
(2002) 11 AP CK 0008
In the Andhra Pradesh High Court
Case No : LPA No. 271 of 2001

Vallapareddy Sumitra Reddy and Another	APPELLANT
Vs	
Kasireddy Laxminarayana Reddy and Others	RESPONDENT

Date of Decision : 22-11-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1
Partnership Act, 1932 — Section 42

Citation : (2002) 6 ALD 642 : (2002) 6 ALT 645

Hon'ble Judges : Ramesh Madhav Bapat, J;M. Narayana Reddy, J

Bench : Division Bench

Advocate : N.V. Suryanarayana Murthy, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Madhav Bapat, J.—This letters patent appeal arises out of a suit O.S. No. 1601 of 1983, which was decided by the II Additional Judge, City Civil Court, Hyderabad, which was filed by the first respondent herein named Sri Kasireddy Laxminarayana Reddy (hereinafter referred to as the "plaintiff") for dissolution of partnership firm known as Viraj Constructions, claiming to be a partner and for settlement of accounts of the firm.

2. It appears from the record that the firm was formed in the year 1964 under a deed dated 31-12-1964, which is filed on record and marked as Ex.A1, with the first respondent and four other partners. It was engaged in public works contracts. In the year 1968 another partnership was formed on 13-12-1968, which is also filed on record and marked as Ex.A2, bearing the same name with the above five partners and one more person named Sri Dasaratha Ram Reddy, who was made the Joint Managing Partner along with the first appellant herein. It is the dissolution of this partnership firm, which is now sought in the suit.

3. It is the further case of the plaintiff that when the firm was running, the plaintiff-1st respondent herein sent a letter dated 9-3-1970 stating that he was

retiring from the partnership with effect from 31-3-1970. On 17-7-1970 the agreement was entered into between the retiring partner and other partners. A pronote was executed in favour of the plaintiff by three out of five continuing partners and another person, who is a stranger to the partnership firm, promising to pay Rs.22,500/- to the retiring partner, the plaintiff in the suit. On the basis of the pronote, the plaintiff-1st respondent herein filed O.S. No. 128 of 1975 before the learned District Judge, Nellore against the executants of the pronote for recovery of the money due under the pronote together with interest. The first defendant in the suit, who was one of the executants of the pronote and also a partner in the firm, died on 8-9-1976. His legal representatives were brought on record. The trial Court proceeded with the trial. The suit filed by the plaintiff-1st respondent herein was dismissed. The trial Court held that the pronote was not supported by consideration and the suit was not maintainable. The trial Court also found that the remedy for the plaintiff to lay a suit for dissolution of the partnership and rendition of accounts. Neither the partnership firm nor all the partners were made parties to the suit. The issues were confined only to the territorial jurisdiction of the Court and whether the pronote was supported by consideration or not. The trial Court discussed these points and ultimately the trial Court held that the Court had no territorial jurisdiction and there was no consideration for the pronote and thus the suit was held to be not maintainable.

4. Aggrieved by the aforesaid judgment and decree of dismissal of the suit, the plaintiff Kasireddy Laxminarayana Reddy i.e., the 1st respondent in this appeal, preferred an appeal before this Court in A.S. (SR) No. 90685 of 1999 and the same was dismissed on 2-11-1983 as not pressed.

5. The plaintiff filed the suit O.S. No. 128 of 1975 in the Court of the Additional District Judge, Nellore against Sri V. Sundara Ram Reddy for recovery of certain amount. During the pendency of the suit O.S. No.128 of 1975, Sri V. Sundara Ram Reddy died on 8-9-1976 and defendants 5 and 6 were brought on record as his legal representatives. In view of the judgment in O.S. No.128 of 1975, the plaintiff got issued another notice dated 18-10-1983 to the defendants dissolving the partnership firm and business with effect from the date of communication of the said notice. The plaintiff issued another notice, as there was a finding in O.S. No.128 of 1975 that the firm was not dissolved and that issue became final. In the said notice, the plaintiff requested the defendants for rendition of accounts within 15 days. Defendants 1, 2, 4 and 6 received the notices. Defendants 3, 5 and 6 having received the notices, got issued a reply dated 17-10-1983. Unless the defendants render the accounts, the plaintiff could not know how much profit he is entitled to. The 7th defendant-Bank is impleaded as a party defendant in the suit as the defendants were operating the bank accounts with D7 and therefore D7 was a necessary party to the suit.

