
(2009) 03 DEL CK 0165
In the Delhi High Court
Case No : CS (OS) 302 of 2007

Smt. Alka Gupta

APPELLANT

Vs

Mr. Narender Kumar Gupta

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11
Contract Act, 1872 — Section 23

Citation : (2010) 7 RCR(Civil) 213

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Aman Lekhi and Jaspreet S. Rai, Rakesh Kumar and Vaibhav Vats,
for the Appellant; Rajiv Awasthi, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—Issue No. 1 as follows, framed on 17th January, 2008 and ordered to be treated as a preliminary issue falls for consideration:

1. Whether the suit is barred by the principle of res-judicata as issue raised in the suit has been directly and substantially been adjudicated between the plaintiff and the defendant in suit No. 16/2006 titled as Alka Gupta v. Narender Kumar Gupta vide an order dated 25th November, 2006 by a competent court?
OPD
2. During the hearing on the aforesaid preliminary issue on 12th January, 2009, after hearing the counsel for the defendant and the senior counsel for the plaintiff in part it was clarified that arguments were being heard not only on the preliminary issue aforesaid but also on as to why independently of Section 11 and Order 2 Rule 2 of CPC, the suit should not be dismissed summarily, also on the ground of re-litigation and abuse of the process of court. Thereafter on 16th January, 2009 the statement of the plaintiff was also recorded and arguments on the preliminary issue and the aforesaid aspect were heard on 16th January, 2009 and 21st January, 2009.

3. The facts are as under:

A. The plaintiff instituted the present suit for rendition of accounts and recovery of dues. It is the case in the plaint, that the plaintiff vide deed dated 5th April, 2000 entered into a partnership with the defendant for doing the business of running an educational institute under the name and style of Takshila Institute. offering specialized coaching to candidates preparing for entrance examinations for Medical and Engineering Colleges; the plaintiff and the defendant were equal partners and the business under the said deed commenced w.e.f. 1st April, 2000; that though the business was very successful but the defendant appropriated all receipts thereof unto himself and instituted a suit No. 438/2004 of the court of Shri Devender Kumar Jangala, Civil Judge, Delhi for permanent injunction against the plaintiff; that upon institution of the said suit it was clear that the defendant was not interested in continuing the said partnership which by implication stood dissolved with effect from the date of institution of that suit; that the said suit instituted by the defendant was withdrawn by the defendant vide his statement dated 16th October, 2004; that the defendant had no right to use the name, style and goodwill associated with Takshila Institute, however the defendant surreptitiously and unlawfully got the name, style and logo of Takshila Institute registered as his exclusive trademark and/or copyright; that the books of accounts of Takshila Institute were being maintained by the defendant and were in his custody; that after the transfer of the immovable property of Takshila Institute at Plot No. 8, Pocket C-9, Sector-8, Rohini, Delhi - 110085 by the plaintiff in favour of the defendant on 13th August, 2004 pursuant to a Bayana Agreement dated 29th June, 2004 between the parties, the plaintiff was not able to enter the said premises and was thus constrained to institute the present suit; that the defendant had refused to account for the monies received from time to time and to pay to the plaintiff her share in it; that the plaintiff had got issued a legal notice dated 8th March, 2005 to the defendant inter-alia calling upon the defendant to render accounts of the said firm and to pay to the plaintiff her share of accrued profits and assets; that the defendant neither replied to the said notice nor rendered the accounts; that the plaintiff had instituted another suit against the defendant being suit No. 16/2006 decided on 25th November, 2006 by the court of Shri Paramjit Singh, Additional District Judge, Delhi; the projected income concealed by the defendant for the period of 21st October, 2000 to 31st July, 2004 was in the sum not less than Rs. 40 lacs which can be attributed to the goodwill earned by Takshila Institute during the subsistence of partnership; that the defendant was even now earning from the said goodwill. The plaintiff thus sought a preliminary decree for accounts of the partnership from the date of commencement of partnership agreement till dissolution by necessary implication on 31st July, 2004 and a final decree for recovery of amounts so found due of the plaintiff's share of profits and a decree in the alternative for recovery of Rs. 25.28 lacs as per particulars given in Annexure "A. to the plaintiff.

B. The defendant filed a written statement admitting the partnership with the plaintiff and inter-alia stated that during the subsistence of the partnership the

