations in the plaint are not true and correct. The suit is not maintainable either under law or on facts. This defendant admits that this defendant is the managing partner of the 1st defendant firm and that defendants 2 to 10 are its partners and that the 1st defendant was a subscriber of chit groups of the plaintiff and became highest bidder. The allegations in para 14 that under the bye-law 3(8) the plaintiff firm is entitled to recover not only the arrears but also future remaining instalments with interest at 12% per annum and that the subscriber is not entitled to the bonus are untrue and untenable. The bye-law of the plaintiff firm is opposed to public policy. Therefore, clause

3(8) is not binding on this defendant. The plaintiff firm is not entitled to claim interest @ 12% per annum on each of the instalments defaulted while simultaneously disallowing the bonus. The plaintiff is put to strict proof of the correctness of accounts maintained by the plaintiff firm and the entries made therein. The suit claim is highly exaggerated and has no basis whatsoever. This defendant prays to dismiss the suit with costs.

4.3 Defendants 1, 3, 5 and 6 filed memos adopting the written statement of the 2nd defendant.

4.4 The averments in the written statement of the 7th defendant, in brief, are as follows:

The material allegations in the plaint are not true and correct. The suit is not maintainable under law. The allegations in paragraphs 8 to 10 of the plaint are denied. This defendant is one of the partners of 1st defendant firm. According to the terms of the partnership deed, dated 16.12.1985, between the partners of the 1st defendant firm, 2nd defendant was never authorized to become a subscriber in chit fund transactions and to participate in the auctions of such chit transactions. This defendant is not aware of the 1st defendant becoming subscriber in the two chits of plaintiff-company and the 1st defendant's bids at the auctions as alleged in the plaint and also the receipt of certain monies by the 1st defendant from the plaintiff. Even if the 1st defendant became the subscriber in the chits with the plaintiff company and received the amounts having participated in the auctions is true, the other partners of 1st defendant firm are not liable to pay any of the amounts that are found payable to the plaintiff. The 2nd defendant has no right under the terms of the partnership deed to enter into such transactions. Therefore, any such transactions that are entered into by the 2nd defendant on behalf of 1st defendant firm with plaintiff are not binding on this defendant. Therefore, the suit is liable to be dismissed against this defendant for want of authority on the part of the 2nd defendant. This defendant denies the allegation that the 2nd defendant represented the 1st defendant firm while joining as subscriber in the two chits mentioned in the plaint. The plaintiff is put to strict proof of all the allegations and also the particulars of the auctions and the payments alleged to have been made by the plaintiff company to the defendants 1 & 2. Bye-laws of the plaintiff company are not valid as they are opposed to principles of natural justice and judicial procedure. It is significant to state that the plaintiff did not even allege in the plaint that the 1st defendant accepted the bye-laws of the plaintiff. Therefore, bye-laws alleged to have been registered by the plaintiff company are not at all binding on this defendant. Even otherwise the plaintiff cannot forfeit the amounts that are paid by the defendants 1 & 2 as per statement of account submitted along with the plaint and the same have to be given credit to from out of the original amount payable by the defendants 1 & 2. The interest claimed in the calculation memo attached to the plaint is not valid. The plaintiff cannot claim interest. The allegations in the plaint when read with the partnership deed, it stands clearly established that the managing partner of the 1st defendant firm, that is, the 2nd defendant colluded with the plaintiff and brought into existence the various documents relied upon by the plaintiff in the plaint. Those documents do not bind this defendant. The suit claim, in any view of the matter, is excessive, exorbitant and penal. This defendant has to be relieved from such penal clauses. Therefore, the suit against the defendant may be dismissed with costs.

4.5 The averments in the written statement of the 9th defendant, in brief, are as follows:

The averments made in the plaint are not true and correct. The suit is not maintainable either under facts or in law. The suit claim is true; but, the plaintiff has to proceed against the assets of the 1st defendant firm. It cannot proceed against the defendants 9 & 10 as the amount was spent for the benefit of the 1st defendant firm. Interest claimed is penal and excessive and is, therefore, liable to be scaled down. The plaintiff is put to strict proof of all other allegations not expressly traversed or denied herein. The suit may be dismissed with costs.

