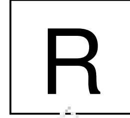

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 25th DAY OF NOVEMBER, 2022

BEFORE

THE HON'BLE MR JUSTICE UMESH M ADIGA

REGULAR SECOND APPEAL NO. 1035 OF 2007 (DEC. & INJ.)

BETWEEN

SRI VENKATARAYA S NAYAK
S/O SANNAPPA NAYAK,
AGED ABOUT 61 YEARS
R/AT NO.15 SHANTALA SANMARG NAGAR
OPP KEC GOKUL ROAD, HUBLI-580030
DHARWAD DIST

...APPELLANT

(BY SRI.S V SHASTRI & SRI. RAVI HEGDE
& RAVINDRANATH K. ADVOCATE)

AND

D VIJAYGOPAL MALLYA S/O DIWAKAR
AGED ABOUT 36 YEARS
R/AT NO.201, HILLI VIEW APARTMENTS
ADARSHANAGAR, HUBLI, DHARWAD DIST

...RESPONDENT

(BY SRI.VIJAY KUMAR B. HORATTI, ADV. FOR
RAVI G. SABHAHIT, ADVS.)

THIS RSA IS FILED UNDER SECTION 100 OF CPC PRAYING TO PASS THE JUDGMENT AND DECREE BY SETTING ASIDE THE JUDGMENT AND DECREE PASSED IN R.A.NO.126/2004 DATED 12.12.2006 ON THE FILE OF THE II ADDL. CIVIL JUDGE (SR. DVN.) HUBBALLI REVERSING THE JUDGEMENT AND DECREE IN O.S.NO.49/2001 DATED 07.07.2004 ON THE FILE OF PRL. CIVIL JUDGE (JR.DVN.) HUBBALLI AND ALLOW THE APPEAL.

Neutral Citation

RSA No. 1035 OF 2007

THIS APPEAL HAVING BEEN HEARD AND RESERVED ON 21.10.2022 FOR ORDERS AND COMING ON FOR PRONOUNCEMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This is the defendant's appeal against the decree and judgment passed in RA No.126/2004 on the file of II Addl. Civil Judge (Sr. Dvn.) Hubballi dated 12.12.2006.

2. I refer the parties as per their rankings before the trial Court, for the sake of convenience.

3. To dispose of this appeal, brief facts of the case of both the parties before the trial Court were as under:

It was the case of the plaintiff that he has been running the business of "Glow Sign Boards and Labels". The defendant joined the said business as working partner without any investment and a formal partnership deed was entered into between the parties on 01.12.1998. Entire capital of Rs.2,50,000/- has been contributed by the plaintiff and 30% of the profit of the business was agreed to be shared with the defendant and 70% of the profit has to be

paid to the plaintiff. The said partnership business was running in the name and style of M/s Vinyl Prints and Designs.

4. Even after entering into partnership and change in the name of business, it has been run as proprietary concern. The role of the defendant was like a servant or subordinate. In the place of salary, he has been paid 30% of the profit of the business. Therefore, in fact, it was not a partnership firm.

5. Due to non-cooperation of the defendant and his miss-deeds, plaintiff could not carry on the business. Therefore, he issued a notice dated 26.12.2000 and dissolved the firm. Defendant replied to the notice with false contentions, which were not maintainable. Defendant unnecessarily interfering in the business of plaintiff and causing loss to him. With these reasons, plaintiff filed the suit praying to declare that the 1) M/s Vinyl Prints and Designs exclusively belongs to the plaintiff and it is a proprietary concern of the plaintiff. 2) After terminating association of defendant with the

plaintiff, defendant has no right, title or interest in the business run by the plaintiff. 3) Defendant be restrained by permanent injunction from interfering and obstructing in running the business of the plaintiff in his own rights. 4) Claim for damages of Rs.5,000/- due to mental stress created by the defendant.

6. It is the contention of the defendant that suit is not maintainable. Partnership deed contains Arbitration clause to settle the dispute. Instead of invoking the provisions of Arbitration clause, plaintiff has filed the suit. Therefore, suit is not tenable before the Court. Defendant has specialized knowledge and he is expert to mobilize raw materials and marketing of the products. Plaintiff himself offered to invest money in the business, accordingly, he invested Rs.2,50,000/- which was required for purchasing of computer and cutting machine. The share of the plaintiff is fixed at 70% for 36 months, which includes installments towards refund of his capital amount, together with interest at 18 %

per annum, Therefore, it was not a formal partnership and defendant was not workman or subordinate of the plaintiff.

