THE HON'BLE SRI JUSTICE M.LAXMAN

APPEAL SUIT No.1909 of 2000

JUDGMENT:

1. The present appeal has been directed against the judgment and decree dated 31.03.2000 in O.S.No.142 of 1993, on the file of the learned Senior Civil Judge, Bodhan, wherein and whereby, the suit filed by the respondent Nos.1 to 4 herein, for declaration that their firm is not liable to pay the loan amount availed by respondent No.5 herein from appellant/Financial Corporation since such amount was not utilized for the establishment of the rice mill in the name of M/s.Matrushri Mini Modern Rice Mill, situated at Pothangal Village, was allowed in part, directing the respondent Nos.1 to 4 herein to pay an amount of Rs.44,374/- and rest of the amounts were held to be not liable to pay. Aggrieved by the same, present appeal has been preferred at the instance of defendant No.2 in the suit.

2. Appellant herein is defendant No.2, respondent Nos.1 to 4 herein are the plaintiffs and respondent No.5 herein is defendant No.1 in the suit. For the sake of convenience, the parties herein after are referred to as they were arrayed in the suit.

3. The sum and substance of the case of the plaintiffs is that the plaintiff is a partnership firm represented by its partners viz., plaintiff Nos.1 to 4 and defendant No.1. The partnership deed was entered

between the partners on 28.08.1991 and the terms of partnership deed was reduced into writing. The purpose of the partnership deed was to carry out the business by constructing and running the rice mill in the name and style of M/s.Matrushri Mini Modern Rice Mill. The rice mill was established with contributions of the partners of the unregistered firm and all the machineries regarding to rice mill were purchased from Baba Auto Mechanical Works, Hyderabad, under various invoices by paying the partnership amount to the supplier. According to the plaintiffs, defendant No.1 by playing fraud and by producing the created invoices given by the Baba Auto Mechanical works, had availed the loan amount of Rs.1,80,000/- for his personal needs from defendant No.2/financial institution, projecting himself as a proprietor of M/s.Matrushri Mini Modern Rice Mill, Pothangal, and ignored the partnership deed entered among the partners including him. The machinery, which was in premises of rice mill, was purchased by contributions of all the partners of the partnership firm but it was not purchased from the loan availed by defendant No.1 from defendant No.2/Financial Corporation. On knowing availment of part of loan by defendant No.1, the plaintiffs have sent a letter to defendant No.2 to stop further disbursement of the loan, but no action has been taken by defendant No.2. In realization of such amount, defendant No.2/financial institution has threatened the plaintiffs that they would seize the rice mill and also threatened to stop the rice mill business until the loan is repaid, which was due by defendant No.1. Under the said circumstances, present suit has been filed.

4. Defendant No.1 set *ex parte.* Defendant No.2 has filed written statement denying all the allegations of the plaintiffs.

5. The case of defendant No.2/financial corporation is that the rice mill is a proprietary concern but not a partnership firm. Defendant No.1 is the proprietor and he obtained the licence in the name of M/s.Matrushri Mini Modern Rice Mill, which shows that defendant No.1 was proprietary concern and such rice mill was not in the name of partnership firm. They further stated that partnership deed entered on 28.08.1991 between the partners is not the registered partnership firm. It is also his case that in pursuance of sanction of loan amount, a sum of Rs.44,374/- was directly paid to the supplier (Baba Auto Mechanical Works, Hyderabad) and the supplier supplied the machinery reflected under the invoices. Subsequently, Rs.1,33,484/- was released in the form of cheque to defendant No.1 and out of the realized amount a sum of Rs.62,926/- was released towards civil work and a sum of Rs.70,558/- was released towards cost of the further machinery as reflected in the invoice produced by defendant No.1. Totally defendant No.2 has given loan amount of Rs.1,80,889/-. Further defendant No.1 has mortgaged the land on which the rice mill was constructed, which he has obtained under the gift deed from his

mother and also all his family members including his brothers. In this regard, all the family members of defendant No.1 have executed an affidavit under Ex.B8 declaring that they have no grievance on the execution of gift deed in his favour. Having taken such property as a mortgage, apart from hypothecation of machinery purchased by defendant No.1, part of the loan amount was paid and when there was a default in realization of remaining amount, defendant No.2 has exercised its powers under the State Financial Act, 1951. At this stage, the plaintiffs have filed the present suit, which in fact is not maintainable and therefore, he prayed to dismiss the suit.

