

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**Reserved on: 19.09.2023
Pronounced on: 01/11/2023**

CFA No. 73/2013.

Executive Engineer, Dal Lake Division-I
(Lakes & Waterways Development Authority)
Miskeen Bagh, Srinagar.

...Appellant

Through: Mr. Syed Musaib, Dy. AG

Vs

1. Mousvy Industries Budgam through its proprietor Abdul Majeed S/o Syed Hyder Shah R/o Zadibal, Srinagar.
2. Commissioner/Secretary to Govt., PHD/UEED Srinagar/Jammu ...Respondent
3. Chief Engineer, UEED J&K Suleiman Complex Srinagar/Jammu.
4. Superintending Engineer, UEED Circle-II, Srinagar.

..... Proforma Respondent(s)

Through: Mr. S.M. Yousuf, Advocate

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. This judgment shall dispose of Civil First Appeal preferred by the Appellant herein against the judgment and decree dated 26.12.2012 passed by the Court of Additional District Judge, Srinagar (for short the 'Trial Court') in a suit titled '**Mousvy Industries v. State of J&K & ors.**' directing payment of Rs. 10,32,080/- in favor of the Respondent No. 1 herein along with simple interest and costs.
2. A perusal of the pleadings and record would reveal that the Plaintiff Respondent 1 herein instituted a suit for declaration, accounts and recovery on 18.02.1997 before this Court under Original Jurisdiction which came to be assigned to District Judge, Srinagar who transferred the same for disposal to 4th Additional District Judge, Srinagar and thereafter to the Trial Court.

3. The case set up in the plaint was that the Plaintiff was involved in the business of manufacturing supplies of steel items under the name and style "Mousvy Industries" having its factory and showroom at Karapora, Alamdar Road, District Budgam and on 31.03.1993, the Defendant No. 5 Appellant herein placed various orders vide Order No's. 2440-42, 2443-45, 2455-57, 2461-63, 2458-60, 2464-66, 2467-69, 2481-83 dated 31.03.1993 before the Plaintiff for the supply of angle iron, readymade panel, duly fabricated out of 50x50x6 mm including chain-link fencing of the size of 8x8 of 8 meters, each worth Rs. 18430/- per meter and Order No. 2462-64 dated 27.05.1993 for supply of main hole covers 2/2x21/2 with extra length on sides for whole made of channel MS Plate flat iron with locking system of 40 numbers, worth Rs. 3760/- per item.

Plaintiff claiming to have supplied the items in terms of the above-referred orders, to the satisfaction of Defendant No.5, submitted bills of the said items in January 1994 as the items were supplied in November 1993 onwards against proper receipts as per Bill No's 420, 421, 425, 427, 426, 428, 429, 430 and 434 dated 20-01-1994. Each bill for the supply of angle iron, ready-made panels fabricated was for an amount of Rs. 147440/- and Bill No. 434 for the supply of 40 numbers of main hole covers was for an amount of Rs. 150400/-. The bills submitted by the Plaintiff were verified and passed by the concerned officers but the payment was delayed for one reason or another, which compelled the Plaintiff to serve notice under section 80 of the J&K Civil Procedure Code (for short the 'Code') upon all the Defendants. The notice was replied by Appellant whereby the said Appellant denied both placing of the aforesaid orders as also the receipt of said items by his office giving rise to cause of action to the Plaintiff to sue the Defendants for recovery for an amount of Rs. 13,29,930/- along with interest and costs.

4. Defendants filed their written statement to the suit and besides raising objections viz-a-viz its maintainability, resisted the suit on merits.

With regard to the maintainability of the suit, it was stated that the Plaintiff was neither a registered firm nor had competence under law to file a suit and that the Defendant No. 5 had been made a part of Lakes and Waterway Development Authority in terms of a cabinet decision dated 31.04.1997 and had been delinked from the J&K Urban Environmental Engineering Department Srinagar and that the Defendant No's. 3 & 4 had no concern with Defendant No. 5 and hence Defendant No's. 3 & 4 were absolved from the responsibilities of Defendant no. 5.

