

M.O.H. UDUMAN AND ORS.

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v.

M.O.H. ASLUM

NOVEMBER 13, 1990

[L.M. SHARMA AND K. RAMASWAMY, JJ.]

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Indian Partnership Act, 1932: Sections 39 and 40 and French Civil Code Article 1865—Duration of partnership provided for—Then not partnership at will—Rights of partners—What are—Contract of partnership to be read as a whole.

The appellants/defendants 1-3 and the respondent/plaintiff are sons of the 4th appellant/defendant—their mother. Their father M.O. Hassan Kuthus Marican started the proprietary concern M/s Hassan Tithus Marican doing import and export and other business in Pondicherry on July 20, 1962, a partnership consisting of the appellants the respondent and the father Ex. B1 was constituted and was registered as per the provisions of the French Law and the business was carried on. By relinquishment deed Ex. B2 dated August 1, 1968 their father retired from the partnership. Thereafter the appellants and the respondent continued the business in terms of Ex. B2.

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Due to some misunderstanding arisen in 1973, the respondent in May 1978 laid the suit for dissolution of the partnership and for accounting etc.

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As per the respondent the partnership is at will and by issue of notice dissolving the partnership, it stood dissolved with effect from the date of the receipt of the notice by the appellants. Whereas the appellants contended that under the French Law, the partnership is not at will, the contract operates as law and that in terms of contract Ex. B1 & Ex B2 the respondent has to relinquish his share in favour of the appellants and take the value thereof without dissolving the firm.

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The Trial Court held that the partnership is not at will. So the suit for dissolving the partnership was not maintainable and that for accounting etc. other remedies are left open. The suit was dismissed, and was affirmed on appeal by a learned single Judge.

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The Division Bench held that the partnership is at will and the respondent can seek its dissolution. It was further held that the rights of

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A the parties are governed by the Indian Partnership Act (9 of 1932) and the suit was maintainable. Accordingly the appeal was allowed and the suit was restored to file and the Trial Court directed to try the suit on merits expeditiously. Hence this appeal.

Appeal Allowed, the Court,

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C HELD: The only question that needs decision is whether the partnership in question is a partnership at will. The trial court and the Learned Single Judge held in favour of the appellants but the Division Bench held that the Indian Partnership Act would apply because the Pondicherry (Laws) Regulation 7 of 1963 was made in exercise of the powers under Article 240 of the Indian Constitution extending the Partnership Act to Pondicherry/Union Territory on and from October 1, 1963. Sec. 69 had come into force from July 1, 1964. Though Ex. B1 was made in accordance with the Civil Code of France 1804, the cause of action to lay the suit had arisen to the respondent in 1978 by which time the 'Act' was in operation. Thereafter rights and remedies of the parties D are to be regulated by the provisions of the Act. [667E-G]

E According to the appellants the provisions of the French Civil Code and the Code of Commerce touching partnership do have a bearing to cull out the intention of the parties manifested in the relevant clauses of the Partnership deed Ex. B1 and B2 which suggest that the partnership in question is not at will but one in perpetuity. The respondent contended that there is no express embargo in the French Law to treat a partnership at will. The contract is treated as law. Clause IV treats the partnership as at will. But the partnership at will cannot be put to an end if the notice of dissolution was not issued in good faith and at an opportune moment. [668A-B]

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G Article 1865 of the French Civil Code postulates that a partnership ends under 5 conditions (1) expiration of time of partnership, (2) termination of the business, (3) death of any partner, (4) insolvency of anyone of the partners, and (5) one or more partners have expressed a desire to cease being in partnership, Article 1869 provides that a partnership can be dissolved at the will of the partners but does not apply to partnership where the duration has been fixed. Article 18 of the Code of Commerce provides that the contract is regulated by the Civil Law and by the agreements of the parties. Article 1134 makes that the agreement legally formed take the place of law and for those who have made them. The contract can be rescinded only with their mutual consent for the H reasons authorised by law and done in good faith. [668C-D; F-H]

