BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 16.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD) No.204 of 2008

1.Ayub Ali @ Vaisool Karunai Ayub Ali
2.Ohudu (Died)
3.Faritha
4.Mustafa
5.Luthfiya ...Appellants

(Appellants 3 to 5 and 6th respondent are brought on record as legal heirs of the deceased second appellant vide Court order dated 29.07.2022 made in C.M.P(MD) No.9580 of 2016)

.vs.

1.J.Zahabar
2.Seeni Mohideen
3.Mohammed Ibrahim
4. K.S.G.Amaran
5.Chunga Chum Shing
(Respondents 2 to 5 remained exparte in the trial Court. Hence, the notice to respondents 2 to 5 are not necessary)
6.Jamees Khan ...Respondents

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C against the judgment and decree dated 28.01.2008 passed in O.S.No.22 of 2004, by the learned Additional District Judge, (Fast Track Court), Ramanathapuram

For Appellant : Mr.M.AjmalKhan, Senior Counsel for M/s.Ajmal Associates

For R-1 : No appearance
For R2 to R5 : Exparte
For R6 : Mr. A.Nawazkhan

JUDGMENT

This Appeal Suit has been preferred as against the decree and judgment passed in O.S. No.22 of 2004 on the file of the Additional District Judge, Ramnad, dated 28.01.2008, wherein the first respondent has filed a suit as against the appellants and other respondents 2 to 5 for recovery of money and the suit was decreed by the trial Court. As against the decree and judgment, the present appeal has been filed by the defendants 1 and 2.

2. For the sake of convenience and brevity, the parties hereinafter will be referred to as per their status/ranking in the Tribunal.

3**. The averments of the plaint are as follows:**

The defendants 1 and 2 are natives and permanent residents of India. They started a partnership business in the name of 'Fathima Sodiyan” in Singapore. To fulfil the statutory requirements of the State of Singapore, the Citizen of that country must also be on record as partner of the firm to enable borrowings. The defendants 1 and 2 were in actual control and management of business dealings all in cash, cheques and outgoings. Accordingly, the third defendant was recorded as a partner of firm at the first instance and later, the fourth defendant lend his name to be recorded as partner. To that effect the first defendant also issued letter dated 28.06.1990. In the month of February, 1984 at the request of the defendant's 1 and 2, the plaintiff lent his name for the record of partnership to fulfil the requirements of the rules of that Country. The plaintiff was so recorded as partner for the limited period from 06.02.1984 to 23.07.1984. After the expiry of the period, the fifth defendant got recorded as a partner and the business was closed on 08.07.1988. When the defendants 1 and 2 requested the plaintiff to give guarantee to the debt due to the bank and the defendants 1 and 2 promised and undertook to discharge the loan amount due to the Singapore bank and they guaranteed that no liability will be charged on the plaintiff.

3.1. The plaintiff was only a name lender and he had no interest in the business of the Fathima Sodiyan run by the defendants 1 and 2. The plaintiff did not derive any kind of benefit or profit from the business. The defendants 1 and 2 borrowed money from the Singapore Development Bank and the plaintiff stood as guarantor to the Singapore Development Bank and to that effect letter was also given to the Bank on 02.03.1984. The defendants 1 and 2 promised to clear the debt due to the bank and discharge and relieve the plaintiff of his personal guarantee to the Bank. Thereafter, due to default in repayment of money, the said Bank filed suit before the Singapore High Court in Suit No. 628 of 1989 and in that suit defendants 1 and 2 remained exparte. In that suit, the plaintiff was also a party and a decree was passed for Rs. 3,31,883.84 Singapore dollars.

3.2. The defendants have no property in Singapore. The plaintiff has paid the entire amount to the bank. Initially, the plaintiff has paid 15000 dollars in three instalment and thereafter, between 18.02.1992 to 19.06.1992, paid 90,000/- Singapore dollars and in total paid a sum of 105000/- dollars. The defendants 1 and 2 are liable to pay the said amount to the plaintiff and the defendants 1 and 2 successfully evaded the process from Singapore Court for exaction and also they attempted to dispose the property in India to defraud the plaintiff. The defendants 3 to 6 also have no property in Singapore and they are formal parties. Therefore, the plaintiff is entitled to recover a sum of 1,05,000/- Singapore dollars equivalent to Rs.17,32,500/- from defendants 1 and 2 and also the plaintiff is entitled to mandatory injunction to get released on the examination of the plaintiff from the Singapore Court in C.S. No. 208 of 1989 and also permanent injunction restraining the defendants from alienating the property and the plaintiff's is totally exonerated and released from the High Court Judicature of Singapore in the said suit.

