

IN THE HIGH COURT OF JUDICATURE AT MADRASDATED : **06.06.2017**

CORAM

THE HON'BLE MR.JUSTICE **P.KALAIYARASAN****C.S.No.878 of 2007**

S.P.Muthiah

.. Plaintiff

vs

R.Ethiraju

.. Defendant

Civil Suit filed under Order IV Rule 1 of the Original Side Rules and Order VII Rule 1 CPC read with Section 44 of the Partnership Act, seeking Judgment and Decree against the defendant (a) for the dissolution of the Partnership carried on by the plaintiff and the defendant under Partnership Deed, dated 13.12.2001; (b) for rendition of the accounts of the Partnership from 13.12.2001 in respect of profits and monies especially to the credit of the plaintiff against the defendant for the amount found due to the plaintiff as ascertained in this suit with interest at 18% per annum from the date of the plaint; (c) for a permanent injunction restraining the defendant, his men, agent, representative or anybody claiming under or on behalf of the defendant herein from making any further alienation or dealing with the schedule mentioned property in any other manner and for costs.

For Plaintiff : Mr.K.V.Sundararajan

For Defendants : Mr.M.Balasubramanian

JUDGMENT

This suit is for the dissolution of the partnership firm carried on by the plaintiff and defendant under Partnership Deed, dated 13.12.2001, for rendition of accounts and for permanent injunction.

2. The plaint averments are as follows :

(i) The plaintiff and defendant entered into a partnership agreement, dated 13.12.2001 in respect of carrying out construction activity in premises bearing Nos.13 and 15, Poes 3rd Street, Teynampet, Chennai-18. As per the agreement, the plaintiff invested a sum of Rs.15,37,000/-. The profit and loss has to be shared at the rate of 50:50 basis. The defendant has to take care of the construction work and he should ensure that the cost of construction should not exceed Rs.500/- per sq.ft. The planning permission and other statutory permission and connections like TNEB, Metro water, Sewerage Board have to be taken care by the defendant. Though the defendant was authorised to negotiate and arrive at the sale price, the same has to be finalised only after the confirmation and acceptance by the plaintiff.

(ii) The defendant had completed the construction and sold the constructed flats to various third parties over a period of time. Even as late as July 2015, some flats were sold to the third parties. The defendant though made huge profits in the transaction has paid only a sum of Rs.15,00,000/- to the plaintiff till now. But the due towards plaintiff's profit would be easily more than Rs.60,00,000/-. Hence, the plaintiff will be entitled to Rs.45,00,000/-.

(iii) The plaintiff was constrained to send a legal notice dated 30.04.2006 calling upon the defendant to render full accounts, but there was no response. Therefore, the present suit has been filed.

3. The averments in the written statement are as follows :

(i) The plaintiff paid a sum of Rs.15,37,000/- to the defendant by way of temporary financial arrangement as a hand loan. The plaintiff obtained signature of the defendant in the prepared finance agreement and it is a shame and nominal and it had never been acted upon as a partnership agreement. The plaintiff realised a total sum of Rs.17,30,000/- on various dates from 24.08.2002 to 30.12.2003 from the defendant. The agreement dated 13.12.2001 does not mention any partnership or about the commencement of the business, place of business, details of financial year etc.

(ii) The defendant had constructed the total area of 14000 sq.ft in the said property, out of which 700 sq.ft were handed over to the land owners' family. The construction cost at the rate of 500 per sq.ft came to Rs.35,00,000/-. The defendant paid a sum of Rs.3,60,000/- in a period of three years to three owners of the land by way of rental amounts at the rate of 12,000/- per month. He also paid a sum of Rs.15,00,000/- to the land owners by way of non-

refundable amount besides 50% constructed area in lieu of 50% UDS of land given to defendant by the land owners. The defendant also spent a sum of Rs.5,00,000/- towards EB expenses for erecting a separate transformer, metro water and sewerage lines, C.M.D.A etc., In all a sum of Rs.23,60,000/- has been spent by the defendant and he sustained loss in the project to the tune of Rs.8,60,000/-. The plaintiff had no right or locus standi to speak about the profit and loss accounts of the project especially when there is no partnership firm in the true sense. The partnership firm is not made party in the suit for the relief of dissolution. There is no cause of action for the above suit. The present suit is filed nearly three years after the plaintiff realised the entire amount due to him. Therefore, the suit is to be dismissed.

