Hari Singh Darbar

Vs

Mahant Vaishnavadas Guru Mahant Rajarangadas

Civil Appeal No. 1078 of 1966

(C. A. Vaidialingam, A. N. Ray JJ)

06.05.1971

JUDGMENT

VAIDIALINGAM, 1. -

1. The defendant appellant, in this appeal, by certificate, challenges the judgment and decree dated October 18, 1960 of the Madhya Pradesh High Court in First Appeal 71 of 1957 reversing the decree of the trial Court.

2. The circumstances leading up to the institution of the suit on September 4, 1952 by the respondents, out of which these proceedings arise may be stated; The respondents instituted Civil Suit 7-B of 1955 in the Court of the Additional District Judge, Raipur, against the appellant for recovery of a sum of Rs. 55,618/10/- comprised of Rs. 46,900 as principal and Rs. 8718/10-in respect of interest on the said amount. The plaint allegations are briefly as follows :

3. The plaintiff is a banker and money lender and the defendant is a merchant. Early in October, 1949, the appellant who was building a cinema house and wanted to equip the same with necessary furniture and machinery for the purpose of conducting cinema shows, approached the respondent for a loan to enable him to complete the work. The respondent agreed to give a loan up to Rs. 50,000. Accordingly from October 4, 1949 to September 20, 1950 on different dates he advanced various amounts totalling Rs. 46,900. Details of the date and the amounts so advanced were all given in the schedule to the plaint. In particular, according to the plaintiff, he lent Rs. 900 on September 26, 1950. No repayments had been made by the defendant in spite of demands. Accordingly, the suit was instituted for the recovery of the amount, mentioned earlier.

4. The defendant in his written statement dated June 30, 1953 pleaded as follows : He admitted having taken a loan of Rs. 46,000, but denied having received Rs. 900 on September 26, 1950 as alleged by the plaintiff. He pleaded that a partnership had been entered into between himself, the plaintiff and one Shambhu Dayal Shukla on October 4, 1949. He referred to some of the clauses in the partnership deed, particularly Clause 10. The partnership was for the purpose of exhibiting cinema films in the building concerned. The partnership was to pay rent for his building at Rs. 2125. According to the terms of the partnership deed the plaintiff was to appropriate towards the loan the share of profits of the defendant in the partnership as well as the monthly rent payable by the partnership to him. The partnership continued till March 22, 1953 and no accounts of the partnership had been taken. Therefore, it was impossible to determine the profits that have accrued to his share as well as the credit that should have been made in his favour in respect of the rent of the building. Taking into account his share of profit and the rents payable to him, the plaintiffs claim should be deemed to have been fully satisfied. The loan was advanced by the plaintiff to the

defendant as a partner under the partnership deed and as the loan has to be adjusted in the manner referred to in the said deed, the suit for recovery of the loan is not maintainable. In any event, as the correct picture regarding the credit of the share of profit and the rent due to the defendant will be available only on accounts being taken, the plaintiff's remedy was to file a suit for dissolution of partnership and for taking accounts. The amount of interest claimed by the plaintiff was to file a suit for dissolution of partnership and for taking account. The amount of interest claimed by the plaintiff was erroneous and the correct amount would be only Rs. 3098/14/9.

5. The plaintiff filed on September 25, 1953 an application for the amendment of the plaint. The amendment sought was for introducing an averment to the effect that the amount sued upon was loan advanced to the defendant and that it had nothing to do with the partnership. Clause 10 of the partnership agreement only indicated one mode by which the plaintiff was enabled to recover his dues. As the partnership business was running at a loss, there was no question of the defendant having got any profit as and for his share and no credit have been made for rent. It is seen that the court by its order dated November 28, 1953 permitted this amendment to be carried out in the plaint.

6. The defendant in turn applied of the written statement on April 16, 1956. He wanted to amend the written statement in two respect - (1) by pleading that the money advanced from time to time by the plaintiff belonged to Dudhadhari Math of which the plaintiff was the sole Mahant and hence he was not entitled to file the suit and (2) that the said Math was a Public Religious Endowment and it not having been registered under the Madhya Pradesh Public Trusts Act, 1951 (Act 30 of 1951) the suit is barred under Section 32 of the said Act.