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A conjoint reading of the provisions of the French Civil Code, Code of Commerce clearly manifest that normally a partnership ends on happening of one of the five events mentioned in Article 1865. If the contract is time bound partnership ends by the expiration of time for which the partnership was made. Undoubtedly, partnership at will can be put to an end by the issue of notice provided it was issued in good faith and at an opportune moment but is subject to the terms of the contract between the parties. Since the parties are governed by Indian Partnership Act, the rights of the parties are to adjudicated accordingly.

The High Court on consideration of the relevant clauses of the deed and section 7 of the 'Act' held that partnership is at will. Cl. 4 and 5 state that the partnership will be brought to an end at will but at the same time state that partnership will continue till there are two partners. [669B-E; H]

Section 7 of the 'Act' deals with partnership at will contemplating two exceptions': (a) when partnership is for specified period, (b) where there is a provision in the contract for the determination of the partnership. Section 32(1) deals with the retirement of the partner either with consent or according to an express agreement (c) where the partnership is at will, by giving notice in writing to all of his partners of his intention to retire. Section 40 gives right to the partners to dissolve the partnership by agreement with the consent of all the partners or in accordance with the contract between the partners. Under Section 43 when 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 which stands dissolved by operation of sub section (2) thereof from the date mentioned in the notice and if no date is mentioned from the date of Communication of the notice. [670G; 671A; B; D-E]

It is a settled cannon of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the Contract by adopting harmonious construction of all the clauses contained therein. The cardinal principle is to be as certain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. It is seldom that any technical or pedantic rule of construction can be brought to bear on their construction. [671G-H]

The contract of partnership in the instant case, is consistent with the French Civil Code. But since the parties are governed by the provisions of the 'Act', it would apply to the facts of the case and the rights are to be adjudicated accordingly. [674H]

- A** **The duration of the partnership has been expressly provided in the deed, namely, that the partnership will continue “till there are two partners” and that, therefore, it is not a partnership at will. Thereby the respondent has no right to dissolve the partnership except to seek accounting for the period in dispute or his right to withdraw or retire from partnership and to take the value of his share in the partnership either by mutual agreement or at law in terms of the partnership deeds Ex. B1 and B2. [674B-C]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5343 of 1990.

- C** **From the Judgment and Order dated 17.11.1988 of the Madras High Court in L.P.A. No. 113 of 1986.**

K. Parasaran, Krishnamurthi Swami and T.K. Seshatri for the Appellants.

- D** **T.S. Krishnamurthy Iyer, K. Ram Kumar and Anjani for the Respondent.**

The Judgment of the Court was delivered by

K. RAMASWAMY, J. Special leave is granted.

- E** **The appeal arises against the judgment and decree of the Division Bench of the Madras High Court dated November 17, 1988 made in L.P.A. No. 113 of 1986 reversing the judgment and decree of the learned Single Judge and of the First Addl. Subordinate Judge, Pondicherry in O.S. No. 206 of 1978. The facts are that the appellants/defendants 1 to 3 and the respondent/plaintiff are sons of the 4th appellant/defendant—their mother. Their father, M.O. Hassan Kuthus Marican, started the proprietary concern M/s M.O. Hassan Tithus Marican doing import and export and other business in Pondicherry. On July 20, 1962, a partnership consisting of the appellants, the respondent and the father, Ex. B1 (a translation copy in English is Ex. B1/a) was constituted and was registered as per the provisions of the French Law and the business was carried on. By relinquishment deed, Ex. B2 dated August 1, 1968 their father had retired from the partnership. Thereafter the appellants and the respondent continued the business in terms of Ex. B2. When misunderstanding between the parties had arisen, as pleaded by the respondent, in 1973 and in May, 1978, the respondent laid the suit for dissolu-**