4. On perusal of the pleadings of the parties, the following issues have been framed for trial :

1. Whether the plaintiff is entitled to the relief of dissolution of Partnership Firm as prayed for ?
2. Whether the plaintiff is entitled to rendition of account as prayed for and for recovery of the amount found due to the plaintiff with interest at the rate of

18% p.a., from the date of plaint ?

3. Whether the plaintiff is entitled to the relief of permanent injunction against the defendant from making any further alienation or from dealing with the suit schedule property ?
4. Whether the arrangement between the plaintiff and the defendant was only a loan arrangement and hence the suit for dissolution of Partnership treating the agreement to be a Partnership Agreement is not maintainable ?
5. To what other reliefs, if any the plaintiff is entitled ?

5. The plaintiff has been examined as P.W.1. Mr.Kasi Viswanathan, a third party was examined as P.W.2 and Exs.P.1 to P.5 were marked on the side of the plaintiff. The defendant was examined as D.W.1 and Exs.D.1 to D.3 were marked on his side.

6. Issue No. 4 :

The undisputed fact is that an agreement was entered into between the plaintiff and the defendant on 13.12.2001 and the same is marked as Ex.P.1. There is also no dispute that the plaintiff paid to the defendant on various dates from the date of agreement till 31.03.2002, Rs.15,30,000/- and the defendant also paid to the

plaintiff on various dates from 24.08.2002 to 30.12.2003, Rs.17,30,000/-. The pleadings on both oral and documentary evidence of both sides also bring forth the above facts.

7. The defendant's main contention is that he obtained only hand loan from the plaintiff and the agreement is only a finance agreement and though it is termed as Partnership Agreement, it is only shame and nominal and the same was not properly acted upon. Another contention of the defendant is that dissolution of non-existent firm is not maintainable.

8. The agreement made between the plaintiff and the defendant is marked as Ex.P.1. The title given in the agreement is Partnership Agreement. A partnership firm is required to be registered under the Indian Partnership Act, 1932. Section 69 of the Act deals with effect of non-registration. As per sub-section (1) and (2), no suit to enforce a right arising from a contract or conferred by the 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 against any third party unless the firm is registered. But sub-section (3) gives exception which reads thus :

"(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, or the Provincial Insolvency Act, 1920, to realise the Property of an insolvent partner."

Therefore when suit for dissolution of firm, firm need not be a registered one.

9. Before looking into agreement in question as to whether it is partnership agreement or not, it is to be seen what are the legal requirements to constitute a partnership in law. For this, the learned counsel appearing for the plaintiff cited **K.D.Kamath v. C.I.T., Bangalore**, reported in **(1971) 2 SCC 873** and contended that two legal requirements under Section 4 of Partnership Act is necessary. In the above ruling in paragraph 28, it has been held as follows :

"From the review of the above decisions, it is clear that the mere nomenclature given to a document is by itself not sufficient to hold that

the document in question is one of partnership. Two essential conditions to be satisfied are : (1) that there should be an agreement to share the profits as well as the losses of business; and (2) the business must be carried on by all or any of them acting for all, within the meaning of the definition of "partnership" under Section 4 of the Partnership Act. The fact that the executive power and control, by agreement of the parties, is vested in one partner or the further circumstance that only one partner can operate the bank accounts or borrow on behalf of the firm are not destructive of the theory of partnership provided the two essential conditions, mentioned earlier, are satisfied."

