

Ketan A. Shah Vs. Devendrakumar Hiralal Veecumesees and ors.

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Court : Chennai

Decided On : Jan-24-2008

Reported in : (2008)2MLJ617

Judge : S.J. Mukhopadhaya and ;M. Venugopal, JJ.

Acts : Madras High Court Original Side Rules

Appeal No. : O.S.A. Nos. 99 and 348 of 2000

Appellant : Ketan A. Shah;deepak Biharilal Adalja and ors.

Respondent : Devendrakumar Hiralal Veecumesees and ors.;devendrakumar Hiralal Veecumesees and ors.

Advocate for Def. : K. Ramu, Adv. for R-1 in OSA 99/00, ;P. Rajamanickam, Adv. for R-2 in OSA 99/00, ;T.R. Rajagopalan, SC for ;K. Banumathy, Adv. for RR-18 to 21 in OSA 99/00, ;Tohera Murtaza, Adv. for ;C. Gopalakrishna

Advocate for Pet/Ap. : L. Joseph, Adv. for ;Surana and ;Surana, Adv. in OSA 99/00 and ;Tohera Murtaza, Adv. for ;C. Gopalakrishnan, Adv. in OSA 348/00

Judgement :

S.J. Mukhopadhaya, J.

1. Both the appeals have been preferred by appellants against order dated 22nd Feb., 2000, passed by learned Judge in Application No. 6917/93 in C.S. No. 577/82. They were heard together and disposed of by this common judgment.

2. The plaintiff, Ketan A. Shah, appellant in O.S.A. No. 99/00 preferred the suit for declaration that the partnership firm 'Sapphire' of which he is partner shall be deemed to have been dissolved with effect from 27th Feb., 1982 and also for rendition of accounts of the firm upto dissolution and also for consequential relief of allotment of plaintiff's share and profit. In the said suit, a preliminary decree was passed on 3rd July, 1989, whereinafter application No. 6917/93 was filed by plaintiff to pass a final decree in pursuance of the preliminary decree.

3. The plaintiff, who was the applicant was in fact appointed as Receiver by order made by Bench on 23rd Aug., 1989 and he took charge of the properties of the firm. Receiver filed application Nos. 6915 and 6916/93 seeking for a direction to the defendants to co-operate with the auditors and to furnish accounts and also for permitting the applicant to sell the property of the firm. By an order dated 11th April, 1994, the Court allowed those applications giving direction to the partner to co-operate with the auditors in preparation of final audited report and also permitted the Receiver to sell the property of the partnership firm, namely, the building situated in Anna Salai, Madras.

It is pursuant to a direction of Division Bench in O.S.A. Nos. 168 to 170/94, the offers made by intending purchasers were placed before the Bench, which accepted the highest offer made by the Joint Secretary of a political party and the Receiver was directed to sell the property to the said party for a sale consideration of Rs. 6,12,00,000/-. Time was granted till 16th Sept., 1994 for the purchaser to deposit the amount and to get the sale deed executed by the Receiver. The highest bidder deposited the amount with the Receiver and sale deed in respect of building bearing Door No. 614, Anna Salai, Madras, was executed by the Receiver in favour of the Joint Secretary of the political party, which was the highest bidder. The auditors, in the meantime, filed their report and the 3rd defendant filed objection to the final report of the auditor.

The objections filed by some of the defendants were dealt with by the Court and they were allowed to peruse the record and other documents available with the Receiver and auditor and to submit their objections. Sale proceeds of the partnership firm, 'Sapphire' with all its goodwill was deposited with the Court and other amounts were accounted for by the Receiver enabling the Court to come to the stage of passing the final decree by allotment of shares and profit due to the partners in accordance with shares held by them. The Court noticed the share of the partners as given in the annexure in the preliminary decree and the report submitted by the auditor.

4. While submitting the report, the auditors had charged interest at 18% p.a., for certain amount overdrawn by defendants 2 to 4 and their father, who were in management of the theatres run by the partnership firm. The auditor had stated, which was also not disputed, that the total amount withdrawn by defendants 2 to 4 and their father is Rs. 9,97,855/- belonging to the partnership firm. The auditor calculated the interest at the abovesaid rate and charged on those defendants, which comes to total Rs. 14,79,596.09.