plaintiff and Smt. Deepa Gupta wife of the defendant jointly acquired second floor of Property No. 8, Pocket C-9, Sector-8, Rohini, Delhi - 110085; that the plaintiff was a teacher in a government school having no knowledge and expertise in the business and remained sleeping partner confining her interest to the benefits arising out of the said business; that the plaintiff had not disclosed at the time of entering into the partnership that she was a teacher in a government school and thus not entitled to enter into partnership business without permission; that the parties were closely related to each other; that upon differences having arisen, with the help of family and friends it was resolved that the total value of the partnership will be made and the 50% share of the plaintiff will be calculated and paid to the plaintiff and who will relinquish all her rights and claims in the institute which will become absolute property of the defendant ; that on 6th June, 2004 the total value was assessed at Rs. 46 lacs and it was decided that the plaintiff will transfer all her claims in the partnership in favour of the defendant and defendant will pay Rs. 23 lacs in lieu thereof to the plaintiff; that the defendant paid Rs. 1,50,000/- to the plaintiff as a token amount; that on 29th June, 2004 a Bayana Agreement was entered upon in which terms were reduced into writing including payment of the balance sum of Rs. 21.50 lacs against 50% share of the plaintiff in Takshila Institute towards goodwill etc. and also transfer of undivided half share in the property at Rohini aforesaid; that on the date of signing of the said agreement the defendant paid Rs. 7.5 lacs to the plaintiff and the balance amount Rs. 14 lacs was to be paid on the date of the execution of the sale deed of the Rohini property; however the plaintiff on 26th July, 2004 forcibly tried to put her locks on the institute leading to the filing of suit No. 438/2004 aforesaid by the defendant; that in the aforesaid suit on 12th August, 2004 the counsels for the parties made statement that compromise talks were going on and on 13th August, 2004 in view of the compromise the plaintiff executed sale deed of the Rohini property in terms of the Bayana Agreement aforesaid and received the entire balance consideration of Rs. 14 lacs i.e. Rs. 2 lac by draft and Rs. 12 lacs in cash; however no receipt for cash payment of Rs. 12 lac was given owing to relationship and since all disputes had been settled and also because the plaintiff as well as her husband were government employees and had expressed difficulty in explaining the said receipt; that the plaintiff on 13th August, 2004 also wrote to the bank that the joint current account be closed and the parties also subsequently on 16th October, 2004 reported to the court where the suit for injunction instituted by the defendant was pending that the matter had been compromised and the suit was withdrawn; that the plaintiff however on 17th January, 2006 filed suit No. 16/2006 in the court of the Additional District Judge, Delhi claiming that the sum of Rs. 12 lacs was still due and to be paid by the defendant; that the plaintiff had instituted the suit as a counter blast to the suit instituted by the defendant against one Shri Suresh Kumar Gupta for infringement of the copyright Takshila by running an institute in the same name and carrying on the same business; that the said Shri Suresh Kumar Gupta had stated in the court that he was running the institute in the same name on the asking of the husband of the

plaintiff and notices of contempt were issued to the husband of the plaintiff; that total consideration of Rs. 21.5 lacs mentioned in the Bayana dated 29th June, 2004 included Rs. 2 lac towards transfer of the Rohini property and the remaining 19.5 lac towards 50% claim in lieu of share in goodwill of Takshila Institute as well as furniture, fittings, intellectual properties etc.; that the suit filed by the plaintiff for recovery of Rs. 12 lacs against the defendant had been decreed against the defendant; it was, therefore, contended that the present suit was hit by the principle of res-judicata and was in abuse of the process of the court and the plaintiff had not approached the court with clean hands.

C. The plaintiff filed a replication to the aforesaid written statement. It was averred that the suit No. 16/2006 was for recovery of money due in respect of immovable property detailed therein and not for rendition of accounts of the partnership and thus the present suit was not barred by res-judicata; that while the plaintiff was a highly acclaimed qualified teacher, the defendant was not even a qualified teacher; that the defendant knew even prior to entering into the partnership that the plaintiff was a government teacher; it was denied that at any stage it was agreed that total value of the partnership firm shall be made and 50% share of the plaintiff would be given to her; it was denied that any valuation of Rs. 46 lacs had been made or that Rs. 1.50 lac was paid by the defendant to the plaintiff on 6th June, 2004; that the Bayana Agreement was a matter of record and its contents may be perused - it was not purported to be a settlement of all issues relating to the partnership between the parties and it was confined to the sale of the property mentioned therein; at that time Takshila Institute was functioning from two places i.e. from the property aforesaid at Rohini as well as from Paschim Vihar and had there been a settlement between the parties in relation to whole of Takshila Institute there must have been some provisions for disposal of the interest of the plaintiff in the branch of the institute at Paschim Vihar also; that the Bayana Agreement was not intended to go beyond the sale of the immovable property at Rohini; it was denied that sum of Rs. 12 lacs was paid in cash and for recovery of which amount the suit No. 16/2006 had been instituted and which had been decreed.

D. It was on the aforesaid pleadings that the preliminary issue aforesaid was framed.

4. The counsel for the defendant, at the outset, drew attention to the Bayana Agreement dated 29th June, 2004 aforesaid. It is significant that though the plaintiff had along with a plaint filed a list of documents with documents running into 410 pages but the said Bayana Agreement dated 29th June, 2004 was not filed by the plaintiff. A large number of other documents having bearing on the present aspect were, though filed, clubbed under eight heads only in the list of documents so as to virtually make it impossible for anyone perusing the said list to decipher the particular/individual documents.