4. **The brief averments of the written statement and additional written statement filed by the defendants 1 and 2 are as follows:**

The averments made in para (3) of the plaint are false. It is true that the business in partnership name by name Fathima Sodiyan was started in Singapore in which the plaintiff and the defendants 1 to 5 are partners but the plaintiff wantonly and willfully suppressed the existence of the said partnership deed for the reasons best known to him. As per the partnership deed the plaintiff is also jointly and severally liable along with the other partners for the debts of the partnership firm. Therefore, the allegation that the defendants 1 and 2 alone were in the actual control and management of the business is false.

4.1. On the other hand, the plaintiff was also under the actual control of business with other partners. The plaintiff was auditing accounts of the said partnership firm. The allegation that the first defendant had admitted and issued letter dated 28.06.1990 is false.

The first defendant did not write any such letter dated 28.06.1990. It is false to state that the plaintiff's name was recorded to fulfil the requirements of the rules of the said country. On the other hand, the actual partner who engaged himself in running the business and shared profit and loss. The business was not closed on 08.07.1988 as alleged by the plaintiff, on the other hand the partnership firm is yet in existence running the business till date and the plaintiff continued as partner and he is managing the business. The loan was borrowed from the Singapore Development Bank in the year 1984 and on that date the plaintiff was one of the partner of the firm so he is also liable to pay the said loan to the bank. Substantial amount has been paid towards loan due to the said bank by these defendants and these defendant 1 and 2 are not aware of the proceedings taken by the said bank in the High Court of Judicature at Singapore. No notice or summon were served upon them. The plaintiff only received summons and appeared before the Singapore Court, but he wantonly and deliberately did not inform the court proceedings to the defendants.

4.2. The decree passed by the High Court of Singapore is for a sum of 3,31,883/- Singapore Dollars. The defendants 1 to 6 have jointly offered their house properties for security purpose and now it is worth about Rs.5,00,000/- Singapore dollars. The Singapore bank as a mortgagee is entitled to sell the mortgaged property and to adjust the sale proceeds towards loan amount. The plaintiff has suppressed all these facts. The plaintiff has not filed any documents about the execution proceedings and to show that he paid the entire amount to the bank. The plaintiff is a guarantor as well as one of the partners of the firm, is liable to pay his share amount towards decree amount. Hence the defendants are not liable to reimburse the said amount to the plaintiff. The defendants 3 to 6 are all Singapore citizens and they are also judgment debtors as per the decree of Singapore High Court. They are also jointly and severally liable to pay the amount but the bank might have executed the decree as against the property mortgaged. The plaintiff filed suit originally claiming a sum of 15000/- Singapore dollars and the same was denied by the defendants. Whileso, the plaintiff thereafter amended the plaint and made additional claim of 90,000 dollars. Even according to the plaintiff he made additional claim of 90,000/- dollars whereas the details given in the amended plaint is only for Rs.80,000/- dollars. Therefore, the claim of the plaintiff is falsified through this plaint. The plaintiff has not stated any reason for non filing of suit for the entire amount at the time of filing the suit, therefore, the suit is liable to be dismissed.

5. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues:

1)Whether this Court is having jurisdiction to try the suit ?

2) Whether the plaintiff is entitled to the suit amount as prayed for?

3) To what other relief the plaintiff is entitled to ?

6.In order to prove the case before the trial Court, on the side of the plaintiff they have examined P.W.1 and P.W.2 and marked Exs.A1 to A9 and on the side of the defendants, D.W. 1 was examined and documents Exs.B.1 to B.2, C.1 and C2 were marked.

