



WEB COPY



A.Nos.4067 of 2021, 2981 of 2022 and 378 of 2023

in
C.S.No.237 of 2021

SENTHILKUMAR RAMAMOORTHY, J.

The suit relates to a partnership firm under the name and style of M/s Bapalal & Co. (the Firm). The 1st plaintiff was one of the partners of the Firm, the 2nd plaintiff is the son of late Surendra M.Mehta, who was one of the partners of the Firm, the 3rd plaintiff is the widow of Tushaar S.Mehta, another former partner of the Firm, and the 4th plaintiff is the daughter of Suresh B.Mehta, former partner of the Firm. The deceased 1st defendant was a partner of the Firm until his death and defendants 8 to 10 are his legal heirs. The 2nd defendant is the sister of late Pranav H.Mehta, who was a partner of the Firm. The 3rd and 4th defendants are the children of late Tushaar S.Mehta, who was a partner of the Firm. The 5th to 7th defendants are persons who purchased the assets of the Firm from the continuing partners. The plaintiffs sued *inter alia* for declarations in respect of various conveyances executed by the continuing partners of the Firm and for complete dissolution of the Firm and settlement of the accounts thereof.



WEB COPY

2. Three applications were presented to reject the plaint. Application No.9067 of 2022 was filed by the 1st defendant. Since the 1st defendant died after the suit was instituted, the said application does not survive for consideration. Instead, Application No.2981 of 2022 was filed by one of his legal heirs, the 8th defendant, for rejection of the plaint. Similarly, Application No.378 of 2023 was filed for rejection of the plaint by the 2nd defendant. These two applications survive for consideration and all three applications are disposed of by this common order.

3. Oral arguments were advanced on behalf of: the applicant/8th defendant in A.No.2981 of 2023 by Mrs.Sudharshana Sunder, learned counsel; the applicant/2nd defendant in A.No.378 of 2023 by Mr.U.Karunakaran, learned counsel; the 5th to 7th defendants in the suit by Mr.T.K.Ramkumar, learned counsel; the plaintiffs by Mrs.L.Maithili, learned counsel; and the 3rd and 4th defendants by Mr.Roshan Balasubramanian, learned counsel.



WEB COPY

4. Learned counsel for the applicant/8th defendant submitted that one group of partners retired from the Firm in 1984. By drawing reference to a letter dated 25.06.1984 from the Firm to the Bank of India, learned counsel submitted that the Firm informed the Bank about the retirement of four partners, namely, Surendra M. Mehta, Suresh B. Mehta, Naresh M. Mehta and Tushaar S. Mehta. She also pointed out that the retired partners signed this document. She next referred to the deed of partial dissolution dated 09.12.1985 and pointed out that the deed specified that the Group A partners, namely, Surendra M. Mehta, Suresh B. Mehta, Tushaar S.Mehta and Naresh M.Mehta had retired from the Firm by permitting the other partners, namely, Harshkant S.Mehta, Sreekant S.Mehta and Pranav H.Mehta to carry on the business of the Firm with effect from 26.06.1984.

5. Learned counsel submitted further that the Firm was originally formed on 28.10.1981 and reconstituted on 06.06.1983. As per the reconstituted partnership deed, she submitted that the retiring partner is not entitled to the goodwill or assets of the Firm. The rights of such retiring



WEB COPY

partners are limited to the amount standing to the credit of the respective partner and the profit accrued up to the date of retirement of such partner.

On a combined reading of the partnership deed and the partial dissolution deed, learned counsel contended that the partners who retired cannot make a claim for the goodwill or assets or seek dissolution of the Firm.

6. The next contention of learned counsel was that a suit was filed by one of the retired partners, Naresh M.Mehta, before the City Civil Court at Bombay in S.C.No.4762 of 1994. The suit was directed against Pranav H.Mehta and Sreekant S.Mehta and decided by judgment and decree dated 27.11.2002. Learned counsel pointed out that the Court concluded that the partners referred to as Group A partners under the deed of partial dissolution retired from the partnership. On such basis, the suit was dismissed with costs. Learned counsel further submitted that no appeal was filed against the said judgment and decree. Therefore, she contended that the said judgment and decree had become final and binding.