5. It was the defendant who along with his list of documents filed the said Bayana Agreement dated 29th June, 2004 at pages 78 to 80. Some of the

relevant clauses of the said Bayana Agreement in which the plaintiff has been described as a seller or the first party and the defendant as the purchaser or the second party relevant for the present purposes, are re-produced herein below:

Whereas the first party has represented to the second party that he/she/they is/ are the sole and absolute owner/s of UNDIVIDED HALF SHARE IN SECOND FLOOR (WITHOUT ROOF RIGHTS) OF BUILT UP PROPERTY BEARING No. 8, POCKET & BLOCK C-9, SECTOR-8, ROHINI, DELHI- 110085, BUILT ON A PLOT OF LAND AREA MEASURING 158.87 SQ. MTSR AND PARTNER OF 50% IN M/S. Takshila Institute, established in the above said property.

WHEREAS THE first party for her/his bonafide needs and requirements, has agreed to sell the above said property to the second party and the second party has agreed to purchase the same for a total consideration of Rs. 21,50,000/- (Rupees Twenty One Lacs Fifty Thousand Only)

AND WHEREAS THE PARTIES have decided to put in writing their terms and conditions of AGREEMENT TO SELL;

Now this Agreement to Sell witnesseth as under:

1. That the Property/UNDIVIDED HALF SHARE SECOND FLOOR (WITHOUT ROOF RIGHTS) OF BUILT UP PROPERTY BEARING No. 8, POCKET & BLOCK C-9, SECOTR-8, ROHINI, DELHI-110085, BUILT ON A PLOT OF LAND AREA MEASURING 158.87 SQ. MTSR. AND 50% Share of M/s Takshila Institute, established in the above said property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including, passages, easements, facilities, privileges etc. which are attached thereto or connected therewith.

2. That total consideration towards the sale of above said property has been settled at Rs. 21,50,000/- (Rupees Twenty One Lacs Fifty Thousand Only) out of which the first party has received from the second party a sum of Rs. 7,50,000/- (Rupees Seven Lacs & Fifty Thousand only) advance/bayana prior to signing of this Agreement, the receipt of which is hereby confirmed and the balance payment of Rs. 14,00,000/- (Rupees Fourteen Lacs only) shall be paid by the second party to the first party on or before 29/8/2004.

10. That all original papers concerning the ownership of property shall be handed over by the first party to the second party on or before 28.2.2004, the date of final payment.

13. That the Property hereby sold includes the Goodwill of the firm M/S. Takshila Institute, having its office at C- 9/8, Sector-8, Rohini, Delhi-85, in which the first party is also the partner of 50%. Moreover it is specifically agreed by the first party that the property includes all rights interest, claims, title, furniture, fitting and all furniture, fixture and all equipment of M/S. Takshila Institute.

At the bottom of the aforesaid document it is written in hand as under:

This deed is subject of settlement of Paschim Vihar (F- 19, Bhera Enclave) Takshila Institute for the consideration of Rs. 15,00,000/- (Rupees fifteen lacs only) in the name of Alka Gupta.

6. With respect to the aforesaid hand written portion it may be mentioned that the senior counsel for the plaintiff argued that the aforesaid had been interpolated by the defendant in the photocopy filed before this Court and the same did not exist in the plaintiff's copy of the said agreement which though not filed was purported to be shown to the court. The counsel for the defendant argued that the copy of the Bayana Agreement filed by the defendant before this Court was itself a copy of the same document filed by the plaintiff herself in suit No. 16/2006 and the argument of interpolation was fallacious. It was also the contention of the counsel for the defendant that in fact the said writing was of the husband of the plaintiff. The husband of the plaintiff present in court had denied the same. However, faced with the said position, it was admitted by the husband of the plaintiff present in court on the subsequent date that the copy of the Bayana Agreement filed by the defendant before this Court was in fact copy of the same document filed by the plaintiff herself and which included the aforesaid hand written portion.

7. The counsel for the defendant next drew attention to a receipt dated 29th June, 2004 also executed by the plaintiff and filed at page 81 of defendants. documents. The same is as under:

RECEIPT

I/We, SMT. ALKA GUPTA W/O Dr. NAVINDU GUPTA R/O H. No. 81, DEEPALI, PITAMPURA, DELHI; do hereby acknowledge and confirm that I/We have received from SH. NARENDER GUPTA S/O SH. S.P. GUPTA R/O E-20/63, SECTOR-3, ROHINI, DELHI-110085, a sum of Rs. 7,50,000/- _____, being advance/ bayana towards the sale of UNDIVIDED HALF SHARE SECOND FLOOR (WITHOUT ROOF RIGHTS) OF BUILT UP PROPERTY BEARING No. 8, POCKET & BLOCK C-9, SECTOR-8, ROHINI, DELHI-110085, BUILT ON A PLOT OF LAND AREA MEASURING 158.87 SQ. MTSR. and 50% Share of M/S Takshila Institute, established in the above said property which includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including, passages, easements, facilities, privileges etc. which are attached thereto or connected therewith in this premises.

