



A.S.No.257 of 2011

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.06.2023

Judgment Pronounced on : **16.06.2023**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.257 of 2011

S.Prakash

.. Appellant

Versus

1. Aiswariya Flour Mills
Rep. by its Partner,
129-A Calicut Main Road,
Kondalampatti,
Salem - 636 010.
2. P.V.Nagaraj Chettiar (Died)
3. R.Premalatha
4. P.Rangaraj
5. N.Venkatammal
6. N.Sunitha (Died)
7. A.Krishnan
8. K.Sahana (minor)
9. K.Sanjana (minor)

R7 as the guardianship of minor daughters 8 and 9

RR-5 and 6 brought on record as LR's of the deceased second respondent *vide* order of Court, dated 19.12.2019 made in C.M.P.No.26666 of 2019 in A.S.No.257 of 2011.

RR-7 to 9 are brought on record as LR's of the



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deceased sixth respondent viz., N.Sunitha, *vide*
order of Court, dated 21.11.2022 made in
C.M.P.Nos.5062, 5065, 5066 and 5072 of 2022
in A.S.No.257 of 2011 .. Respondents

Prayer : Appeal Suit filed under Section 96 of the Code of Civil Procedure to allow the above Appeal setting aside the judgment and decree of the learned Additional District Judge (Fast Track Court No.2), Salem, dated 10.08.2009 in O.S.No.50 of 2005 and to decree the said suit in toto as prayed for.

For Appellant : Mr.T.M.Hariharan

For Respondents : No Appearance for RR-1, 3 and 4

: Mr.R.Nalliyappan for R5

JUDGMENT

This Appeal Suit is directed against the judgment and decree, dated 10.08.2009 passed by the learned Additional District Judge, Fast Track Court No.II, Salem in O.S.No.50 of 2005, in and by which, the suit filed by the appellant / plaintiff for recovery of a sum of Rs.14,57,200/-, though was decreed against the respondents / defendants 1, 3 and 4, was dismissed against the second respondent / second defendant. Aggrieved by the dismissal of the suit against the second respondent /second defendant, the



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appellant / plaintiff has filed this Appeal Suit. Hereinafter, in this judgment, the parties are referred to as per their array in the suit.

2. The case of the plaintiff is that the first defendant is a partnership firm and the defendants 2 to 4 are its partners. The first defendant firm borrowed a sum of Rs.6,00,000/- from the plaintiff on 20.03.1999 for its business purposes and in consideration thereof, a promissory note was executed by the third defendant as the partner of the first defendant firm along with the fourth defendant promising to repay the same on demand or order with interest at the rate of 24% per annum. However, no amount was repaid. On 08.03.2002, the first defendant firm, through the third defendant, had paid a sum of Rs.10,000/- and an acknowledgment of liability was endorsed on the reverse of the promissory note. On 22.02.2022, the third defendant also deposited a sale deed, dated 02.03.2000 with the plaintiff with an intention to create an equitable mortgage as the security for the debt. However, the amount was not repaid inspite of the demand notice, dated 14.02.2005 and hence the suit.



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3. In the suit, the first defendant firm and its partner, the third defendant and her husband, the fourth defendant, remained *ex parte*. Only the second defendant contested the suit by filing a written statement to the effect that there was no such borrowal on the part of the first defendant firm. The promissory note is belatedly concocted and the deposit of the title deed is denied. Due to his personal reasons, the second defendant retired from the first defendant firm on and from 01.04.2000. On the said date, the third defendant inducted her husband, the fourth defendant as a partner. Therefore, the second defendant, having retired from the partnership, is not liable to pay the amount.

4. On the said pleadings, the Trial Court framed five issues which were recasted on 10.08.2009 as follows :-

(i) Whether or not the endorsement, made on the reverse of the promissory note by the third respondent / defendant after the retirement of the second respondent / defendant as a partner from the firm, will bind the second respondent / defendant in the suit loan?

(ii) Whether the second respondent / defendant is liable to pay the suit amount?

(iii) Whether for the first respondent / defendant's firm, the third respondent / defendant



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borrowed a sum of Rs.6,00,000/- under the suit pronote?

(iv) When the third respondent / defendant has deposited a memorandum of title deeds as a security to the very same loan, whether the suit on pronote is maintainable?

(v) To what reliefs the appellant / plaintiff is entitled and what orders have to be passed regarding costs?

5. On the said issues, parties let in evidence. The plaintiff examined himself as **P.W.1** and **Exs.A-1** to **A-7** were marked. The second defendant examined himself as **D.W.1** and **Exs.B-1** to **B-2** were marked. Thereafter, the Trial Court considered the case of the parties and held that even though the intimation given to the Registrar of Firms upon the retirement of the second defendant from the partnership is not marked as a document, still it was filed along with the written statement which confirms his retirement as on 01.04.2000. Once the second defendant retired from the partnership on 01.04.2000, the endorsement made by the third defendant acknowledging the debt and promising to repay the same by making part payment of Rs.10,000/- on 08.03.2002, will not in any manner bind the second defendant. Therefore, the suit was dismissed against the second defendant and decreed in respect of the other defendants.