tion of the partnership and for accounting etc. It is the respondent's case that the partnership is at will and by issue of notice dissolving the partnership, it stood dissolved with effect from the date of the receipt of the notice by the appellants. He sought to have his share in the partnership ascertained and decree granted accordingly. The appellants contended that under the French Law the partnership is not at will. The contract operates as Law. In terms of the contract Ex. B1 and B2, the respondent has to relinquish his share in favour of the appellants and to take the value thereof without dissolving the firm. One of the issues raised was the maintainability of the suit which was tried as a preliminary issue. Only partnership deeds Ex. B1 and B2 were marked and arguments were addressed on the issue. The Trial Court held that the partnership is not at will. The suit for dissolution of the partnership was not maintainable. The relief of accounting and other remedies were left open. Accordingly the suit was dismissed, which was affirmed, on appeal, by a learned Single Judge. The Division Bench held that the partnership is at will and the respondent can seek its dissolution. It was further held that the rights of the parties are governed by the Indian Partnership Act 9 of 1932 (for short 'the Act'). The suit was maintainable. Accordingly the appeal was allowed; the suit was restored to file and the Trial Court was directed to try the suit on merits expeditiously.

At this stage we are not concerned with the merits of the rival contentions of the alleged mis-management of the partnership or for attempt of converting the partnership firm into a Private Limited Company. The only question that needs decision is whether the partnership in question is a partnership at will. Considerable debate was made across the bar contending that it is the French Law and not 'the Act' that would govern the facts of the case. The Trial Court and the learned Single Judge held in favour of the appellants but the Division Bench held that the Act would apply to the facts of the case. Admittedly the Pondicherry (Laws Regulation 7 of 1963 was made in exercise of the powers under Art. 240 of the Constitution extending the Act to Pondicherry/Union Territory on and from October 1, 1963. Section 69 had come into force from July 1, 1964. Though Ex. B1 was made in accordance with the Civil Code of France, 1804, the cause of action to lay the suit had arisen to the respondent in 1978 by which time the Act was in operation. Therefore the rights and remedies of the parties are regulated by the provisions of the Act.

Shri Parasaran, the learned Senior Counsel for the appellants referred to us the provisions of the French Civil Code and the Code of

- A** Commerce touching the Partnership and contended that those provisions do have bearing to cull out the intention of the parties manifested in the relevant clauses of the partnership deeds Ex. B-1 and B2 which would suggest that the partnership in question is not at will but one in perpetuity. While agreeing that the French Civil Code would be looked into to construe the covenants in the partnership deed, Shri
- B** Krishna Murthy Iyer, the learned Senior Counsel for the respondent contended that there is no express embargo in the French Law to treat a partnership at will and the contract is treated as law. In that light Clause IV treats the partnership as at will. But the partnership at will cannot be put to an end to if the notice of dissolution was not issued in good faith and that it was not an opportune moment.
- C** Article 1865 in Chapter IV of the French Civil Code postulates that a partnership ends (1) by the expiration of the time for which the partnership was made; (2) by the destruction of the subject matter or the termination of the business; (3) by the death of any of the partners; (4) by the civil death, interdiction of insolvency of one of the partners
- D** and (5) by the fact that one or more of the partners have expressed a desire to cease being in partnership. Article 1869 provides that "if the partnership articles contain provisions stipulating that the partners shall, in the case of the death of one of the partners continue the partnership with his heir, or that the partnership shall only continue with the surviving partners such provisions shall be adhered to. In the
- E** latter case the heir of the deceased partner is only entitled to require a partition of the partnership property as it stood at the time of such death and the heir has no share in any rights which the partnership may acquire after the death of such partners, unless they were a necessary consequence of what had been done before the death of the partner to whose rights he has succeeded". Article 1869 further provides that a
- F** partnership can be dissolved at the will of the partners does not apply to partnership, the duration of which has been fixed. The dissolution is effected by the partner who wishes to retire sending a notice of such intention to all his co-partners. Such notice of dissolution of partnership must be given in good faith and not at an inopportune moment.
- G** Articles 18 of the Code Commerce provides that the Contract of a Company is regulated by the civil law, by the laws in particular to Commerce and by the agreement of the parties. Article 1134 postulates that the agreements legally formed take the place of law for those who have made them. They can rescind the contract only with their mutual consent or for the reasons authorised by law. They have to be
- H** executed in good faith. These are the translated articles supplied by