The total deal has been settled for Rs. 21,50,000/- (Rupees Twenty One Lacs Fifty Thousand Only) and I agree to sign and execute all necessary documents in favour of the above said purchaser or his/her nominee on or before 29.8.2004 at the time of receiving balance consideration of Rs. 14,00,000/-. I further undertake and agree that if the purchaser fails to pay balance consideration on or before due date, his earnest money of Rs 7,50,000/- shall be forfeited by me or if I fail to execute all sale documents in favour of the purchaser on or before

due date, I shall be liable to pay the double of earnest money/advance, and alternatively the purchaser shall have the option to get the documents executed in his/her or his/her nominee's favour through court of law at my risk, cost and consequences.

Hence, I have executed this Receipt at Delhi on this 29 day of June 2004 in the presence of following witnesses.

WITNESSES.

EXECUTANT.

The aforesaid document also has handwriting as under:

All the previous deed executed stands cancelled. The Paschim Vihar Instt. deed would be settled in the name of Dr. Rashmi Gupta for for the consideration of Rs. 15,00,000/- (Fifteen Lacs Only).

The handwriting on this document also was first called an interpolation but subsequently the same admission as aforesaid with respect to the Bayana Agreement was made with respect to the aforesaid handwriting also.

8. It is interesting to note that the aforesaid receipt also contains another writing as under:

Original Bayana Agreement of 29th June, 2004 handed over and the court case will be withdrawn.

Sd/-

13th August, 2004

9. The counsel for the defendant next drew attention to the copy of the plaint in suit No. 16/2006 instituted by the plaintiff; and paras 4,5&6 whereof are as under:

4. That an Agreement to Sell dated 29.06.2004, called the "Bayana Agreement. had taken place between the defendant and the plaintiff at Delhi in respect of undivided half share of the plaintiff in respect of the Second Floor of the built up property, without roof rights, bearing No. 8, Pocket & Block C- 9, Sector 8, Rohini, Delhi 110 085. The said agreement has been annexed herewith this plaint.

5. That under the said Agreement, in consideration of the sale of the half share of the plaintiff in the said property, including the goodwill, rights, interest, claims, title, furniture, fixtures, fittings and equipment of the Partnership Firm doing business from the said address under the name and style of M/s Takshila Institute, the defendant had agreed to pay to the plaintiff a sum of Rs. 21.5 lacs. The defendant admitted this fact at para 10 of the plaint dated 30.07.2004 of his suit No. 438/2004, which is reproduced as follows:

10. That the defendant No. 1 executed a BAYANA Agreement dated 29.06.2004

for the sale of her rights, title and interest in the built up premises in which the Takshila Institute is housed at present, that is, 2nd floor of the property bearing No. 8, Pocket and Block C-9, Sector 8, Rohini, and also the goodwill, title, interests in the Takshila Institute, in favour of the plaintiff No. 1, true copy of the said Agreement is annexed hereto and marked as Annexure XIV, and received Rs. 7.5 lacs has advance money for which she executed a proper receipt copy whereof is annexed hereto and marked as Annexure XV. That under the above said agreement the residue amount of Rs. 14 lacs is to be paid to the defendant No. 1 on or before 29.08.2004.

6. That the price of the share of the plaintiff in the above Said immovable property had been agreed between them as Rs. 2,00,000/- (Rupees Two Lacs Only), and the balance amount of Rs. 19.5 lacs (Rupees Nineteen Lacs Fifty Thousand only) had been agreed by the defendant to be paid to her in lieu of her share of the goodwill of the Takshila Institute, her share in the furniture, fittings, intellectual property in the form of Course Materials developed for the students and her future rights in the Takshila Institute.

10. The counsel for the defendant also drew attention to a clearance certificate dated 13th August, 2004 obtained by the plaintiff from the defendant and copy of which had been filed by the plaintiff herself in the bunch of documents filed by her along with the plaint and which is as under:

I, Narender Kumar Gupta S/o Late S.P. Gupta R/o E-20/63, Sector-3, Rohini, Delhi-110085 in the capacity of Managing Director of Takshila Institutes situated at 19, LSC, Bhera Enclave, Paschim Vihar, New Delhi and Plot No. 8, C-9, Sector-8, Rohini, New Delhi do hereby state that Smt. Alka Gupta W/o Dr. Navindu Gupta R/o 81, Deepali, Pitampura, Delhi- 110034 had never received any amount of money in cash or cheque from the institutes.

I further confirm that she or her legal heirs had never shared any profit or loss in finances of the institutes, during the period November 1999 to July 2004. She had only academic interest as a visitor in the welfare of the students.

I, Narender Kumar Gupta declares that I would be solely liable for any legal liabilities that may arrive concerning tax, finance, academics etc. against these institutes.

Sd/-

13.08.2004.

The counsel for the defendant also drew attention to the written statement filed by him in suit No. 16/2006 and to the judgment of the Additional District Judge therein.