7. The plaintiff opposed the amendment asked for but it is seen that on May 2, 1956 the written statement has been permitted to be amended only to the effect that the amount advanced belonged to the Math of which the plaintiff is the Mahant and the latter is not entitled to maintain the suit, This has been incorporated in paragraph 13 of the written statement.

8. The findings of the trial Court are as follows; The amounts advanced by the plaintiff were from and out of the assets of the Math and not from his separate property. Even though the moneys belonged to the math, the plaintiff being the Shebait or Mahant has got the right to sue and therefore the suit was maintainable. In dealing with this aspect, the trail Court had made certain observations to the effect that the Math in question is a Public Religious Endowment. Between October 4, 1949 and June 20, 1950, the plaintiff has advanced a sum of Rs. 46,900 as stated in the plaint. The plea of the defendant that he has not received the sum of Rs. 900 on September 26, 1950 is not true. The interest due to the plaintiff, according to the Katmiti system is only Rs. 7981/8/- and not Rs. 8718/10/- as mentioned in the plaint. The amounts were advanced by the plaintiff as per the partnership deed of October 4, 1959 to the defendant as a partner. Clause 10 of the partnership agreement provides for the manner of discharge of the defendant's liability. But without going into the accounts of the partnership and ascertaining their rights and liabilities inter se, it cannot be satisfactorily adjudicated in the present suit whether the entire debt or any portion of the debt has been satisfied. The proper remedy of the plaintiff was to render the accounts of the partnership for the period he was incharge and to bring a suit for dissolution of the partnership and for taking accounts. Clause 10 of the partnership agreement clearly indicates that the suit as laid by the plaintiff is not maintainable. The present suit, though not barred under Section 69 of the Partnership Act is barred under Clause 10 of the partnership agreement Ex. P.1. The plaintiff is a registered money lender and he has not kept proper accounts as required under Section 3(1)(a) of the Central Provinces and Berar Money Lenders Act, 1934 (Act No. 13 of 1934). The plaintiff has not compiled

with the provisions of Section 3(1)(a) and has complied with the provisions of Section 3(1)(b) of the said Act for only one year. Regarding the applicability of Section 32 (1) of the Madhya Pradesh Public Trust Act, 1951, the defendant has not raised the plea of want of registration of the Math in the written statement and the said point has not been put in issue and hence Section 32(1) is no bar. Though almost all the findings were in favour of the plaintiff inasmuch as it was held that the plaintiff's remedy was to file a suit for dissolution of partnership and accounts, the trial Court dismissed the suit.

9. On appeal by the plaintiff, the High Court recorded the following findings. The total amount advanced by the plaintiff is Rs. 46,900. No repayments have been made by the defendant and the evidence of the plaintiff as PW 2 and of Shambhu Dayal establishes that the partnership had not been making any profit from January 1, 1950 to February 23, 1953 and as such the defendant has not earned any profits. The said evidence also shows that as there were no profits, no credit for rent has been made in favour of the defendant. As such no adjustment could have been made by the plaintiff, under Clause 10 towards the loan transaction. Clause 10 of Ex. P.1 is not a bar to the maintainability of the suit. The loan advanced by the plaintiff to the defendant was not one from one partner to another but in their individual capacity, which had no relation to the partnership arrangement which was confined only to the business of showing film in the cinema building. The partnership had no interest in the loan transactions between the plaintiff and the defendant and it did not from part of either the capital or asset of the partnership. The view of the trial Court that the amount advanced by the plaintiff belonged to the Dudhadhari Math was erroneous and the said finding by the trial court is based on no evidence whatsoever. Similarly, the observation of the trial Court that the Said Math was a public Religious Endowment was also without any evidence. In fact that question did not arise for consideration. The total amount due to the plaintiff on the date of the suit was Rs. 46,900 as principal plus Rs. 7981/8/- as interest. On these findings the High Court reversed the judgment of the trial Court and in turn decreed the plaintiff's suit for Rs. 54,881/8/- payable with interest at 6% per annum from the date of the suit till realisation.