the appellants and their correctness was not disputed by the respondent. **A**

A conjoint reading of these provisions clearly manifests that normally a partnership ends on happening of one of the five events mentioned in Article 1865. If the duration of the partnership is mentioned in the contract, the partnership ends by the expiration of the time for which the partnership was made. The death of a partner operates as a dissolution of partnership by operation of Clause 3 of Article 1865. Article 1869 empowers the parties to stipulate in the partnership deed that on death of one of the partners the partnership would continue with the surviving partners provided an express provision in that regard was made in the contract. The heirs of the deceased partners would then be entitled to seek partition of the share of the deceased partner. Article 1869 further adumbrates that a partnership cannot be dissolved at will if there is a stipulation of duration in the contract of partnership. The contract between the parties operates as law as per the terms thereof. It is undoubted that a partnership at will can be put to an end by issue of the notice provided it was issued in good faith and at an opportune moment. But it is subject to the contract of the parties. Therefore we hold that the contract of partnership is consistent with the French Civil Code. But since the parties are governed by the provisions of the Act, it would apply to the facts of the case and the rights are to be adjudicated accordingly. **B**
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The further contention of Shri Parasaran is that clause (5) of the contract of partnership (Ex. B1) envisages that the partnership would continue notwithstanding one of several partners withdrew from partnership. The continuing partners should pay to the withdrawing partners or to the heirs of the deceased partner, only the value of the share of the retiring or deceased partner according to the last inventory. This was reiterated under Ex. B2 after retirement of their father. Clause (12), thereof expressly prohibited the parties to assign his/their share to the third parties without the consent of the continuing partners which would clearly indicate that the partnership is not at will and the Division Bench committed serious error in its construction that it is a partnership at will. Shri T.S. Krishnamurthy Iyer, placed strong reliance on paragraph 4 of the Contract, Ex. B1; wherein it has specifically been stated that it is a partnership at will and anyone of the partners is entitled to exercise his right to dissolve the firm and seek the reliefs under the Act. The High Court on consideration of the relevant clauses of the deed and of s. 7 of the Act held that the partnership is at will. **E**
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A The material question is whether the partnership deed Ex. B1, is at will. Clause (3) specifies the shares of the partners and clauses (4) and (5) read thus:

B “(4) The business of the firm has been started on the 1st of July, 1962 and the partnership will be brought to an end at will.”

C (5) The partnership will continue till there are two partners, even in the case of one or several partners withdraw themselves or die, the partnership will continue between the two partners, will remain owners of all the capital, on condition that they should pay back to the withdrawing partners and to the heirs of the deceased partners, only the amount of their rights according to the last inventory”.

D Clause (6) empowers the first three appellants to manage the business jointly or severally. Under Clause (7) they have to maintain the accounts. Clauses (8) and (9) give right to participation and to invest the funds in other business etc. Clause (10) provides that “in case one of the partners withdraw himself from the partnership firm, the other continuing partners of the firm will have the absolute rights on the quotas rights and the other rights benefitted by the firm as on the date of the withdrawal, the outgoing partner shall have the right only to receive the balance in his account after his share in the profit or loss on the date of the withdrawal from the partnership has been transferred”. Clause (11) provides that in case of death of one of the partners, his heirs shall have the right only to the share in the profits or the loss in the remainder of his account for the period starting from the beginning of the accounting year upto the date of death. Thereafter “all other rights shall be devolved on the partners who are continuing the partnership firm”. Clause (12) provides that “the parties should not be eligible under any pretext to assign their rights in the partnership to anyone, without the assent of other partners”. The other clauses are not relevant for consideration and hence omitted.

