
(2001) 04 MAD CK 0073

In the Madras High Court

Case No : S.A.Nos. 499 and 1311 of 2000

S.K. Parthasarathy Naidu and another

APPELLANT

Vs

K. Rama Naidu and 7 others

RESPONDENT

Date of Decision : 23-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 7 Rule 7, 100
Partnership Act, 1932 — Section 14, 18, 19, 20, 4
Specific Relief Act, 1963 — Section 38
Trusts Act, 1882 — Section 88

Citation : AIR 2001 Mad 399 : (2002) 1 LW 41 : (2001) 2 MLJ 779

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : Mr. T.P. Rajagopalan, A.A.G. and Mr. M.G. Subramaniam, for the Appellant; Mr. Mohan Parasaan for Mr. M.S. Srinivasaghavan, for the Respondent

Final Decision : Allowed

Judgement

1. The plaintiffs in the two suits have filed the second appeals. O.S.No.1125 of 1991 was filed by one Benedict, the appellant in S.A.No.1311 of

2000 for injunction restraining the first respondent Rama Naidu from alienating the suit property and for other reliefs. The suit was dismissed and

so was the appeal A.S.No.108 of 1999 and therefore, the second appeal has been filed, one S.K. Parthasarathy Naidu filed O.S.No.5006 of

1996 for a decree that the partnership of the plaintiff and the defendants to carry on the business of laying out and selling the property may be

dissolved as and from the date of the suit, for accounts and other reliefs. The defendant was the same Rama Naidu referred to above. Benedict

was the second defendant in this suit. The suit was dismissed. Against this, both S.K. Parthasarathy Naidu and Benedict jointly filed A.S.No.109

of 1999. This was dismissed. Therefore, S.A.No.499 of 2000 has been filed. O.S.No.5006 of 1996 is the comprehensive suit. So reference to

parties will be based on their array in S.A.No.499 of 2000. The main contest is amongst the aforesaid three persons Benedict, Parthasarathy

Naidu and Rama Naidu. It is the case of the two appellants that there was a partnership business amongst the three of them and the appellants had

each contributed Rs.1.00 lakh. According to them, the business was real estate business, the partnership agreement was oral and pursuant to the

oral agreement, there were two documents; one is Ex.A1 dated 23.9.87 and the other is Ex.A4 dated 16.4.88 wherein the respondent Rama

Naidu had agreed to give a fixed share in the profits and had also acknowledged receipt of the contribution of Rs.1.00 lakh. According to the

appellants, they expected the respondent to develop the suit property by plotting it into a lay-out" and upon sale of the several plots, share the

profits with them. Contrary to the arrangement between the parties, the respondent had sold several plots without sharing the profit and therefore,

the appellant in S.A.No.1311 of 2000 was constrained to file the suit for bare injunction instantly to prevent further alienation of the suit property

and thereafter, the other suit out of which S.A.No.499 of 2000 arises was filed by S.K. Parthasarathy Naidu for dissolution of the partnership and

for accounts. The respondent denied that there was an oral agreement of partnership and resisted the two suits. He also stated that the payment of

Rs.1.00 lakh was nothing but a loan and that the appellants herein are only money lenders who are entitled to a certain share in the profit and that

there was no partnership business at all.

2. Mr.G. Subramanian, learned senior counsel for the 2nd appellant who is the sole appellant in S.A.No. 1311 of 2000 submitted that the main

question that comes up for consideration in this second appeal is the nature of the relationship between the parties, whether they are partners or

borrowers and lenders. According to the learned senior counsel, the pleadings establish that there was an idea of joint business. The contribution

by the parties is proved by Exs.A1 and A4. It was a single venture partnership which is not unknown to law. He referred to the counter affidavit

filed by the respondent herein in April, 1991 in the interlocutory application in O.S.No.1125 of 1991 and in the Interlocutory Application in Civil

Suit No. 597 of 1991 which was later re-numbered as O.S.No. 5006 of 96 in which the case that is now set up in the written statement was not at

all pleaded. According to the learned senior counsel, this was the earliest instance, when the correct relationship could have been stated and it was

not done. This would show that the relationship was only that of a partnership. He referred to the cross-examination of D.W.3 wherein it is stated

as follows:

This, according to the learned senior counsel would support the case of the plaintiffs since in O.S.No.5006 of 1996, the pleadings are as follows:

The plaintiff and the defendants 1 and 2 are dealing in real estate within and outside the jurisdiction of this Hon'ble Court. They used to do this

business independently and/or in partnership with one another in respect of any particular transaction. They used to purchase lands, develop it as

an approved lay-out and sell lay-outed plots to other parties and share the net profits arising out of those transaction depending upon the agreed

share of investments and the share of profits fixed therefore.