The placing of orders for the supply of items was pleaded to be fictitious, false, concocted, and fabricated while stating that the orders could not be have been placed by the Defendants for supply of the aforementioned items in violation of financial code and other regulations and that the officials were in collision with the Plaintiff as the purchasing committee of the department was hand in glove with the supplier and the supplies shown were fictitious, false, and fraudulent and that there was no relationship between supplier and buyer and that the orders had been made by the then executive engineer in connivance with the storekeeper and Plaintiff and that the bills were verified by the then executive engineer and that the suit was belated and that the signatures of certain officers resembled each other, the same were as such fictitious and that it was obligatory upon the Defendants to make purchases of items from the Government stores i.e. SICOP and it is only upon exhaustion at Government stores, then same could have been purchased from private persons.

5. On the basis of the pleadings of the parties, the Trial Court, vide its order dated 11.08.1998, framed the following issues:

- a. Whether Defendant No. 5 has placed the orders for the supply of items well described by the Plaintiff in the bills? OPP
 - b. Whether the order placed by Defendant No. 5 for the supply of items will bind all the Defendants? OPP
 - c. Whether the items ordered for have been supplied by the Plaintiff within time? OPP
 - d. Whether the bills submitted by the Plaintiff to defendant No. 5 are unpaid to till date? OPP
 - e. Whether the suit is not maintainable in its present form? OPDs
 - f. Whether the Plaintiff firm is not a registered Unit under self-employment Unit? OPD
 - g. Relief?
6. After framing of issues, Plaintiff besides examining himself as a witness, examined/produced Hamidullah Tralli (the then Executive Engineer), Gulla Sheikh, Syed Maqbool, Abdul Rasheed, Ghulam Haider, Abdul Rehman, Manzoor Ahmad Wani (A.E.E Stores), Mehrajud Din Bhat (Assistant Storekeeper), Showkat Ali (Storekeeper) and Niyaz Ahmad (Establishment Clerk) as witnesses in support of his case who testified about the genuineness of the documents/record; whereas the Defendants did not produce any witness. The witnesses produced by the Plaintiff were officials/employees of the Defendants who proved the case of the Plaintiff.
7. A brief account of the depositions by the witnesses adduced by the Plaintiff being relevant and germane is reproduced hereunder:

(i) **PW/Abdul Hamid Tralli** stated that he was Executive Engineer in the relevant days when he issued the supply orders dated 31-03-1993 for the supply of fabricated items for channel paneling and fixing of the dimensions of 50x50x6mm which are ranging from 2440-42 to 2467-69 as mentioned in the plaint. He stated that the supply orders bear his signatures. In cross-examination, he stated that he himself is competent to make supply orders up to rupees 1.50 lacs.

(ii) **PW/ Gulla Sheikh** driver of the truck stated he has made the supplies through the truck which he used to ply which are 6051-JKB and 6128-JKB. He used to supply the material to the Divisional office in accordance with the supply orders.

(iii) **PW/Mohammad Maqbool** stated that in 1993 he was a daily wager in the division and was doing Chowkidari those days. He knows the Gulla Sheikh driver who brought the supplies from Mousvy Industries Budgam. One store was at Miskeen Bagh and another at Dhobi Mohalla and he used to come and go in the vehicle also for receiving the supplies.

(iv) **PW/Abdul Rashed** has stated that was working in the department since 1987. He was posted as a daily wager in the division and has seen Mousvy Industries. The supplies were made to the department which was of chain-link fencing. The vehicle was used to come to the stores of Miskeen Bagh and Nishat. He used to do loading and unloading often 20/22 numbers used to be loaded in the truck in the year 1994. In those days he was a storekeeper up to 1994.

(v) **PW/ Manzoor Ahmad Wani** has stated that in March 1993 he was posted in Lake Division Ist as AEE stores. He was deputed to verify the supplies which he had done and referring to the different bills he stated that his signatures are appended with the bills and the same are true and correct. He stated that the department has issued a physical verification statement (liability list) in which the name of Mousvy Industries is shown at Serial No:1 and liability of Mousvy Industries is shown about RS, 14,50000/-. In cross-examination, he stated that the verification had been done of the supplies which were made by the Respondent No. 1-Plaintiff. The Storekeeper stores the item in the store and it's true that the GR was issued and the same is correct.

