

(1976) 06 AP CK 0001

Andhra Pradesh High Court

Case No: A.S. No. 158 of 1974

Tedikapalle Anjaneyulu and
others

APPELLANT

Vs

Sri Rama Krishna Textiles,
carrying on business at Bombay

RESPONDENT

Date of Decision: June 23, 1976

Acts Referred:

- Contract Act, 1872 - Section 22, 28

Hon'ble Judges: Alladi Kuppuswami, J

Bench: Single Bench

Advocate: N.R. Rajeswara Rao, for the Appellant; N. Ramamohan Rao for Respondent 1,
for the Respondent

Judgement

Alladi Kuppuswami

1. Defendants 2 to 4 in O.S. No. 390 of 1971 on the file of the Second Additional Subordinate Judge's Court, Vijayawada, have filed this appeal against the judgment and decree in that suit granting a decree in favour of the plaintiff for a sum of Rs. 17,493-27. The first respondent herein filed that suit for recovery of a sum of Rs. 21,651-17. The case of the plaintiff which is a registered firm carrying on business in clothes as Pedhee at Bombay is that the defendants formed a partnership in the name and style of Sri Lakshmikanth Textiles. All the defendants are partners of the firm carrying on business at Vijayawada. The defendant purchased goods from time to time from the plaintiff Under the terms of the contract the defendants agreed to pay interest and commission at 1% per mensem on the amount due to the plaintiff On 16th October, 1963 there, was a settlement of accounts and it was found that the defendants are to pay the plaintiff a sum of Rs. 25,000 They agreed to pay the sum with interest at 88 paise per, month and further agreed to pay 1% commission and executed a pronote in the plaintiff's account book. The first defendant signed the account book on behalf of the firm as partner. Subsequent to the settlement the

defendants made several payments and after giving credit to these payments a sum of Rs. 14,911-25 is due towards principal, together with interest at 88 paise per month and commission at 1% the total amount payable to the plaintiff is Rs. 21,651.17. It is sufficient to refer to the contentions of defendants 2, 3 and 4 who alone are the appellants here. They contended inter alia that they ceased to be partners with affect from 4th September, 1968 and hence they are not liable to pay any amount under a settlement arrived at after their retirement. It was further contended that the plaintiff was not entitled to any commission. Lastly it was contended that the Court at Vijayawada has no jurisdiction to try the suit. It is unnecessary to set out the other contentions as these three contentions alone are pressed before me. The Court below held that it had jurisdiction to by the suit. It found on the evidence that defendants 2 to 4 had not satisfactorily established that they retired from the partnership business prior to the settlement and that the settlement was not binding upon them. It was also found that under the settlement the defendants had agreed to pay commission also in addition to interest. It however found that the amount claimed included commission as well as interest on commission and a sum of Rs. 1,000 which had been paid on 4th September, 1968 was not deducted from the suit claim. The Court below disallowed a sum of Rs. 4,157-90 for these items and held that the plaintiff was entitled to recover Rs. 17,493-27.

2. In this appeal Sri Rajeswara Rao, the Counsel for the appellants has raised the following contentions.

(1) The sub-Court, Vijayawada has no jurisdiction to try the suit.

(2) Defendants 2 to 4 ceased to be partners on 4th September, 1968 and are not liable to pay any amount.

(3) In any event the lower Court ought to have held that the plaintiff was not entitled to commission.

3. Before dealing with these contentions seriatim a few facts relating to the course of business as disclosed in the evidence may be set out. The defendants who are carrying on business as a firm at Vijayawada had dealings with the plaintiff's firm which was carrying on business at Bombay. The defendants indicate to the plaintiff the goods which they are interested buying from them. Accordingly the plaintiff purchased the goods locally and sold them in turn to the defendants. The plaintiff does not act as a broker but there is a direct sale by the plaintiff in favour of the defendants. In the bills prepared by the plaintiff it is stated that interest is chargeable at 9% on the amount payable by the defendant for the value of the goods. Further it is the case of the plaintiff that the mills wherefrom the plaintiff purchases goods charge commission from the plaintiff at 1% per month if the plaintiff does not pay the amount within 5 months and hence plaintiffs charge commission from the defendants. This fact is however not mentioned in the bills.

The commission is calculated after a lapse of certain period on the total amount of unpaid purchase money together with interest. On 16th October, 1968, there was a settlement of accounts and the total amount due was worked out. The settlement of accounts is evidenced by Exhibit A-2 which is an entry at page 33 of the ledger of the plaintiff relating to the defendants. It shows the total amount due as per the bills and gives credit to some payments made. The debit items entered in commission bills are also mentioned. Ultimately it was found that Rs. 25,000 is the balance due. It is then stated as follows :--

After verifying the accounts relating to us and to you till this date the amounts towards the principal and interest has to be given to us is Rs. 25,000 whenever demanded. We shall bring and pay the principal together with interest accrued there an at the rate of 88 paise per annum and 1% commission per month to you or to the person ordered by you at Bombay and obtain a receipt from you to this effect this verasikattu is got written with consent.

