

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Dated: 28.4.2005

C o r a m

The Honourable Mr. Justice P.SATHASIVAM
and
The Honourable Mr. Justice S.K.KRISHNAN

O.S.A.NO.278 OF 1997

and

C.M.Ps.Nos.11390 of 1996, 13128 of 1997 and 6843 of 1998

Smt. Sarojini, recorded as
legal representative of the
Deceased 1st defendant.

1. Smt. Sarojini

..Appellant/ 3rd Defendant
(L.R. of 1st Defendant)

Vs

1.Kumari Bhagiyavathi
2.Smt.Rajalakshmi Ammal
3.Smt. S.Gajalakshmi

..Respondents/ Plaintiff &
2nd & 4th Defendants

Appeal filed under Order XXXVI Rule 1 O.S.Rules against
the judgment and decree of this Court passed in C.S.No.178 of
1981, dated 23.4.1992.

For Appellant : Mr.K.Venkatraman

For Respondent No.1 : Mr.S.Sundar

Senior Counsel

for Mr.A.S.Thambusamy

For Respondents No.2 and 3:Mr.V.Avudainayagam

S.K.KRISHNAN.J.

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JUDGMENT

Aggrieved by the judgment and decree passed by the learned Single Judge of this Court in C.S.No.178 of 1981, dated 23.4.1992, the third defendant has preferred this original side appeal.

2. The facts leading to the filing of this appeal are as follows:

The plaintiff, who is the first respondent herein,

has filed a suit against the defendants, for the following main

reliefs:

a) for partition and separate possession of the plaintiff A Schedule properties by metes and bounds and allot to her one fourth share in all the properties and valuing the B Schedule properties and deliver her 1/4th share therein to the plaintiff;

b) for directing the defendant to pay the marriage expenses of the unmarried plaintiff to be paid from out of the estate; and

c) for directing the defendants 1 and 2 to render a true and proper account of the mesne profits from 'A' Schedule and item 1 of the B Schedule property and pay her 1/4th share therein.

3. On the basis of the oral and documentary evidence, the learned Single Judge of this Court, passed a following preliminary decree:

"In the result, preliminary decree for partition and separate possession in respect of $\frac{1}{4}$ share in item 2 of plaintiff 'A' Schedule Ambattur house and $\frac{1}{8}$ share in respect of item 1 of plaintiff 'B' Schedule partnership business in favour of the plaintiff and in respect of $\frac{1}{8}$ share in item 2 of plaintiff 'A' Schedule and $\frac{1}{16}$ share in item 1 of plaintiff 'B' Schedule in favour of the second defendant is passed. In other respects, the suit is dismissed." Aggrieved by the judgment and decree passed by the learned Single Judge, the third defendant has preferred this appeal."

4. Before going into the contentions of both sides, it is necessary to see the facts of the case-in-brief, which are as follows:

a. The first and second defendants are the first and second wives of late Srinivasalu Naidu, respectively. The said Srinivasalu Naidu died intestate at Madras on 4.5.1980. The plaintiff and the third defendant are the daughters of second and first defendants respectively. The said Srinivasalu Naidu was running a company as a sole proprietor under the name and style of M/s. Srinivasalu Naidu & Co.,. Since the plaintiff and the defendants alone are the legal heirs, the plaintiff is entitled to 1/4th share, the first and second defendants $\frac{1}{8}$ th share each and the third defendant $\frac{1}{3}$ rd share in all the properties. The first and third defendants have been collecting the rental income from the schedule properties. Further, they have been carrying on the said business under the name and style of M/s Srinivasalu Naidu & Co. and evading to pay her share of the mesne profits. Though the notice was given by the plaintiff along with the second defendant, since the defendants 1 and 3 took untenable stand and have been evading to comply with the demand of the plaintiff, the plaintiff filed the above said suit for the above said reliefs.

5. Heard both sides.

6. The learned Counsel would appearing for the appellant would contend that though the learned Single Judge has stated that the third defendant has to render accounts in respect of the half share of the deceased Srinivasalu Naidu in the partnership firm till it got dissolved on 4.5.1980, since the same is not found place in the result portion, the judgment and decree passed by the learned Single Judge are not sustainable under law and therefore, they are liable to be set aside.