(vi) **PW/ Mehrajud Din Bhat** has stated that he was an assistant storekeeper in the Lake Division 1st in 1993. He stated that the Chain-Link fencing, Angle Iron panels, and manholes were supplied by Mousvy Industries. As per the bill numbers mentioned in the plaint from EXPW-1 to EXPW-8, the same are correct. On support, the material was kept by driver Gulla Sheikh in the store. In cross-examination, it was stated that when material was supplied it was checked by the defendants.

(vii) **(PW>Showket Ali** has stated that in 1993-94 he was posted in Dal Lake Division- 1st as a storekeeper. He stated that he had signed on the bills submitted by the Respondent No. 1-Plaintiff and identified his signatures and also identified the signatures of store Munshi Mehrajud Din and Assistant Engineers stores Manzoor Ahmad on those bills. He has also stated about different items which were supplied to the defendants by the Respondent No. 1-Plaintiff and GR No's are the same. In cross-examination, he stated that supplies were made in pursuance of the orders of the executive engineer and the same has been seen by him.

Those contain his signatures and that of the Assistant storekeeper and Assistant Engineer, the same are correct.

(viii) PW/ Niyaz Ahmad has stated that previously he was working as an establishment clerk in Lake Division 1st. He stated that the supply orders have been seen by him, which are compared with the original lying with the department and the same are found true and correct. He has also seen the bills and compared them with the original record and found them true and correct. As per the record, the supply orders and bills that are exhibited in the case are true and correct. He has also compared the liability statement issued by the department on 22-09-1995 and stated that in said liability statement Respondent No. 1-Plaintiff's number is shown and serial no.1 and an amount of Rupees 14,40,000/- was shown the liability of the Respondent No. 1-Plaintiff.

8. The Trial Court, upon appreciation of the evidence led by the Plaintiff, held that it had proved its case and decided the issues in its favour and against the defendants and after rendering its findings on the issues framed in the suit, decreed the suit to the extent of Rs. 10,32,080/- only along with a simple interest of 6% from the institution of the suit till realization of the amount in favor of the Plaintiff and against the defendants along with costs.
9. The Defendant No. 5 Appellant herein being aggrieved of the impugned judgment and decree dated 26.12.2012 has questioned the same in the instant appeal on the following grounds:
 - (a) That the suit filed by the Respondent No. 1-Plaintiff was a suit for declaration and accounts and in money suits the law provides that in such matters in the first instance, the preliminary decree is to be drawn before passing the final decree. The court below instead of following the mandate of law has passed a decree for the payment of money.
 - (b) That the trial court formulated erroneous issues and thus focus of the court and the parties shifted from the main controversy.
 - (c) That the Trial Court passed the impugned judgment and decree in a slip-shod manner without proper application of mind.
 - (d) That the Trial Court did not appreciate the facts and circumstances of the case because the entire controversy was already under cloud for the reason that the subject matter of the controversy was being investigated by the crime branch in

terms of FIR No. 90/1996. The Trial Court had overlooked this aspect of the matter and even did not make a mention in the impugned judgment/decrees with regard to the existence of an FIR regarding the subject matter of the suit.

- (e) That impugned judgment and decree was passed without stating reasons or recording evidence.
10. The first ground raised by the Appellant traces its roots to Order 20 Rule 16 of the Code which provides as under:

16. Decree in suit for account between principal and agent. —*In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.*

The expressions “where it is necessary...that an account should be taken” and “such account to be taken as it thinks fit” amply indicate that the Court is not required to pass a preliminary decree before passing a final decree in each and every suit for accounts but only in suits where the Court thinks it fit and necessary to ascertain the amount of money due to or from any party in the facts and circumstances of the case.