6. The defendants filed their written statements.

7. The 7th defendant-Bank filed a written statement and contended that no relief

was sought against them and they were not proper parties to the suit. The 7th defendant-bank is no way concerned with the suit subject.

8. Basing on the above pleadings, the learned Judge framed the following issues.

1. Whether the judgment and decree in O.S. No. 128/75 on the file of Sub-Judge, Nellore gives cause of action for the suit or whether it is a bar to the present suit?

2. Whether the plaintiff is entitled to have rendition of accounts and whether the defendants are liable to render accounts as claimed by the plaintiff?

3. Whether the plaintiff had retired from partnership and whether he is not entitled to seek dissolution of partnership at this stage and ask for rendition?

4. Whether the suit is barred by limitation?

5. To what relief?

9. It appears from the record that the plaintiff examined himself as PW1. Certain documents produced and proved by him were marked as Ex.A1 to A57. On behalf of the defendants, DW1 was examined and certain documents produced and proved by them were marked as Exs.B1 to B8.

10. The trial Court considered the issues 1, 3 and 4 and gave a finding that the partnership firm was not dissolved by an earlier notice, partnership continued, defendants failed to render accounts, the profit and loss account of the dissolved firm was not ascertained and therefore passed a decree in favour of the plaintiff together with interest at the rate of 12% p.a. from 1-10-1969 till the date of realisation of the decretal amount. The suit was originally filed against defendants 1 to 7 only. During the pendency of the suit, D1 died and therefore defendants 8 and 9 were brought on record as the legal representatives of the first defendant. The 2nd defendant as the legal representative of the first defendant was on record. The plaintiff along with defendants 2 to 4 and late V. Sundara Ram Reddy constituted a partnership firm. The finding was given by the trial Court that the plaintiff along with defendants 2 to 4 and late V. Sundara Ram Reddy constituted a partnership firm viz., M/s Viraj Constructions with its headquarters Office at H.No.3-5-942, Himayatnagar, Hyderabad for carrying on business in contracts as per the deed Ex.A1 dated 31-10-1964. It was further held that the plaintiff and 2nd defendant were entitled for 1 4/5th share while defendants 3 and 4 and late V. Sundara Ram Reddy were having 1/6th share in the partnership firm. It was further held by the trial Court that the first defendant was admitted as a partner in the said firm and therefore Ex.A2 dated 13-12-1968 was entered. The initial capital of the partnership business was Rs.One lakh. According to the plaintiff, he contributed Rs. 50,000/- to start the business and the firm acquired the land admeasuring Ac.3-27 guntas in Sy.No.28/1 to 3 situated at Begumpet, Hyderabad and two lorries and one Jeep besides iron centering plates with anglers etc.

11. On 4-5-1967 the firm opened C.D. Account No. 2186 with Andhra Bank, Sultan Bazaar, Hyderabad and the managing partners, who are the plaintiff and 3rd defendant even after re-constituting the firm in the year 1968, operated the bank account. Further finding was given by the trial Court that in the year 1967 the firm undertook a contract from the Railways and the immovable property of Begumpet was given as security for execution of the work. When there was a dispute with the Railways, O.S. No.27 of 1973 was filed against the Railways before the Additional Chief Judge, City Civil Court, Hyderabad for recovery of damages on account of breach of contract and the suit was decreed for Rs. 2,20,000/-. Against the said decree and judgment, the Railways carried the matter in appeal before the High Court by filing CCCA No.14 of 1979. The High Court disposed of the said appeal on 17-10-1987 modifying the decree under Ex.A45. These facts were narrated by the trial Court in the judgment to come to the conclusion that the plaintiff did not retire from the partnership firm though the first notice was given for dissolution. After disposal of CCCA No.14 of 1979, the plaintiff issued a notice dated 9-3-1970 to all the partners of a firm expressing his intention to retire from the firm with plaintiff late Sri V. Sundara Ram Reddy and defendants 1, 2 and 5.