11. The senior counsel for the plaintiff initially argued that the sum of Rs. 21.50 lacs out of which the plaintiff claimed to have received Rs. 9.5 lacs and had sued for recovery of balance of Rs. 12 lacs was only for sale of Rohini property. It may

be mentioned that this is the stand of the plaintiff in the replication also. However, on being confronted as to how such argument could be raised in the face of the sale deed of the Rohini property being for the sale consideration of Rs. 2 lac only, it was argued that a number of improvements had been made by the plaintiff in the Rohini property and the sum, over and above Rs. 2 lac was meant for the said improvements. Upon being further confronted that the improvements and constructions, if any, made by the plaintiff in the Rohini property would be part and parcel of the immovable property and the consideration thereof also would form part of the sale consideration of the property and which had not been shown in the sale deed, it was argued that the sum over and above Rs. 2 lac was meant for the fittings and fixtures in the Rohini property. Upon being confronted with the clauses of the Bayana Agreement aforesaid, it was argued by the senior counsel for the plaintiff that there was no mention in the recitals of the said Bayana Agreement of the same being with respect to the 50% share in the goodwill and the same finds mention only in the operative portions. It was also sought to suggest that the pleadings of the plaintiff in the earlier suit as set out above was a case of bad drafting.

12. I find the aforesaid conduct of the plaintiff of taking, shifting and opportunistic stand to be in abuse of the process of the court. In my view, the absence of the recitals with respect to the consideration mentioned being for 50% share in Takshila Institute also in the operative portions of the said agreements would not justify an inference that the said clauses in the operative portions of the agreement were not intended to be given effect to. In fact the recitals also mention of the plaintiff being partner of 50% share to Takshila Institute. Upon this view being made known to the senior counsel for the plaintiff in the course of hearing, it was argued that the 50% share of the goodwill of the firm mentioned therein was with respect to branch of the institute being run in the Rohini property and not in the goodwill of the branch of the institute/firm being run in the Paschim Vihar property.

13. I find the aforesaid stand also to be unbelievable. This suit was instituted for the rendition of accounts of the firm and without specifying that the accounts or goodwill of the branch of the firm at Rohini had been settled and only the accounts and goodwill of the Paschim Vihar branch were due.

14. The senior counsel for the plaintiff also argued that the plaintiff had in the plaint in CS(OS) No. 16/2006 merely repeated the contents of the Bayana Agreement and not made any further admissions. I disagree with the said submission also. It is unequivocally mentioned in para 6 of the plaint reproduced hereinabove that out of Rs. 21.5 lacs the price of the share of the plaintiff in the immovable property had been agreed at Rs. 2 lac and the balance Rs. 19.5 lacs had been agreed to be paid to the plaintiff in lieu of her share in the goodwill of Takshila Institute and her share in furniture, fittings, intellectual property in the form of course material developed for students and her future rights in the Takshila Institute. The reference in para 6 is not with respect to Takshila Institute

in Rohini property but to Takshila Institute generally.

15. During the course of hearing on 12th January, 2009 in view of the aforesaid inconsistent stand being taken by the plaintiff, it was deemed expedient to direct the personal presence of the plaintiff before the court for recording of her statement if found necessary. The plaintiff appeared in person on 16th January, 2009 and after hearing some arguments of the senior counsel for the plaintiff it was deemed expedient to record the statement of the plaintiff. The plaintiff in her statement has stated that she is an Income Tax assessee since 1994 and had been filing Income Tax returns since then; that she had entered into a partnership with the defendant in 1999 and which partnership remained in existence till August, 2004; she admitted execution of the Bayana Agreement dated 29th June, 2004; she claimed that under the Bayana Agreement she was to receive a sum of Rs. 21,50,000/- against the Rohini property and the goods lying in Rohini property; upon the Bayana Agreement being shown to her and upon being asked to point out as to where it was so written in the Bayana Agreement, she stated that it was nowhere written therein that the sum of Rs. 21,50,000/- was also for goods lying in the Rohini Property. The senior counsel for the plaintiff had interrupted at that stage and drawn attention to Clause 13 of the document. The plaintiff in her statement admitted that it was written in the Bayana Agreement that the sum of Rs. 21,50,000/- was the consideration for all her rights, title and goodwill in the partnership with the defendant also; she volunteered that it was only with respect to the branch of Takshila Institute being run in the Rohini property and not with respect to the branch at Paschim Vihar; she admitted that before filing the suit she had not stated anywhere that the rights and goodwill of the partnership mentioned in the Bayana Agreement receipt aforesaid was only with respect to the Rohini branch and not with respect to the Paschim Vihar branch; she stated that she had not shown the amount of Rs. 9.5 lacs admittedly received from the defendant in her Income Tax return till then and claimed that it will be shown only after the full amount is received by her; upon being shown the plaint in Suit No. 16/2006 (Supra) she said that she could not remember whether it was mentioned therein that the accounts of Paschim Vihar institute have not been settled; she admitted that there was only one partnership with respect to both the institutes; she admitted that the bank account of the partnership in which she was earlier a signatory was got closed by her after the execution of the sale deed of the Rohini property; she admitted having obtained the clearance certificate aforesaid from the defendant but stated that the same was for the reason of having not received any amount from the defendant; she further stated that she was a teacher in a government school. Upon being asked whether she was to receive profits under the partnership deed or not she stated that she was told that she will be compensated. She stated that besides academic interest she had profit interest also in the partnership; she claimed to have taken the clearance certificate for the reason of the accounts having not been settled; she admitted that she had not disclosed to the government school where she was employed as a teacher that she was in