10. The first contention of Mr. Bishan Narain, learned Counsel for the appellant, is that the suit is not maintainable as the amounts have been advanced by the plaintiff as a partner to the defendant as a partner under the partnership deed Ex. P.1. The proper remedy as pointed out by the trial Court, is for the plaintiff to file a suit for dissolution of partnership and for taking accounts. The Counsel further pointed out that such a suit. (Suit No. 6-A/1959) has been instituted by the plaintiff herein and a preliminary decree has been passed on December 24, 1969 by the Second Civil Judge, 1st Class, Raipur. A final decree has also been passed on June 20, 1970. The respondent has filed civil appeal 5A of 1970 and Civil Appeal 29A of 1970 against the preliminary and final decree and the appellant herein has filed civil appeal 28A of 1970 against the final decree and all these appeals are pending before the Court of the District Judge, Raipur and therefore this appeal must be kept pending to abide the result of these appeals.

11. Mr. S. T. Desai, learned Counsel for the respondent, pointed out that the points arising for consideration in this appeal are totally different from the subject matter of the suits and appeals referred to by Mr. Bishan Narain and hence this appeal has to be heard and dispossed of independently.

12. Though we find that on an earlier occasion certain orders have been passed by this Court postponing the hearing of this appeal to await the decision of the partnership action, after hearing preliminary arguments in this case, we felt that the present appeal need not be kept pending to await the result of the partnership appeals and hence we proceeded to hear argument. According to Mr.

Bishan Narain the present suit is not maintainable in view of the terms of the partnership agreement Ex. P.1 and the only remedy of the plaintiff is to have the loan amount adjusted in accordance with Clause 10 of the partnership agreement. On the other hand, Mr. S. T. Desai pointed out that Clause 10 is only an enabling provision for the benefit of the plaintiff. The plaintiff has proved that there were no profits accruing from the partnership business and therefore the question of the defendant having got for his share any profits does not arise. There is nothing material on record to show that the partnership credited the defendant with the rent payable for the building, and so the plaintiff could not have got the benefit of those rents for adjustment toward his dues. We will now proceed to consider the terms of the partnership deed to the extent to which they are necessary for the purpose of this litigation, and that only to find out whether the amount has been advanced by the plaintiff to the defendant as a partner and whether it from part of the capital of the partnership. We make it clear that we are clear that we are not considering the rights and liabilities of the partners inter se under Ex. P.1.

13. The partnership deed Ex. P.1 is dated October 4, 1949. The partners are the Plaintiff, the defendant and one Shambhu Dayal Shukla, who has figured as PW 2. The partnership is for the purpose of running and exhibiting cinema films in the Darbar Talkies. Clause 3 again emphasises that the partnership constituted is only with respect to the running and exhibition of cinema films in the said talkies. The share of profits and loss of the partners is then specified. Clause 6 states that the plaintiff has agreed to advance to the defendant sums to the extent of Rs. 40,000 to Rs. 50,000, which was to carry interest at - /8/- per cent per month to be calculated according to the Katimiti system. The amount of the loan is to be given as required by the defendant for the purpose of completing the building which he was constructing and for equipping it with machinery, furniture and electrical fittings etc. The defendant should not draw any amount from the partnership without the consent of the plaintiff. Clause 10 is as follows;

> "(10) That the rent of the theatre payable to Babu Hari Singh Darbar as stated in paragraph 13 below together with share of profit of the partnership accruing to Babu Hari Singh Darbar shall be credited or appropriated towards the payments of the aforesaid loan, till such time as the said loan together with interest is not paid off fully."

14. Under Clause 13 the defendant was to be paid Rs. 2125 per month as rent for the full equipped theatre, the building and the machinery, furniture and electrical fitting are all to continue to belong to the defendant.