7. Defendant further contended that plaint averments are false. Plaintiff has not issued the notice in accordance with law and the firm should be a necessary party in the suit. He also contended that he is partner of the said firm and entitle for share of 30% in the profit and loss of the firm. The dispute could be settled by arbitration. With these reasons prayed to dismiss the suit.

8. From the rival contentions of the parties, the trial Court framed the following issues:

> 1) Whether the plaintiff proves that M/s Vinyl Prints and Designs Exclusively belongs to him and it is his proprietary concern as stated in para 5 of the plaint?
>
> 2) Whether the plaintiff further proves that by way of notice dated 26.12.2000 partnership is dissolved and subsequent there to the defendant is not concerned to the same?
>
> 3) Is the plaintiff entitled for the relief of declaration and consequential relief of injunction as prayed for in the suit?

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4) Whether the defendant proves that the suit is not maintainable without availing the remedy by way of referring the dispute to the Arbitrator as per clause 24 by the partnership deed for settlement?

5) Do the defendant further proves that for the reasons stated in para 12 of the written statement, this court has no pecuniary jurisdiction to try this suit?

6) Whether the defendant further proves that the suit suffers for non-joinder of parties?

7) What order or decree?

9. Both the parties let in evidences. Plaintiff examined PW1 and got marked EX.P1 to P.16 and defendant examined DW1 and got marked EX.D1 and D2.

10. Learned trial judge appreciating the pleadings and evidence on record, dismissed the suit by judgment and decree dated 07.07.2004. Plaintiff has challenged the same in RA No.126/2004 before the II Addl. Civil Judge (Sr.Dvn.) Hubballi. The learned First Appellate Judge, reversed the said judgment by impugned judgment dated 12.12.2006.

11. This appeal was admitted to consider the following substantial questions of law:

1) Whether the Lower Appellate Court is justified in holding that partnership deed dated 01.12.1998 cannot be looked into as the same is unregistered one?

2) Whether the Lower Appellate Court is justified in holding that unregistered partnership deed could be looked into only for collateral purpose when the entire suit is based on the said partnership deed dated 01.12.1998?

3) Whether the Lower Appellate Court is justified in holding that the partnership deed has been dissolved even when the notice is not in consonance with Section-43 of the said Act?

12. I have heard the arguments of learned advocate for both sides and carefully gone through the records. As rightly pointed out by the learned advocate for appellant, while discussing point No.1 at para no.8 of the impugned judgment, the learned First Appellate Judge observed that Ex.P1 i.e. Partnership deed is unregistered document. Hence, it cannot be looked into, to arrive at conclusion that defendant was partner of the firm. The said finding of the learned First Appellate Judge is misconceived. The learned trial judge has not discussed under which provisions of law the partnership deed is to be registered. Section 17 of the

Registration Act or partnership Act does not compel that the partnership deed shall be registered. When the registration of the partnership deed is not compulsory in accordance with Indian Registration Act or partnership Act, question of non-admissibility of Ex.P1 does not arise. In the said findings of learned First Appellate Judge is perverse.

13. It appears that the learned First Appellate Judge instead of considering that partnership needs to be registered to claim certain rights under the partnership act, wrongly construed that partnership deed should be registered under the Registration Act. Ex.P1 is an admissible in evidence. The learned trial judge erred and it was completely ignoring it and considering it under Section 47 of the Registration Act for collateral purpose. That needs to be interfered in the second appeal.

14. The learned trial Judge in para No.10 of the impugned judgment at page No.10 and 11, discussed about the particulars, facts of the case and held that defendant has not produced the relevant documents or he has not taken such

contentions in the notice or written statement. Therefore, it is to be presumed that earlier to the business of partnership, plaintiff was running a proprietary concern. Looking to the contentions or discussions made in para 10, it appears that learned First Appellate Judge shifting the burden on the defendant, to prove the case of the plaintiff. Plaintiff has approached the Court and he should plead and prove his contention. Plaintiff has not placed any materials to show that prior to partnership firm he had been running his business. Plaintiff cannot get relief on the basis of weakness in the case of defendant. The said finding is erroneous.