WEB COPY

7. Learned counsel thereafter referred to the suit filed by Pranav H. Mehta before the City Civil Court at Chennai. This suit was directed against the partners who retired, namely, Surendra M.Mehta, Tushaar S.Mehta, Naresh M.Mehta and Suresh B.Mehta. In this suit, Pranav H.Mehta had prayed for a declaration that the defendants are not partners of the Firm and for a permanent injunction to restrain the defendants from interfering with the administration of the Firm. Learned counsel pointed out that the suit was dismissed after recognizing that the defendants had retired from the Firm under Ex.P4. Learned counsel also referred to the appeal filed against the above mentioned judgment and decree in A.S.No.240 of 2001. By judgment dated 04.07.2003, she pointed out that the judgment and decree of the trial court was affirmed by the first appellate court. She also referred to the order dated 10.12.2020 by which the miscellaneous petition for setting aside the abatement on account of the death of the sole appellant was dismissed by this Court.

8. In view of the above judgments, learned counsel submitted that the present suit is barred by *res judicata* and that the plaintiffs are not

Page 5 of 27



WEB COPY

entitled to resurrect issues conclusively decided in earlier civil proceedings between the parties. She concluded by reiterating that the plaintiffs are not entitled to seek dissolution of the Firm after retiring from the Firm with effect from 25.06.1984.

9. Mr.U.Karunakaran, learned counsel for the applicant in A.No.378 of 2023/2nd defendant, made submissions next. His first contention was that the suit is barred by limitation. By drawing reference to the Limitation Act 1963 (the Limitation Act), learned counsel submitted that a suit for accounts should be filed within a period of three years from the date of retirement of the partners concerned. Although Section 37 of the Partnership Act, 1932 (the Partnership Act) enables a retired partner to sue for a share of profits if his accounts were not settled upon his retirement, learned counsel submitted that Section 37 is subject to a contract to the contrary. Learned counsel contended that clause 4 of the partnership deed dated 06.06.1983 qualifies as a contract to the contrary because a retired partner is not entitled either to the goodwill or assets of the Firm.



WEB COPY

10. The next contention of learned counsel was that arbitration proceedings were initiated earlier in respect of the same dispute. Therefore, he submitted that the present suit is not maintainable. The last contention of learned counsel was that the retirement of the partners constituting Group A under the deed of partial dissolution was recognized in earlier civil proceedings, such as the judgment and decree in S.C.No.4762 of 1994 and the judgment and decree in O.S.No.9548 of 1995. Therefore, he submitted that the present suit is barred by *res judicata*. He further contended in conclusion that, even reliefs 'a' to 'c' in the suit, which are in relation to more recent transactions, are purely consequential to reliefs 'g' and 'h' and, therefore, the plaint is liable to be rejected as a whole both on the grounds of limitation and *res judicata*.

11. Mr.T.K.Ramkumar, learned counsel, advanced arguments on behalf of the 5th to 7th defendants. His first contention was that the suit is not maintainable at the instance of retired partners. He substantiated this contention by comparing and contrasting Sections 32 and 39 of the

Page 7 of 27



WEB COPY

Partnership Act, which deal with retirement and dissolution, respectively. He also referred to the fact that the income tax returns of these persons indicate that they have retired from the Firm.

12. In response to these contentions, Mrs.L.Maithili, learned counsel for the plaintiffs, invited my attention to the order passed in the petition to set aside the abatement of the second appeal. By drawing reference to paragraph 10 thereof, learned counsel submitted that the Court recorded a finding that the miscellaneous petition to set aside the abatement was kept pending and that conveyances were effected by the continuing partners while the matter was pending. The next contention of learned counsel was that the plaint cannot be rejected in part. In support of this contention, she relied upon the judgment of the Hon'ble Supreme Court in *Madhav Prasad Aggarwal and Another v. Axis Bank Limited and another(Madhav Prasad Aggarwal)*, (2019) 7 SCC 158. By referring to the reliefs prayed for in the plaint, she submitted that the admitted position is that accounts were not settled. Consequently, she submitted that at least prayer 'g' in the plaint cannot be rejected at the threshold.



WEB COPY

13. As regards the plea of limitation, she submitted that the cause of action is continuing since accounts have not been settled till date. Her next contention was that fraud unravels everything. The judgment of the Hon'ble Supreme Court in *A.V.Papayya Sastry and others v. Government of Andra Pradesh and others*, (2007) 4 SCC 221, was relied upon in this regard. Learned counsel for the plaintiffs refuted the contention that the suit is liable to be rejected because of the arbitration clause by submitting that parties waived the arbitration clause by instituting multiple civil suits. As regards the plea of *res judicata*, learned counsel submitted that the relief prayed for in the Bombay suit was different. She further submitted that the Court merely concluded that the plaintiff therein had retired from the Firm.