10. In this case on hand, cursory perusal of the agreement discloses the sharing of profits 50% between the two parties who entered into the agreement. They also agreed to face the problems if any during the process. The party of the second part namely the defendant has been entrusted with the execution of the work. So he acted as an agent and thus the essential requirements as per Section 4 of the Partnership Act for the definition of Partnership is well attracted in this case.

11. While receiving the amount from the plaintiff, the defendant

himself made endorsements under Ex.P.2. In Ex.P.2, he made various entries, viz, dated 06.11.2001 and 17.01.2002. In these entries, he clearly mentioned that he received the amount towards further share and towards the partnership work to be executed at No.13 and 15 Poes 3rd Street, Teynampet, Chennai. Thus from the conduct of the defendant also it is very clear that Ex.P.1 is only a Partnership Deed and not made for loan arrangement. Therefore, this issue is answered in favour of the plaintiff.

12. Issue Nos. 1 and 2 :

The case of the plaintiff is that the defendant has not acted as per the agreement made between them and he committed breach. Admittedly the plaintiff invested Rs.15,30,000/- from the date of agreement till 31.03.2002 and he realised from the defendant from 24.08.2002 to 30.12.2003, Rs.17,30,000/-. As per the agreement the plaintiff is entitled to 50% of the profits. The party in the second part of the agreement, namely the defendant should explain the process in detail regarding technical and financial aspects to the party of the first part, namely the plaintiff. Though the party in the second part namely the defendant was allowed to negotiate and decide the rate per sq.ft., with the customers, the final decision should be accepted with the consultation of the party of the first part. But the defendant have not

followed the above terms of the agreement. It is seen from Exhibit, Ex.P.5 Encumbrance Certificate, the defendant along with land owners executed sale deed in favour of the third parties on various dates till 12.07.2015. It is also not the case of the defendant that he followed the terms of the agreement and there is no breach on his part. Thus the plaintiff has clearly made out, through both oral and documentary evidence that the defendant committed the breach of the agreement relating to the conduct of the business. Therefore, as per Section 44 of the Indian Partnership Act, 1932, the partnership firm established under Ex.P.1 agreement is liable to be dissolved.

13. The plaintiff also claims rendition of accounts of the partnership firm from 13.12.2001 in respect of the profits and in respect of assets of the partnership firm. The defendant in his pleadings has stated that he incurred expenses towards getting various connections from various departments. He has not consulted the plaintiff while selling the flats for confirmation of price. Therefore, the defendant is bound to render the accounts of partnership firm from the date of agreement till the date of dissolution and the plaintiff is entitled to the amount found due to him. For the aforesaid reasons, this Court holds that the plaintiff is entitled to the relief of dissolution of partnership firm and rendition of accounts as prayed for.

14. Issue No.3 :

The plaintiff seeks the relief of permanent injunction from making any further alienation with the suit schedule property. Already flats allotted to the builder under the Joint Venture Agreement have been sold and the plaintiff has not brought out any left-out portion for sale. Therefore, the relief of permanent injunction is rejected.

15. Issue No.5 :

The decree is passed for dissolution of partnership business carried on by the plaintiff and the defendant under the Partnership Deed, dated 13.12.2001 as on 25.09.2007, the date of the plaint and the plaintiff is entitled to rendition of accounts from the defendant from 13.12.2001 till the date of dissolution in respect of properties and assets of the partnership firm and the plaintiff is entitled to 50% of profits. With respect to the relief of permanent injunction, the suit is dismissed.

In fine, this Civil Suit is partly allowed with costs whereby judgment and decree is passed for dissolution of partnership business carried on by the plaintiff and the defendant under the Partnership Deed, dated 13.12.2001 as on 25.09.2007, the date of the plaint and

the plaintiff is entitled to rendition of accounts from the defendant from 13.12.2001 till the date of dissolution in respect of properties and assets of the partnership firm and the plaintiff is entitled to 50% of profits. With respect to the relief of permanent injunction, the suit is dismissed.

06.06.2017

Speaking order

Index : Yes / No

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P.KALAIYARASAN, J

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