partnership with the defendant; she further admitted that under the rules of her service she is entitled to only make academic contribution and was not entitled to be in partnership with the defendant; she admitted that she had made statement to the Service Tax authorities on 7th February, 2005. The said documents were produced by the counsel for the defendant during the recording of the statement of the plaintiff and upon the plaintiff admitting the same were exhibited as C-1, C-2 & C-3. The plaintiff in the said documents had represented that she was in the partnership of M/s Takshila Institute acting on behalf of her father-in-law as sleeping partner for all practical purposes and had further stated that she had never been formally associated with Takshila Institute in any activity, teaching or office work. The plaintiff on a subsequent date clarified that it was she who was a partner in Takshila Institute and not her father-in-law. She further stated that she had no knowledge whatsoever of any of the affairs of the said firm. In the said statement she further relied upon the clearance certificate aforesaid obtained from the defendant and reiterated that she had only academic interest as a visitor in the welfare of the students.

16. What emerges from the aforesaid is that the plaintiff at the time of inception of the partnership and till date is a government teacher and under the terms of her employment was not entitled to enter into the partnership and was not entitled to earn any profits therefrom. Not only under the terms of her employment, the plaintiff before the Service Tax Authorities also represented that she had only academic interest. It can only mean that she had no profit interest in the partnership. Though the plaintiff has denied that she has filed the clearance certificate aforesaid with the government school in which she is employed but the purport of plaintiff obtaining the said clearance certificate from the defendant can only be to use the same in the event of any complaint of breach of terms of employment being made against her. Since the plaintiff had obtained the said certificate, it can safely be presumed that the language thereof is at the instance of the plaintiff only. The language of the said certificate does not suggest that the same was taken for the reason of the accounts of the partnership remaining to be settled as deposed by the plaintiff. If the intent of obtaining the certificate had been so, nothing prevented the certificate from stating so; on the contrary the certificate is a confirmation by the defendant of the plaintiff having never shared any profits and of the plaintiff thus being not liable for any liabilities of the firm. On the contrary, the case of the plaintiff before this Court is that she was entitled to a share in the profits of the firm.

17. The question which arises for adjudication is whether a litigant can be permitted to take a stand in the court, diametrically opposite to the stand of that litigant elsewhere. Can there be different stands before the government as employer and before the Taxation Authorities and before the court. Should the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant in recovering dues which that litigant elsewhere has represented are not due to her.

18. The aforesaid circumstance leaves no manner of doubt that the plaintiff in contravention of the terms of her employment was carrying on business as a partner with the defendant. The question is of enforcement of such a partnership and or the terms thereof by the court.

19. In *Murli Prasad Vs. Parasnath Prasad and Others*, partnership agreement was found to be contrary to the provisions of the Electricity Act; it was thus held to be forbidden by law and void u/s 23 of the Contract Act. It was further held that the partnership is illegal if its object is the attainment of which is contrary to law and or if it is formed for a purpose forbidden by statute although independently of the statute there would be no illegality. It was further held that the most important of consequences of illegality in contract of partnership is that the members of the partnership have no remedy against each other for contribution or apportionment in respect of partnership dealings and transactions. Reliance was placed on *Velu Padayachi Vs. Sivasooriam Pillai*,) where it was held that a partnership entered into for the purpose of conducting a business in arrack or toddy on a license granted or to be granted to only one of them is void ab initio, for the reason that it involves a transfer of the license, which is prohibited under Rule 27. Reliance was also placed on Pollock's Principles of Contract inter-alia to the effect that when conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the conditions are imposed. Pollock was also quoted to the effect that if it is shown as a fact that there was from the first, a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction.

20. *Ram Sewak Vs. Ram Charan (deceased by L. Rs.) and Another*, was a case of concealment of profits; in that case the parties had been keeping double set of accounts for evading payment of Income Tax and Sales Tax. The lower court reported the matter to the Taxation Authorities. The High Court held that the court should have refused to entertain the suit on the ground of public policy, as it involved directing the recovery of an amount found to be due to either party as a share of the profits which had been deliberately concealed by the parties from the books of account in order to evade the payment of taxes. It was held that no court can countenance a deliberate evasion of tax laws of the country and to lend the aid of the court for recovering an amount which had been deliberately kept concealed by the parties in order to evade payment of taxes due thereon. It was held that if the courts were to do so it would amount to aiding and abetting evasion of the laws by the court itself. It was further held that since the object of the parties was found to be that the profits will be earned in such a way or retained in such a manner as to evade the payment of taxes which was forbidden by law and which defeats the provision of the tax laws, therefore the object of the agreement was forbidden by law and is opposed to public policies. The

agreement between the parties to earn concealed profits being void, it was held that the court could not enforce the agreement by directing an inquiry into that amount or the destination of the concealed profits in order to enforce the recovery of the share therein of one party from another.