4.6 The 10th defendant filed a memo adopting the written statement filed by the 9th defendant.

5. Based on the above pleadings, the trial Court framed the following issues for trial:

1. Whether D3 to D10 and D7 in particular are liable for the action of D2 on behalf of D1?
2. Whether the plaintiff is not liable to proceed against D9 and D10 until it exhausts its remedies against the assets of D1 firm?
3. Whether the bye-laws of the chit disentitling the subscriber from receiving bonus and making subscriber pay interest in case of default are ultravires, illegal and are unenforceable?
4. Whether the interest claimed is usurious and penal?
5. Whether the statement of account furnished by the plaintiff is correct?
6. Whether the plaintiff is entitled to the decree, as prayed for?
7. To what relief?

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6. At trial, PW1 was examined and exhibits A1 to A14 were marked on the side of the plaintiff. No oral and documentary evidence is adduced on the side of the defendants.

7. On merits and by the judgment impugned in this appeal suit, the trial Court dismissed the suit of the plaintiff. Therefore, the plaintiff is before this Court.

8. Learned counsel for the plaintiff contended as follows:

A plain and harmonious consideration of the defences set up by the defendants particularly of the 2nd defendant, who is the managing partner and the person who subscribed to the chits in question, would show that the defendants admitted that the 1st defendant was not only the subscriber but also the highest bidder and that they only contended that the term in the bye-laws disentitling the subscriber to the bonus is opposed to public policy and that the plaintiff firm is not entitled to claim interest @ 12% per annum while simultaneously disallowing the bonus. Therefore, the trial Court ought to have seen that there is no denial of the suit claim and the only contest is with regard to the disentitlement of the 1st defendant to the bonus and the entitlement of the plaintiff to claim interest that too @12% per annum. The trial Court failed to note the said crucial and material aspect and erroneously dismissed the whole suit though the plaintiff is entitled to a decree on the admissions in the defence of the defendants. The trial Court ought to have seen that the 9th defendant, who is one of the partners, filed a written statement stating clearly that the suit claim is true and that the plaintiff has to first proceed against the assets of the 1st defendant firm as the amount was spent for the benefit of the 1st defendant firm. The said defence coupled with the defence of the 2nd defendant, which was adopted by defendants

1,3,5 & 6 by all means is sufficient to grant a decree in favour of the plaintiff as prayed for. The trial Court ought to have seen that the only defence of the 7th defendant is with regard to the lack of authority of the 2nd defendant, as per terms of the partnership deed of the 1st defendant firm, to subscribe to chits, participate in the auctions and receive monies and that the 7th defendant did not substantiate the said defence by entering into the witness box. The trial Court, in the facts and circumstances, committed a grave error in dismissing the suit of the plaintiff. The trial Court having held in favour of the plaintiff firm on various aspects erroneously dismissed the suit on the ground that there is no cogent evidence to conclude that the accounts furnished by the plaintiff are correct. The trial Court erroneously held so despite the fact that the defendants did not dispute their liability in respect of the suit claim and on the other hand admitted their liability but only raised a feeble defence as regards bonus and rate of interest. The trial Court ought to have seen that the accounts of the plaintiff firm are maintained in regular course of business and that there is no denial of the claim of the plaintiff. The trial Court ought to have seen that the term regarding disentitlement of bonus in the bye-laws of the chit is a well recognized legally enforceable term, which is being implemented in all chits by all chit fund companies including the plaintiff firm and that the said term is being upheld by the Courts in suits of similar nature. Therefore, the contention of the defendants that the said term is opposed to public policy is untenable. The trial Court ought to have seen that the oral evidence and the exhibits marked on the side of the plaintiff sufficiently established the suit claim and that there is no rebuttal evidence adduced by the defendants to discharge the onus which is upon them. The trial Court failed to appreciate the pleadings and the facts correctly and the unrebutted evidence on the side of the plaintiff in proper perspective and erroneously dismissed the suit instead of decreeing the suit.

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

10. The points that arise for determination in this appeal suit are –

(1) Whether the plaintiff is entitled to a decree for money against the defendants as prayed for?

(2) Whether, in the light of the pleadings of the parties, which are adverted to supra, the plaintiff is entitled to a decree for the suit amount or any part thereof? And, if so, to what amount and what is the rate of interest to which the plaintiff would be entitled to on the principal sum?

(3) Whether the decree and judgment of the trial Court are unsustainable under facts and in law as being contended by the plaintiff?

(4) To what relief?