15. It is pertinent to note that once partnership firm come into existence by agreement between the parties, it is not necessary to go back and see whether prior to starting of the firm, whether either parties were running said business as an proprietary concern.

16. The learned First Appellate Judge has observed in para No.10 & 11 of the impugned judgment that it was an admitted fact that defendant has not contributed towards

share of capital, therefore, he was a co-worker or sub-ordinate of the plaintiff. The said finding is also against the provisions of law. It is not necessary that each parties shall contribute towards share capital to become partners. It is agreement between parties. Partnership Firm is defined under Section 4 of the Indian Partnership ACT, 1932.

Section 4 of Indian Partnership Act, 1932 reads as under:

> "4. Definition of "partnership", "partner", "firm" and "firm name".—"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.
>
> Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the "firm name".

According to the above said definition, there is no necessary that there must be an investment by each parties

to constitute firm. In the evidence of PW1 i.e in his cross examination, he has specifically says that except for purchasing computer and cutting machine, there was no requirement of any fund to purchase raw materials etc. He has also stated that except deposit of Rs.30,000/-, remaining raw materials were obtained on credit basis and the amount has been paid from time to time. According to the admission of PW1, evidence of DW1, pleading of defendant and contents of Ex.P1, plaintiff has been getting 70% of the profit. According to the defendant said profit was including refund of capital invested by the plaintiff and 18% interest per annum and interest on capital amount. PW.1 admits that he has received interest on the said capital. He has also admitted that by installment he used to get refund of capital invested by him. Therefore, finding of the learned trial judge that defendant has not invested the money. Therefore, it can be presumed that he was co-worker is erroneous.

17. The plaintiff has not properly pleaded in the plaint, however, vaguely it is stated that after issue of notice as per

Ex.P5, he dissolved the firm and thereafter, he continued the same business in individual capacity i.e proprietary concern. It appears even without settlement of accounts in accordance with Indian Partnership Act, he continued the business. In page No.11 and 12 of impugned judgment dated 12.12.2006 in RA No.126/2004, PW.1 has stated that after dissolving the partnership firm according to the notice given by him, he has not prepared profit and loss account or settled the accounts. He says that there was raw materials worth Rs.23,000/- and the business was about to be Rs.7,00,000/-. After receiving Ex.P2, he has filed the present suit and obtained exparte temporary injunction and thereafter he shifted all the materials to his house. He has stated that after he commenced business in partnership firm, the business has been growing. He also stated that when he vacated the premises, wherein they have been running partnership business, assets worth Rs.90,000/- were available in the firm account and after issue of dissolution notice as per Ex.P5, he has been continuing business. The above admission of PW1

clearly indicates that he has not approached the Court with clean hands. He did not settle the partnership firm account or dissolved the partnership firm in accordance with law and thereafter continued the very same business in the very same name and style and with the goodwill of the firm. Plaintiff has issued Ex.P5 and washed his hands without even settlement of account. Hence, he is not entitled for the relief.

18. The facts of the present case indicates that Section 69 of Indian Partnership Act is squarely applicable. Plaintiff has no right to file the suit to claim the relief of the present suit since, the partnership was unregistered. Admittedly, the firm of the unregistered, there cannot be any estoppel against the law. Defendant has not taken the said contention in written statement and no issues were framed by the trial court in this regard, cannot be a ground to hold that plaintiff has a right to claim the suit. It is a question of law basing on the admitted fact. Therefore, as submitted by learned advocate for appellant, the suit was not maintainable since plaintiff had no right to file the suit. On this count also the

suit was liable to be dismissed. These facts were not considered by the First Appellate Court. Hence finding of the First Appellate Court is erroneous and arbitrary.

19. The prayer made in the suit is not sustainable. Plaintiff being a partner of the firm, during continuation of the business of the firm by issuing notice, dissolved the firm and immediately he continued the same business by declaration that it was a proprietary concern and prayed to restrain the defendant from interfering in the said business. The said prayer is not tenable as observed by the learned trial judge.

