

**(2013) 02 KAR CK 0121**

**In the Karnataka High Court**

**Case No : Regular Second Appeal No. 844 of 2011**

K. Nagesh Rayakar

APPELLANT

Vs

Smt. Lakshmidevi and Amith Financiers (R)

RESPONDENT

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**Date of Decision : 28-02-2013**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Limitation Act, 1963 — Section 5  
Partnership Act, 1932 — Section 32(2), 45

**Citation :** (2013) 2 AKR 854 : (2013) ILR (Kar) 3211 : (2013) 5 KarLJ 376 :  
(2013) 2 KCCR 1542

**Hon'ble Judges :** B.S. Patil, J

**Bench :** Single Bench

**Advocate :** R.G. Devadhar, for the Appellant; K. Chandrashekar for C/R1, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

B.S. Patil, J.—This appeal u/s 100 CPC is preferred challenging the judgment and decree dated 24.06.2008 passed by the Trial Court in O.S. No. 131/2003, thereby decreeing the suit filed by the respondent herein seeking recovery of a sum of Rs. 1,53,422/- along with future interest at 15% per annum from the date of the suit till realization. Liability to pay the amount has been fastened jointly and severally on defendants 1(a), 1(b) & 1(c). Aggrieved by this judgment, the legal representatives of defendant 1(a) preferred R.A. No. 89/2009. As the said appeal was belated, an application seeking condonation of delay was filed invoking Section 5 of the Limitation Act. The lower Appellate Court has dismissed the application holding that no sufficient cause was made out for condoning the delay of 307 days in filing the appeal. Consequently, the appeal also has been dismissed. In the circumstances, aggrieved by the judgment and decree passed by both the courts below, this regular second appeal is preferred.

2. Facts leading to this appeal, stated in nutshell are, that defendant No. 1 - M/s. Amith Financiers, a registered partnership concern was dealing in the business of financing. Defendants 1(a) to (c) were partners of the said firm from 1987 onwards. Plaintiff invested different sums of money in defendant No. 1-partnership firm with the fond hope that she will get assured interest and would get back her money after the investments got matured. According to him, at the instance of defendant No. 1(a) - Nagesh Rayakar, she gave money to him on 29.01.1987 in a sum of Rs. 10,000/- by way of cheque. Subsequently, on 08.10.1991 through another cheque, she deposited Rs. 6,000/- and again on 21.02.1993 through cheque bearing No. 145988, she has deposited Rs. 15,000/-. Later on, on 13.03.1995 another sum of Rs. 25,000/- was invested followed by another sum of Rs. 59,000/- through two cheques dated 11.12.1995. Thus, she contended that in all a total sum of Rs. 1,14,000/- was invested as deposits, which was evidenced by the respective receipts issued by the firm.

3. According to him, the defendant had agreed to pay interest at 15% per annum on the deposited amount. Though the defendant paid interest till 31.03.2001, subsequently they failed to pay interest as promised, therefore, the plaintiff got issued a legal notice on 13.05.2003. The registered notice was served on the first partner, but the notice issued to the other defendants were returned unclaimed.

4. The defendants resisted the suit. Defendant No. 1(a) - Nagesh Rayakar contended that he was the partner of 1st defendant-firm till 1994 and that as back as in the year 1994, he retired from the partnership firm which was well within the knowledge of the plaintiff. He urged that the plaintiff appeared to have continued to enjoy the benefits by receiving monthly interest on her deposits. He further urged that inspite of all these facts, plaintiff has intentionally made defendant No. 1(a) as a party with ulterior motives in order to make wrongful gain. As we are not concerned with the defence setup by the other defendants, it is unnecessary to dilate on that.

5. The Trial Court framed the following issues:

(i) Whether the plaintiff proves that she had made deposits in the defendant No. 1 firm on various dates as pleaded?

(ii) Whether plaintiff proves that defendants have not paid interest from 31.03.2001?

(iii) Whether suit of the plaintiff is barred by time?

(iv) Whether defendant No. 1(b) proves that in collusion with defendant No. 1(c) by creating documents, suit filed?

(v) Whether plaintiff is entitled for relief sought for?

(vi) What order or decree?

6. On behalf of the plaintiff, she examined herself and produced Exs. P1 to P13. During the pendency of the suit, defendant No. 1(a) - K. Nagesh Rayakar died on

28.11.2006. His wife and two sons being the legal representatives came on record. One of the sons of defendant No. 1(a) was examined as DW-1 and another witness was examined as DW-2. Exs. D1 & D1(a) were produced and marked.

7. Based on the evidence on record, the Trial Court found that the plaintiff successfully proved that she had made deposits in the 1st defendant-firm on various dates as pleaded by her and that the defendants had paid interest on the deposits with effect from 31.03.2001. The Trial Court decreed the suit fastening liability on all the partners.

8. As already referred to above, the Appellate Court has dismissed the appeal only on the ground of delay holding that there was no sufficient cause made out for condoning the delay.

9. I have heard the learned Counsel for both parties on the substantial question of law framed by this Court.

10. The following substantial question of law has been framed:

Whether the courts below are legally correct in decreeing the suit against defendant No. 1, though he retired from the partnership 12 years earlier to the date of filing the suit?

11. Section 32(2) of the Indian Partnership Act, 1932 (for short, "the Act"), makes it clear that a retiring partner may be discharged from any liability to any third party for the acts of the firm done before his retirement, by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement. Sub-clause (3) states that notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement.