It is signed by the first defendant on two 25 paise stamps.

Contention (1) :--

4. The first contention is that the sub-Court, Vijayawada, has no jurisdiction. This is based upon the circumstance that in the bills issued by the plaintiff for the goods supplied by them it is stated "subject to Bombay jurisdiction." It is therefore argued that the parties agreed that the Courts at Bombay alone has jurisdiction and hence the sub Court, Vijayawada, has no jurisdiction to entertain the suit.

5. It is seen from the facts stated that the contract for the supply of goods was entered into at Bombay and the goods were delivered at Bombay. But the amounts were being paid at Vijayawada. Further the settlement of accounts was entered into at Vijayawada Therefore part of the cause of action arose at Vijayawada and part of the cause of action at Bombay. Further the defendants reside and carry on business at Vijayawada. There can therefore be no doubt that the suit could have been validly land in Vijayawada. But the submission is that there was an agreement between the parties that suns arising out of contracts between the plaintiff and the defendants should be filed only in Bombay in view of the stipulation in the bill subject to Bombay jurisdiction." It is well settled that if the two courts have jurisdiction to entertain a suit it is open to the parties to agree between themselves that one of them alone will have jurisdiction. Such a contract is not contrary to the provisions of section 28 of the Contract Act, vide [Hakam Sing Vs. Gammon \(India\) Ltd.,](#) The Court below however held in this case that the expression "subject to Bombay jurisdiction" in the contract could not mean that the Bombay Court could have exclusive jurisdiction and there is nothing in the contract to exclude the jurisdiction of the Courts at Vijayawada. It observed that the jurisdiction of Court can be excluded only by express words or by necessary implication. There are no express words in this contract excluding the jurisdiction of the Courts at Vijayawada and it cannot be said

that by necessary implication that such jurisdiction was excluded. In support of this conclusion reliance was placed upon the decision in [Patel Bros. Vs. Vadilal Kashidas Ltd.](#), While construing a similar clause in a contract that the transaction was subject to Bombay jurisdiction it was held by the Madras High Court that it cannot be implied that the jurisdiction of all other Courts is excluded. Sri Rajeswara Rao contends that this decision is not correct. He submitted that the very fact when there are two Courts having jurisdiction to entertain a suit, and the parties stipulated that disputes will be subject to the jurisdiction of one of them, there is a necessary implication that the jurisdiction of the other Court is excluded. Otherwise there is absolutely no purpose in stating "subject to Bombay jurisdiction" if there was no intention of excluding the jurisdiction of the Vijayawada Court. I am inclined to agree with this contention. In [Hoosen Kasam Dada \(India\) Ltd. Vs. Motilal Padampat Sugar Mills Co. Ltd.](#), Clause 8 of the "offer forms" provided :

all disputes in respect of this contract shall be settled in the Court of the seller's jurisdiction where this contract shall be deemed to have been entered into

There it was observed :

The parties must be deemed therefore to have had a choice of Courts at the time when they entered into the contracts but they voluntarily agreed with each other that any suit relating to the contract shall be instituted only in the Court of the seller's jurisdiction.

6. No doubt the main question that was discussed and decided in the judgment was whether such an agreement would be contrary to the provisions of section 28 of the Contract Act. It was held that it was not contrary to section 28. But in paragraph 3 of the judgment it was also held that in providing that the Court of seller's jurisdiction is the Court where the disputes should be settled, the parties must be deemed to have agreed that the suit shall be instituted only in the Court of the seller's jurisdiction (*Italic is mine*). Ramachandra Iyer, J. in *Patel Bros. v. Vadilal Kashidas Ltd.* AIR 1959 SC 227, distinguished this decision by saying that :--

As may be seen from the terms of the contract in that case there was a specific mention in the contract itself that one Court shall have jurisdiction and the other Courts shall not have such jurisdiction.

7. With great respect to the learned Judge the contract in that case did not contain any provision that other Courts shall not have such jurisdiction. All that was stated was that the disputes should be settled in the Court of seller's jurisdiction. The learned judges however inferred from this clause that the party should be deemed to have agreed that the Court of the seller's jurisdiction alone could entertain the suit and the other Courts have no jurisdiction. The position is the same in this case also. If therefore the matter rested only on the construction of the contract the terms of which are referred to in the bill, I would have agreed with the contention that it was agreed between parties that the Bombay Court alone shall have

jurisdiction. Sri Rammohan Rao, the learned Counsel for the respondent tried to argue that the bill cannot be said to be a contract between the parties as it was issued by the plaintiff alone, and the clause in the contract "subject to Bombay jurisdiction" is only a unilateral statement by the plaintiff. I am not inclined to agree. When the plaintiff acted upon these terms and obtain the goods and paid for them it must be taken that the defendants agreed to all the terms including the terms subject to Bombay jurisdiction.