7. After analysing the evidence adduced on both sides, the trial Court has decreed the suit in respect of relief of recovery of money and dismissed the suit in respect of other reliefs. As against the relief granted for money decree the defendants 1 and 2 have preferred this appeal on the following grounds:

i) the judgment and decree of the learned District Judge is contrary to law, weight of evidence and probabilities of the case

ii) The learned judge ought to have dismissed the suit as there is no cause of action to file a suit within the jurisdiction of the learned Judge as the entire cause of action arose at Singapore outside the jurisdiction of Ramanathapuram

iii) The learned Judge ought to have seen that the suit was filed by the first plaintiff for recovery of money as against the appellants/defandants 1 and 2 on the basis of the decree passed by the High Court of Singapore in O.S. No.628 of 1984. The decree is against all the partners viz the appellants as well as the respondents herein, and as such the finding of the learned District Judge that the appellants/defendants 1 and 2 alone are liable to satisfy the decree passed by the High Court of Singapore is not in conformity with law.

iv) the learned Judge ought to have seen that the first respondent/plaintiff has not produced the partnership deed so as to sustain his plea that he is only a nominal partner and he is not liable to make any loss to partnership firm and as such the finding of the learned Judge that he plaintiff/first respondent is not liable to the debts incurred by the partnership firm is opposed to the decree passed by the High Curt of Singapore in O.S. No.628 of 1989

v) the learned Judge ought to have seen that the alleged undertaking given by the first appellant/ first defendant under Ex.A. 9 is forged and the same cannot be relied upon to exonerate the liabitliy of the plaintiff/1st respondent.

vi) the learned Judge ought to have seen that there cannot be any agreement or undertaking nullifying the decree passed by the competent court of law and as such the reliance placed on under Ex.A.9 cannot be sustained

vii) the learned Judge ought to have seen that the first respondent/plaintiff had chosen to file the suit initially for recovery of a sum of Rs.15000/- singapore dollars in 1992 whereas he had chosen to file an application for amendment in 1994 for the recovery of balance sum and as such the recovery of the additional sum on the basis of the amendment is hit by Order 2 Rule 2 C.P.C.

8. The learned counsel appearing for the appellant would contend that the plaintiff and defendants are partners of Fathima Sodiyam and they run the business through the above said partnership firm at Singapore and they obtained loan from the Singapore Development Bank. At that time, they offered properties of the partners of the firm and mortgaged the property to the bank. They also paid instalments to the bank and after some time the first defendant came to India and the second defendant went to Hongkong and the other defendatns have been running the business. Due to non payment of amount by other partners, the bank has initiated steps to recover the money and filed a suit in C.S. No.608 of

1989 before the Singapore Court and a decree also was passed for a sum of Rs.3,31,883/- Singapore dollars directing the seventh defendant to pay the amount along with other defendants jointly and severally.

8.1. The plaintiff is the seventh defendant in the above said suit and after the decree the properties mortgaged to the bank were brought for auction and a sum of Rs.3,70,000/- dollars were realized for the decree amount. Therefore, the plaintiff could not pay the above said amount as alleged by him in the plaint. The plaintiff has filed documents to show that he paid the above said amount to the attorney for the due payments to the bank but those documents have not been proved in accordance with law and they have not examined any witnesses to prove those documents. The auction sale of the properties which were mortgaged to the bank by the partners have been supresseed by the plaintiff and the plaintiff initially filed a suit for a sum of Rs.15,000/- dollars and thereafter amended the plaint and included Rs.90,000/- dollars in total he filed the suit for Rs.1,05,000/- dollars.

8.2.The plaintiff was also the actual partner and thereby only decree was passed by the Singapore High Court by directing to pay the amount along with other defendants. Therefore, the plaintiff even assuming that he has paid the amount, he is also liable to pay the amount. Per contra, he claimed that the first defendant executed a deed Ex.A9 and he admitted his liability for the entire amount. Ex.A.9 was not executed by the first defendant and the signature found in the document is not that of the first defendant. Even as per the recitals of Ex.A.9 the date of execution is 10.06.1990 but decree was much prior to the execution of document. Whileso there is no recitals about the decree passed by the Singapore High Court. Therefore the plaintiff failed to prove the said document. Admitedly the amount was borrowed for the partnership firm and and the decree was passed by the Singapore High Court as against all the partners. Therefore, all the partners are liable to pay the decree amount. Whileso, the plaintiff cannot seek remedy only as against the defendants 1 and 2. The trial Court relied on Ex.A.9, which was not proved in accordance with law and the trial Court erroneously held that the suit claim is not in respect of partnership firm. Ex.B.4 is the sale certificate executed by the bank in favour of the third party in respect of the property mortgaged to the bank. As per Ex.B.4 the property was sold for 3,70,000/- Singapore Dollars, whereas the decree amount is only Rs.17,32,500/-.