The auditor having taken into consideration of the relevant facts and services rendered by the Receiver, provided a sum of Rs. 24,48,000/- for payment of fee towards the services rendered by the Receiver. The amount was worked out by charging a fee of 4% on the sale price of Rs. 6,12,00,000/-. The auditor also provided a sum of Rs. 24 lakhs for meeting out the contingent liabilities, which was said to have been set apart in the hands of the Receiver to meet any liability that may arise in future. The report of the auditor also revealed that a sum of Rs. 3 lakhs had been paid to the advocate, M/s. Surana & Surana by the Receiver towards its fee on 10th Dec., 1994. The auditor, therefore, provided a further sum of Rs. 4,75,000/- for further payment to the advocate for the Receiver. The account submitted by the auditor further shows that a sum of Rs. 2,40,000/- had already been paid to the advocate of the Receiver between 28th March, 1990 to 16th March, 1994. So the auditors report has provided a total sum of Rs. 10,15,000/- for payment towards fee for advocate for the Receiver. The amount that has been realised from Receiver from running the theatre, which was running till August, 1994, was stated to be Rs. 2,05,48,050/-. The amount derived by

selling the building of the partnership firm was Rs. 6,12,00,000/-.

5. The applicant and defendants made their submissions with regard to the division of the assets of the partnership firm and distribution of shares and assets to the partners at the time of passing of final decree.

6. On behalf of the Receiver prayer was made to accept the auditors report for payment in his favour. It was also contended on behalf of the Receiver that overdrawal of the amount done by defendants 2 to 4 and their father to the tune of Rs. 9,97,855/-, which comes to Rs. 14,79,596.09 alongwith interest at the rate of 18% p.a., as calculated by the auditor must be charged as per recommendation of the auditor and the said amount must be realised from those defendants to be made available among the partners for disbursement.

The proposal for levying interest, that too at the rate of 18% suggested by the auditor was opposed by defendants 2 to 4. According to them, they are the promoters of the partnership firm along with their father and they had contributed initially some amount, which was made available for the partnership firm for running the business and while the partnership firm has been benefited by such generosity on the part of defendants 2 to 4 and their father, it was not proper to charge interest for overdrawing done by them.

The Receiver, i.e., the plaintiff (appellant herein), vehemently contended before the trial court that the amount having overdrawn by defendants 2 to 4 and their father, belong to the partnership firm and was so overdrawn without the knowledge of other partners. Therefore, they must pay interest for the overdrawn amount. Parties relied on one or other decision in support of their claim.

7. By impugned order dated 22nd Feb., 2000, learned Judge having noticed different decisions rendered by courts and in absence of any provision for charging interest for any amount overdrawn by the partner, accepted the submission made on behalf of defendants 2 to 4 that no interest is allowable for overdrawal of funds made by defendants 2 to 4 and their father, while the partnership firm was a going concern. Therefore, the auditor's report charging interest at 18% for the amount overdrawn by them was not accepted and such part of the auditor's report was

rejected.

So far as the question of payment of remuneration of the Receiver for the services rendered by him is concerned, defendants 2 to 4 objected the claim. Learned Judge noticed that for service rendered by the Receiver for conducting the sale and realising the sale amount, the auditor has provided remuneration @ 4% of the sale price, which comes to Rs. 24,48,000/-, but in view of the objection made by the defendants and other grounds as shown in the order, remuneration of the Receiver was fixed to the extent of Rs. 1,25,000/- and further sum of Rs. 75,000/- was fixed as remuneration for running the theatre for the period of five years. So far as the advocate's fee is concerned, similar objection was made on behalf of defendants 2 to 4 that the auditor's recommendation should not be accepted, but in the case of advocate's fee, learned Judge allowed a sum of Rs. 6,12,000/- in favour of the advocate.

8. The grievance of the appellant/plaintiff Receiver is two fold - (i) with regard to interest at the rate of 18% not charged on defendants 2 to 4 and their father as per report of the Receiver; and (ii) with regard to remuneration of Receiver. Apart from the submission as was made before trial court, it was contended that the Court, almost in all cases allow 4% of the sale proceeds as Receiver's fee.