12. The defendants pleaded that under Ex.A3 dated 17- 7-1970 by which the plaintiff relinquished his share in the immovable property for a sum of Rs. 22,500/-, a pronote was executed in favour of the plaintiff. After expiry of stipulated period of one year for payment, the plaintiff filed OS No.128 of 1975 for recovery of the said amount with interest. During the pendency of the said suit, late Sri V. Sundara Ram Reddy died on 8-6-1976. His legal representatives were brought on record as defendants 5 and 6. In the first suit, the defendants had taken a plea that the plaintiff did not retire from the partnership and the accounts of the partnership firm were not settled and it is not possible to settle the accounts due to the pendency of the suit against the Railways and the firm never stood dissolved. Even after the death of Sri V. Sundara Ram Reddy, his legal representatives did not take the plea that the partnership firm stood dissolved. As stated earlier, OS No.128 of 1975 was dismissed holding that the partnership firm was not dissolved. The plaintiff preferred an appeal and withdrew the same in the S.R. stage earlier and thus under these circumstances, the plaintiff issued Ex All legal notice dated 18-10-1983 to the defendants asking for dissolution of the firm with effect from the date of commencement of the said notice and requested the defendants for rendition of accounts within a period of 15 days. When the accounts were not settled, the plaintiff filed the present suit i.e., OS No.1601 of 1983. In the above suit, the defendants had contended that the suit is barred by limitation as it was not filed within three years from 1-4-1970 on which the plaintiff expresses his intention to retire from the partnership firm or in the alternative the suit should have been filed within three years on the death of Sri V. Sundara Ram Reddy, who was one of the partners of the firm, and the partnership firm stood dissolved on his death. Therefore, contended the suit is not maintainable.

13. It appears from the record that the trial Court decreed the suit of the plaintiff for rendition of accounts. A preliminary decree was passed in favour of the plaintiff against defendants 1 to 6, 8 and 9 declaring the plaintiff is entitled to 25 ps. share out of 100 ps. Capital amount of the partnership of M/s. Viraj Constructions and the defendants 1 to 6, 8 and 9 were directed to render accounts on or before 31-3-1969 towards the plaintiffs share upto 31-3-1970. The plaintiff has to file a petition to pass a final decree by appointing a Receiver in terms of the preliminary decree. Further the plaintiff was awarded interest at the rate of 12% p.a. on the amount if found to be due to him towards his share after settlement of accounts on 1-4-1970 till the date of realisation. The suit against D7 was dismissed as no relief was claimed against him. Aggrieved by the said judgment and decree of the trial Court, the plaintiff preferred an appeal before this Court which was numbered as CCCA No.52 of 1999. The respondents filed cross-objections. The said appeal and the cross- objections were disposed of with slight modifications. The learned single Judge held that the view expressed by the learned II Additional Judge, City Civil Court, Hyderabad, that the plaintiff is entitled to seek rendition of accounts from the defendants upto 31-3-1970 and not from 1-10-1969 towards or till the date of dissolution of the firm i.e., on 18-10-1983 as claimed in the suit. The learned single Judge further held that when the plaintiff himself wanted to withdraw/ retire from the partnership firm, the defendants have not permitted him to retire from the partnership firm, according to the notice dated 9-3-1970. Therefore the partnership was not dissolved according to his will. On the contrary he continued to be a partner of the firm. As per the judgment in OS No. 128 of 1975, he issued a notice dated 18-10-1983 to dissolve the partnership firm and render accounts. Therefore, the partnership is at will, u/s 43 of the Act, soon after the partner has expressed his willingness to dissolve the partnership firm, after giving notice, the partnership M/s. Viraj Constructions was dissolved on 18-3-1983 and the defendants 1 to 6, 8 and 9 are liable to render accounts to the plaintiff towards his share upto 18-10-1983 and if any amount is due payable to the plaintiff from out of the profits of the partnership firm, he is entitled to receive 12% p.a. till the date of realization. Accordingly the preliminary decree passed by the II Additional Judge, City Civil Court, Hyderabad was modified and the cross-objections filed by the cross-objectors were dismissed.