9. Even according to Ex.B.4, the amount was already recovered by the bank. Whileso it is the duty of the plaintiff to prove why he has paid the amount of Rs.1,05,000/- dollars to the attorney. The above said documents were not proved in accordance with law. Therefore the judgment and decree passed by the trial Court are liable to be set adide by allowing this appeal.

10. Though notice was served on the first respondent none appeared for him. Respondents 2 to 5 were set exparte. 6th respondent was represented through his counsel and he is also sailing with the appellant.

11. This Court heard both sides and perused the records and upon hearing both sides the points for determination in this appeal are as follows:

1) Whether the trial Court has jurisdiction to try the suit?

2) Whether the first defendant executed Ex.A.9 ?

3) Whether the plaintiff paid the decree amount to the bank?

4) Where the defendants 1 and 2 are liable to pay the said amount to the plaintiff?

5) Whether this appeal has to be allowed or not?

Point No.1

12. In this case the defendants 1 and 2 have raised objection in respect of territorial jurisdiction of the Court. This suit is filed by the plaintiff for recovery of money as against the defendants. The defendants 1 and 2 are residing within the jurisdiction of the trial Court and the suit was also filed as against the defendants and other defendants who are residing in other places. The suit is filed based on the decree passed by the Singapore Court where the plaintiff alleged to have paid the amount to the bank. Though the cause of action arose in Singapore, since some of the defendants are residing within the jurisdiction of the trial Court as per Section 20 of the Code of Civil Procedure the suit can be filed before the trial Court where the defendants 1 and 2 are residing within jurisdiction. The trial Court after elaborate discussion fairly came to conclusion that the suit is maintainable as per Section 20 of the Code of Civil Procedure.

Point No.2

13. In this case, according to the plaintiff, he paid money to the bank and after payment the first defendant executed undertaking deed and after payment the first defendant executed undertaking deed to pay the above said amount and the plaintiff is only a formal party and he is not liable to any amount to the bank on

behalf of the partnership firm and the first defendant will pay the entire amount of behalf of the partnership firm and to that effect he executed Ex.P.9 and the first defendant denied the execution of the above said documents. Whileso, it is the duty of the plaintiff to prove the execution of Ex.A.9. On careful perusal of Ex.A9 it reveals that the date of execution of document is 10.06.1990 and the decree was passed on 20.04.1990 but the decree passed by the Singapore Court has not been referrred in the deed. The very purpose of execution of the above said deed is to settle the decree amount of the Singapore Court. Whileso, there is no reference about the Singapore Court decree in the document and no reason was stated by the plaintiff as to why the recitals in respect of the decree has not been referred in the document, has not been explained. Further, the plaintiff failed to send the said documents, Ex.P.9 for expert opinion and thereby failed to prove the execution of Ex.A.9. In this context the trial Court has compared the signature of the first defendant with the written statement and other documents. The date of execution of alleged deed is 10.06.1990 and the written statement was filed on 27.12.1991. Though the Court has power under Section 73 of Evidence Act to compare the signature it is appropriate to send the documents for expert opinion. The trial Court ought to have send the documents for expert opinion. Therefore, the comparison is not on the contemporary period of the disputed documents. Therefore, the findings of the trial Court that the comparison of the signature made by the Court and as per the comparison both the signatures are one and the same is not acceptable. Therefore, the order passed by the trial Court is liable to be set aside in respect of the above said findings. Thus, the plaintiff failed to prove the execution of Ex.A.9. Thus the point is answered.

Point No.3

14. The plaintiff has filed the suit for recovery of money alleging that the Singapore Court has passed decree in C.S. NO.308 of 1989 and a sum of 3,31,883/- Singapore Dollars have to be paid by the defendants therein and the plaintiff is the seventh defendant in the suit and after the decree, he paid the entire amount and thereby the defendants are liable to pay the said amount. After satisfying the above said amount, the first defendant executed document by admitting his liability and the plaintiff is only a formal partner and the first defendant would pay the entire amount. Therefore, the plaintiff is entitled to reimburse the amount which was paid for the bank. In this context they have examined P.W.1 to P.W.3 and marked Exs.A1 to A9 and on the side of the defendants D.W.1 was examined and documents Exs.B.1 to B.2, C.1 and C2 were marked. The plaintiff has produced Exs.A3 to A7 and the statutory