G Section 7 of the Act deals with partnership at will, which reads thus:

H “Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is “partnership at will”.

This Section contemplates two exceptions to a partnership at will. The first one is where there is provision made in the deed of the partnership for the duration of the partnership; (2) where there is provision in the contract for the determination of the partnership; in either of these cases, the partnership is not at will. Duration of Partnership may be express or may in given circumstances be implied. Section 11(1) of the Act postulates that subject to the provisions of the Act "the mutual rights" and duties of partners of a firm "may be determined by contract" between the partners and such contract may be express or implied by course of dealings. Section 32(1) deals with the retirement of a partner (a) with the consent of the other partners; (b) in accordance with an express agreement by the partners; or (c) where the partnership is at will, by giving notice in writing to all of his partners of his intention to retire. For the purpose of this case sub-sections (2) and (3) are not material.

In Chapter VI, s. 40 gives right to the partners to dissolve the partnership by agreement with the consent of all the partners or in accordance with the contract between the partners. Section 43 declares that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm which stands dissolved by operation of sub-section (2) thereof from the date mentioned in the notice as the date of dissolution or if no date is so mentioned from the date of communication of the notice. In *Banarsi Das v. Seth Kanshi Ram & Anr.*, [1964] 1 SCR 316 this Court held that where the suit was filed after issuing the notice dissolving the partnership against more than one partners/defendants, the partnership stood dissolved from the date on which the last partner received the notice from the Court. Section 44 empowers the Court, at a suit of a partner, to dissolve the firm on the happening of any one of the grounds enumerated in clauses (a) to (g), the details thereof are not also material as the dissolution of the partnership in question is not by the Court.

It is settled cannon of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein. The cardinal principle is to ascertain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. It is seldom that any technical or pedantic rule of construction can be brought to bear on their construction. The guiding rule really is to ascertain the natural and ordinary sensible meaning to the

A language through which the parties have expressed themselves, unless the meaning leads to absurdity.

In *Ram Singh v. Ram Chand*, A.I.R. 1924 P.C. 2 Lord Dunedin speaking for the Board held that the rights in the partnership is a legal right under the Code of Civil Procedure and under the Contract.

B Therefore, the right of the parties under the contracts Ex. B-1 and B-2 are legal rights to which they are tied down. The question, therefore, is whether Ex. B-1 & B-2 partnership deeds expressly indicate the intention of the parties regarding the duration of the partnership? If not, whether it can be implied from the terms of the contracts. The relevant clauses have already been referred to. Clause (4) of the Contract empowers a partner to put an end to partnership at will. if the exercise of the right to dissolve the partnership is given acceptance as contended for by Shri Krishnamurthy Iyer, the rest of the clauses in the contract get nullified. If the contention of Shri Parasaran is accepted that under clause (5) of the Contract, the partnership will continue in perpetuity and the only right to the outgoing partner is the right to retirement and to payment of his share in the partnership is accepted, Clause (4) would be rendered nugatory. The right to continue the business by the firm as an on-going one would be discernible from clauses (6) to (9) so long as the objects are lawful. Clauses (10) to (12) would lend an added assurance by imposing express limitations on the outgoing partners or the heirs of the deceased partner to receive only the benefits derived by the firm upto the date of withdrawal or death of a partner together with profits and loss. The legal representatives of the deceased partner are not entitled to be partners. There is an absolute embargo to induct strangers into the partnership except with the consent of all the other partners. Thereby it is clear that the partnership would continue till there are two partners as specified in Clause F (5). Thereafter either partner may put an end to the partnership as partnership at will.