11. **POINT Nos.1 and 2:**

11.1 The pleadings of the parties are stated supra, in detail. As rightly pointed out by the learned counsel for the plaintiff, a plain, harmonious and wholesome consideration of the pleadings would show that the defendants are not only not disputing the material aspects as regards the plaintiff's claim but are also admitting that the 2nd defendant, on behalf of the 1st defendant firm, subscribed to the subject chits, participated & bid at the auctions and received the subject prize amounts on becoming the highest bidder at the auctions and on execution of promissory notes and that the only contention of the defendants is with regard to the validity of the relevant bye-law or the term of chit agreement, which says that if a member commits default, the plaintiff would become entitled to recover the arrears, that is, the future installments/subscriptions with interest @ 12% per annum and that such defaulter is not entitled to bonus in respect of the installments and subscriptions in respect of payment of which defaults are committed. The law is well settled that admission in the defence is the best form of proof on which the plaintiff can rely upon to succeed in the suit. That apart, PW1, the managing partner of the plaintiff firm and the foreman of the chit groups, in his evidence reiterated the pleaded case and exhibited exhibits A1 to A14 namely exhibits A1 & A2-pronotes respectively, dated 06.01.1987 & 30.01.1987, executed by D1; exhibits A3 & A4-stamped receipts executed by D1 respectively, dated 06.01.1987 & 30.01.1987; exhibits A5 & A6-minutes proceedings (Form no.XI); exhibit A7-Xerox copy of form C certificate, dated 27.01.1979; exhibits A8 & A9-chit agreements respectively dated 06.01.1987 & 30.01.1987; exhibit A10-ledger for the year 01.01.1987 to 31..12.1989 (ledger No.2) page 85; exhibit A11- ledger for the year 01.01.1987 to 31.12.1989, contd., page No.223; exhibit A12-ledger for the year 1.1.1987 to 31.12.1987 page 198 and 199; exhibit A13-day book for the year 1.1.1988 to 31.3.1989 (entire book); exhibit A14-bunch of unpaid receipts (19 receipts). Exhibits A8 & A9, chit agreements, and A1 & A2, promissory notes executed by the 2nd defendant, are the crucial and vital documents and they by themselves are sufficient to make out a *prima facie* case for the plaintiff in view of the non denial of execution of the same and the relevant plaint averments coupled with the admissions in the defence. Once, the execution of the agreements and the promissory notes is admitted and the receipt of consideration is also admitted, the plaintiff shall be entitled to a decree, more particularly when the contesting defendants failed to adduce any evidence to discharge the onus of proof which is upon them. The said documents coupled with the other documents, which constitute legal evidence, in the considered view of this Court, entitle the plaintiff to a decree more particularly in the absence of rebuttal evidence. PW1 maintained his stand and there is nothing brought out in his evidence to impeach his credit or disbelieve the plaintiff's case. In this backdrop, it can safely be held that the plaintiff is entitled to a decree subject to proof of the validity of the said term in the byelaws as regards the bonus and its entitlement to claim interest @ 12% per annum.

11.2 Dealing with the contention of the plaintiff that the defendants are not entitled to bonus and the contrary contention of the defendants that the plaintiff is not entitled to contend that the defendants are not entitled to the bonus despite committing defaults in payment of installments/subscriptions, what is to be noted is that in exhibits A8 & A9, agreements, it was specifically agreed to forfeit bonus in the event of committing defaults in payments of installments and subscriptions. Dealing further with the crucial question - whether the defendants are entitled to the benefit of bonus when admittedly they are defaulters in payment of subscriptions, it is necessary to note that as per the byelaw and the chit agreements, a prized subscriber, who becomes a defaulter subsequently, is not eligible to bonus on further defaulted subscriptions. Once defaults are committed, the defendants become liable to make a consolidated payment of all the future subscriptions inclusive of the defaulted installments with interest from the date of default. Thus, as per terms and conditions, which are not in dispute, the defendants admittedly being defaulters are not entitled to any dividends or benefits, which they are claiming. It is clearly stated in the chit agreements that even in case of a single default in payment of instalment/subscription, the defendants would be disentitled to bonus/dividend and that they would be liable to pay without reference to the installments, the consolidated amounts respectively mentioned in the promissory notes with interest. Though the defendants contended that the term with regard to the bonus being relied upon by the plaintiff is opposed to public policy, they could not establish the said contention by placing reliance on any legal position, which squarely applies to the facts of the case. On the other hand, as rightly contended by the plaintiff, the defendants, who are bound by the terms of contracts, that is, the terms of the chit agreements and the promissory notes, are not entitled to claim the bonus when admittedly they are defaulters. If the default is committed by the prized subscriber and if the default continues, such member will not be entitled to dividends and such a prized subscriber and the sureties lose the future dividends and benefit of paying the future subscription in installments and they all shall become liable to make a consolidated payment of all future subscriptions including the defaulted installment with interest @ 12% per annum from the date of default is borne out by the evidence brought on record. Therefore, in view of the agreed terms and conditions in the chit agreements, exhibits A8 & A9, which are not disputed and conversely as the contents of the same are adequately proved through PW1 and the said evidence is not rebutted by adducing any defence evidence, it follows that there is no merit in the contention of the defendants and hence, the said contentions stand rejected being devoid of merit.

