

## **M/S.Durga Projects Inc vs Sri.N.N.Balakrishna Reddy on 17 October, 2015**

IN THE COURT OF THE XIX ADDL. CITY CIVIL &  
SESSIONS JUDGE AT BANGALORE CITY: (CCH.18)

Dated this 17th day of October, 2015.

Present

SMT.K.B.GEETHA, M.A., LL.B.,  
XIX ADDL. CITY CIVIL & SESSIONS JUDGE,  
BANGALORE CITY.

O.S.NO.2037/2010

PLAINTIFF : M/s.Durga Projects Inc,  
Having Office  
At No.703, 10th A Main Road,  
Jayanagar 4th Block,  
Bangalore-560 011.  
Represented by its Partner  
Sri.Niraj Jhunjjhunwala,  
Aged about 32 years,  
s/o Sri.0m Prakash Jhunjjhunwala.

(By Sri H.S.Dwarakanath,Advocate)

-VS-

DEFENDANTS : 1. Sri.N.N.Balakrishna Reddy,  
s/o late V.Narayana Reddy,  
aged 64 years,  
r/at No.729, 8th Main Road,  
7th Sector, HSR Layout,  
Bangalore-560 016.

2. Sri.N.Shamanna Reddy,  
s/o late V.Narayana Reddy,  
aged 61 years,  
r/at No.57,  
B.Narayanapura,  
Doorvani Nagar Post,  
Bangalore-560 016.

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3. Sri.N.Prakash Reddy,  
s/o late V.Narayana Reddy,  
aged 54 years,  
r/at No.74,

Ramaswamy Reddy Layout,  
Banaswadi,  
Bangalore-560 043.

4. Smt.V.Nanjamma,  
w/o late V.Venkataswamy Reddy,  
aged 73 years,  
r/at No.56,  
A.Narayanapura,  
Doorvani Nagar Post,  
Bangalore-560 016.

5. Smt.Bhagya G.Reddy,  
w/o J.S.A.Gajendra Reddy,  
aged about 55 years,  
r/at No.56,  
A.Narayanapura,  
Doorvani Nagar Post,  
Bangalore-560 016.

6. Sri.V.Venkatesh,  
s/o late Venkatasamy Reddy,  
aged 53 years,  
At Laurie Memorial School,  
No.4, "Nisarga",  
Universal Gym Road,  
Yerainnapalya,  
Ramamurthy Nagar,  
Bangalore-560 016.

7. Smt.V.Annapoorna,  
w/o Sri Raghunath,  
aged 49 years,  
r/at No.24,  
2nd Cross, N.R.Colony,

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Murugeshpalya Airport Road,  
Bangalore-560 017.

8. Smt.AMR Jyothi,  
w/o late Rama Reddy,  
aged 39 years,  
r/at No.420/1,  
2nd Cross, Behind New Brilliant School,  
Udaynagar,  
Bangalore-560 016.

9. Sri.V.Mallesw Reddy,  
s/o late Venkataswamay Reddy,

aged 42 years,  
r/at No.A-1,  
Vinayaka Niwas Apartment,  
1st Main Road,  
Pai Layout,  
Bangalore-560 016.

10.Sri.V.Lakshmipathi,  
s/o late Venkataswamy Reddy,  
aged 38 years,  
r/at No.579,  
C.G.Compound,  
Doorvani Nagar,  
Bangalore-560 016.

(D.1 to D.3 - By Sri.NHC, Advocate)  
(D.4 & D.5 - By Sri.CMG, Advocate)  
(D.6 to D.9 - By Sri.MRS, Advocate)  
(D.10 - By Sri.MNB, Advocate)

Date of Institution of the suit : 26/3/2009 (P.Misc.9/2009)

Nature of the Suit : Recovery of money.

Date of commencement of recording  
of evidence : 10/8/2011  
4 O.S.No.2037/2010

Date on which the Judgment was  
pronounced : 17/10/2015

	Year/s	Month/s	Day/s
Total Duration :	06	06	21

#### JUDGMENT

The plaintiff has filed this suit for recovery of Rs.72,11,500/- with current and future interest at the rate of 18% p.a. from the date of suit till realization; for court costs and for such other reliefs.

