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Court : Chennai

Decided On : Nov-10-2016

Judge : The Honourable Chief Justice Mr. Sanjay Kishan Kaul &Amp;amp; R. Mahadevan

Appeal No. : O.S.A. No. 220 of 2016

Appellant : B.S. Krishnamurthy

Respondent : S. Sreenivasamurthy and Another

Judgement :

(Prayer: Appeal under Order 36 Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent against the order dated 26.7.2016 of the learned Single Judge in Application No.8211 of 2015 in C.S.No.290 of 2013.)

Sanjay Kishan Kaul, CJ.

1. The appeal is directed against the order dated 26.7.2016 of the learned Single Judge dismissing the application filed by the appellant under Order VII Rule 11(a) and (d) of the Code of Civil Procedure, 1908, alleging that there is no cause of action of the original plaintiff/first respondent in the suit.

2. As usual, this is one more family dispute between the brothers. The suit has been filed by the original plaintiff for recovery of money. There are already three suits pending inter se the parties two of them for declarations in respect of the two

settlement deeds dated 31.7.2009 and 16.10.2009 executed by the mother as null and void. Apart from this, the appellant has filed a suit for declaration that the partnership firm stands dissolved and should be wound up under Sections 46 and 48 of the Partnership Act, 1932 and for rendering of true and faithful accounts and for appointment of Receiver. The original plaintiff is the defendant in those suits.

3. The basis for the claim for rejection of the plaint is that in the absence of relief for dissolution of the partnership firm and for rendition of accounts, the claim of recovery for amounts due from the partnership inter se cannot be maintained.

4. We may note that the mother was also a partner of the firm, which has been impleaded as the defendant in the present suit as well as other suits.

5. The learned Single Judge, from the records, noticed that the appellant made an earlier endeavour by filing an application under Order XIV Rule 2 of the CPC to determine this very question of maintainability as a preliminary issue, but that relief was not granted and that application was disposed of on 17.11.2015, though an additional issue in respect of maintainability of the suit was framed. Thus, the very objection with respect to maintainability of the suit before accounts are finalized and dissolution of firm takes place is the additional issue. Despite this, the present application was filed for rejection of the plaint under Order VII Rule 11 of the CPC without disclosing the earlier order and predicated on the ground of non maintainability under Order VII Rule 11(d) of the Code.

6. The learned Single Judge noticing the contention of the appellant has dismissed the application by the impugned order.

7. We have heard the learned Senior Counsel for the appellant and the plea is once again the same. It is the submission of the learned Senior Counsel for the appellant that the Full Bench of the Madras High Court in T.K.P.Rajagopala Chettiar v. A.P.S.Palani Chettiar, AIR 1954 Madras 1101, in paragraph (32) recognizes that the decision rendered earlier by the Privy Council in Gopal Chetty v. L.G.Vijayaraghavachariar, AIR 1922 PC 115 (A) is good law and unless an account has already been taken, whenever a partner either has in his hands money which his partners allege to belong to the firm or is alleged by his partners

to owe money to the firm in connection with partnership transactions, such money can only be recovered from him in an action for an account; and in that action, it would be open for him to show that money is his or that a larger sum is due to him.

8. The learned Senior Counsel referred to the provisions of Section 48 of the Partnership Act, 1932 to contend that the mode of settlement of accounts between the partners is set out and in terms of sub-clause (b)(iv), the residue after applying the amounts in terms of the Section is to be divided among the partners in the proportions in which they are entitled to share profits.

9. On our query, the learned Senior Counsel concedes that it was open to the original plaintiff to have filed a counter claim in the same suit.

10. In our view, it really makes no difference whether the two suits are tried together or counter claim is made by the original plaintiff in the same suit.

11. We are constrained to notice that when almost the very same plea have been raised, an additional issue framed albeit not a preliminary issue, evidence is being recorded, another endeavour is made to delay trial through the process of filing this application without disclosing the earlier order. We, thus, find no infirmity in the impugned order.

12. The learned Senior Counsel for the appellant seeks an earlier trial, but then it is the appellant, in our view, who is only seeking to delay the trial which would naturally proceed expeditiously but for such endeavours of the appellant.

13. The appeal is dismissed. No costs. Consequently, C.M.P.No.16895 of 2016 is closed.

At request, the present suit is also posted before the First Additional Master, as it is stated that the other suits are pending for trial before him.

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