He also referred to section 14 of the Partnership Act and Section 88 of the Trusts Act to support his case that the appellant is entitled to a share in

the profits and in the property that is also acquired by the partner. He submitted that section 100 of C.P.C. may permit re-appreciation of

evidence, but definitely the Courts shall interfere, where there a wrong construction is placed upon a vital document that will decide the rights of the

parties. According to the learned senior counsel, Exs.A1 and A4 , if properly read, would permit of no other construction except that there was a

relationship of partners between Rama Naidu, Benedict and S.K. Parthasarathy Naidu. Ex.A1 is signed by the first respondent herein and it is in,

favour of 1st appellant. The document is termed as This acknowledges receipt of Rs.1.00 lakh and speaks of an agreement to share 1/5th of the

profit. Ex.A4 which is signed by Rama Naidu is in favour of 2nd appellant. It is termed as and this also speaks of an agreement to share the profit

by giving 1/5th of the same to the 2nd appellant after plotting out the lands. The learned senior counsel submitted that if there was an agreement of

partnership, then there was no need for the borrower to refer to his intention to do real estate business, realise profits and give 1/5th share in the

same. Both the courts below had totally failed to apply their mind to this aspect.

According to the learned senior counsel, all the necessary ingredients of a partnership are present in the instant case and therefore, to deny the parties, the relief that they are entitled to would be unjust. He also submitted that if the courts had drawn the proper inference from the established facts, then it would have been apparent that there was a partnership relationship amongst the parties. The omission to do so is a question of law. He then drew attention to the recitals in the written statement. The learned senior counsel relied on the judgment reported in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, where the Supreme Court held as follows:

Thus, where in a suit for specific performance of a contract in part performance of which the plaintiff alleges to have paid the defendant some money, the defendant denies the contract and pleads that the money was taken by him as a loan, the court can pass a decree for recovery of the loan in favour of the plaintiff on his failure to prove the contract even though the plaintiff had failed to plead and claim relief on this alternative case.

Placing reliance on this, the learned senior counsel would submit that, even assuming without admitting that there was no partnership, then at least, the appellants should be allowed to recover the money due under Exs.A1 and A4 since they show ex-facie that appellants had given a sum of

Rs.1.00 lakh to the first respondent who had received it and promised to repay the same together with 1/5th share in the profits.

3. Mr. T.R. Rajagopalan, learned Additional Advocate General appearing for the first appellant in S.A.No.499 of 2000 submitted that the

pleadings and the evidence show that there was a reference to a business transaction. He again referred to Exs.A1 and A4 to support his case.

According to him, neither in the pleadings, nor in the evidence, has any explanation been given as to how Exs.A1 and A4 came into being.

According to the learned Additional Advocate General, the law does not militate against the existence of oral partnership. The receipt of Rs.1.00

lakh is not denied. The business understanding is not denied by the respondent and in spite of this, the courts below have failed to construe what

could be the nature of the relationship between the parties in these circumstances. There was an understanding between the parties which was

evident from the recitals in Ex.A1. The understanding spoke of the appellants

handing over to the first respondent Rs.1.00 lakh each with intention to do some business in real estate and also with the intention to share the profits. Therefore, the documents Exs.A1 and A4 showed that there was an agreement amongst the three persons. The agreement was to share profits and the intention was to carry on business of real estate by the first respondent herein on behalf of the other two. When these three elements are present, the partnership comes into existence as per section 4 of the Partnership Act. There is also no law that forbids a single venture partnership. So, even if the case of the appellant that there were intermittent partnership ventures between the three persons is not believed, Exs.A1 and A4 atleast show that in respect of the suit property, the parties intended to deploy capital, generate profit and share the same. According to the learned Additional Advocate General, the plea in the written statement that the amount borrowed was only a loan is an afterthought since at the earliest juncture, there was no pleading that the amount borrowed was a loan transaction. He referred to the decisions reported in 2000 (1) S.C.C. 60 to support the proposition that interpretation of a document would be a substantial question of law and therefore, inasmuch as in this case, Exs.A1 and A4 have not been properly construed, the interference u/s 100, C.P.C. is justified. He also referred to the judgment reported in A.V. Abdul Lateef & Co. v. Thotakara Devamma, 2000 (I) M.L.J. 29 where this Court had held that when the lower appellate court as a final Court of fact had come to accept the case of the defendants on practically no evidence, the erroneous approach would compel the High Court to interfere u/s 100, C.P.C.