2. The case of plaintiff in nutshell is that the defendants represented that they are the absolute owners of property bearing Sy.No.74 of B.Narayanapura Village, Bangalore East Taluk, Bangalore, measuring 1,08,000 sq.ft. i.e., suit schedule property and it is free from encumbrance, litigation, acquisition etc. Based on their representation and assurances, plaintiff entered into Memorandum of Understanding on 12/3/2006 to Joint Development of the suit schedule property. Accordingly, plaintiff paid Rs.2,00,000/- each to each defendants though cheques dtd:12/3/2006 and 13/3/2006. Defendants further represented that they are in urgent need of funds and demanded

further sum of Rs.32,00,000/-. Accordingly, plaintiff paid further advance amount of Rs.2,00,000/- through cheque dtd:31/3/2006 in favour of 10th defendant; Rs.1,00,000/- through cheque dtd:31/3/2006 to 9th defendant; Rs.2,00,000/- through cheque dtd:15/7/2006 in favour of 9th defendant; Rs.2,00,000/- through cheque dtd:15/7/2006 in favour of 9th defendant; Rs.2,00,000/- through cheque dtd:15/7/2006 in favor of 6th defendant; Rs.2,00,000/- through cheque dtd:15/7/2006 in favour of 6th defendant; Rs.2,00,000/- through cheque dtd:15/7/2006 in favour of 10th defendant; Rs.5,00,000/- through cheque dtd:27/10/2006 in favour of 1st defendant; Rs.5,00,000/- through cheque dtd:27/10/2006 in favour of 2nd defendant; Rs.5,00,000/- through cheque dtd:27/10/2006 in favour of 3rd defendant; Rs.4,00,000/- by way of cash to 9th defendant on 16/11/2006. Thus, in all, plaintiff paid Rs.52,00,000/- to defendants. Under Memorandum of Understanding, plaintiff was entitled to 61% and defendants together were entitled for 39% of the developed property, undivided rights, car parking, garden area and the entire terrace. The amount payable was non-refundable advance amount of Rs.45,00,000/- per acre on actual measurement and refundable advance of Rs.20,00,000/- per acre on the basis of actual measurement. The period for completion of the project was 24 months from the date of sanction of BDA with a grace period of 6 months. The Registered Joint Development Agreement was to be entered into after getting the conversion of the property and sanction from BDA. In spite of repeated requests and demands made by plaintiff, defendants did not come forward to comply with their obligations under the agreement; did not get conversion or co-operated in obtaining conversion and sanction from BDA. Later, plaintiff came to know that the defendants have suppressed that one Smt.Narayanamma has filed suit pertaining to suit schedule property and other family members were claiming rights in respect of suit schedule property; there were various litigations in respect of the suit schedule property; defendants are not in possession of the property and falsely represented that the person in occupation is their family member who is independently claiming right over the property; plaintiff is not fully aware about the details of litigation and persons claiming rights in respect of suit schedule property. In spite of repeated requests and demands, defendants have not handed over the documents mentioned in Memorandum of Understanding. If defendants would not have represented that they are the owners in possession of suit schedule property and it is without any litigation, plaintiff would not have entered into Memorandum of Understanding with defendants and would not have parted with such a huge amount. After plaintiff came to know about the fraud played by defendants, plaintiff approached defendants and demanded to return the amount paid under Memorandum of Understanding dtd:12/3/2006 with interest at 18%. Defendants have not paid the amount and avoided payment. The transaction between plaintiff and defendant was commercial in nature. Plaintiff is doing business by taking loan from financiers. Hence, the suit for appropriate reliefs.

3. Defendant Nos.1 to 3 filed their written statement wherein they denied the plaint averments that defendants are the absolute owners of suit schedule property, etc. They contended that Sy.No.74 of B.Narayanapura Village was owned and possessed by late V.Narayana Reddy and late V.Venkataswamy Reddy and family. Defendant Nos.1 to 3 are sons of late V.Narayana Reddy and defendant Nos.4 to 10 are children of late V.Venkataswamy Reddy. There was partition amongst them on 27/3/2006 in respect of said property. As per said partition, it was divided amongst them. In the portion which is in possession of defendant Nos.1 to 3, two portion of land totally measuring 33,000 sq.ft. of land was proposed for Joint Development along with adjoining portion of defendant

