IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.814 OF 2016
WITH
CIVIL APPLICATION NO.15427 OF 2016

Vikram Shivdas Kalyankasture

...**Versus**...

Datta Vitthal Sontakke

...

Mr. N.L. Jadhav, Advocate i/b Mr. V.S. Panpatte, Advocate for the appellant

Mr. A.D. Hande, Advocate h/f Mr. A.M. Gaikwad, Advocate for the sole respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07th FEBRUARY, 2019

ORDER :

1 Present appeal has been filed by the unsuccessful plaintiff. He had filed Regular Civil Suit No.25/2012 before Joint Civil Judge Junior Division, Mukhed, Dist. Nanded for recovery of Rs.3,72,500/- along with interest against the present respondent/defendant. Plaintiff had come with a case that he is the uncle of defendant's wife. Defendant was working as Accountant (Munim) at Adat shop since 15 years and therefore, he had secured the knowledge of Adat business. Defendant put a proposal to the

plaintiff to start Adat business in partnership with him. Plaintiff had got finance after his retirement and therefore, agreed to do the said business with the defendant. According to the plaintiff, it was decided in presence of one Subhash Mariba Waghmare and Ganesh Rajaram Kalyankasture that he would provide amount to purchase agricultural produce. The business was started about 18 months prior to the suit under the name and style 'Sant Dnyaneshwar Adat Shop'. Plaintiff had invested amount of Rs.4,00,000/- and at the time of handing over the said amount one Sk. Mujib Sk. Amad and one Ganesh Rajaram Kalyankasture were present. It is also stated that the business was running smoothly and from the income derived from the business they had taken a plot. The sale deed was taken in the name of defendant, but it is stated that plaintiff is having half share in the same. Thereafter, the defendant was not providing accounts of the business and therefore, their relations became strained. He put proposal for closing down of the business and dissolution of partnership on 16.05.2011. Thereafter, the accounts were settled. An agreement was entered into stating that plaintiff would pay amount of Rs.2,00,000/- on the next day i.e. on 17.05.2011 and the remaining amount of Rs.1,72,500 would be paid after Diwali. The said document was executed in presence of witnesses. That document was written by Shivaji Mallikarjun Tangshitte. However, on the next day the defendant did not give amount of Rs.2,00,000/-. Plaintiff gave notice on 13.06.2011. Defendant has given a reply and denied such transaction on 29.06.2011. Hence, the suit was filed.

2 Defendant resisted the claim of the plaintiff by filing written statement. All the contentions were denied including that there was a partnership between them and plaintiff had contributed amount of Rs.4,00,000/-. It is stated that defendant has got licence from Agricultural Produce Market Committee and he is running the business. He had purchased the property from his own funds. He does not owe any amount to plaintiff.

3 Taking into consideration the rival contentions, issues came to be framed, parties have led oral as well as documentary evidence. After considering the evidence on record and hearing both sides, the learned Trial Court has decreed the suit on 13.01.2014. Defendant was directed to pay amount of Rs.3,72,500/- together with interest @ 6% per annum, from the date of the suit, till actual realization of the entire amount, to the plaintiff.

4 The defendant challenged the said Judgment and Decree before District Court, Kandhar, Link Court, Mukhed in Regular Civil Appeal No.5/2014. The learned District Judge-1, Kandhar heard the appeal and allowed the same on 27.09.2016, thereby dismissing the suit. Hence, the present appeal has been filed by the plaintiff.

5 Heard learned Advocate Mr. N.L. Jadhav instructed by Advocate Mr. V.S. Panpatte for appellant and learned Advocate Mr. Avinash D. Hande holding for Mr. A.M. Gaikwad for respondent.