14. Aggrieved by the judgment and decree of the learned single Judge, the present LPA has been filed by the respondents 4 and 5 in CCCA No.52 of 1999 and defendants in the suit.

15. The learned senior Counsel Mr. N.V. Suryanarayana Murthy appearing on behalf of the appellants herein submitted at the Bar that the plaintiff i.e., Kasireddy Laxminarayana Reddy had filed earlier suit i.e., OS No.128 of 1975 on the file of the Subordinate Judge, Nellore. The suit filed by the plaintiff was dismissed for the reason that the Court found that the said Court had no territorial jurisdiction and the plaintiff did not retire from the partnership firm. Aggrieved by the said judgment and decree, the plaintiff filed CCCA No.52 of

1999 but the plaintiff himself withdrew it. No permission was sought under Order 23, Rule 1 CPC to file the suit on the same cause of action. Therefore, the trial Court as well as the learned single Judge of this Court ought to have held that the second suit in OS No. 1601 of 1983 on the file of the II Additional Judge, City Civil Court, Hyderabad itself is not maintainable. The learned Counsel invited our attention to Order 23 CPC, which reads as under:

"ORDER 23 - WITHDRAWAL AND ADJUSTMENT OF SUITS (withdrawal of suit or abandonment of part of claim):

1. (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim. Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

2. An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

3. Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

4. Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1); or

(b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

5. Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs".

With this legal provision the learned senior Counsel submitted at the Bar that unless permission is sought, the second suit itself is bad in law.

16. As far as the facts as narrated to above are concerned, we are of the considered view that the proposition made by the learned senior Counsel is not applicable to the present set of facts; firstly because when the suit at Nellore was dismissed, a special finding was given by the learned Judge that the partnership continues. The plaintiff was not allowed to retire. That issue had become final. When the partnership continues and not dissolved, in that event any partner is not entitled to seek for rendition of accounts unless he expresses his willingness to retire from the partnership firm. In the present case, it is a fact that the plaintiff had issued a notice to the defendants expressing his willingness to retire from the partnership; he was not allowed to retire. The plaintiff also continued to participate in the business. He continued for some years. The plaintiff was operating bank accounts and also had executed a bond with the Railways, which are crucial documents produced on record as Exs.A36 and A37. When the trial Court gave a specific finding that the partnership continues, there was no question of granting a decree in favour of the plaintiff. The said finding is not challenged anywhere and therefore that finding has become final.

17. The learned senior Counsel further submitted that there is a bar under Order 2, Rule 2 CPC to institute the second suit. We adjudicate this issue by giving the same reasons as it was given earlier that the partnership was not dissolved. That issue has become final.

18. The third contention raised by the learned senior Counsel that the suit is barred by limitation. The learned senior Counsel contended that D1 died and the partnership firm stood dissolved, though the defendants 5 and 6 were brought on record as the legal representatives of D1. We are also not in agreement with the submission made by the learned senior Counsel for the appellants herein for the reason that the partnership still continue even after the death of D1 and allowing his legal representatives to join as partners in the firm. The firm had taken a contract with the Railways. There was a dispute and a suit was filed. As per the order of the Court, they executed the bonds. Therefore, the sole intention of all the partners was to continue the partnership business.