Ordinarily in a case for an account, even though the defendant may deny his accountability, the proper course is to pass a preliminary decree and send the case for taking accounts. But it does not mean that in every case, irrespective of other considerations, the Court is bound to send the case for taking accounts. All that Rule 16 supra provides that a preliminary decree may be passed where it is necessary in order to ascertain the amount of money due to or from any party, that an account should be taken. In other words, where the facts of the case are so simple, either by admission or proof as to afford a ready decision, the court can pass a final decree without passing a preliminary decree. Reliance in this regard is placed on **Purushotham Haridas & ors. v. M/s Amruth Ghee Ltd. & Ors**, [reported as AIR 1961 AP 143], **Balkishan**

Dass v. Parmeshri Dass [reported as AIR 1963 (P&H) 187 and **Palaniappa Chettar v. Ramanathan Chettair** [reported as AIR 1939 Madras 671].

In the present case, the Plaintiff-Respondent No. 1 had proved his case by providing witnesses who were the officials of the Appellant herein who deposed viz-a-viz the correctness of the supply orders, supply of items and the bills on the basis of the record particularly the liability statement prepared by the Appellant herein, therefore, there was no requirement of rendition of accounts or passing of preliminary decree particularly in absence of any evidence led by the Appellant herein to contradict the evidence of the Respondent No. 1 herein. Therefore, in the facts and circumstances of the case, the passing of preliminary decree would have been an unnecessary formality.

11. With regard to the ground that the Trial Court framed erroneous issues, what issues were erroneous or required to be framed which were not framed by the Trial Court are not stated in the memorandum of appeal. Assuming the said ground has any substance, yet the Appellant herein could have filed an application seeking amendment, alteration, or framing of additional issues in terms of Order 14 Rule 5 of the Code at any time during the trial or even before this Court at the time of filing of appeal or thereafter, however, having failing to do so within the period prescribed, Appellant herein is disentitled from raising this ground in appeal, more so, when the appellant herein was alive and conscious about the dispute and point of controversies, the omissions to frame an issue cannot urge for seeking setting aside of a judgement and decree. A reference in this regard to the following judgements of the Apex Court and this Court would be advantageous and appropriate.

In **Nedunuri Kameswaramma v. Sampati Subba Rao** [reported as AIR 1983 SC 884] the Hon'ble Supreme Court has

held when the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of other sides, it cannot be said that the absence of an issue was fatal to the case, or that there was mistrial which vitiates the proceedings. The suit couldn't be dismissed on this narrow ground, and also there is no need for a remit.

In ***M/s Highland Fashions v. Jammu and Kashmir Bank &ors.*** [reported as 2005 (1) SLJ 315], this Court has held that failure to frame the issue cannot be a ground for remanding the case. It has been held that when the parties are alive and are conscious of a dispute and the point of controversy, there is no need to frame an issue and remand the case, more so when there is evidence on file by which the point of controversy can be set at rest.

12. The next ground of challenge raised by the Appellant herein in the memorandum of appeal, is that the trial court conducted the trial in hurry and passed the impugned judgement and decree in a slip shod manner without proper application of mind.

Perusal of the record the record would reveal that the suit was filed by the Respondent No. 1 herein way back in the year 1997 and was decided on 26.12.2012 that is after a period of 16 years after a full-dressed trial. It is not understandable as to how many more years or decades should the Trial Court have taken to decide the suit, which would have been sufficient or reasonable as per the Appellant herein.

13. The ground which would have been of serious consequence, was the registration of FIR by the Crime Branch against the officials of the Appellant herein in the matter. However, the same seems to be only an afterthought to defeat the claim of the Respondent No. 1 as the Appellant herein had neither taken such plea in their written statement nor produced any witness to that effect. Therefore, in absence of any pleading

and/or any evidence in support thereof, the same cannot be entertained and accepted at this stage.

14. As a last resort to oppose the impugned judgement and decree the counsel for the Appellant, while the appeal was being finally heard raised an additional ground, though not raised in the memorandum of appeal, that since the Respondent No. 1 herein was not a firm, i.e., a legal entity, therefore, the suit was not maintainable. However, it is pertinent to note here that the Trial Court had framed an issue as to whether the Plaintiff firm is not a registered Unit under a self-employment Unit. The onus of proof was on the Defendants-Appellant herein, however, they failed to discharge the same. On the other hand, the Plaintiff-respondent 1 herein deposed that same used to be on the record of the DIC, as such the issue was decided in favour of the Plaintiff-Respondent 1 herein. The Defendant Appellant herein did not cross-examine the Plaintiff Respondent 1 on this issue. Therefore, acceptance of Plaintiff's Respondent 1 evidence which remained un-rebutted and unchallenged cannot be said to be an illegality committed by the Trial Court.