8. In this case, however, the suit is not brought on the basis of the contract contained in the bill. The suit is filed on the basis of the settlement which was arrived at Vijayawada. In the plaint it is stated that the defendants verified and settled the accounts on 16th October, 1968 at Vijayawada and became liable to pay a sum of Rs. 25,000. Under the settlement the defendants agreed to pay interest at 88 paise per month whereas under the original contract the terms of which were set out in the bill, interest has to be paid at 9% per annum. Further it is also said in the plaint the cause of action arose when the accounts were settled and the pronote was executed in the plaintiffs account book. As has been pointed out in [Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.,](#) at 188 citing AIR 1934 147 (Privy Council)

Such a transaction is in truth bilateral and creates new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true because there must in such cases be, at least in the end, a creditor to whom the balance is due and to pay it, the other side agreeing the entire debt as at a certain figure.....

9. The suit in the present case is based upon the agreement arrived at Vijayawada under Exhibit A-2 and not on the agreement of purchase contained in the bills. In paragraph 6 of the written statement of defendants 2 to 4 also it is stated that a novation was effected in regard to the original liabilities. The defendants therefore also treated this as a fresh cause of action. The circumstance that there was a clause in the bill providing for submission to Bombay jurisdiction will not therefore be of any help to the defendants in the suit based on the foot of the settlement evidenced by Exhibit A-2 which was admittedly entered into at Vijayawada and in which there is no such clause limiting the jurisdiction of the Courts at Bombay.

10. In this view it is unnecessary to consider the further contention of Sri Ramamohan Rao that as there is no failure of justice by reason of the Vijayawada Court entertaining the suit, the submission regarding the lack of jurisdiction should not be entertained.

11. I am therefore of the view though for reasons different from those which weighed with by the Court below that the Sub-Court, Vijayawada had jurisdiction to entertain the suit.

12. Contention (2)--It is argued that defendants 2 to 4 ceased to be partners even on 4th September, 1968. Therefore they are not liable for any amount payable under the settlement. Exhibit A-2, which was entered into later, i.e., on 16th October 1968. The Court below has held that there is no evidence to show that defendants 2 to 4 have ceased to be partners, I agree with this finding. It was said that a release deed was executed. But the release deed has not been produced. D.W. 3 deposes that he had attested the release, deed. He said that he did not remember whether the original release deed was written on stamp paper and whether the said debt was referred to in the release deed. In the absence of the document said to have been executed whereby defendants 2 to 4 retired from the partnership the Court below was right in holding that there is no proof for such retirement.

13. Sri Rajeswara Rao then contended that even assuming that they were continuing to be partners they are not bound by the settlement which was signed by defendant I alone. He drew my attention to section 22 of the Indian Partnership Act which provides :

In order to bind a firm, an act of instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

14. It was submitted that he did not sign as partner of the firm in this case. But it is clear from the circumstances of the case that when he signed he had an intention to bind the firm. The defendant signed it in the account books of the plaintiff's firm, in the page containing the account of the defendants. It is also stated that a similar entry was made in the defendants' books. But those books are not produced. Further it was never the contention of the defendants that the first defendant had no right to represent the firm or did not intend to do so when he signed the settlement. The only contention of the defendants 2 to 4 was that the defendants had ceased to be partners by 4th September, 1968. It is not open to them to raise the contention for the first time in appeal in this Court. Even in the lower Court there was no issue to the effect that the first defendant had no authority to enter into a settlement on behalf of the firm or did not represent the firm, while doing so. This contention is also negated.

15. Contention : (3)--It is contended that the plaintiff is not entitled to commission. It is no doubt true that in Exhibit A-2 it is stated that commission is payable at 1%. I am unable to see on what basis commission can be claimed from the defendants. It was stated that as the plaintiff was obliged to pay commission to the mills it was collecting commission from the defendants. This may be true so long as the contract of sale and purchase is in force. Actually such a commission was being charged and was being paid, as is clear from the entries in Exhibit A-2 itself. Once a fresh settlement is arrived at there is no relationship of seller and purchaser. I am unable to see how the defendants would be liable to pay commission. The expression "commission" used in Exhibit A-2 is in my view only additional interest at 12%

charged in addition to interest at 88 paise per month which is also provided. In fact the total interest would be nearly 22%. There is an issue framed whether the commission at 1% is penal, oppressive and unenforceable. The lower Court held that it was shown that it was penal. In the view which I am taking that the commission is really in nature of additional interest, there can be no doubt that interest charged at 22% is penal and oppressive. The learned Counsel for the respondent also very fairly stated in consultation with his client who is present in the Court that he was willing not to charge commission at 1% after the date of the settlement and the suit may be decreed only for the balance. The decree will be modified in the light of this judgment and the appeal is allowed in part. The appellants will pay proportionate costs to the respondent.