Learned Counsel for the appellant further submitted that the Receiver having performed all the duties which he was supposed to perform and in absence of any failure, there was no occasion for the learned Judge to curtail any amount from the fee as was recommended by the auditor.

Counsel appearing on behalf of the 1st respondent/2nd defendant, made similar argument as was advanced before the trial court, such argument was adopted by learned Counsel appearing on behalf of the 2nd respondent/4th defendant and 7th respondent/9th defendant.

9. We have heard the parties, noticed the rival contentions and the judgments referred to by one or other party.

10. Payment of interest on the money drawn by a partner from a partnership fund:

Similar matter fell for consideration before a Bench of this Court in Uma Maheswara Mudaly and Ors. v. Muniswami Mudali and Ors. reported in AIR 1926 Mad 642, wherein the Court held that it is not the practice to allow interest on money drawn by a partner from a partnership firm, be it capital or interest, unless it is so provided in the deed.

In Suleman and Anr. v. Abdul Latif and Ors. reported in , Privy Council noticed that it was a matter in which an action was taken to dissolve and to wind up the affairs of a partnership firm. Until the accounts have been taken it was impossible to say whether if anything is due from any partner to his co-partners. The Court held that interest should be allowed only from the date of final decree by which the amount, if any, is found due from the defendant to the plaintiff.

Similar was the view of this Court in the case of Palla Veeraswami and Anr. v. Bandaru Chitti Naidu and Ors. reported in AIR 1948 Mad 231. In the said case, this Court held that 'usually courts allow interest only in exceptional circumstances where there is an express or implied agreement to that effect or that a partner wrongfully withholds money or a partnership business and makes secret profit in breach of his duty to other partners or where some partners have overdrawn money from partnership fund and have established other business with that money and have made large profits. In such cases, they are not only bound to account for the profits made in the other business, but are chargeable with interest on the money so overdrawn.

In another case of Vincent Antony Jabamalai Fernando and Ors. v. S.A. Thomas Fernando and Ors. reported in : AIR1978 Mad90 , the Court held that in a suit for settlement of account of a dissolved firm, interest could be allowed from the date of plaint.

11. In the present case, it has not been brought on record that there is a partnership deed for charging interest for any amount overdrawn by a partner. The plaintiff failed to bring on record any evidence to suggest that any practice was in vogue that in case a partner overdrawn some amount from the partnership firm, he is liable to pay interest. In view of the aforesaid fact and the decisions rendered by this Court, if learned single Judge rejected the auditor's recommendation in regard

to payment of 18% interest on the amount overdrawn by defendants 2 to 4, no interference is called for against such part of the order.

11. Remuneration to Receiver:

Learned Judge disallowed the report of auditor so far as remuneration of Receiver is concerned, which was calculated @t 4% of the sale proceeds for the ground mentioned in paragraph 29, and quoted hereunder:29. In the report submitted by the Auditor, the remuneration of the Receiver has been calculated at 4% out of the sale proceeds of the theatre building. The sale has been actually conducted by the court through the Receiver and the Receiver has only caused advertisement in newspapers calling for tenders and all the sealed tenders from the prospective purchasers were placed by the Receiver before the Court and it was the Court which finally decided that the properties shall be sold to the General Secretary of AIADMK who has offered the highest price of Rs. 6,12,00,000/-. In this respect, the learned Counsel appearing for the Receiver would draw my attention to the Original Side Rules of the High Court, Madras, according to which the Court may grant upto 7% of the realised amount to the Receiver. But, the remuneration has to be only paid in accordance with the efforts made by the Receiver, the services rendered by him and the labour which has been extracted from the Receiver. So far as the sale of the building is concerned, the Receiver has not conducted the negotiations, he has not met the parties concerned and it was not with the efforts of the Receiver the property was sold. The mode of sale of property was by calling for public tenders and the Receiver has not contributed his labour or service and, therefore, if we were to pay the Receiver at the rate of 4% which may be permissible to a commission agent or broker, this alone will come to more than Rs. 24 lakhs which is totally not warranted. The Receiver is only an instrument in the hands of the court and the court has decided the mode of conducting sale, calling of tenders and accepting the highest bid and only by the direction issued by the court no doubt the sale deed was executed by the Receiver. Therefore, towards the sale of the property for the services rendered by the Receiver, he shall be entitled to a sum of Rs. 1,25,000/- as remuneration. So, towards the services rendered, the Receiver is entitled to Rs. 1,25,000/- and Rs. 75,000/- which is to be paid to him as remuneration for running the theatre for five years. The Receiver is

entitled to only this remuneration and he cannot be paid in excess. So, towards remuneration, the Receiver is entitled only to this amount.