Furthermore a reference to Order 30 Rule 1 of the Code becomes imperative here which reads as under: -

"Suing of partners in name of firm.- (1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if

such pleading or other document is signed, verified or certified by any one of such persons.

The Rule supra, which is an enabling provision, creates a statutory backing for a suit to be brought by or against the firm and the partner. Object of the provision is that if a person carries on a business in a name other than his own name, then that person should not be able to avoid the liability just by taking a plea that the assumed name does not belong to him. The said Rule neither creates a bar to the institution of a suit by or against the partner or partners of a firm in their individual capacity nor to institution of a suit by a proprietorship concern in its own name or by a person in the name of an assumed business name.

Otherwise also, there is no express or implied bar imposed by any provision of the Code to filing of a suit by a proprietorship concern or by a person under assumed name of business.

A further reference to Rule 10 of Order 30 of the Code also would be appropriate here which reads as under:

10. Suits against person carrying on business in name other than his own. - Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly."

Once a suit is filed against a person carrying business under an assumed name, such person, in terms of Order 8 Rule 6A of the Code would have the right to file a counter claim. A reference to Order 8 Rule 6A of the Code also becomes imperative hereunder which provides as under:

Rule 6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the

defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) *Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.*

(3) *The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.*

(4) *The counter claim shall be treated as a plaint and governed by the rules applicable to plaints.*

A bare perusal of Sub Clauses (2) & (4) supra, it is clear that the counter claim filed by a defendant shall have the effect of a cross suit on behalf of the defendant and that a counter claim shall be treated as a plaint and governed by the rules applicable to plaints. Therefore, if a proprietary concern or an assumed name of a business of a person is sued against under Order 30 Rule 10, in that case, it has got a right to file a cross suit as a defendant, which cross suit shall be treated as a plaint and rules governing the plaints shall be applicable to such counter claim under the above said provisions. That being the position would be not be illogical to say that a proprietary concern cannot file a suit as plaintiff. If an entity is treated as a legal person and a plaintiff for the purpose of cross suit then there is nothing to prevent such an entity to come as plaintiff in the first instance.

The definition of the term 'person' as defined by Section 3(30) of the J&K General Clauses Act assumes significance here which reads as under:

(30) Person. - "Person" shall include any company or association or body of individuals, whether incorporated or not;

From a plain reading of the term 'person', supra it can be said that any person is entitled to file a suit for enforcement or

adjudication of his right against the defendant unless the suit is prohibited by some specific provision of law. Incorporation is not necessary for an entity to claim the status of a person.

Therefore, a suit by a proprietary concern of a sole proprietor or by the assumed business name or style of a person seems to be maintainable; only legal requirement being that when such a suit is filed, complete details of the owner of the proprietary concern or assumed business name should be disclosed in the plaint as required under Order 7 Rule 1 of the Code to establish the identity of the owner of the proprietary concern or the assumed business name.

Even otherwise also if the title in the plaint is seen, the Plaintiff-Respondent 1 herein had mentioned "Mousvy Industries Budgam through its Proprietor Abdul Majid S/o Syed Hyder Shah R/o Zadibal, Srinagar" instead of "Abdul Majid S/o Syed Hyder Shah R/o Zadibal, Srinagar Proprietor Mousvy Industries Budgam". This at the most can be said to be a mis-description which would not go to the root of the case, as the proprietor was sufficiently identified for the Defendant-Appellant herein to know who is suing.

Therefore, the aforesaid argument of the counsel for the Appellant does not merit acceptance.

15. In view of what has been observed, considered and discussed hereinabove, the instant appeal fails and is, accordingly, **dismissed.**

**(JAVED IQBAL WANI)
JUDGE**

SRINAGAR

01.11.2023

Naresh, Secy.

Whether the order is reportable: Yes