21. The Apex court in *Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others*, quoted Lord Mansfield, C.J. in *Holman v. Johnson* (1775) 1 Cowper 341:

The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this : *ex dolo malo non-oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpicausa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

It was further held that in a case in which a plaintiff must rely upon his own illegality, the court may refuse him assistance. The Apex court in that case held that the plaintiff did not have to rely upon any illegality and thus held the principle not applicable.

22. In *Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar*, also it was reiterated that if the plaintiff seeks the assistance of the court to effectuate an illegal transaction the court will refuse to assist him.

23. In *Sita Ram Vs. Radhabai and Others*, it was held that The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim *in pari delicto potior est conditio defendantis*. In *Kedar Nath Motani and Others Vs. Prahlad Rai and Others*, it was held that if the illegality is of so trivial or venial character and it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gain the benefit of an illegal transaction, the plaintiff would be entitled to the assistance of the court. The test to be applied is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered; If the illegality be trivial or venial and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. It was further held that a strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the

facts.

24. Reference may also be made to the Full Bench decision in Ghulam Ahmed Vs. Mohammad Iqbal and Others where a partnership which entailed transfer of truck and its route permit to the partnership business, in contravention of the provisions of the Motor Vehicle Act was held to be void in entirety.

25. Lastly, in the celebrated case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, it was held that the courts of law are meant for imparting justice between the parties; one who comes to the court, must come with clean hands; it can be said without hesitation that a person whose case is based on falsehood has no right to approach the court - He can be summarily thrown out at any stage of litigation. The Apex Court also noted that the process of the court is being abused - property grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely.

26. In the present case the condition in the term of the employment of the plaintiff as a government teacher, admittedly prohibit her from carrying on any business activity or other vocation for profits. Such condition has been imposed to ensure that the teachers of the government school devote their full energy and time to developing the young minds, rather than treating the government service as a mere source of income and utilizing their time and skill in earning/making money elsewhere. The plaintiff by entering into the agreement of partnership with the defendant had clearly violated her terms of employment and this Court cannot come to her assistance to enable her to earn profits which she otherwise is not entitled. The plaintiff has admitted to having not shown any profits whatsoever in her Income Tax return. It is inconceivable that the plaintiff who has claimed to be in partnership since the year 1999 or 2000 would not have earned any profits from the partnership and/or if would not have earned would have sat quietly for four years. The plaintiff cannot be permitted to take different stands before different foras. The condition/term of employment prohibiting the plaintiff from entering into partnership is found to be in public interest and the action of the plaintiff of breaching/violating the same is found to be immoral and opposed to public policy. The breach is not found to be trivial or venial. Further, the conduct of the plaintiff thereafter also, as noted above is found to be of subterfuge and plaintiff has been found to be misstating facts. The plaintiff is found to be an unscrupulous person and her case is found to be based on falsehood. This Court refuses to come to the aid of plaintiff and her case is liable to be dismissed summarily.

27. That even on the facts of this case, I have no doubt that the plaintiff has abused the process of the court. The plaintiff in the Bayana Agreement aforesaid had clearly agreed to the sum of Rs. 21.50 lacs towards her share in the partnership firm inclusive of the value of the Rohini property where the partnership business was being carried on. As far as the Paschim Vihar property is concerned, the issue with respect whereto was raised, the same also finds

mention in the said Bayana Agreement and the receipt. The conduct of the plaintiff also shows that all accounts had been settled and no accounts remained to be taken and for which purpose the suit had been filed. Had the accounts not been settled, the question of the plaintiff instructing the bank to delete her name from the account in the name of the firm and of receiving the original Bayana Agreement and of obtaining the clearance certificate aforesaid would not have arisen. The case set up by the plaintiff is contrary to all the admitted documents.

28. The Apex court in *T. Arivandandam Vs. T.V. Satyapal and Another*, has held that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial court should ensure that bogus litigation is shot down at the earliest stage. Again in *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, it was held that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of the suit; the court should interpret the provisions in such a manner so as to save expenses, achieve expedition, avoid the court's resources being used up on cases which will serve no useful purpose. It was further held that a litigation which in the opinion of the court is doomed to fail should not further be allowed to be used as a device to harass. The Apex court yet again in *Shipping Corporation of India Ltd. Vs. Machado Brothers and Others*, held that it is the duty of the court to dispose of infructuous litigation.