The other ground taken by learned Judge to allow only a sum of Rs. 1,25,000/- as remuneration is that it is the discretion of the Court, which has to determine and fix the amount of remuneration to be paid for the service rendered by the Receiver.

12. Order XL deals with 'Payment to Receiver'. Order XL Rule 2 relates to remuneration, whereas Rule 3 and 4 relates to duties and enforcement of Receiver's duties, where Receiver fails to perform any one or other duty as shown therein.

In the present case, there is nothing on the record to suggest that the Receiver failed to perform any duty. Learned Judge has taken plea that the sale has actually been conducted by the Court through the Receiver, but we are of the view that such observation is misconceived because the Receiver appointed by court cannot sell any property of his own without the order of the Court concerned. Other ground taken is that the property was sold to the party, who gave the highest offer, which is also misconceived as the sale is always to be made in favour of highest bidder, which has nothing to do with the remuneration of the Receiver.

It is not in dispute that under the Original Side Rules of the High Court, Madras, the Court may grant remuneration to the Receiver upto 7% of the amount realised by the Receiver. We have noticed that normally 4% of the amount realised is allowed by the court as fee payable to the Receiver in normal course in majority of the cases. However, in some of the cases, lesser amount is allowed, but for the reasons as shown in such case. This is not a case of such nature to disallow 4% of amount realised as recommended by the auditor. The respondents also fail to show as to why any amount lesser than the amount recommended by auditor be allowed in favour of the Receiver.

13. It is true that the Receiver's commission is the price of the work done by them. It must have some relationship with the labour involved and time taken for such purpose. (See decision of this Court in P.V.S. Kabalamurthi Pillai v. P.V.

We are not disputing that Order XL Rule 2 leaves a discretion for the Court to pay the Receiver a percentage of the collection so fixed as remuneration for his services, but that does not mean that the Court will exercise such discretion without any basis in an arbitrary manner. If the Original Side Rules of the Madras High Court prescribes fee upto 7% of the sale proceeds, the Receiver cannot be provided any amount excess to such prescription, nor the court can allow a meagre amount on the ground of discretion of the court. It must be in consonance with the nature and volume of work entrusted on the Receiver and the time required for performing the duties. In this regard one may refer to the Division Bench decision of this Court in B. Soundarapandian and Anr. v. Industrial Finance Corporation of India and Ors. reported in AIR 1982 Mad 206.

Admittedly, the Receiver has performed work for more than five years. He has performed all the job, which was entrusted to him and there was no failure shown on his part. Sale was conducted in the manner the court ordered. Though the order was passed by court and auction had taken place in the court, but all such proceeding were done through the Receiver. It is not the case of the respondent that the Court accepted money directly, and no work was taken from the Receiver.

14. It is also not in dispute that an advocate was appointed to assist the court and the Receiver. The trial court has allowed a sum of Rs. 6,12,000/- in favour of the said advocate. If such amount is allowed in favour of the person, who assisted the Receiver, it is not clear as to why a lesser and petty amount of Rs. 1,25,000/- has been allowed in favour of the Receiver, while the auditor recommended to allow 4% of the sale proceeds, which comes to Rs. 24,48,000/-.

15. Taking into consideration the nature of work done by the Receiver, the period of service rendered by him (five years), including running of a cinema hall for a period of five years, we are of the view that atleast 2% of the sale proceeds should be allowed in favour of the Receiver, which will come to Rs. 12,24,000/- approximately, which will include the remuneration for running the cinema hall for five years.

16. In the result, the judgment and decree dated 22nd Feb., 2000, passed by learned Judge in C.S. No. 577/82 is modified to the extent above. Both the appeals stand disposed of. But there shall be no order as to costs.

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