14. Learned counsel for the 3rd and 4th defendants supported the plaintiffs. His first contention was that *res judicata* will not stand in the way. In support of this contention, learned counsel referred to S.C.No.4762 of 1994 and pointed out that only Naresh M.Mehta filed the said suit. Consequently, he submitted that the judgment and decree would not be binding on the other three retired partners and their respective legal heirs.



As a corollary, he submitted that *res judicata* is not applicable in as much as the application of *res judicata* requires that the parties to the two suits should be the same and the matters in issue should be substantially and directly the same. With regard to O.S.No.9548 of 1995, learned counsel submitted that the suit was dismissed by the City Civil Court at Chennai. Therefore, he contended that it was not possible for the defendants therein to file an appeal against the suit. By relying upon the judgment of the Hon'ble Supreme Court in *Ramesh Chandra v Shiv Charan Dass and others, 1990 (supp) SCC 633*, particularly paragraph 4 thereof, he contended that *res judicata* would operate only if the aggrieved party is in a position to challenge an order. By relying on the judgment of this Court in *M/s. Ram Mohan and Co. v. Ganesar Ginning Co.P. Ltd. and others, 2000-1-L.W.143*, particularly paragraph 22 thereof, learned counsel submitted that a party in whose favour the proceedings end is not entitled to file an appeal against a finding and that, therefore, such finding cannot operate as *res judicata*. By referring to the judgment in *Kuppuswami v. Krishnaveni and others, 1995-2-L.W.793*, he submitted that even cross objections cannot be filed against a finding unless the decree is based on such findings.



WEB COPY

15. As regards the retirement of the partners from the Firm, learned counsel submitted that the deed of partial dissolution only dealt with the transfer of the telephones of the Firm. Since such telephones are assets of the Firm, learned counsel contended that retired partners are also entitled to a share of the assets of the Firm. In this connection, he also referred to the draft deed of dissolution dated 22.06.1984 and pointed out that the said draft deed of dissolution provided for division of the assets of the Firm.

16. As regards the plea of limitation, learned counsel submitted that the suit is founded on Section 88 of the Indian Trusts Act, 1882 (the Trusts Act). Consequently, Section 10 of the Limitation Act becomes applicable and there is no limitation period in respect thereof. On this issue, he relied upon the following judgments:

- (i) *Satti Paradesi Samadhi and Pillayar Temple v. M.Sakuntala and others*, (2015) 5 SCC 674, paragraphs 14 and 15;
- (ii) *G.V.Films v. Gayathri Holdings and another*, 2009 (4) L.W.891, paragraphs 12 to 15;



- (iii) *Ramnarayanan and others v. Kashinath Jagnarain and another*, 1953 SCC OnLine Pat 154, paragraphs 6, 8 and 10;
- (iv) *P.S.Nagaajan v. Robert Hotz*, ILR (1995) 1 P & H 426, page Nos.118 and 121.

17. Learned counsel also submitted that in a suit for dissolution of a partnership, all partners are effectively plaintiffs. He relied upon Order 23 of the OS Rules and the judgments in *Devsey Khetsey v. Hirji Khairaj*, MANU/MH/0072/1941 and *Edulji Muncherji Wacha v. Vullebhoy Khanbhoy and others*, MANU/MH/0007/1883. In conclusion, he submitted that a plaint cannot be rejected on the ground of *res judicata* because the Court is required to examine the pleadings, issues and the judgment and decree in the earlier case and compare the same with the subsequent case before deciding whether the subsequent suit is barred by *res judicata*. According to learned counsel, such exercise cannot be carried out in an application to reject the plaint. In support of this proposition, he relied upon the judgment of the Hon'ble Supreme Court in *Srihari Hanumandas Totala v. Hemant Vithal Kamat and others (Srihari Totala)*, (2021) 9 SCC 99.



WEB COPY



18. In the above factual context, the first step is to understand the nature of relief prayed for in the suit. The reliefs prayed for in the suit are as under:

“a) Declare the sale deed bearing Document No.8509/2018 dated 29.11.2018 executed by the 1st defendant in favour of 7th defendant, registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.

b) Declare the sale deed bearing Document No.6361/2019 dated 22.07.2019 executed by the 1st defendant in favour of the 6th defendant, registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.

c) Declare the sale deed bearing Document No.6362/2019 executed by the 1st defendant in favour of 5th defendant registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.



d) Declare that the Partition Deed bearing Document No.3668/2005 dated 03.06.2005 between Late Pranav H Mehta, Late Pravina H Mehta, the 1st defendant and the 2nd defendant, registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.