12. Dealing with this provision, a Division Bench of this Court in *Syndicate Bank Vs. R.S.R. Engineering Works*, has held that a retiring partner does not cease to be liable for partnership debts incurred by the firm and the discharge of his liability would be only if agreement exists between him and the third party and such an agreement could be implied by course of dealings and knowledge of retirement and if third party had notice of dissolution, he cannot contend absence of public notice u/s 45.

13. In the instant case, the main contention of the appellant is that as deceased defendant No. 1(a) had retired as partner of the firm during year 1994, he would not be liable for any investments made by the plaintiff by way of deposits subsequent to his date of retirement. His submission is, though a specific defence was taken in this regard, the Trial Court did not frame any issue and no finding has been recorded. He further submits that unfortunately defendant No.

1(a) who had taken the defence by filing written statement regarding his retirement and absence of his liability after the date of his retirement, died during the pendency of the suit and therefore, in the absence of any issue framed in this connection, his legal representatives were handicapped in adducing proper evidence with regard to this aspect of the matter and the Trial Court simply proceeded on the basis of proof of investment and deposit made by the plaintiff and the failure on the part of defendants to establish that defendant No. 1(a) had retired from the firm.

14. Along with this appeal, an application is filed seeking permission to produce additional documents. The additional documents sought to be produced are, deed of reconstitution of the firm dated 26.11.1992 and the extract of the register maintained by the Registrar of Firms u/s 59 of the Act, disclosing the names of the partners of the 1st defendant-firm. By referring to these documents, it is contended by the learned Counsel for the appellant that with effect from the year 1994, the appellant has seized to be the partner of the firm as he retired from the firm.

15. Learned Counsel for the respondent would submit by referring to the provisions contained in Sections 32, 63 & 72 of the Act and also placing reliance on the judgment in the case of Kamangar and Company Vs. A.L. Byahatti and Sons and Others, that there is no retirement in the eye of law of deceased defendant No. 1(a) and therefore, he has to be regarded as a continuing partner liable to discharge the dues to the plaintiff.

16. On consideration of the respective contentions, I find that the lower Appellate Court has seriously erred in terminating the proceedings on the ground of delay alone. Having regard to the nature of the dispute and keeping in mind the ends of justice, the lower Appellate Court ought to have examined the merits of the case putting the parties, particularly the appellant before it on certain terms. The order dismissing the appeal as barred by limitation, therefore cannot be sustained in law.

17. As regards the judgment and decree passed by the Trial Court, it is clear that defendant No. 1(a) has taken up a specific contention in the written statement that he retired from the firm during the year 1994. He has also specifically asserted that the plaintiff was aware of the same and he transacted with the other partners of the firm knowing fully well that he had ceased to be a partner of the firm. Section 32(2) of the Act, certainly comes in the way of deceased defendant No. 1(a) to contend that he cannot be held liable for the acts done by the firm or his partners prior to the date of his retirement because, the retiring partner can be discharged from any liability to any third party only by an agreement with such third party, which may be express or implied. In this case, there is no defence taken up by defendant No. 1(a) stating that he was not liable for the acts done by the firm or its partners prior to the date of his retirement. On his showing, as per his averment in the written statement, he retired from the firm during the year 1994. If that is so, whatever deposits were made till the

year 1994 by the plaintiff by way of investment in the firm, he is liable. Due to his death his estate in the hands of his legal representatives is liable. The said amount along with interest will have to be paid by the appellants.

18. The deceased defendant has taken up a defence that he retired in the year 1994. He does not bother to state the date on which he retired. Therefore, if the amount invested by the plaintiff till the end of December 1994 is taken into consideration, it will come to Rs. 31,000/-. The appellants shall pay this amount along with interest at 15% as decreed by the Trial Court. However, for the investment made by the plaintiff subsequently i.e., on or after 13.03.1995 in a sum of Rs. 84,000/-, keeping in mind, the facts and circumstances of the case, the plea of retirement taken and the absence of any issue framed by the Trial Court, coupled with the death of defendant No. 1(a) during the pendency of the proceedings thereby depriving the defendants/appellants of an opportunity to establish that plea, I am of the view that the matter requires to be remitted back to the Trial Court for fresh consideration.

19. Hence, this appeal is allowed in part The judgment and decree passed by the Trial Court is set aside only to the extent mentioned above, subject to the condition that the appellants deposits the amount of Rs. 31,000/- along with interest at 15% per annum, before the Trial Court within four weeks from today. On such deposit, the plaintiff-respondent shall be entitled to withdraw the same. The Trial Court shall frame an issue regarding the liability of the appellants for the amount advanced by the plaintiff after 1994. An issue shall also be framed with regard to the factum of retirement of deceased defendant No. 1(a) and his liability or otherwise to pay the amount. It will be open for the appellant to request the Trial Court to permit them to furnish Bank Guarantee, keeping in mind the order now passed by this Court. The Bank Guarantee furnished in this appeal before this Court stands discharged making it clear that a fresh Bank Guarantee can be insisted upon by the plaintiff, if so desired, before the Trial Court. The entire records shall be transferred to the Trial Court forthwith. Since the matter is being remanded, it is unnecessary to pass any order on the I.A. filed for permission to produce additional evidence. Having regard to the fact that the matter is pending for a long time, the Trial Court is directed to dispose of the suit within eight months from the date of receipt of a copy of this judgment.