7. Further, relying on Section 37 of the Indian Partnership Act, 1932, the learned counsel for the appellant would contend that no property is passed from the dissolved partnership firm since the property is only the customs licence which is in the name of deceased Srinivasalu Naidu and that the appellant, who is the surviving partner, need not to share the profit with the plaintiff and the other defendants, who are claiming share in the partnership firm as running concern.

8. Per contra, the learned Senior Counsel appearing for the first respondent would contend that whatever the findings of the learned Single in his judgment, would bind the parties concerned, irrespective of whether the same would find a place in the result portion or not and therefore, the contention of the learned counsel for the appellant cannot be accepted.

9. Further, the learned Senior Counsel would contend that as per Sections 16 and 50 of the Indian Partnership Act, 1963, the third defendant has to render accounts as held by the learned Single Judge and therefore, the Original Side Appeal has to be dismissed.

10. It is not in dispute that the third defendant and the deceased Srinivasalu Naidu were the partners of M/s. Srinivasalu Naid & Co., and after the demise of Srinivasalu Naidu on 4.5.1980, the partnership firm was getting dissolved. Thereafter, a new firm was constituted, in which the third defendant, her son and daughter are the partners.

11. Now the question is that the finding of the learned Single Judge in para 27 of the judgment would bind the third defendant as the same is not found place in the operative portion of the judgment.

12. The finding of the learned Single Judge in para-27 of the judgment is as follows:

"So it is evident that the third defendant has to render accounts in respect of the half share of deceased Srinivasalu Naidu in

the partnership firm till it got dissolved on 4.5.1980."

13. No doubt, the above finding is not found place in the last para, i.e. result portion of the judgment.

14. The learned Single Judge while discussing the issues No.6 to 8 in C.S.No. 178 of 1981 gave such finding and held at the conclusion of the discussion that the issues are answered accordingly. When the above finding relate to the issues 6 to 8 and such issues are answered according to the discussion and finding, there is no necessity to sum up the same in the operative portion, i.e. last portion of the judgment. For the issues 6 to 8, when the learned Judge held that these issues are answered accordingly, the entire discussion portion would automatically become operative and whatever be the findings of the learned Judge in that portion shall bind the parties concerned and the parties concerned cannot shirk their responsibility or liability on the ground that the finding is not found place in the operative portion of the judgment.

15. Further, since the learned counsel for the appellant relies on Section 37 of the Indian Partnership Act, in support of his contention, it is necessary for us to see, what Section 37 of the Act, says:

"37. Right of Outgoing partner in certain case 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 where by 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 material respects comply with

the terms thereof, he is liable to account under the foregoing provisions of this section."

16. A plain reading of the above Section would not lend any support to the contention of the learned counsel for the appellant for the reason that admittedly either there was no final settlement of accounts or no contract to the contrary was entered and in such circumstances, it cannot be accepted that no property was passed from the dissolved partnership firm to the new partnership firm and therefore, the third defendant has to render accounts till the firm got dissolved on 4.5.1980.

17. On the other hand the learned counsel appearing for the respondents would rely on Sections 16 and 50 of the Indian Partnership Act, 1963.

18. Section 50 of the Act, reads as follows:

50. Personal profits earned after dissolution:

"Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name."

19. Clause (a) of Section 16 of the Act reads as follows:

Personal profits earned by partners:

Subject to contract between the partners-

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

20. A combined reading of the above said sections makes it clear that the surviving partner shall render accounts till the date on which the firm getting dissolved.

21. In view of the provisions of Sections 16 and 50 of the Act and when Section 37 of the Act would not lend any support to the contention of the learned counsel for the appellant, the contention of the learned Senior Counsel has to be accepted and that we are of the view that what was rightly held by the learned Single Judge in para-27 of the judgment

would certainly bind the third defendant.

22. For the foregoing reasons, the Original Side Appeal fails and is dismissed. No costs. Consequently, connected C.M.Ps. are also dismissed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

RNB

To,

The Sub Asst.Registrar
Original side,
High Court, Madras.

1 cc to Mr.A.S.Thambusamy, Advocate, SR. 20322
1 cc to Mr.V.Avudainayagam, Advocate, SR. 20237

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