4. Mr. Mohan Parasaran, learned counsel appearing for the first respondent who is the main contesting respondent submitted that the scope for interference u/s 100 is very limited. Exs.A1 and A4 do not speak of any partnership and in any event, no suit for dissolution of partnership is maintainable in law as per section 69 of the Act. When there is absolutely no evidence to show consensus ad-idem between the so called three partners, there cannot be a partnership. As regards single venture partnership, the pleadings is not to that effect. The learned counsel submitted that some share in profits would not give rise to the conclusion that there is a partnership. He submitted that section 4 of the Partnership Act should be

read with section 6 and if so done, it would be apparent that the case of the plaintiffs that there was a partnership falls to the ground. Exs.A1 and

A4 do not show any mutuality between the parties. Both of them are unilateral agreements signed by only the first respondent. It would strain one's

powers of construction of documents to read into Exs.A1 and A4, any intention to create a partnership. He pointed out the pleadings in the two

plaints where the word "partnership" is not found anywhere. According to the learned counsel, both the appellants are at variance in their pleadings

and evidence. There is no substantial question of law to justify interference. He referred to Karnataka Board of Wakf Vs. Anjuman-E-Ismaail

Madris-Un-Niswan, and submitted that the concurrent finding of the trial and appellate courts cannot be reversed by the High Court by substituting

its own subjective satisfaction in their place u/s 100. In this case, the concurrent finding is that Exs.A1 and A4 were not partnership agreements

and except for sharing of profits, the other elements are not there. He then referred to the judgment reported in Kondiba Dagadu Kadam Vs.

Savitribai Sopan Gujar and Others, and pointed out to Head notes (in AIR) B and D: "B. Civil Procedure Code, 1908 - S. 100 (as amended in

1976) - Second appeal Opinion of High Court - High Court, held, 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 (1) contrary to the mandatory provisions of applicable law; or (2)

contrary to the law as pronounced by the Apex Court; or (3) based upon inadmissible evidence or no evidence.

D. Civil Procedure Code, 1908 - S. 100 (as amended in 1976) - Second appeal

-Substantial question of law in the absence of factual basis - A question arising between parties in absence of factual format should not be allowed

to be raised as a substantial question of law.

He submitted that there was no basis for treating the relationship as a partnership, especially when the appellant in one case has chosen to file only

an injunction suit and the pleadings were very carefully drafted without mentioning in any place that there was a partnership agreement. He then

referred to Nagendrier v. Muthiah Bagavathar, AIR 1927 Mad.1096 in which this Court held that the loan to a person engaged in a trade which is

received by such person agreeing to give the lender, interest and share in the

profits does not itself constitute a partnership. Santiranjana Das Gupta

Vs. Dasuram Murzamull, was referred to, in particular, Index Note A:

Partnership Act (1932), S. 6 -Partnership, existence of - No written down partnership contract - No record of terms and conditions of oral

partnership - No account of partnership maintained for use of partners - No Bank account of partnership - No written instruction conveyed to

Government Officials who were concerned in the business of alleged partnership - Held, no inference can be drawn as to existence of partnership.

Meenakshi Achi v. P.S.M. Subbranian Chettiar AIR 1957 Mad. 8 is the judgment of a Division Bench of this Court in which, it was held that

while sharing of profits is an important criterion, it is not conclusive. Further, the learned counsel submitted that when the parties themselves have

not come out with unambiguous pleadings regarding partnership, the court need not lend its hand to construe the two documents as evidence of

partnership agreement and decree the suits.

4. (a). The counsel appearing for D7, who is the purchaser submitted that even assuming that the business of partnership existed between the three

persons, without admitting the same to be true, the Sections 18, 19 and 20 of the Partnership Act provided that a partner is an agent of the Firm,

that he has the implied authority to carry on in the usual way, the firm's business and his actions will bind the firm and any act done by a partner

on behalf of the firm which falls within his implied authority would bind the firm. Even according to the appellants, the partnership business was to

carry on real estate business and sell the plots in the layout, so, the appellants are bound by any sale made by the first respondent under the

implied authority of the partners. The learned counsel submitted that when it was their intention to sell the plots, they cannot attack the partner's

actions which are not in excess of the partner's authority. If at all, they have a right, it is only to share in the profits and therefore, according to the

learned counsel for the 7th respondent the state in his favour is perfectly valid and cannot be attacked.