6. The trial Court on the basis of the above pleadings framed the following issues:

> *1.Whether the rice mill is a partnership firm consisting of plaintiffs and defendant No.1 and another?*
>
> *2.Whether Defendant No.1 played fraud upon the plaintiffs and had obtained loan from defendant No.2?*
>
> *3.Whether the suit is not maintainable against defendant No.2 as pleaded by them?*
>
> *4.Whether defendant No.1 misrepresented to defendant No.2 as to his right over the rice mill?*
>
> *5.Whether the gift deed in favour of D-1 by his mother is not binding on the plaintiffs?*
>
> *6.Whether the plaintiff are entitled for a decree that they are not liable for the loan advanced by D-2 against the rice mill?*
>
> *7.Whether the plaintiffs are entitled for consequential injunction against defendant No.2?*
>
> *8.To what relief?*

7. The plaintiffs, to support their case, examined PW1 and PW2 and relied upon Exs.A1 to A25. The defendants, to support their case, examined DW1 and DW2 and relied upon Exs.B1 to B35.

8. Heard the learned counsel on either side and perused the materials placed on record.

9. In the light of the above submissions, the points emerging for consideration in this appeal are as follows:

> *(i).Whether the plaintiffs could able to establish the machinery of the rice mill was purchased by them and such machinery belong to partnership firm?*
>
> *(ii).Whether the defendants established that the machinery covered under the invoices submitted by the first defendant was installed in the rice mill premises?*
>
> *(iii).Whether the appellant/financial corporation is entitled to recover the amounts?*

Point Nos. 1 to 3:

10. It is not in dispute that a partnership deed was entered between the partners viz., plaintiffs and defendant No.1, under Ex.A1 and the said partnership firm is unregistered one. It is also not in dispute that the partnership firm has issued a legal notice to defendant No.2 asking the corporation not to disburse the loan amount in favour of defendant No.1, since such loan was obtained by playing fraud.

11. The evidence of the plaintiffs shows that they have purchased the machinery much prior to the invoices submitted by defendant No.1 to defendant No.2 for obtaining the loan. Simultaneously, the defendant No.1 also produced invoice showing that the same supplier has supplied machinery to the extent of Rs.1,14,000/- and odd. From a comparative analysis of both the invoices, it is observed that there is over lapping of machines. Both invoices contained the same nomenclature rice mill items. Further the machinery cannot be identifiable with reference to any identical number. The only evidence produced by defendant No.2 is payment of Rs.44,374/- directly to the supplier (Baba Auto Mechanical Works) and other amounts were not paid to the supplier but paid to the defendant No.1 and to that effect also invoices were submitted by defendant No.1. Defendant No.2 has failed to explain why the amounts were directly paid to defendant No.1 when the amount was intended to be for purchase of machinery worth of Rs.70,000/- out of the said amount of Rs.1,80,000/-. This creates some kind of doubt over the actual purchase of machinery by defendant No.1.

12. On the contrary, the plaintiffs' invoices, pay bills and receipts also show the purchase of similar kind of items prior to the invoices produced by defendant No.1. The admission of DW1 shows that after the installation of machinery, there is no visit of officials of defendant

No.2/financial corporation to the rice mill. In such circumstances, it is difficult for defendant No.2 to identity the machinery, which is in the premises of rice mill so as to reclaim them on the ground that the said machinery was hypothecated to them. If defendant No.2 visited the rice mill at the time of installation of the machinery purchased, there could have been some evidence, which could be taken note for identity of the hypothecated machinery. In the absence of such thing, it is difficult to establish that the machinery, which was installed in the premises, is the same machinery, which was hypothecated by defendant No.1.