e) Declare the Settlement Deed bearing No.3669/2005 between Late Pranav H Mehta and Late Pravina H Mehta, registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.

f) Declare that Settlement Deed bearing No.3670/2005 dated 23.06.2005 between Late Pravina H Mehta and the 2nd defendant, registered before the Sub-Registrar, Neelankarai as null and void ab initio and not binding on the plaintiffs.

g) Direct the 1st defendant to complete dissolution of the Partnership Firm and settlement of accounts of the Firm Bapalal & Co.1983;



WEB COPY



h) Pass an award or decree for distribution of the assets of the Firm Bapalal & Co. 1983 mentioned in the schedule hereunder, granting the 1st plaintiff 8.34% of the assets of the Firm, granting the 2nd plaintiff 16.67% of the assets of the Firm, granting the 3rd plaintiff 5.56% of the assets of the Firm and granting the 4th plaintiff 16.67% of the assets of the firm.

i) Pass a decree of permanent injunction restraining the defendants, by themselves, their partners, men, servants, agents, distributors, representatives, heirs or anyone claiming through or under them from in any way alienating or encumbering the properties of the firm as scheduled hereunder.

j) Decree the suit with costs.



WEB COPY

k) Pass such further or other orders that this Court may deem fit and proper in the facts and circumstances of the case”

19. The reliefs prayed for can be classified into three categories (excluding the costs and residuary claims). The first category consists of remedies in respect of conveyances already executed by one or more of the defendants. Prayers 'a' to 'f' fall within this category. The second category consists of remedies in respect of dissolution, accounts and assets of the Firm. Prayers 'g' and 'h' relate to this category. The third category consists of injunctive relief to restrain further conveyances. Prayer 'i' falls within this category. As submitted by learned counsel for the 8th defendant, prayers 'a' to 'f' and, indeed, even prayer 'i' are consequential to prayers 'g' and 'h'. As regards prayers 'g', there are two parts to it. The first limb of prayer 'g' relates to the dissolution of the Firm and the second limb to the settlement of accounts of the Firm. While strongly refuting the plaintiffs' right to seek a share in assets or dissolution, the contesting parties agree that the accounts of the Firm have not been settled till date. Bearing in mind the dictum in



WEB COPY

Madhav Prasad Aggarwal that a plaint cannot be rejected in part, the question as to whether the relief of settlement of accounts is barred by limitation assumes significance.

20. Learned counsel for the 2nd and 8th defendants contended that a suit for accounts should have been filed within a period of three years from the date of retirement of the retired partners. On the contrary, learned counsel for the plaintiffs and the 3rd and 4th defendants submitted that the plaint has been instituted by relying on Section 88 of the Trusts Act and Section 37 of the Partnership Act and that, therefore, the plaint is not liable to be rejected on the ground of limitation. An application to reject the plaint should be decided largely by referring to statements made in the plaint, which may include documents referred to therein. At paragraph 48 of the plaint, the plaintiffs have made express reference to Section 88 of the Trusts Act. The plaintiffs state that a partner has a fiduciary duty to hold the assets and profits in trust for the other partners. Section 88 of the Trusts Act is as under:



WEB COPY



“Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other persons the advantage so gained.”

21. Learned counsel for the plaintiffs and the 3rd and 4th defendants also relied on Section 37 of the Partnership Act, which is as under:

37. Right of outgoing partner in certain cases to 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 per cent. per annum on the amount of his share in the property of the firm: Provided that whereby 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.

22. On examining Section 37, it appears that a retired partner, whose accounts have not been settled, is entitled to make a claim for the profits earned by retaining his contribution in the firm, including interest



WEB COPY

thereon. Section 37 is, no doubt, subject to a contract to the contrary.

According to learned counsel for the 2nd defendant, clause 4 of the partnership deed dated 06.06.1983 constitutes a contract to the contrary.

23. Limitation is ordinarily a mixed question of fact and law unless the relevant facts are admitted by the contesting parties. Only if the relevant facts are admitted by the contesting parties, it becomes a pure question of law. In this case, whether clause 4 of the partnership deed qualifies as a contract to the contrary in terms of Section 37 of the Partnership Act requires not only an interpretation of clause 4 in the context of the partnership deed but also entails detailed examination of disputed questions of fact. For such purpose, all the documents relating to the retirement of partners, including the terms and conditions relating thereto should be tested. This exercise cannot be carried out while deciding an application to reject the plaint.