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6. Heard *Mr.T.M.Hariharan*, learned Counsel for the appellant and *Mr.R.Nalliyappan*, learned Counsel for the fifth respondent.

7. *Mr.T.M.Hariharan*, learned Counsel for the plaintiff would submit that once the second defendant was a partner at the time of borrowal, he would be liable for repayment of loan even after his retirement. Referring to Section 32(3) of the *Partnership Act, 1932*, the learned Counsel would submit that the other partner, who is retired from the partnership firm, would still be liable till such time a public notice in respect thereof is given by him. As a matter of fact, Section 72 of the *Partnership Act, 1932* clearly delineates the method, in which, the public notice has to be given which includes publication in the Gazette and publication in the newspaper. In this case, when the second defendant has not resorted to any such exercise, he would continue to be liable for the repayment of the loan in spite of his retirement from partnership, as in this case there is no agreement under Section 32(2) of the *Partnership Act, 1932*.



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8. In support of his submission, the learned Counsel relied upon the judgment of the Hon'ble Division Bench of this Court in ***The Lakshmi Vilas Bank Ltd. Vs. M/s. Sun Finance and Ors.***¹, more specifically by referring to the paragraph Nos.19 and 20 of the said judgment. The learned Counsel also relied upon the judgment of another Hon'ble Division Bench of this Court in ***Meera Raju & Ors. Vs. 1. State Bank of Travancore and Ors.***², more specifically relying upon the paragraph Nos.19 and 20 of the said judgment. Further, the learned Counsel also submitted that the Trial Court erred in awarding interest only at the rate of 6% per annum post decree.

9. The learned Counsel, referring to Section 34 of the *Code of Civil Procedure*, would submit that when the transaction is commercial in nature, award of 6% per annum is totally unjustified. In this regard also, the learned Counsel relied upon the paragraph No.22 of the judgment of the Hon'ble Division Bench of this Court in ***Meera Raju*** (cited *supra*).

1 1995 SCC OnLine Mad 66

2 2012 SCC OnLine Mad 3580



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10. Opposing the above submissions, *Mr.R.Nalliyappan*, learned Counsel for the fifth respondent, would submit that firstly, the appellant / plaintiff has accepted the decree and has filed Execution Petition in R.E.P.No.104 of 2021 before the Trial Court. Therefore, they cannot simultaneously maintain this appeal and the appeal is liable to be dismissed as not maintainable. In any event, he would submit that once the second defendant had retired from the partnership well before the endorsement was made in the promissory note acknowledging the debt, the same will not bind the second defendant.

11. In this regard, the learned Counsel would rely upon the judgment of the Hon'ble Division Bench of this Court in *Vinaitheethal Achi Vs. Chidambaram Chettiar*³, more specifically relying upon the paragraph No.6 of the said judgment. The learned Counsel would further submit that there was no borrowal at all and as a matter of fact, only to victimize the second defendant, the plaintiff and the defendants 3 and 4 have colluded with each other and created the promissory note. As a matter of fact, the second defendant never signed the promissory note. Therefore, he would pray that the Appeal Suit be dismissed.

³ 1972 (85) LW 855



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12. I have considered the rival submissions made on either side and perused the material records of the case. On consideration thereof, the following points arise for consideration in this case :-

(i) Whether the appeal filed by the plaintiff is maintainable in view of the fact that the plaintiff has already filed an Execution Petition against the other defendants against whom the decree is already passed?

(ii) Whether or not the endorsement made on 08.03.2002 acknowledging the debt would be binding on the second defendant, who is retired from the partnership on 01.04.2000 itself?

(iii) Whether or not the interest awarded by the Trial Court at the rate of 6% per annum is in order?

Point No. (i) :-

13. When a suit is partly decreed granting relief against the defendants 1, 3 and 4 and refusing against the second defendant, it is always open for the plaintiff to file an Execution Petition so as to realize the amounts due from the defendants 1, 3 and 4, even at the same time, maintaining an appeal in respect of disallowed part alone. There is no bar whatsoever and that the principle of estoppel does not arise in respect of the



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same as the prayer of the plaintiff itself is for a decree directing all the defendants to jointly and severally pay to the plaintiff. Therefore, I hold that the Appeal Suit as maintainable and answered the point accordingly.

