

(2011) 01 KAR CK 0210

In the Karnataka High Court

Case No : Regular First Appeal No. 304 of 2005

Kamangar and Company

APPELLANT

Vs

A.L. Byahatti and Sons and Others

RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Partnership Act, 1932 — Section 32 (3), 4, 45, 45 (1), 63

Citation : (2013) 1 AKR 475 : (2011) ILR (Kar) 1576 : (2011) 61 KarLJ 1576

Hon'ble Judges : N.K. Patil, J;A.N. Venugopala Gowda, J

Bench : Division Bench

Advocate : Ravi S. Hegde, for S.V. Shastry, for the Appellant; Iqbal Patel, for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—Plaintiff is the Appellant. The suit was filed for recovery of money. 1st Defendant is a registered partnership firm constituted by Defendants 2-4, under Ex.D-8. The firm was carrying on business in produces like onions, garlic etc. The 3rd Defendant, representing the 1st Defendant, purchased onions from the Plaintiff between 08.11.1999 to 10.01.2000, to the tune of Rs. 5, 26, 336, 58 and paid Rs. 3,02,737/-and retained the balance of Rs. 2,23,599.58. A cheque dated 24.01.2000 for Rs. 25,000/- (Ex.P-5) was issued towards payment of part of the outstanding amount. The cheque was returned unhonoured (Ex.P-6). A legal notice as per Ex.P-7 was sent, which was served on Defendants 1 & 2 (Ex.P-7(a) & Ex.P-7(b)). The notices sent to Defendants 3 & 4 were returned (Ex.P-7(c) to (f)). Suit for recovery of Rs. 2,23,599.58 was instituted. Defendants 1, 2 & 4 appeared through their Learned Counsel. 2nd Defendant filed the written statement, which was adopted by Defendants 1 & 4, 3rd Defendant though served with suit summons, did not appear and hence was placed exparte. In the written statement, it was contended that, 3rd Defendant was not a partner at the time of the transaction and also at the filing of the suit and hence, his acts and deeds are not binding on

Defendants 1,2 & 4. It was stated that, 3rd Defendant retired voluntarily from 1st Defendant - partnership firm on 02.09.1999 and the cheque for Rs. 25,000/- has not been issued by the partner and the cheque will not bind the 1st Defendant and that, the issuance of cheque by Aizaz Ahmed may be being in respect of his personal transaction. It was contended that, the alleged acknowledgement deed dated 19.03.2000 is not binding on Defendants 1, 2 & 4 and in view of retirement of 3rd Defendant, the suit instituted is malafide; that it has No. cause of action and is also bad for non-joinder of necessary parties. It was prayed that the suit be dismissed with exemplary costs.

2. Based on the material pleadings, issues were raised and during course of trial, for the Plaintiff, its Managing Partner deposed as PW-1, through whom Ex.P-1 to Ex.P-10 were marked. For the Defendants, the 2nd Defendant deposed as DW-1, through whom Ex.D-1 to Ex.D-9 were marked. Finding merit in the contentions of Defendants 1, 2 & 4, the suit was dismissed. Feeling aggrieved, the Plaintiff has filed this appeal.

3. Sri Ravi. S. Hegde, Learned Advocate appearing for the Appellant contended that, the 3rd Defendant being a partner of the 1st Defendant as per Ex.D-8 being not in dispute and the 3rd Defendant being not even a signatory to Ex.D-9, the alleged reconstitution of the 1st Defendant - partnership firm and the fact of reconstitution having not been notified to the Registrar of Firms as required u/s 32(3) of the Act and there being no public notice as mandated u/s 72 of the Act, the dismissal of the suit by the Learned Trial Judge, by relying upon reconstituted partnership deed (Ex.D-9), without even taking into consideration and appreciating the deed of acknowledgement executed by the 3rd Defendant (Ex.P-4), is wholly erroneous and illegal. Learned Counsel contended that, the Learned Trial Judge by misdirecting himself has recorded erroneous findings on facts and has failed to apply the law in the correct perspective, in view of which, interference in the matter is called for.