15. A perusal of the partnership deed clearly shows that the partnership is only for the purpose of running and exhibiting cinema films, but that object could not be achieved unless the defendant has completed the building which he was constructing and installed the necessary machinery etc. It is for the purpose of enabling the defendant to complete the construction of the building and to equip it so as to enable the partnership to conduct film shows, that the plaintiff has agreed to advance the amount as loan to the defendant. There is no indication in Ex. P.1. that the plaintiff was advancing those amounts as a partner. The loan transaction is a purely personal one between the plaintiff and the defendant. That the partnership has no interest in the building and the machinery etc., is made clear in the recitals in Ex. P.1 that the defendant continues to be and will continue to be the owner of those items.

16. Then the question is what is the effect of Clause 10. Clause 10, in our opinion, and as rightly pointed out by the High Court, is only a provision to enable the plaintiff to recover his dues from

the defendant and it indicates the mode in which it may be so recovered or adjusted. The significant expression used in Clause 10, namely, the share of profit accruing to the defendant in the partnership and the rent paid to him for the building per month by the partnership clearly shows that the plaintiff will be able to adjust towards his dues only if the partnership has earned profits in which the defendant had a share and if the partnership had credited the defendant with the rent. If no profit accrued to the partnership, there is no question of any share of the defendant in the profits being available for adjustment by the plaintiff. Similarly, unless it is borne out from the evidence that the defendant was credited with the rent due in respect of the building by the partnership, that amount again would not have been available to the plaintiff for adjustment towards the defendant's liability. That is all the purpose that is sought to be served by Clause 10. It does not, in any manner, bar the plaintiff from finding a suit for recovery of the amount due to him, unless the defendant is able to establish that the amounts were available either from the credits made in his favour towards rent or from his share of the profits or from both.

17. Regarding the above aspects, the High Court has referred to the evidence of the plaintiff as PW 2, that after a reference to the account, that partnership has not made any profit; nor any credit was made to the defendant by way of rent available for adjustment towards the loan. It has also been pointed out that no suggestion has been made to PW 1 Sambhu Dayal Shukla who is the third partnership has made any profits. Even the defendant as DW 1 has not referred to the partnership having earned any profits or to credits having been made in his favour by way of rent for the building. We accept the finding of the High Court that Clause 10 of the partnership is no bar to the maintainability of the present suit. We also accept the finding of the High Court that the defendant has not made any repayment of the loan and the plaintiff also had no occasion to adjust any amount is per Clause 10 of the partnership agreement. If so, it follows that the finding of the High Court regarding the amount payable by the defendant is correct.

18. The second contention of Mr. Bishan Narain related to the dispute raised by the defendant regarding the receipt of Rs. 900 on September 26, 1950. No doubt, it is seen that the defendant in his written statement had pleaded that this sum of Rs. 900 was not advanced to him on September 26, 1950, as pleaded by the plaintiff and that the total amount advanced to him was only Rs. 46,000.

19. Mr. Desai, on the other hand, pointed out that there was no dispute raised before the High Court that the amount due to the plaintiff was Rs. 46,900 by way of principal plus Rs. 7981/8/- by way of interest. Some confusion has been created by the trial Court in regard of the sum of Rs. 900 and that is sought to be taken advantage on behalf of the appellant. While considering issue 2, the trial Court has adverted to the dispute raised by the defendant of this sum of Rs. 900, but the trial Court rejected the plea of the defendant as not true and also holds that there is no evidence to support his plea that he has not received the sum of Rs. 900. The categorical finding of the trial Court is that between October 4, 1949 and September 26, 1950, the plaintiff advanced to the defendant a sum of Rs. 46,900. This clearly shows that the trial Court rejected the plea of the defendant that he has not received Rs. 900 on September 26, 1950. But in the concluding part of its judgment in paragraph 44, the trial Court has stated that the sum of Rs. 900 will not be taken into account in fixing the total liability of the defendant. This finding is clearly inconsistent with the previous finding recorded by the trial Court under issue 2. It is really this last observation which is in paragraph 44 of the judgment of the trial Court and thoroughly unwarranted, that is sought to be taken advantage by the appellant. The High Court has referred to the finding of the trial Court that this sum of Rs. 900 was paid to the defendant on September 26, 1950 and states "with regard to this item of Rs. 900, the finding of the Lower Court was not challenged before us". This observation clearly shows that the defendant did not attack the finding recorded against him under issue 2. Again in the concluding