5. The substantial question of law is the proper construction of the documents and the reliefs that flow therefrom. Exs. A1 and A4 are the crucial

documents. Under Ex.A1, the 1st respondent agrees to sell the suit property after dividing it into plots and return the amount given along with a

share of 1/5th of the profit. Under Ex.A4, the 1st respondent agrees that he would deal with the suit property after it is plotted out and return the amount given along with a share of 1/5th of the profits. Therefore, the agreement between the parties, for the moment, we will not decide what their relationship is, is that the 1st respondent should sell the plots and give to each of the appellant 1/5th of the profit and a sum of one lakh. Now if we look at O.S.No.1125 of 1991 plaint paragraph 7 reads as follows:

As submitted earlier, as per the terms of the agreement, referred above, the 1st defendant has to sell the plaint schedule property only by plots, to be laid out in consultation with and co-operation, of the plaintiff and the 2nd defendant, so that they will get maximum profits for their shares. But for this arrangement, the plaintiff and also the 2nd defendant would not have parted with huge amounts of one lakh each. By this attempt to sell the plaint scheduled property without the knowledge and before plots are laid out therein, he is backing out of ""this agreement and wants to deny their legitimate share in the profit, the plaintiff and the 2nd defendant are entitled under law. If he succeeds in his attempt, the plaintiff will not be able to realise his share of profits as agreed upon, not even interest. Unless the 1st defendant is restrained from selling the plaint schedule property by permanent injunction and is directed by mandatory injunction to sell it only by plots, with the co-operation of the plaintiff and the 2nd defendant, the plaintiff will be put to great hardship and irreparable loss. No other remedy is available to the plaintiff to avert the danger except by way of permanent injunction.

The 1st respondent had definitely and admittedly received the money only to purchase and then sell the property. He agreed to give 1/5th of the share of the profits. Whether the term ""sell it after plotting it out"" is a crucial part of the agreement and whether the respondent did not have the authority to sell the property otherwise is a matter in regard to which the two exhibits are silent. In fact, the two exhibits are signed only by the first respondent herein. There is nothing in the evidence which shows that the sale of the property can be made only by plotting out and to sell it otherwise is a breach of the agreement between the parties. In this regard, there is no examination of D.W.2 as to whether he agreement between the parties or understanding, if you will, is only to sell it in plots and not in large

extent. In the absence of any material to show that the substratum of the understanding between the parties was that the money was advanced to do business only by dividing the suit properties into plots and selling them, it is difficult to accept the case of the appellant that the 1st respondent should be restrained from selling the property and that mandatory injunction must be issued directing the 1st respondent to plot out and sell it. Even if one assumes and accepts the case of the appellant as true and that there was an agreement of partnership, it is clear from Ex. A.1 and A4 that the appellants had authorised the 1st respondent to sell the property and realise profits. If he had the authority to sell, it would also include the authority to sell, in the manner he deems fit. The courts below rightly to grant injunction against the 1st respondent. Therefore, there is no illegality in the dismissal of O.S.No.1125 of 1991. S.A.No.1311 of 2000 is dismissed.

6. Now, we come to the other appeal which arises against O.S.No.5006 of 1996. The case of the appellants that there was a partnership is sought

to be supported by the following factors: (1) That in Exs.A1 and A4, the 1st respondent has agreed to share the profits that arise out of the real

estate business and therefore, it cannot be a mere debtor/creditor relationship; (2) The 1st respondent in his evidence has given a list of all the

creditors, but has not mentioned the name of the appellants which would go to show that he treated the appellants not as creditors, but as partners;

(3) The respondent has clearly admitted in his written statement:

This defendant further states that as already stated supra the plaintiff and the 2nd defendant herein are only money lenders to this defendant and

that merely because they are entitled to a certain share in the profit besides the principles the plaintiff cannot contend that there is relationship of

partnership between the parties to the suit.

This defendant further states that as per the documents dated 16.4.88 and 8.8.88 this defendant is obliged to give a 20% share to each of the 2nd

defendant and the plaintiff over and above the sale consideration of Rs.10,75,000.

The plaintiff and the 2nd defendant know very well about the agreement of sale dated 5.1.1991 entered into between this defendant and the

intending purchasers. Further the plaintiff had agreed to receive the principal

loan amount of Rs. 1,00,000 (Rupees one lakh only) and his due share of profits of Rs.5,000 (Rupees Five thousand only) at the time when the final sale deed is executed by this defendant in favour of the intending purchasers. Similarly the 2nd defendant also agreed to receive the total sum of Rs.1,05,000 (Rupees one lakh and five thousand only) towards principal loan amount and share of profits at the time when the final sale deed is executed. But all of a sudden an evil idea struck the plaintiff to grab the property absolutely belonging to this defendant through deceitful means in the guise of staking a claim as partner.