Clause (5) also manifests the intention of the parties that so long as there exist two partners, partnership cannot be determined, although he/she may withdraw from partnership and terminate the legal relationship between himself and other partners. If one partner desires to withdraw or retires from partnership, the partnership shall continue between the remaining partners, unless all the partners mutually agree to determine the relationship. It also further indicates that on the retirement or death of one of the partners the partnership does not automatically comes to an end. Therefore, so long as there are two partners, the partnership would continue unless either by mutual

agreement or according to law it is put an end to the partnership. This construction of the relevant clauses put up by us appears to be the intention of the parties and any other construction would run counter to the express intention of the partners, manifested in the contract.

In *Karumuthu Thiagarajan Chettiar & Anr. v. E.M. Muthappa Chettiar*, [1961] 3 SCR 998 relied on by the appellants, the facts are that the appellants and the respondent therein entered into a written partnership with respect to the managing agency business of two mills, the terms of which were *inter alia* that the management shall be carried on in rotation once in four years, the appellant to manage for the first four years and thereafter the respondent to manage for the next four years and in the same way thereafter. It also provided that the partners and their heirs and those who get their rights shall carry on the management in rotation. After the dispute arose between the partners, notice of dissolution was given by the appellant to the respondent to terminate the partnership treating it as a partnership at will, and the Directors of the mill in their turn terminated the managing agency on the ground that the partners were acting detrimental to the good management of the mills. The accounts were to be settled once in every year. In case of either partner relinquishing his rights of the management, it shall be forwarded to the other partners but it shall not be transferred. It was also further provided that the two partners would carry on the affairs of the firm by rotation once in four years and the income earned thereby shall be divided between the partners every year. In that context when it was contended that there was no duration provided under the contract and that, therefore, under s. 7 of the Act, the contract was treated to be a partnership at will, it was held at page 1007 thus: our attention was drawn in this case to a clause which lays down that either partner may withdraw from the partnership by relinquishing his right of management to the other partner. That however does not make the partnership at will, for the essence of a partnership at will is that it is open to either partner to dissolve the partnership by giving notice. Relinquishment of one partner's interest in favour of the other, which is provided in this contract, is a very different matter. It is true that in this particular case there were only two partners and the partnership will come to an end as soon as one partner relinquishes his right in favour of the other. That however is a fortuitous circumstance, if for example there had been four partners in a case and one of them relinquished his rights in favour of the other partners, the partnership would not come to an end. That clearly shows that a term as to relinquishment of a partner's interest in favour of another would not make the partnership one at will. Accordingly it was held that the

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A partnership is not at will as it continued to subsist till the termination of the managing agency and, therefore, s. 7 is not attracted.

Giving our anxious consideration to the controversy, we have no hesitation to reach the finding and hold that the duration of the partnership has been expressly provided in the deed, namely, that the partnership will continue "till there are two partners" and that, therefore, it is not a partnership at will. Thereby, the respondent has no right to dissolve the partnership except to seek accounting for the period in dispute or his right to withdraw or retire from partnership and to take the value of his share in the partnership either by mutual agreement or at law in terms of the partnership deeds Ex. B-1 and B-2.

Though Shri Krishnamurthy Iyer contended that the appellants established a limited company and transferred the assets of the firm to it and thereby the partnership ceased to subsist, we cannot give countenance to the contention for the reason that it is a question of fact and was not raised in the courts below. Therefore, it cannot be raised for the first time in this Court.

In case the respondent desires to retire from partnership and the rights and liabilities are not mutually effected, it would be open to the respondent to amend the plaint appropriately and seek a decree in that regard. It is also open to the respondent to seek accounting for the profit during the entire period in dispute as per law. It is also open to the appellants to amend the written statement raising appropriate pleadings, except the limitation. In case the respondent elects to adopt the above course the suit would be disposed of expeditiously giving priority. Otherwise the suit should be dismissed. The appeal is allowed accordingly and we direct the parties to bear their own costs throughout.

S.B.

Appeal allowed.