Point No.ii :

14. The contention of the second defendant is that even though he was a partner at the time of borrowal as on 20.03.1999 in the first defendant partnership firm, he had retired from the partnership with effect from 01.04.2000. In this regard, the *Partnership Act, 1932* itself contains provisions regarding the continuation of liability of a retired partner and it is essential to extract Section 32 of the *Partnership Act, 1932* which reads as hereunder :-

"Section 32 - RETIREMENT OF A PARTNER.

- (1) A partner may retire -*
- (a) with the consent of all the other partners,*
 - (b) in accordance with an express agreement by the partners, or*
 - (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.*

- (2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an*



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agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement.

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a party.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm."

Thus, it can be seen that under Section 32(2) of the Act, a retiring partner, by making an agreement with the other partners as well as the third party to whom the firm is liable, can be discharged from any liability. In other cases, it can be seen that as per Section 32(3) of the Act, notwithstanding his retirement, he will continue to be liable as partner to third parties for act done by any of the partners as if it is done before the retirement, until public notice is given of the retirement.



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15. The manner, in which public notice should be given, is provided under Section 72 of the *Partnership Act, 1932* and the same is extracted hereunder for ready reference :-

**"Section 72 -
MODE OF GIVING PUBLIC NOTICE.**

A public notice under this Act is given

(a) Where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates, has its place or principal place of business, and

(b) in any other case, publication in the Official Gazette, and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business."

Thus, it is clear that unless and otherwise the public notice is given, the second defendant will continue to be liable for the repayment of liability and he as not caused any public notice in the manner provided under Section 72 of the *Act*.



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16. This position has also been made clear by the judgment of the Hon'ble Division Bench of this Court in **Meera Raju's** case (cited *supra*) and it is useful to extract the paragraph Nos.19 and 20 of the said judgment which read as follows :-

" **19.** *Coming to the submission of the contesting defendants that since D3 to D6 have retired from the partnership on 31.12.1989, they cannot be held liable to pay the loan amount after their retirement, it would be appropriate to refer the judgment relied on by the plaintiff reported in Lakshmi Vilas Bank Ltd. v. Sun Finance (1995-2-L.W. 574), which gives a fitting answer to this issue and the relevant paragraphs are extracted hereunder:*

" **22.** *Section 72 of the Indian Partnership Act deals with the mode of giving public notice. It is useful to extract the following passage in J.P. Singhal's Indian Partnership Act, Fifth Edition, appearing at page 1215:*

"A partnership continues, as to third persons who deal with the members thereof as partners, until due notice of dissolution is given even though as between the partners, the firm has been dissolved prior to such notice, especially as to persons who dealt with the firm or extended credit prior to the dissolution as between partners. Accordingly, each member of a former firm is bound, and continues liable for the acts of any partner within the ordinary



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scope of the business of the firm, until due notice of such dissolution has been given. But, in case of dissolution by operation of law, notice thereof need not be given, nor is notice necessary where a valid partnership has never existed. Wherever a notice is required by law to be given, it ought to be given in such a manner as the law deems sufficient. In India, notice is regulated by this Act”.

23. *Under Section 32(3) of the Indian Partnership Act, a retired partner continues to be liable until public notice is given of his retirement and what the public notice under the Act is specified by Section 72. Therefore, on a reading of both the sections, it is clear that a retiring partner will be liable for any subsequent act on behalf of the firm which would bind the firm until the public notice as prescribed by Section 72 is given”.*

20. *From the dictum laid down in the said judgment, it is clear that as per section 32(3) of Indian Partnership Act, a retired partner continues to be liable until public notice is given of his retirement. In the instant case, it is to be noted that no such notice was given. Moreover, by perusal of written statement filed by D3 on 10.01.1996, it is seen that she did not say anything about the retirement of D3 to D6. Only in the written statement of D4 filed in the month of September, 1998, he has stated about the*



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retirement of D3 to D6 from D1 firm. Though it has been claimed by D3 to D6 that they have retired from the partnership firm, no notice was given to the plaintiff bank. In view of the factual aspects as well as the legal position laid down in the above judgment, we are of the opinion that D3 to D6 are liable to pay the amount."

17. As a matter of fact, the very same position has been reiterated in the judgment of an Hon'ble Division Bench of this Court in ***The Lakshmi Vilas Bank Ltd.***'s case (cited *supra*), which was relating to a case of dissolution of partnership firm and it is useful to extract the paragraph No.20 of the said judgment which reads as follows :-

" 20. The 2nd defendant has examined himself as D.W. 1. He has stated in chief examination that the Chairman of the plaintiff bank knew that defendants 2, 4 and 5 have retired from the 1st defendant firm recently. He does not say or explain to the Court as to how the Chairman of the plaintiff bank knew about their retirement. He has admitted in cross-examination that no notice was given in writing to the plaintiff about the alleged retirement. In the letter of undertaking Ex. A-5 dated 15.4.1970, the partners of the 1st defendant have undertaken to give notice to the plaintiff of any change occurring in the firm in writing and that until receipt of such notice by the bank and the receipt of acknowledgement by them from the bank for the same, the plaintiff shall be entitled to regard all of them as partners of the 1st defendant firm. Since admittedly, no notice was given in writing