19. The learned senior Counsel relied upon various rulings reported in *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, , *Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills*, , *Nagar Mahapalika, Bareilly Vs. State of U.P. and Others*, ; *Commissioner of Income Tax, Central-I, Bombay Vs. Empire Estate, Bombay*, , *K.P.A. Vellayappa Nadar (Dead) through Lrs. Vs. Bhagirathi Ammal and Others*, , *Banarsi Das Vs. Seth Kanshi Ram and Others*, , *Vishnu Chandra Vs. Chandrika Prasad Agarwal and Others*, , *Khaliq (dead) by Mir Abdul Khaliq (Dead) by Lrs. Vs. Abdul Gaffar Sheriff (Dead) by Lrs and Others*, , and *M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others*, . We have gone through the aforesaid rulings. As per the ruling reported in *Commissioner of Income Tax, Central-I. Bombay v. Empire Estate, Bombay (supra)* is concerned, their Lordships were pleased to hold that nothing is given subject to the contract between the parties. Section 42 of the

Partnership Act reads as under:

"42. Subject to contract between the partners a firm is dissolved-

(a)-(b)

(c) by the death of a partner, and

(d)"

Section 42 of the Partnership Act does not say that on the death of the partner, the partnership stands dissolved automatically. It is always subject to the contract between the parties. It is not necessary that every contract of partnership must be in writing. It can be oral and it can be inferred by the conduct of the parties.

It appears from the record since the LRs., of deceased defendants 1 and 2 were brought on record, it goes without saying that even after the death of the partner, the partnership continued and not only continued, they continued to take contracts of construction from different parties.

20. The learned senior Counsel further relied upon a ruling reported in *Bansari Das and Anr. v. Kanshi Ram and Ors.* (supra) in which their Lordships were pleased to hold in para No. 12 as under:

"12. In the plaint in the present suit, the plaintiff Kundan Lal alleged in para 10 of the partnership being "at will it stood dissolved on May 13, 1944, when Sheo Prasad filed suit No. 105 of 1994 in the Court of the Sub-Judge, Lahore. No doubt, as pointed out by the High Court, Banarsi Das has admitted this fact in his written statement at not less than three places. The admission, however, would bind him only in so far as facts are concerned but not in so far as it relates to a question of law. It is an admitted fact that the partnership was at will. Even so, Mr. Veda Vyasa points out the mere filing of a suit for dissolution of such a partnership does not amount to a notice for dissolution of the partnership. In this connection, he relies upon 68, *Corpus Juris Secundum*, p.929. There, the law is stated thus: The mere fact that a party goes to Court asking for dissolution does not separate as notice of dissolution. He then points out that under Order XX, Rule 15 of the Code of Civil Procedure, a partnership would stand dissolved as from the date stated in the decree, and that as the Lahore suit was dismissed in default and no decree was ever passed herein it would be incorrect even to say that the partnership at all stood dissolved because of the institution of the suit. On the other hand, it was contended on behalf of some of the respondents that the partnership being one at will, it must be deemed to have been dissolved from the date on which the suit for dissolution was instituted and in this connection reference was made to the provisions of Sub-section (1) of Section 43 of the Partnership Act which reads thus:

"(1) Where the partnership is at will, the firm may be dissolved by any partners giving notice in writing to all the other partners of his intention to dissolve the

firm."

The argument seems to be based on the analogy of suits for partition of joint Hindu family property, with regard to which it is settled law that if all the parties are majors, the institution of a suit for partition will result in the severance of the joint status of the members of the family. The analogy however cannot apply, because, the rights of the partners of a firm to the property of the firm are of a different character from those of the members of a joint Hindu family. While the members of a joint Hindu family hold an undivided interest in the family property, the partners of a firm hold interest only as tenants-in-common. Now as a result of the institution of a suit for partition, normally the joint status is deemed to be severed, but then, from that time onwards they hold the property as tenants-in-common i.e., their rights would thenceforth be somewhat similar to those of partners of a firm. In a partnership at will, if one of the partners seeks its dissolution, what he wants is that the firm should be wound up, that he should be given his individual share in the assets of the firm, (or may be that he should be discharged from any liability with respect to the business of the firm apart from what may be found to be due from him after taking accounts) and that the firm should no longer exist. He can call for the dissolution of the firm by giving a notice as provided in Sub-section (1) of Section 43 i.e., without the intervention of the Court, but if he does not choose to do that and wants to go to the Court for effecting the dissolution of the firm, he will, no doubt, be bound by the procedure laid down in Order 20, Rule 15 of the Code of Civil Procedure, which reads thus:

"Where a suit is for the dissolution of a partnership or the taking of partnership accounts, the Court, before passing a final decree may pass a preliminary decree declaring the proportionate share of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, as much accounts to be taken, and other acts to be done, as it thinks fit."

This rule makes the position clear. No doubt, this rule is of general application, that is, to partnerships at will as well as those other than at will, but there are no limitations in this provision confining its operation only to partnerships other than those at will. Sub-section (1) of Section 43 of the Partnership Act does not say what will be the date from which the firm will be deemed to be dissolved. For ascertaining that we have to go to sub-section (2) which reads thus:

The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."

21. In the present case, though the plaintiff had given notice expressing his intention to retire, the other defendants ignored it and even the plaintiff did not insist upon getting his share in the property. Therefore, we are of the considered view that the partnership continued.

22. The learned senior Counsel further relied upon a ruling reported in Vishnu

Chandra v. Chandrika Prasad Agarwal and Ors. (supra) by their Lordships as under:

"Partner can retire from ongoing partnership without effecting dissolution the firm, if the partnership agreement provides therefore -Partner's right to retire, therefore, has to be ascertained from the terms of the agreement - Whether the partnership was one at will and whether dissolution was sought u/s 44, not relevant in this context."

Lastly the learned senior Counsel for the appellants herein raised a contention with a Latin Maxim, which reads as under in Brooms Legal Maxims at page 103.

"*Allegans contraria non est audiendus*" "this elementary rule of logic, which is frequently applied in our Courts of Justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest."

At page 197 of the same volume, we may, therefore, lay it down as a general Rule, applicable alike in Law and Equity, that a party shall not entitle himself to substantiate acclaim or, to enforce a defence, by reason of acts or nature and quality; and further, that where misrepresentations have been made by one of the two litigating parties, in his dealings with the other, a Court of Law will either decline to interfere, or will so adjust the equities between them, as to prevent an undue benefit from accruing to that party, who is unfairly endeavouring to take advantage of his own wrong.

In Trayner's Latin Maxims, this maxim is referred to at page 41 of the 4th Edition as follows:

Allegans contraria non-est audiendus: He is not to be heard who alleges things contradictory of each other. For example no one can be heard to maintain that a deed is invalid as regards some obligation, which it imposes on him, and yet valid in so far as it confers upon him a right. In other words, no one is permitted at the same time, to approbate and reprobate. It must be kept in view, however, that this does not militate against what is fair alternate pleading."

In support of the above contention, the learned senior Counsel appearing for the appellants herein relied upon a ruling reported in B.S. Lail Vs. Sardar Mal Lalwani, , in which their Lordships were pleased to hold in para 8 as under :

"8. In my opinion the contention raised on behalf of the plaintiff-appellant is correct and ought to be accepted. It is well settled that a party cannot be allowed to approbate and reprobate. This principle is based on the maxim "*allegans contraria non est audiendus*" it mean she shall not be heard who says things contradictory to each other. The maxim applies to proceedings in Court; it creates a sort of estoppel. Bigelow on Estoppel, six Edition, states the principle

as follows:

"If parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts or justice would in most cases be paralyzed the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest are in keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one, who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it, one cannot play fast and loose."

We hold that the same Maxim is not applicable to the present set of facts. We have given elaborate reasons stating that the first notice was given and no body had acted upon the said notice. Therefore, the very foundation of approbates and reprobates are not applicable to the present set of facts. All the parties to the suit understood and acted holding that the partnership is not dissolved.