4. The Respondents though have entered appearance through their Learned Counsel, none appeared and made submissions despite the matter being adjourned more than once.

5. We have perused the record of the suit received from the Trial Court.

6. The Trial Court noticing the fact that the purchase of onion from the Plaintiff was between 08.11.1999 to 10.01.2000 and that the 1st Defendant firm constituted under Ex.D-8 as having been reconstituted on 02.09.1999 vide Ex.D-9, as per which the 3rd Defendant voluntarily retired from the partnership, has held that, the suit is devoid of merit and has dismissed the same.

7. In view of the above, the point for determination is:

Whether the Trial Court is justified in dismissing the suit?

8. Indisputably, Respondents 2 to 4 agreed to share the profit of business carried on by all or any of them, acting for all, by constituting a partnership as defined u/

s 4 of the Indian Partnership Act, 1932. The partnership deed of Defendants 2 to 4 is at Ex.D-8. The said partnership was alleged to have been reconstituted on 02.09.1999 by the voluntary retirement of the 3rd Defendant. Ex.D-9 has not been signed by the 3rd Defendant. Upon constitution of 1st Defendant - partnership firm, it was notified and registered with the Registrar of Firms vide Ex.P-2, certified copy of Form-A.

9. Section 32(3) of the Act lays down 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.

10. Section 45(1) of the Act provides that, notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before dissolution until public notice is given of the dissolution. The mode of giving notice has been laid down in Section 72 of the Act, which says that, a public notice has to be given by intimation to the Registrar of Firms u/s 63 and by publication in the official gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business. Un-deniably, No. notice was given to the Registrar of Firms of the retirement of the 3rd Defendant from the 1st Defendant firm and its reconstitution. No. publication was got made in the Official Gazette/vernacular newspaper circulating in the District. DW-1 has admitted the fact of not notifying the Registrar of Firms about reconstitution of the firm vide Ex.D-9 and the fact of not taking out the publication in the Official Gazette and the newspaper. It is clear that, no public notice as contemplated under Sections 45(1) and 72 of the Act has been issued and published. In the circumstances, the retirement of 3rd Defendant, even if to be true, cannot affect the rights of the Plaintiff, who is a third party in view of Section 32(3) of the Act.

11. Towards the amount due, cheque for Rs. 25,000/- (Ex.P-5) was issued. The cheque was returned unhonoured (Ex.P-6). 3rd Defendant by acknowledging the return of the cheque and also the amount due, has executed the deed of acknowledgement as per Ex.P-4. Though the notice as per Ex.P-7 was served on Defendants 1 & 2 vide acknowledgements at Ex.P-7(a) and Ex.P-7(b), No. reply was sent. The suit was instituted based on Ex.P-8 & Ex.P-9 and also the acknowledgement deed Ex.P-4. The case of the Plaintiff has been well established by the oral and the aforesaid documentary evidence brought on record.

12. The Appellant, who was unaware of the alleged retirement of the 3rd Defendant, has sold and delivered the goods to the 3rd Defendant, who has acted as partner of the 1st Defendant. The 3rd Defendant, acting as the partner of the 1st Defendant, has executed Ex.P-4. The alleged retirement of 3rd Defendant, having been neither notified to the Registrar of Firms u/s 32(3) of the Act nor having been notified u/s 72 of the Act, the Plaintiff being under the

impression that the 3rd Defendant continues to be the partner of the 1st Defendant, has delivered the goods. The payment of the balance amount having not been made, the suit instituted against the Respondents for recovery was well-founded.

13. The Trial Court, without noticing the said material facts and also the fact that the 1st Defendant is a family partnership firm, in that the 2nd Defendant is the father and Defendants 3 & 4 are his sons, has erroneously dismissed the suit. Neither on facts nor in law, the Trial Court was justified in dismissing the suit.

For the foregoing reasons, the Appeal is allowed and the impugned judgment and decree are hereby set-aside. The suit stands decreed. The Defendants are directed to pay to the Plaintiff Rs. 2,51,431.58 with interest at the rate of 6% per annum from the date of filing of the suit till date of realization along with costs.