So, according to the appellants, there would be no occasion for the respondent to agree to share the profits unless there was a partnership amongst the three persons. The agreement to share profits would be clear indication of the fact that there was a partnership. He would also refer to the words in Exs.A1 and A4 where there is a reference to the business of plotting out the suit property and earning profits. In particular, the following words are pointed out. In Ex.A1 which is dated 28.9.97, which is the receipt issued by the 1st respondent to S.K. Parthasarathy, the 1st appellant in s.A.499 of 2000, the following words are found:

Ex.A3 which is the document between the 1st respondent and the 2nd appellant in S.A.No.499 of 2000, where the following words are found:

Ex.A4 is the receipt for Rs. 1,00,001 and Ex.A2 is the agreement between the 1st appellant in S.A.No.499 of 2000 and the 1st respondent herein, where the following words of is found. The appellant's case is that there was no occasion for the use of the above words to indicate joint business unless there was an agreement of partnership. But, it is not possible for this Court to come to the conclusion that there was a relationship of partners between parties merely because there was such a statement in a document. The legal existence of a partnership is proved by facts to support-such a claim. There need not be any particular form of document and in fact, the partnership can even be oral, but, whether a relationship of partners exists or does not exist depends on what was intended by the parties. In the decision reported in Hirabai Gendalal Vs. Bhagirath Ramchandra and Company, the Division Bench of the Bombay High Court held:

Thus although the right to participate in the profits of a business is a strong test of a partnership, yet whether that relationship does or does not

exist must depend on the real intention and contract of the parties. The true test is whether such a participation of profits constitutes the relationship

of principal and agent between the person taking the profit and those actually carrying on the business. In the present case there is nothing in the

agreement to suggest that the defendant company was to carry on the business of the Mills company on behalf of itself and the plaintiff company.

The responsibility of the management of the business was completely taken over by the defendant company. Surajmal, who was examined on

behalf of the defendant company clearly admitted that the plaintiff company was not authorised to do any business of the Mills company on behalf

of the defendant company. Thus one of the essential elements of partnership is lacking in the present case. The mere fact that in the agreement itself

the plaintiff company was described as "a sleeping partner" cannot alter the real nature of the transaction.

Therefore, even the explicit use of the word "sleeping partner" by itself cannot be held to indicate the relationship of partner. Partnership is as much

a contractual relationship as any and it has to be established that there was a consensus amongst the persons to be partners since a partnership

creates mutual rights and liabilities inter se the various partners. In this case, there is nothing in the agreement to suggest that the 1st respondent was

to carry on the business on behalf of the appellants. The only commitment made by the 1st respondent is to return the amount given and to share

the profits. Needless to say, a partnership may be express or implied. It can even arise out of a mutual understanding, evidenced by a consistent

course of conduct.

7. In the decision reported in *Meenakshi Achi v. P.S.M. Subramanian Chettiar* AIR 1957 Mad. 8 the Division Bench of this Court held:

In determining whether a particular group of persons constitutes a partnership, regard has to be had to the real relationship between the parties as

drawn by all relevant facts taken together".

The question whether a particular group of persons constitutes a partnership or not is often a difficult one to decide. There are certain other

indicators for testing the existence of a partnership like books of account, existence of other employees of the partnership, proof of business

dealing etc. But then according to the learned senior counsel appearing for the

appellants, these will not be available in this case since this was a single venture partnership. The intention was to do business, realise profits, share it, and "close shop". This is not improbable, but yet, this too must be proved and established to the satisfaction of a court. To decide the question of partnership only on the basis of an agreement to sharing of profits is fraught with danger. In the decision reported in *Ohla Nagendrier and Another Vs. Thoomathi Muthiah Bagavathar and Others*, the learned Judge held that a loan to a person engaged in any trade upon a contract with such person that the lender shall receive interest and also a share of the profit does not of itself constitute the lender a partner. Therefore, a transaction may be a loan transaction, yet the parties may have agreed to share the profits.

8. In the decision reported in *Santiranjan Das Gupta Vs. Dasuram Murzamull*, the learned Judges held thus:

It is inconceivable that the parties should have entered into an oral agreement of partnership without retaining any record of its terms and conditions. This is not the normal course of business. It is equally inconceivable that the partnership business should have maintained no accounts of its own, which would be open to inspection by both parties even though kept secret from the rest of the world. Absence of such accounts is conceded by the appellant before us. Maintenance of separate accounts by the plaintiff and the defendant firm as suggested by the appellant is no substitute for the maintenance of the accounts of the partnership business as such, accessible to both parties and, indeed, keeping only separate accounts by the parties would tend to negative rather than support the plea of partnership.