part of its judgment in paragraph 18, the High Court says that there is no dispute between the parties with regard to the quantum of the principal amount being Rs. 46,900 and the amount of interest upto the date of suit being Rs. 7981/8/-. The High Court has further stated that the findings of the trial Court in favour of the plaintiff were not challenged before them. The finding of the trial Court under issue 2, as well as the finding recorded by the High Court, referred to above, clearly show that the plea of the defendant that he did not receive the sum of Rs. 900 on September 26, 1950 has been rejected, specially when he has not raised any dispute before the High Court, it is so longer open to the appellant revive the dispute regarding this amount before this Court. The second contention will also stand rejected.

20. The third contention of Mr. Bishan Narain is that the Dudhadhari Math, of which the plaintiff is the sole Mahant, is a Public Religious Endowment and the moneys advanced to the defendant belonged to the Math. As the Math has not been registered under the Madhya Pradesh Public Trust Act, 1951, the suit is barred under Section 32. We have already referred to the application made by the defendant for amending the written statement in this regard and the limited permission given for amending the written statement. The finding of the trial Court that the moneys advanced belonged to the Math has been set aside by the High Court and quite rightly, in our opinion. Even the trial Court in paragraph 45 of its judgment has rejected the plea based upon the bar of Section 32 on the ground that the defendant did not take up the plea in his written statement and the point was not put in issue. The trial Court has held that the bar of Section 32(1) does not apply to the suit. The High Court has also adverted to this aspect and it has held that there was no plea in the written statement and as such no finding could have been arrived at by the trial Court regarding the nature of the Math. It has further held that there is no acceptable evidence to show that the amount advanced by the plaintiff belonged to the Math. The finding in this regard recorded by the trial Court has been set aside by the High Court. Therefore, it is not open to the appellant to raise the contention regarding the bar of Section 32 of the Madhya Pradesh Public Trusts Act, 1951. This contention also will stand rejected.

21. The last contention on behalf of the appellant was that the plaintiff has not complied with the provisions of the Central Provinces and Berar Money-Lenders Act, 1934 and hence no interest can be awarded to the plaintiff.

22. We have referred to the finding of the trial Court that the plaintiff has not complied with the provisions of Section 3 (1)(a) and has complied with the provisions of Section 3(1) (b) for only one year. The grievance of the appellant is that the High Court has not at all considered this aspect. This contention need not detain us further because it is seen from the judgment of the High Court that there was no dispute between the parties with regard to the amount of principal Rs. 46,900 as well as the amount of interest upto the date of suit being Rs. 7981/8/-. There is a further statement in the judgment of the High Court that the findings of the trial Court in favour of the plaintiff were not challenged by the defendant. When once the appellant did not raise any dispute regarding the interest due to the plaintiff, upto the date of suit being Rs. 7981/8/- the appellant cannot raise any controversy regarding the non-compliance by the plaintiff of the provisions of the Central Provinces Money-Lenders Act. It is not necessary for us even to express any opinion whether the plaintiff has or has not complied with any of the provisions of the Act as such an investigation, in our opinion, is totally unnecessary for the reason mentioned above. All the contentions urged on behalf of the appellant have to be rejected.

23. Mr. Bishan Narain in the end made a request that the execution of the decree passed by the High Court in favour of the plaintiff be stayed till the final adjudication in the partnership action, now

pending before the District Judge, Raipur. We are not inclined to accede to this request. We find from a reference to the judgment of the High Court that a similar request was made by the appellant. It is also seen that the appellant was not prepared to create a charge on the building or the cinema house or other property to ensure payment of the decretal amount. In view of this the High Court rejected the request of the appellant for staying the execution of the decree. Therefore, we cannot entertain any further request in this regard, again, by the appellant.

24. In the result the decree and judgment of the High Court are confirmed and this appeal dismissed with costs.

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