Nos.4 to 10 and it was well within the knowledge of plaintiff. The suit filed by the sisters of defendants is also within the knowledge of plaintiff and plaintiff has agreed to settle the matter with sisters of defendants and knowing fully well, the plaintiff at the time of negotiations prepared a provisional agreement termed as 'Memorandum of Understanding' on 12/3/2006 and agreed to take 33,000 sq.ft. of land in Sy.No.74 of B.Narayanapura Village belonging to these defendants along with the adjoining portion of land belonging to defendant Nos.4 to 10 with an assurance that full fledged Memorandum of Understanding with all terms and conditions to be followed by plaintiff and defendants together with costs of construction, conversion of land at the cost of plaintiff. Knowing fully well the ground reality, plaintiff forced the defendants to enter into Memorandum of Understanding dtd:12/3/2006 and paid Rs.2,00,000/- each to defendants and further Rs.5,00,000/- each on 27/10/2006, pending Memorandum of Understanding totally Rs.21,00,000/- was paid to these defendants. With said assurance, defendants evicted their tenants who are using their land for the purpose of stock yard of the vehicles by TVS Company and by Ashoka Leyland Company and they lost their earnings in a sum of Rs.1,00,000/- p.m. by the act of the plaintiff. They agreed that they have received Rs.2,00,000/- each, but denied that it was on Memorandum of Understanding dtd:12/3/2006. Further, they admit the receipt of Rs.5,00,000/- each on 27/10/2006, but contended that plaintiff failed to come forward to enter into Memorandum of Understanding fulfilling the terms and conditions as agreed and take up the project. They further admitted the other pleadings in the plaint regarding fixing up of percentage, refundable and non-refundable deposit. Their main contention is that plaintiff has not come forward to complete the transaction and hence, they sustained loss. They contended that they were always ready and willing to perform their part of contract and denied the contention that Joint Development Agreement was to be entered after conversion of property and sanction from BDA. They further contended that the property claimed by Smt.Narayanamma in Sy.No.74 is totally a separate property and not included in the measurement of 33,000 sq.ft. They further contended that plaintiff was aware about the suit for partition filed by sisters of defendants. Only 33,000 sq.ft. was agreed to give under Memorandum of Understanding to plaintiff which is 1/3rd of the land in Sy.No.74 which is still in their possession. They deny all other averments made in the plaint regarding fraud, misrepresentation, etc. and contended that they are not liable to pay amount with interest at 18% p.a. Hence, prayed for dismissal of the suit with costs.

4. Defendant Nos.4 and 5 filed their separate written statement wherein they deny the plaint averments that defendants are absolute owners of Sy.No.74 of B.Narayanapura Village. They further contended that defendant Nos.1 to 3, 6 to 10 have 1/3rd share in said survey number. Defendant Nos.4 and 5 are having 2 shares in the entire 1,08,000 sq.ft. Plaintiff and defendants are claiming interest over said property to have unjust enrichment. Defendant Nos.1 to 3 are the sons of V.Narayana Reddy and they are not having any right and interest in the suit schedule property. Defendant Nos.6 to 10 are children of V.Venkataswamy Reddy through 2nd wife Rajeshwari. 4th defendant is the 1st wife of V.Venkataswamy Reddy and 5th defendant is their daughter. In fact, defendant Nos.4 and 5 got released from other defendants and enjoying two shares out of 3 shares in the entire survey number. In view of Memorandum of Understanding, plaintiff ought to have been converted the land from agricultural use to non- agricultural use immediately and after obtaining conversion order, it is mandatory on the part of plaintiff to get the required documents to be approved with the concerned departments and also to get NOC from BDA. Within 24 months

from 12/3/2006, plaintiff ought to have been completed the project as per the Memorandum of Understanding, but they did not do so. The amount received by other defendants pertaining to 1/3rd share is not binding on these defendants as they have not entered into any sort of contract or agreement except Memorandum of Understanding dtd:12/3/2006. Plaintiff has not approached the court with clean hands and suit is barred by Law of Limitation. They denied all other averments made in para 4 to 8, 10 to 14 in the plaint. It is only because of negligence and dereliction on the part of plaintiff in performing its part of contract, total project was collapsed and these defendants became victims in the hands of plaintiff. Plaintiff was not at all ready and willing to perform his part of contract. It is defendants who were regularly requesting and demanding plaintiff to perform his part of contract. There is no litigation between Smt.Narayanamma and these defendants and they are the absolute owners in possession of their 2/3rd share in Sy.No.74. Only after verifying required documents, plaintiff entered into Memorandum of Understanding with defendants. Only because of lapses and negligence on the part of plaintiff, these defendants suffered loss, humiliation and harassment and they were always ready and willing to perform their part of contract within the stipulated period. Hence, prayed for dismissal of suit with costs.