11.3 Coming to the claim of rate of interest @ 12%, it is to be noted that in exhibits A1 & A2, promissory notes, the execution of which is not denied and is admitted, the rate of interest is mentioned as Rs.1.50 paise per cent per month, that is, 18% per annum, whereas the plaintiff claimed and is claiming interest @ 12% per annum. The said rate of interest having regard to the nature of transactions and the contract between the parties is just and fair and is, therefore, permissible under facts and in law.

11.4 In that view of the matter, this Court finds that the two contentions as regards entitlement of the defendants to bonus and the disentitlement of the plaintiff to claim interest that too @ 12% per annum, which are raised by the defendants are untenable being without any merit.

11.5 Though the 7th defendant contended that the 2nd defendant is not authorized under the deed of partnership of the 1st defendant firm to subscribe to the chits, bid at auctions and receive prize monies, he did not substantiate his defence by entering into witness box. Therefore, this Court holds that the said defence which is not substantiated is indefensible. Coming to the contention of the 9th defendant that the firm alone is liable, it is to be noted that the 9th defendant expressly admitted that the amount was spent for the benefit of the 1st defendant firm. Be it also noted that a partnership firm is not a legal entity and that the persons who entered into a partnership though individually called partners are collectively called as a firm and that a partnership is a relationship between the persons agreed to share the profits of a business carried on by any or all of them acting for all and that the liability of the partners is joint and several. Further, unless there is anything to the contrary, each partner is liable for the acts of the other partner and that of the managing partner, who is competent to represent the firm on behalf of all the partners. A contracting partner like the managing partner is an agent of the firm for the purpose of the business of the firm and every partner has implied authority as an agent of the firm to bind the firm and that when a partner does an act or executes an instrument on behalf of the firm as was done in this case, the same shall bind the firm. It is not the case of the 9th defendant that the act of the 2nd defendant is a wrongful act. In that view of the matter, the said contentions of the 9th defendant are also untenable and are accordingly rejected.

11.6 On the above analysis, this Court finds that the plaintiff is entitled to a decree against the defendants as prayed for. Points are answered accordingly in favour of the plaintiff and against the defendants.

12. **POINT No.3:**

I have gone through the judgment of the trial Court. Though the admissions in the defence of the defendants and their non denial of the execution of the chit agreements and promissory notes, coupled with the unrebutted evidence on the side of the plaintiff, sufficiently proved the case of the plaintiff and made out a sufficient case for granting a decree, the trial Court erroneously went into matters, which are not put in issue in the suit, and incorrectly dismissed the suit of the plaintiff by ignoring the admissions as well as the unrebutted legal evidence on the side of the plaintiff. For the said reasons and for the reasoned finding recorded under points nos.1 and 2, this Court finds that the decree and judgment of the trial Court are unsustainable under facts and in law and are liable to be set aside and that as a sequel to the above said findings of this Court, the suit of the plaintiff is to be decreed by remedying the injustice.

13. **POINT No.3:**

In the result, the appeal suit is allowed without costs and, the judgment and decree, dated 28.10.1998, of the learned Principal Senior Civil Judge, Rajahmundry, passed in O.S No.74 of 1988, are set aside. And, as a sequel, the afore-said Original Suit is decreed with costs in favour of the plaintiff and against the defendants 1,2,4,6 to 9 & 10 for a sum of Rs.76,438/- (Rupees Seventy Six Thousands Four Hundreds and

Thirty Eight only) with interest on Rs.75,000/- [Rupees Seventy Five Thousands only] @ 12% per annum from the date of the suit till the date of the decree and @ 6% per annum from the date of the decree till date of payment or realization. This appeal suit against the respondents 3 & 5 was already dismissed for default by orders, dated 06.04.2006.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

Date:04.04.2018
VA/Vjl