In this case, it is said, there was no necessity to open a bank account or to have a ledger account, which itself is unlikely, since it was a single-venture partnership. For it cannot be denied that when a large extent of property is plotted out and sold, the period during which the various plots are sold to third parties may take a long time and when one person alone is entrusted with the task of dealing with the property on behalf of others, it is extremely unlikely that no written record was maintained in the business regarding the various agreement holders and the various purchasers. It is also relevant to note that though the appellants' case that there was a

partnership was strenuously urged on the basis of Exs.A1 and A4, nowhere in those Exhibits is there a mention of the partnership of the three persons. The case of the appellants is that these three persons constitute a partnership, but these documents reveal only two parties of which only one of them is the executant. There is not even a reference to the third party of the partnership in these documents. It appears extremely unnatural that the parties who intended to constitute a partnership would not have atleast said that this amount is being paid towards the done by Rama Naidu, Parthasarathy Naidu and Benedict.

9. In In the Matter of R.K. Abdul Rahiman AIR 1928 Mad. 890 it was held thus:

Although a right to participate in profits of a trade is a strong test of partnership and there may be cases where from such a participation alone it may as a presumption, not of law but of fact, be inferred, yet, whether that relation does or does not exist must depend on the real intention and contract of the parties. Participation in profits is not conclusive evidence as to the existence of a partnership. It is very cogent evidence, and if it stands alone may be conclusive evidence of a partnership, but the fact of the participation in profits must be considered in the light of other circumstances.

10. Even when a deed is named a partnership deed, courts have held that the nature of the relationship is not determined by the mere use of the word "partnership" either in the agreement or in the pleadings. There must be three elements before any relationship which can be called a partnership comes into existence: (1) there must be an agreement entered into by all the parties concerned; (2) the agreement must be to share the profits of the business, and (3) the business must be carried on by all or any of the persons concerned action for all. All these elements must exist in a partnership. One searches in vain for any satisfactory evidence even of an oral agreement entered into by all the persons concerned in this case namely, the two appellants in S.A.No.499 of 2000 and the 1st respondent. The third factor is also conspicuously absent. The Exhibits do not show that the 1st respondent agreed to do the business on behalf of the appellants and even in the oral evidence, nothing was pointed out to show that the 1st respondent was acting on behalf of the appellants. When two factors are missing, the court would have to strain its sinews to reach for an

inference of partnership.

11. In the decision reported in Mohammed Musa Sahib (Died) and Others Vs. N.K. Mohammed Ghouse Sahib and Another, , this Court

observed that a creditor who supervises the conduct of a debtor's trade with an agreement that he will be paid out of the profits of business does

not thereby become his partner. In this case, even the element of supervision of the business by the appellants is missing. The crucial test is whether

the one was authorised to do business on the other's behalf or whether he was merely sharing the profits. It appears, here the 1st respondent

merely agreed to share the profits.

12. Now, if we look at the plaint filed by the 1st appellant in S.A.No.499 of 2000, paragraph 5 is as follows:

The first defendant requested the plaintiff for contribution of the part of sale consideration to purchase the suit property from the trustee of the

temple agreeing to pay 1/5th of the profits of the sale of lay-outed plots. Believing the said representation of the first defendant the plaintiff paid a

sum of Rs. 1,00,000 (One Lakh only) on 28.9.87 for purchase of the suit property and the first defendant also issued a stamped receipt, therefore

in the said receipt itself the first defendant admitted to give 1/5 share of profits to the plaintiff. Subsequently, the first defendant executed an

agreement dated 8.8.83 incorporating the business of partnership and the share of profits as stated above between plaintiff and the first defendant.

The plaintiff states that the first defendant subsequently represented to the plaintiff that the first defendant has entered into similar partnership with

the 2nd defendant agreeing to pay to him. 1/5th share in the business of selling the suit property for which the second defendant has also paid a

sum of Rs. 1,00,000 (One lakh only) and that the first defendant has also entered into an agreement dated 10.4.88 for sharing the profits, as stated

above with the second defendant.

It is clear that the 1st respondent only asked for a contribution. The pleadings do not show that there was an invitation to form a partnership.

Thereafter, there is reference to a partnership business of the plaintiffs and defendants 1 and 2, but there is no categoric averment to show that the

three of them formed a partnership to do business and that the 1st respondent was asked to act on behalf of the other.

13. Then again, there is Ex.B7, which is the affidavit filed by the 2nd appellant in S.A.No.499 of 2000 in the counter praying for interim injunction.

The following extract is found:

Hence, he approached the plaintiff and the 2nd defendant for contribution of one lakh each towards the amount to be deposited in court,

undertaking to give 1/5th share of the net profits out of the sale proceeds of plots to be laid out in the plaint schedule property, after purchase....

The 1st defendant also received similar amount from the 2nd defendant and executed similar agreement. Under the said agreement, therefore, the

plaintiff has to plot out the property as and when he got the sale deed in his favour in respect of the plaint schedule property and sell them in plots

and share the profits, as indicated above.