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about the alleged retirement of defendants 2, 4 and 5 from the 1st defendant firm to the plaintiff, they are, in our view, also liable for the suit claim. Section 45 of the Indian Partnership Act says that a partnership continues as to third persons who deal with the members thereof as partners until public notice of dissolution is given, even though, as between the partners the firm has been dissolved prior to such notice. In other words, a partnership is presumed to continue as to third persons until public notice of dissolution has been given, unless the person dealing with the firm after its dissolution, had actual knowledge of such dissolution. Accordingly, each partner of a former firm is bound by, and continues liable for, the acts of any former partner, if they would have been acts of the firm if dissolution had not taken place. The dissolution of a firm completely breaks the partnership relation between its members and consequently the agency constituted by that relation in regard to dealings with third persons. Thereafter, a partner ceases to have any authority to bind his previous co-partners by any act. The words "any act done by any of them which would have been an act of the firm if done before dissolution" indicate that notwithstanding the dissolution of the 1st defendant firm, the old partners of the firm continue to be liable as partners although by virtue of the dissolution they have ceased to be partners and are no longer partners for any act done by any of the old partners, provided that fact is of a character that would have been an act of the firm."

Thus, it would be very clear that the second defendant continues to be liable.



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18. As a matter of fact, the judgment of the Hon'ble Division Bench of this Court which is relied upon by the learned Counsel for the second defendant in *Vinaitheethal Achi's* case (cited *supra*) which falls under Section 31(2) of the *Partnership Act, 1932*, whereunder, the third party creditor has agreed that the amount will be paid by the new firm and thus, is not applicable in the instant case. The relevant portion of the paragraph No.6 of the said judgment is also extracted hereunder :-

" 6..... In this connection, we may also refer to the decision in Meenakshi Achi Vs. Subramanian Chettiar, 69 Mad LW 704 : A.I.R. 1957 Madras 8, wherein, a Division Bench of this court had held that if the new firm had assumed liability to pay the debt and the creditor had agreed to accept the new firm as his debtor to discharge his old partnership firm from its liability, the partners of the new firm would be liable to pay the creditor. It may be mentioned that the firm continued to exist even after the death of the original partners."

19. As a matter of fact, the Trial Court did not even advert to the above relevant provisions and settled law on the point and given an erroneous finding. Therefore, I hold that the second defendant continued to be liable for the repayment of the loan and the endorsement, made by the



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other partner namely, the third defendant in the suit on 08.03.2002, even after his retirement on 01.04.2000, is binding on him since no public notice whatsoever has been given by the second defendant and this point is answered accordingly.

Point No.iii :

20. Considering the fact that the borrowal is made by the firm for its business purposes, while awarding the post decree interest, the Trial Court has awarded only 6% per annum. In this regard, it can be seen that the transaction is commercial in nature. As a matter of fact, the learned Counsel for the appellant / plaintiff relied upon the judgment of the Hon'ble Division Bench of this Court in **Meera Raju's** case (cited *supra*) to indicate that in that case, the contractual interest rate was at 15.5% and 14.5% and the Court has ordered 12% per annum. I find that the Trial Court erred in awarding only 6% per annum, especially, when the contractual rate of interest, as per **Ex.A-1** promissory note, was 24% per annum and the transaction, being commercial in nature. Therefore, considering the nature of the transaction, efflux of time and the facts and circumstances of the present case, I deem it



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proper that the said post decree interest, awarded by the Trial Court, also be modified into 9% per annum.

21. In the result,

(i) A.S.No.257 of 2011 is partly allowed;

(ii) The judgment and decree of the learned Additional District Judge (Fast Track Court No.II), Salem in O.S.No.50 of 2005, dated 10.08.2009 is set aside inasmuch as it dismisses the suit against the second defendant;

(iii) The decree granted by the Trial Court is modified as:

" (a) the defendants 1 to 4 shall jointly and severally pay a sum of Rs.14,57,200/- with further interest at the rate of 9% per annum from the date of plaint till the date of decree and from the date of decree till the date of realisation and;

(b) the plaintiff would be entitled to the costs of the suit;"

(iv) As far as the costs of the Appeal Suit is concerned, the same is made easy.



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16.06.2023

Index : yes
Speaking order
Neutral Citation : yes
grs

To

1. The Additional District Judge
(Fast Track Court No.2), Salem.
2. The Section Officer,
V.R. Section,
High Court of Madras.



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D.BHARATHA CHAKRAVARTHY, J.,

grs

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