23. Applying the aforesaid test to the present set of facts, we hold that the partnership continued even after giving the first notice, not only continued but also the plaintiff participated in the business actively as stated supra.

24. As against the arguments of the learned senior Counsel for the appellants herein, the learned Counsel Mr. M.V.S. Suresh Kumar appearing for the respondents herein submitted at the Bar that the rulings cited by the learned senior Counsel for the appellants herein are not at all applicable to the present set of facts as the plaintiff continued to do the business along with the other partners and therefore the partnership was very much in existence even after the notice for dissolution was given and even after the death of D-1. In support of his contention, the learned Counsel relied upon a ruling reported in *Lala Ram Kumar Vs. Kishori Lal and Others*, Their lordships of Allahabad High Court were pleased to hold as under:

"Partnership Act, Section 42 - death of partner - Continuation of partnership of legal heirs of deceased partner - This may evidence contract that partnership should not be dissolved on death of partner - such contract may be express or implied.

The words "subject to the contract between the partners" at the beginning of Section 42 do not mean that the contract must be express. Hence a contract to continue the partnership after the death of the partner may be implied from the conduct of the parties. Though the contract must be one between the original partners, the conduct of the surviving partner and the heirs of the deceased partner after the death of partner may evidence an original contract that the partnership should not be dissolved on the death of a partner."

25. The learned Counsel further relied upon a ruling reported in *Kesrimal and*

Another Vs. Dalichand and Others, in which His Lordship was pleased to hold in para (5) of the judgment as under:

"(5) Having given my careful consideration to this aspect of the case, I am disposed to hold the view that there can be no serious obstacle in the way of the acceptance of the position so far advanced by learned Counsel for the petitioners. It is true that Section 42 of the Partnership Act provides that a firm is dissolved by the death of a partner. It must, however, be remembered that this would be subject to contract between the partners as the opening words of Section 42 go to show.

Again, it is not necessary that a contract between the partners in this connection need be express, but may be implied and it may be possible to spell out such a contract from the subsequent conduct of the surviving partner and the heirs of the deceased. Whether a firm, which should have otherwise been dissolved by the death of one of its partners, still continued to exist without being dissolved, would depend on the facts and circumstances of each case.

We have the plaintiffs own averment in the plaint supported by the testimony of plaintiff Kesrimal in Court to the effect that Kesrimal and Pukhraj have been continuing as partners of the firm in question even though it is common ground between the parties that Pukhraj's father Premchand died some time in samwat 2005 (corresponding to some time in 1948 A.D) and the present suit was brought on 6-10-1952 In these circumstances, I am inclined to the view that the partnership business which was commenced during the life time of Premchand between him and Kesrimal continued to subsist even after Premchand's death and it was not dissolved by his death, and that Kesrimal and Premchand's son Pukhraj became the partners thereof.

26. Both the Counsels cited further many more rulings but the ratio laid down in the rulings is somewhat similar; hence it is not necessary to cite them in our judgment.

27. The last contention of the learned Counsel for the appellants herein was that the suit should have been filed within three years from the date of death of the partner. It is filed beyond the three years and the suit as well as CCCA, ought to have been dismissed. We are (sic not) in agreement with the learned Counsel for the appellants herein. We have already discussed the above contention raised by the learned Counsel for the appellants herein that even after the death of D1, his legal representatives were brought on record. The partnership business continued and therefore even after the death of the partner, the partnership is continued.

28. It appears from the judgment of the learned single Judge of this Court that the learned single Judge modified the decree of the trial Court holding that the plaintiff in the suit is entitled to get rendition of accounts upto 18-10-1983 on the date on which the plaintiff issued a final notice and filed a suit for partition.

29. Therefore, we hold that there is no reason to interfere with the judgment and decree passed by the learned single Judge. Hence, we dismissed the appeal. No costs.