6 It has been argued on behalf of the appellant that the learned First Appellate Court committed error in interfering with the decree passed by the learned Trial Court. There was partnership between plaintiff and defendant to conduct the shop. Plaintiff has proved that he had invested/given amount of Rs.4,00,000/- to the defendant to run the business in partnership. Though the partnership was oral and it was not registered, yet to claim the amount due, there was no bar under Section 68 of the Partnership Act. In fact, the right to recover the specific amount on account of investment cannot be said to have been barred by Section 69(i) of the Indian Partnership Act. A specific agreement was entered into between the plaintiff and defendant, which has been produced at Exh.23 and in order to prove the said agreement, plaintiff has examined witnesses. Taking into consideration the testimony of those witnesses, the trial Court has rightly arrived at the conclusion that there was the partnership between them and plaintiff had invested amount of Rs.4,00,000/-. The agreement showed that defendant had promised to pay amount of Rs.2,00,000/- on 17.05.2011 and the remaining amount was to be paid at the time of Diwali of the same year. There was no such circumstance, which was brought on

record before the First Appellate Court for interference in the Judgment and Decree passed by the Trial Court.

7 Per contra, the learned Advocate appearing for the respondent supported the reasons given by the First Appellate Court and submitted that the partnership itself was not proved. Under such circumstance, there was no question of any amount due from defendant to the plaintiff.

8 At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiff, for exercising jurisdiction of this Court under Section 100 of the Code of Civil Procedure. As per the law laid down by Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of CPC, after the 1976 amendment, is confined only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the CPC.

9 A reliance can be placed on decision in **Ishwar Dass Jain vs. Sohan Lal** reported in **(2000) 1 SCC 434**, wherein it has been observed that -

> "Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question

> of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant, taking into consideration the facts as well as evidence that has been adduced.

10 Here, the plaintiff had come with a case that there was a partnership between him and defendant to run an Adat shop. However, the pleadings as well as evidence of plaintiff would show that he has not disclosed the terms and conditions, on which, the partnership was entered into. How much was the capital which was brought in the hotch pot, what was the ratio of profit and loss to be sustained by them etc.. He has also not explained as to why he allowed the licence issued by Agricultural Produce Market Committee in the name of defendant alone, should be the licence for the partnership business. All the way, he has used the word that

he has invested in the partnership firm amount of Rs.4,00,000/-. Investment is different from capital. According to him, the business was started under the name and style 'Sant Dnyaneshwar Adat Shop'. The question is, why the Shop Act licence is also not obtained in the name of partnership firm ? Another aspect is that there was no written document of partnership. Even if we presume that it was a partnership at will and then he comes with a case that defendant is the person who had expressed the dissolution of the partnership. According to him, the accounts were also settled. If accounts were already settled, then how a partner can be made personally liable to pay any amount itself is a question. He has not come with a case that after the settlement of amount there were no assets with the partnership, from which he could have recovered his dues. There is absolutely no document produced by him to show that accounts of the partnership were settled. If the partnership account was settled, then whether the partnership business was in profit or loss ought to have been explained. Under such circumstance, the First Appellate Court has rightly come to the conclusion that plaintiff had failed to prove that there was a partnership between him and the defendant.

11 Plaintiff has examined four witnesses to prove the transaction between him and the defendant. However, it is to be noted that none of those witnesses are reliable. He has tried to prove agreement Exh.23, but

surprisingly he himself has not signed that document. He has not given any explanation as to why he has not signed it. There are contradictions in the testimony of the witnesses in whose presence Exh.23 is stated to have been written or executed. The evidence of those witnesses has been rightly discussed by the First Appellate Court. Another important point is that plaintiff had issued notice to the defendant and then in reply to the said notice the defendant has denied the existence of partnership firm, running a business under the said partnership and execution of Exh.23. Inspite of this, plaintiff had not filed any document for settlement of account of the partnership, if at all such partnership had come into existence. Not a single document, showing that such partnership was in existence at any point of time, has been produced.

12 Even if for the sake of argument it is accepted that a partner of unregistered partnership firm can file a suit for recovery of amount from another partner, yet in this specific case, there is absolutely no evidence about existence of partnership business itself. Therefore, taking into considering the observations in the above said case and also on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

> "In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First

Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence.

Further, it is observed in the said case that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal.

13 There is no substantial question of law involved in this appeal. Hence, the Second Appeal is disposed of as not admitted.

14 Civil Application No.15427 of 2016 stands disposed of as a consequence of disposal of Second Appeal.

(Smt. Vibha Kankanwadi, J.)

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