The 2nd appellant is an advocate and we see how carefully he hovers around the edge without exactly committing himself to a categorical statement

that there was a partnership. This establishes the correctness of the findings of the court below that there was no partnership though there was an

agreement to share profits. Much was made of what was called an admission by the 1st respondent herein as D.W.3 wherein he has admitted that

he is aware of the recitals in Exs.A1 to A4 and that they are correct. But, when the evidence is read as a whole, we see that the 1st respondent

constantly denies that there was a partnership. However, he admits that the amount was given only as a loan with a commitment that the principal

would be returned along with a share in the profits.

With great vehemence, it was also pointed out that the 1st respondent did not come out with a case that it was a loan at the earliest juncture and

so, that would show that the explanation given by the 1st respondent for the receipt of Rs.1.00 lakhs each to be only a loan, was an afterthought.

When the plaintiffs namely the appellants herein appear to be extremely inhibited about uttering the word "partnership" in their own pleadings and

prevaricate, it is open to the defendant to wait until a categorical statement is made before giving his own explanation. Should the Court give this

unnamed relationship, the title of partnership? I think not. The appellants have reservations and act coy without calling the relation by any name.

Therefore, the finding of the court below in this regard cannot be interfered with on this ground.

14. The learned counsel for the 1st respondent pointed out to several decisions of the Supreme Court and High Court which limit the jurisdiction

u/s 100, C.P.C. There can be no gainsaying the position that unless a substantial question of law is involved, the concurrent findings of fact cannot

be disturbed and that High Court cannot substitute its own opinion unless it finds that the conclusions drawn by the lower court were erroneous,

contrary to the mandatory provisions of law or contrary to the law as pronounced by the Supreme Court or based upon inadmissible evidence.

Since in this appeal, the learned senior counsel for the appellants raised the substantial question of law regarding the construction of document, I

have examined the evidence whether indeed, the findings of the lower court were perverse, whether any fatal error was committed by the court

below in relation to the findings of fact. In this case, as regards the existence of partnership, I do not see any fatal error or perversity in approach of

the courts below as to warrant interference in second appeal. But we are not done yet.

15. The learned senior counsel Mr.G. Subramanyam submitted that in the event, this court came to the conclusion that there was no partnership,

still in view of the admission by the 1st respondent that amounts were received under Exs.A1 to A4 and there was an agreement to share profits,

relief must be granted to the appellants moulding the prayer. So, we look at the written statement filed by the 1st respondent in C.S.No.507 of

1998:

The defendant further states that to meet the total expenditure of the purchase of the lands including the sale consideration of the lands this

defendant was running short of Rs.2,00,000 (Rupees two lakhs only). This defendant warned to make up this amount by borrowing through

outside sources. As such this defendant approached the plaintiff and asked him to lend an amount of Rs.1,00,000 (Rupees one lakh only). The

plaintiff asked the details as to when the loan would be repaid.

To safeguard the loan given by the plaintiff to this defendant the plaintiff also demanded a share of profits when the lands were resold by this

defendant. To put it in more precise words the plaintiff demanded a 20% share over and above the sale consideration of Rs. 10,75,000. (Rupees

Ten lakhs and seventy-five thousand only) in addition to the principal amount.

This defendant conceded the demand of the plaintiff in return for the loan amount availed by this defendant. Based on the above terms this defendant received a sum of Rs.1,00,001 (Rupees one lakh and one only) in cash from the plaintiff on 28.9.87 and issued receipt for the loan to the plaintiff. . . .

This defendant-also approached the 2nd defendant and asked him to lend an amount of Rs.1,00,000 (Rupees one lakh only) to make up the deficit amount in the total expenditure of Rs. 10,75,000 (Rupees ten lakhs and seventy five thousand only) for the purchase of the suit property.

The defendant-2 also asked this defendant as to when this loan amount would be repaid. This defendant promised to return this loan amount as

soon as the lands were resold. The 2nd defendant also demanded in addition to the principal amount a 20% share of profits over and above the

sale consideration of Rs. 10,75,000 (Rupees ten lakhs seventy five thousand only). This defendant conceded this demand of the 2nd defendant in

return for the loan amount availed by this defendant. Based on those terms this defendant received a sum of Rs.1,00,001 (Rupees one lakh and

one only) in cash from the 2nd defendant on 16.4.1988 and issued a stamped receipt for the loan to the 2nd defendant.