29. The senior counsel for the plaintiff referred to *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, and K.K. Modi Vs. K.N. Modi and Others*, and argued that various issues already framed on 17th January, 2008 required adjudication of questions of facts, recording of evidence to determine the understanding of parties and parties ought to be given an opportunity to give their explanation of documents aforesaid. It was argued that thus this suit did not fall in the category of bogus and irresponsible litigation which could be thrown out at threshold. It was further urged that re-litigation was an abuse of process of court only when matter had been heard and finally decided - in the present case no court has gone into the question of whether accounts have been settled between the parties or not; the judgment in previous suit was only concerned with whether payment in cash claimed by the defendant had been made or not. It was further urged that non mentioning and non filing of Bayana agreement and the clause therein of consideration mentioned therein being also towards her 50% share in Takshila Institute, was not in abuse of process of court, since the foundational facts of two cases were different. It was further urged that the power of restraining proceedings was to be exercised sparingly and only in exceptional cases. It was submitted that the defendant also had been taking inconsistent stand and the understanding of defendant also was that inspite of clearance certificate, the plaintiff was entitled to her share in profits; both were acting illegally and thus defendant could not take the plea of plaint being in abuse of process of court. It was further argued that bogus and irresponsible has to be on reading of plaint and not on the basis of defence.

30. The senior counsel for the plaintiff further argued that dismissal of suit would hamper the right of the plaintiff to have her claim adjudicated. Reliance was placed on Chapter VIII of 186th to 195th Report of Law Commission of India on Prevention of Vexatious Litigation - it has to be habitual and persistent. *Sathi Vijay Kumar Vs. Tota Singh and Others*, was referred to, to urge that power to strike off pleadings should be exercised with circumspection. Reference was also made to *Attorney General of the Duchy of Lancaster v. London and North Western Railway Co.* (1892) 3 Ch 274 and *M/s. Crescent Petroleum Ltd. Vs. m.v. "MONCHEGORSK"* and another, in this regard. The senior counsel for plaintiff also relied on *All India Reporter Ltd. v. D.D. Datar* AIR 1951 Nag 412 and *Anderson Kirkwood Tennent Vs. Walter Mitchel*, to buttress that court should not as a rule decide an important point at the stage of striking out pleadings, unless it is clear beyond all reasonable doubt.

31. I find the present case to be clear beyond all reasonable doubts. The Beyana Agreement and Receipt admittedly executed by plaintiff and the averments of plaintiff in plaint in earlier suit instituted by plaintiff, permit of no controversy. The consideration mentioned therein was in settlement of all claims of plaintiff with respect to her share in partnership. The contemporaneous conduct of plaintiff, of statement on 13th August, 2004 in suit No. 438/2004 instituted by defendant; of taking clearance certificate dated 13th August, 2004 from defendant, of having her name as signatory deleted from the bank account of firm are also in consonance with said documents. The facts of this case do not require any opportunity for leading evidence to be given to the plaintiff. This Court cannot put a case contrary to such documents and conduct to be put to trial. The explanations now given during arguments do not form the basis of suit and pleadings.

32. The next question is with respect to the preliminary issue framed on 17th January, 2008. The plaintiff in the plaint in Suit No. 16/2006 on the basis whereof the said issue was framed stated that she was reserving her right to institute separate proceedings for accounts of the partnership. However, no leave under Order 2 Rule 2 of the CPC was taken. What has to be determined is whether the cause of action for that suit and this suit is the same or not.

33. The cause of action for that suit was the Bayana Agreement aforesaid. The plaintiff sued for recovery of balance amount due under the said Bayana Agreement. However, the same Bayana Agreement provided for the amount of Rs. 19.5 lacs to be paid towards the plaintiff's share in the partnership and of Rs. 2,00,000/- towards the plaintiff's share of the Rohini property. Thus the payment of Rs. 19.5 lacs the balance whereof was claimed was towards the share in partnership and if it was the case of the plaintiff that the plaintiff was also entitled to the further relief of accounts also besides the said amount of Rs. 19.5 lacs, the cause of action was the same. It is only upon being confronted with contradictions, now argued by the senior counsel for the plaintiff as well as stated by the plaintiff in her statement that the accounts sought to be settled

therein were with respect to the Rohini branch only of Takshila Institute and not the Paschim Vihar branch. The plaintiff did not state so in the plaint in that suit or in the plaint in this suit. The said claim if any of the plaintiff was to be adjudicated in that suit only and plaintiff having not claimed relief in that suit and having also not sought the permission under Order 2 Rule 2 of the CPC in that suit is now not entitled to maintain the present suit. The Division Bench of this Court in Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan, held a second suit for specific performance on same averments as in previous suit for permanent injunction to be barred by Order 2 Rule 2 CPC, when cause of action for the relief of specific performance had accrued prior to the institution of suit for permanent injunction. The preliminary issue is also decided in favour of the defendant and against the plaintiff. Of course, it cannot be said that the present suit is barred by res-judicata in as much as the said claims were not decided in that case; but the principles of constructive res judicata are applicable.

34. The effect of the aforesaid findings is that the suit is dismissed with costs. The plaintiff is also burdened with costs of Rs. 50,000/- payable to the defendant.