24. In addition, the plaintiffs and the 3rd and 4th defendants place



reliance on Section 10 of the Limitation Act. Whether the contribution made by the retired partners to the Firm creates an express or constructive or resulting trust and whether the plaintiffs are entitled to the benefit of Section 10 of the Limitation Act is a matter that can be appropriately determined only in course of final disposal. For these reasons, I am of the view that the plaint is not liable to be rejected on the ground of limitation.

25. The next ground on which the respective applicant seeks to reject the plaint is that the suit is barred by *res judicata*. The said contention was made by relying upon the previous suits. The first of the suits, S.C.No.4762 of 1994, was instituted by Naresh M.Mehta against Pranav H. Mehta and Sreekant S.Mehta. Thus, it is clear that all the retired partners and all the continuing partners were not made parties to the suit. The reliefs prayed for in the suit are in relation to an immovable property: Plot No.2, 1st Floor, Deepak Building, Peddar Road, Bombay. Therefore, the parties are different and the reliefs claimed are not directly and substantially in issue in the present suit. The next suit, O.S.No.9548 of 1995, was filed by Pranav H.Mehta, who is one of the continuing partners, against the four retired

Page 21 of 27



partners. While it appears that a finding was recorded on retirement, this suit was dismissed and the judgment and decree is final and binding as on date. Therefore, the present suit cannot said to be barred by *res judicata* merely because of the finding in the suit that the four partners had retired from the Firm.

26. In the context of *res judicata* as a basis for an application to reject the plaint, the judgment of the Hon'ble Supreme Court in ***Srihari Totala*** is of considerable significance. In paragraph 25 of the judgment, the Hon'ble Supreme Court held as under with regard to rejection of the plaint on the ground of *res judicata*:

25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11 (d) can be summarised as follows:

25.1. To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.

25.2. The defence made by the defendant in



the suit must not be considered while deciding the merits of the application.

25.3.To determine whether a suit is barred by res judicata, it is necessary that (i) the “previous suit” is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a Court competent to try the subsequent suit.

25.4.Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the “previous suit”, such a plea will be beyond the scope of Order 7 Rule 11(d), where only the statements in the plaint will have to be perused.

Thereafter, in relevant part in paragraph 27, it was held as below:

27.... Therefore, the plaint, on the face of it, does not disclose any fact that may lead us to the conclusion that it deserves to be rejected on



the ground that it is barred by principles of res judicata. The High Court and the trial Court were correct in their approach in holding, that to decide on the arguments raised by the appellant, the Court would have to go beyond the averments in the plaint, and peruse the pleadings, and judgment and decree in O.S.No.103 of 2007. An application under Order 7 Rule 11 must be decided within the four corners of the plaint. The trial Court and High Court were correct in rejecting the application under Order 7 Rule 11 (d).

27. The principles formulated by the Hon'ble Supreme Court are squarely applicable to the present case. As discussed earlier, the parties to the earlier suits are not the same and it appears *prima facie* that the issues directly and substantially in issue in the present suit are not the same as the issues directly and substantially in issue in the earlier suits. More importantly, as held by the Hon'ble Supreme Court, a definitive conclusion cannot be drawn without closely examining the pleadings, issues and judgement and decree in the earlier suits and drawing a comparison to the plaint in the present suit. Therefore, the plaint is not liable to be rejected on



WEB COPY

the ground of *res judicata* but it is open to the defendants to raise this issue or issue estoppel in course of hearing of the suit.

28. The respective applicant also contended that parties had earlier invoked the arbitration clause, and this aspect merits a brief discussion. An arbitration clause is not a bar to the exercise of jurisdiction by a civil court. Put differently, a party to an arbitration agreement is not prohibited from filing a civil suit. The effect of Section 8 of the Arbitration and Conciliation Act 1996 is that the counter party/defendant in such suit has the option of seeking a reference of the dispute to an arbitral tribunal. If the counter party/defendant chooses to contest the suit on merits, the court will proceed to determine the suit on merits. Only in the event of an application under Section 8 being filed, the Court will give effect to the arbitration agreement by referring the parties for arbitration. Therefore, the existence of an arbitration clause is not a ground to reject the plaint as being barred by law.

29. Therefore, the plaint is not liable to be rejected on any of the



WEB COPY

grounds canvassed by the respective applicant or by defendants 5 to 7.

Consequently, Application Nos.2981 of 2022 and 378 of 2023 are dismissed. In view of the demise of the applicant in A.No.4067 of 2021, the said application is closed.

23.03.2023

sbn



WEB COPY



SENTHILKUMAR RAMAMOORTHY, J.

sbm

A.Nos.4067 of 2021, 2981 of 2022 and 378 of 2023
in
C.S.No.237 of 2021

23.03.2023