Therefore, while denying the partnership, the 1st respondent has given an explanation as to how and under what circumstances, this one lakh was

received from each appellant. This case is sustained by him in his evidence as D.W.3. Though at certain points in his testimony, he admits that the

recitals in Exs.A1 to A4 are correct, from which the appellants want to construe that he admitted the existence of joint business; the crux of the

evidence is to the effect that the amounts were advanced only as a loan. If the amounts were advanced only as a loan, can relief be granted to the

appellants who stated their case that the amounts were only contribution to the partnership business? So we look Srinivas Ram Kumar Vs.

Mahabir Prasad and Others, referred to by Mr.G. Subramanyan, learned senior counsel, where the plaintiff filed a suit for specific performance. It

was also his case that some amount was advanced by him to the defendant, the defendants denied the existence of the contract, but admitted that

they were in need of some money and had borrowed this amount as a loan, the suit for specific performance was dismissed and the High court also

confirmed this. The Supreme Court saw no reason to go beyond the facts found by the courts below against the plaintiff. But the trial court while

dismissing the claim for specific performance granted a money decree in his favour since there was an admission of receiving an-advance. The

plaintiff and the defendants filed appeal before the High Court and the defendants challenged the propriety of a money decree when that was not

the case of the plaintiff. The Supreme Court held that the High Court had taken a rigid and technical view. The Supreme Court held as follows:

The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that

basis. The rule undoubtedly is that the Act cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which

the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only

admitted by the defendant. In his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit,

there would be nothing improper in giving the plaintiff a decree upon the case which the defendant, himself makes. A demand of the plaintiff based

on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would

arise when they were expressly admitted by the defendant, in his pleadings. In such circumstances, when no injustice can possibly result to the

defendant, it may not be proper to drive the plaintiff, to a separate suit.

This case squarely applies to the appeal before us. It is no doubt true that there is no foundation in the pleadings for the case of a loan, but it was

on alternative case which he could have made, but did not and which was admitted by the defendant in the written statement. There is no

question of the 1st respondent being taken by surprise since there is no necessity to adduce evidence of these facts when it was expressly admitted

by the 1st respondent in the written statement. If we look at the judgment of the trial court and issues that were framed thereunder, we find that

issue no.2 is ""Whether the transaction between the parties is a loan transaction?"" There is a detailed discussion by the trial court and the trial court

considers the use of the word which means principal and finds that the transaction is a loan transaction. Therefore, not only had the 1st respondent

admitted that he had borrowed the sum of one lakh from each of the appellants, and that he had agreed to share the profits, the trial court had also found that the transaction was a loan transaction. Therefore these amounts were given as loan and must be returned. The courts cannot refuse this relief only because it is not consistent with the pleadings, in this regard, reference was made to the decision reported in Vijayalakshmi and Others Vs. Vasantha and Others, where this Court had held that it is the duty of the court to give effect to the inference to be drawn from the evidence on record even if the findings is not consistent with the pleadings of either party. The 1st respondent has not only admitted that he had availed of the loan, but it is clear that he has also made profits from the business that he has done with the money given by the appellants. The written statement of the 1st respondent is again referred to wherein he has stated that since he did not have funds to deposit the sale consideration and he wanted to make up the amount, he asked for loan from the appellants herein. In paragraph 32 of the written statement, the 1st respondent repeats that he is liable to pay the due share of profits. In the case reported in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, the Supreme Court held that it would not be proper to drive the plaintiff to a separate suit. In fact, when this respondent had enriched himself with the funds advanced by the appellants, he is bound to return the same as per the agreement between the parties. The Court should not shut its eyes to realities, remain shackled by technicalities, when the materials for granting the relief is on record, the oral and documentary evidence is available and the finding regarding the existence of loan is unchallenged. The 2nd appellant herein filed only a suit for the basis for bare injunction. It is only in the comprehensive suit against which S.A.No.499 of 2000 has been filed, that the suit for dissolution of partnership and share in the property was asked for. In this suit, the 2nd appellant is the 2nd defendant and he had undertaken to pay the necessary court-fee upon the suit being decreed. The 2nd appellant therefore shall pay the Court fee within eight weeks from date. The findings of the court below as regards the reliefs of dissolution of partnership and consequential allotment of 1/5th share etc. are all confirmed. But in view of the findings above, there will be a decree in favour of the appellants for recovery of Rs.1.00 lakh together with 1/5th share in the profits made by the 1st respondent out of the sale of the suit

property together with interest at 12% p.a from date of decree since the transaction from which the money was advanced was for a commercial venture. The respondent is directed to render accounts in respect of his sale of the suit property. Both the appellants shall pay the proper court-fee on the amount recoverable. S.A.No.499 of 2000 is therefore allowed and S. A. No. 1311 of 2000 is dismissed. No costs.