declaration of Advocate Solicitor on 21.01.1993. On a perusal of the documents, they revealed that a sum of Rs.85,000/- dollars have been paid by the plaintiff. According to the plaintiff, he paid a sum of 1,05,000/- Singapore dollars. Therefore, the receipts filed by the plaintiff are not tallied with the said amount. Further, the plaintiff has not examined any witneses to prove those documents and mainly the plaintiff relied upon Ex.A.9 declaration letter dated 28.06.1993. This Court already in previous points decided that Ex.A9 was not proved by the plaintiff and thereby the plaintiff failed to prove his claim. Further, the defendants have marked Ex.B.4. On a perusal of that document, it reveals that there was a sale deed executed by the Singapore Development Bank in favour of one Sinnavappu Seeni Mohamed farook dated 04.11.1991 which was mortgaged for the loan obtained by the partnership firm Fathima Sodiyam. Therefore, it is the duty of the plaintiff to prove that how much amount was paid to the decree amount and he has to produce documents either from the bank or from the Singapore Court but the plaintiff has not filed the documents. Morever, the plaintiff has filed suit initially for 15,000/- Singapore dollars and thereafter, he amended the plaint and claimed additional 90,000/- dollars and in total 1,05,000/- dollars. To prove the same, he has not filed any documents, thereby the plaintiff has failed to prove the payment.

Point No.4.

15. According to the plaintiff, the defendants 1 and 2 are liable to pay the amount. It is an admitted fact that the suit was filed as against the partners of the firm before the Singapore Court and the Court directed the plaintiff/seventh defendant therein has to pay the amount jointly and severally along with other defendants in the suit. This defendants 1 and 2 are parties to the suit and as per the decree passed by the Singapore Court all the partners of the firm are jointly and severally liable to pay the amount. Whileso the plaintiff is also liable to pay the amount but the plaintiff in the suit sought for relief as against the defendants 1 and 2 and he has not prayed decree as against the other partners. Even assuming that the plaintiff has paid the entire amount on behalf of the other partners he is entitled to recover the amount from each partner on their respective shares but unfortunately they have not sought for prayer as against other partners. Even assuming that the defendants are liable to pay the amount to the extent of their share only they are liable to pay the amount, but the trial Court wrongly misinterpreted that the suit is not filed on partnership firm but based on decree. The decree of Singapore Court was based on partnership firm and thereby the findings of the trial Court is not inaccordance with law and the same is liable to be set aside. Therefore filing of suit seeking prayer as

against the defendants 1 and 2 alone is not maintainable for the entire decree amount and this Court already in the previous points decided that the plaintiff failed to prove the payment made by him to the bank and thereby the question of repayment by the defendants to the extent of their share would not arise. Thus the point no.4 is answered.

Point No.5

16. The trial Court mainly relied upon Ex.A.9 and failed to prove that Ex.P.9 was not proved in accordance with law and also the trial Court held that the suit is not based on partnership and only based on decree and the trial Court failed to consider that the decree was passed based on partnership firm and the plaintiff also admitted the partnership firm but his only contention is that he is not an actual partner and his name is included for registration purpose and he has not actually participated in the partnership firm but as per the decree passed by the Singapore Court the plaintiff is also one of the partner and he is also liable to pay the amount. Whileso he has not filed the suit for the shares of other partners but he has filed the suit only as against the defendants 1 and 2 for the entire amount. Even assuming that Ex.A9 is executed by the first defendant then how the plaintiff sought relief as against the second defendant has to be explained. When other defendants were

exonerated by the plaintiff why the second defendant has not been exonerated and why Ex.A.9 was alleged to have been executed has to be explained but no any explanation by the plaintiff to that regard. Therefore the trial Court without considering all the above aspects erroneously held that the suit is not filed for partnership firm and the Ex.A.9 has been proved. Therefore the decree and judgment passed by the trial Court are not sustainable and liable to be set aside.

17. In the result, the appeal suit is allowed and the decree and judgment passed by the trial Court in O.S.No. 22 of 2004 on the file of the learned Additional District Judge, (Fast Track Court), Ramanathapuram are set aside and the suit in O.S.No. 22 of 2004 is dismissed. No costs.

16.02.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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To:

1. The Additional District Judge,
   (Fast Track Court), Ramanathapuram

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

P. DHANABAL,J.

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A.S(MD) No.204 of 2008

16.02.2024