13. The trial Court, considering aforesaid defect, has directed the plaintiffs to pay an amount of Rs.44,374/-, which defendant No.2 directly paid to Baba Mechanical Works and rest of the claim made over the machinery was not granted since the plaintiffs also produced invoices, pay bills relating to the machinery. The findings of the trial Court in this regard cannot be found fault with.

14. Now further question is whether the plaintiffs can prevent defendant No.2 from recovering the balance amount from the assets mortgaged by defendant No.1 other than the machinery?

15. Defendant No.1 has mortgaged the immovable property, which he got under the gift deed from his mother. Apart from hypothecation

of machinery, the plaintiffs cannot prevent the sale of such immovable property for recovery of loan, which was due by defendant No.1, since such property does not belong to the firm. The plaintiff can only succeed to prevent defendant No.2 from attaching the machinery, which is difficult to be identified as a machinery and which was hypothecated to defendant No.2. The trial Court has not considered this factor.

16. The claim of the plaintiffs was that Ex.B8/affidavit of Goranti Pandarinath, dated 06.09.1992, was forged. In this regard, a criminal case was also lodged by them and it was ended in acquittal and the Court below has also considered the effect of such finding viz-a-viz and other evidence on record. The trial Court after examining witnesses and based on the evidence available on record found that defendant No.1 has not forged Ex.B8/affidavit. This means the claim of the plaintiffs that Ex.B8 is a forged document, is negatived. If such a document is found to be correct, the claim of defendant No.1 in respect of the property, which is covered under Ex.B4/gift deed is correct. When the trial Court having found so, could not have prevented defendant No.2 from proceedings with recovery of the amounts paid to defendant No.1 by sale of mortgage property. The plaintiffs have no right to prevent such attempt of defendant No.2 to recover the amount. Therefore, this Court holds that the trial Court

ought not to have prevented defendant No.2 from recovering the balance of loan amount. In this regard, the trial Court findings require interference. The trial Court has decreed the part of the amount, but it is not challenged by the plaintiffs and therefore, such findings have attained finality.

17. In the present case, some of the partners died while the suit is pending and some of the other partners died while the appeal is pending. The terms of the partnership deed do not show that death of one of the partner cannot dissolve the partnership firm. When there is no such contract, in terms of Section 42 of the Partnership Act, 1932, on the death of one of the partner, the firm gets dissolved. In this regard it is relevant to refer Section 42 of the Partnership Act, 1932, which reads as under:

Section 42: Dissolution on the happening of certain contingencies:

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.

A reading of the above provision, a partnership firm is dissolved, when the partners died during the pendency of the suit.

18. Now the further question is whether such dissolved firm can continue the proceedings? In this regard it is apt to refer to Section 47 of the Partnership Act, which reads as under:

> *47.* ***Continuing authority of partners for purposes of winding up.—****After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affair of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:*
>
> *Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.*

19. A reading of the above provisions would clearly indicate that the surviving partners have the continuous authority to complete the transaction which begun but unfinished at that time.

20. In the present case, the transaction of institution was already initiated and the same could not be finished. Therefore, surviving partners, who being the representatives of the dissolved firm, are entitled to continue the proceedings and the death did not abate the proceedings. Therefore, the appeal requires to be allowed in part.

21. In the result, the appeal is allowed in part as follows:

The judgment of the Court below to the extent of declaring that defendant No.2 is not entitled to recover the balance of loan amount due by defendant No.1 by sale of mortgage property covered under Ex.B4/gift deed is set aside. The defendant No.2 is entitled to sell the immovable property covered under Ex.B4. Defendant No.2 is not entitled to seize or sell the machinery, which is lying in the rice mill, however, it is open to them to recover the amount decreed by the trial Court by initiating appropriate steps including seizure or sale of machinery, if they have right to recover, since there is no appeal from the plaintiffs' firm. No costs. Miscellaneous petitions pending if any shall stand closed.

JUSTICE M.LAXMAN

15.12.2022
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