20. The learned advocate for appellant contends that Ex.P1.has arbitration clause and in the written statement defendant

21. Defendant has not pressed the said Arbitration clause and not filed necessary application under Section 8 of the Arbitration Act before trial Court to refer the dispute to arbitration. To discuss this point, it is necessary to refer Section 8 of the Arbitration and Conciliation Act,1996.

Section 8 in THE ARBITRATION AND CONCILIATION ACT, 1996 read as under

> 8. Power to refer parties to arbitration where there is an arbitration agreement.—
>
> (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

The defendant has not filed such application before trial Court to refer the dispute to arbitration. He waived his right to invoke the Arbitration Clause and acquiesced himself to the jurisdiction of the Court. Mere existence of Arbitration Clause to the agreement does not bar the jurisdiction of the Civil Court. Defendant has waived his right and not filed any such application under Section 8 of Arbitration and

Conciliation Act, 1996, cannot raise such point in Regular Second Appeal. Said contention of Appellant is not tenable.

22. The learned advocate for appellant has contends that Ex.P.1 has Arbitrary clause and in the written statement defendant has taken said contention. But Courts below have not considered the same. The said submission, at this stage is not tenable.

23. It is true that Ex.P.1 contains Arbitration Clause and said defence was taken by defendant in the written statement.

24. Learned advocate for the appellant has repeatedly contended that the suit was not at all maintainable and it is barred under Section 69 of the Partnership Act. The suit was hit by Section 69 of the Indian Partnership act. Learned advocate for respondent contends that such contention was not taken in the pleadings or when the matter was pending before the trial court as well as before First Appellate Court. Therefore, at present, appellant cannot be permitted to take

new contentions in the second appeal. To consider the said contention, it is necessary to refer Section 69 of the Indian Partnership Act, 1932.

25. Section 69 of Indian Partnership Act,1932 reads as under:

> "69. Effect of non-registration.—
>
> (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,—
>
> (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply,—

(a) to firms or to partners in firms which have no place of business in [the territories to which this Act extends], or whose places of business in [the said territories], are situated in areas to which, by notification under [section 56], this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

26. In this case, as per the pleadings, plaintiff sought for the relief of declaration and permanent injunction against one of the partner in respect of business of the firm to continue the business of the firm in his individual capacity and also restrain defendant from interfering in the said business without settlement of account of the defendant in the firm.

Under these circumstances, Section 69 of the Indian Partnership Act, also squarely applicable to the facts of the present case.

27. Learned advocate for appellant relied on the judgment reported in ***(2018) 12 SCC 580*** in the case of ***Farooq Vs. Sandhya Antheraper Kurishingal and others.*** It is true that in the above said case, it is held by the Hon'ble Supreme Court that suit is not maintainable since there is a specific bar under Section 69(2) of Indian Partnership Act, 1932. In that case, defence was taken by the defendant that suit was not maintainable in view of specific bar under Section 69 of the Indian Partnership Act. Preliminary issue was framed. Considering the same, the Hon'ble Supreme Court held that rejection of the plaint by the trial Court was proper. In the present case, defendant has not taken such contention and there was no issue framed by the trial court in this regard. Therefore, we cannot find fault with either trial Court or First Appellate Court to hold that they erred in not considering the Section 69 of the Indian partnership Act, 1932.

28. The trial court assessing the pleading, evidence and also inconsistencies pleaded by the plaintiff, rightly dismissed the suit. First Appellate Court without any materials on record wrongly appreciated the question of fact as well as law and came to erroneous finding. First Appellate Court wrongly held that Ex.P1 requires compulsory registration and it was not registered, therefore, did not looked into to consider the claim of the party to the suit.

29. Learned trial Judge has presumed that for certain facts there is no question of presumption of such facts. Under these circumstances, the finding of First Appellate Judge is erroneous and needs to be interfered by this Court.

30. For the above said discussions I answer point Nos.1 to 3 in the affirmative and pass the following:

ORDER

Appeal is allowed with cost.

The impugned judgment of First Appellate Court in RA No.126/2004 dated 12.12.2006 is

set aside and judgment of the trial Court is confirmed.

Sd/-
JUDGE

HMB

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