5. Later defendant Nos.4 and 5 have got amended the written statement and included one more para in the written statement contending that the suit filed by plaintiff is not maintainable as plaintiff is not a Registered Partnership Firm and there is no Registration Number to the alleged firm and Niraj Jhunjjhunwala is not the Managing Partner of the plaintiff firm. Even the plaintiff not stated who authorized Niraj Jhunjjhunwala to file the suit. The partnership firm is not entitled to enter into an agreement pertaining to agricultural land in Karnataka State as per provisions of Karnataka Land Reforms Act and to enforce any agreement or to claim any amount, the firm is to be registered, otherwise suit cannot be filed by a partnership firm as per S.69(2) of the Partnership Act. There is no pleading in the plaint to file suit against defendants. Some additional documents are inserted in the Memorandum of Understanding produced by plaintiff by playing fraud. Plaintiff intentionally filed petition under Order XXXIII R.1 & 2 CPC in P.Misc.9/2009 on 26/3/2009 to avoid payment of court fee and to gain time and finally paid court fee on 4/3/2010. The seal and registration number of the firm were not put on the plaint and Vakalathnama. Hence, prayed for dismissal of suit with costs.

6. Defendant Nos.6 & 8 filed their written statement wherein defendant Nos.6 & 8 stated that the suit is not maintainable in law and barred by Law of Limitation. Hence, prayed for dismissal of suit. They further denied the contention that defendants are owners of Sy.No.74 of B.Narayanapura Village. As per Memorandum of Understanding, plaintiff under took to apply for conversion, but has not done so even after documents were submitted in respect of the suit schedule property. They denied all other averments made in para No.4 to 15 of the plaint and further contended that inspite of repeated requests and demands; plaintiff has not bothered to take any steps. Hence they forced to issue legal notice dtd:3/4/2009 to plaintiff. Even after receipt of said legal notice, plaintiff has not given reply to it nor started development work. But they admitted that defendant No.6 received Rs.6,00,000/-, defendant No.8 received Rs.2,00,000/- and hence, they cannot be jointly and severally liable to pay the amount. Hence, prayed for dismissal of suit with exemplary costs.

7. From the above facts, the following issues were framed:-

## ISSUES

1. Whether the plaintiff proves that the defendants are due and liable to pay the suit claim of Rs.72,11,500/- as prayed for?
2. Whether the plaintiff proves that the defendants are also liable to pay the interest as claimed?
3. Whether the suit is barred by limitation?
4. Whether the plaintiff is entitled for a judgment and decree as sought for?
5. To what order or decree?

## ADDITIONAL ISSUES

1. Whether defendants prove that the plaintiff firm is not a registered firm and thus suit is hit by S.69(2) of the Partnership Act?
  2. Whether defendants prove that the suit agreement is not enforceable in law as per provisions of Karnataka Land Reforms Act?
  3. Whether defendants prove that Neeraj Jhunjanwala is not the managing partner of plaintiff firm and not authorized to file suit against defendants?
8. On behalf of plaintiff, one of the partners of plaintiff firm is examined as PW-1, got marked Ex.P.1 to Ex.P.8 and closed its side. On behalf of defendant Nos.1 to 3, 3rd defendant is examined as D.W.1, got marked Ex.D.1 and Ex.D.2 and closed their side. On behalf of defendant Nos.4 and 5, power of attorney holder of defendant Nos.4 and 5 was examined as D.W.2, got marked Ex.D.3 to Ex.D.6 and closed their side. On behalf of defendant No.6 to 9, 9th defendant is examined as D.W.3, got marked Ex.D.7 and closed their side.
9. Heard arguments of both sides.
  10. Findings of this court on the above issues are:-

Issue No.1:- Partly in Affirmative;

Issue No.2:- Partly in Affirmative;

Issue No.3:- In Negative;

Issue No.4:- Partly in Affirmative;

Addl.Issue No.1:- In Negative;

Addl.Issue No.2:- In Negative;

Addl.Issue No.3:- In Negative;

Issue No.5:- As per the final order for the following:-

#### REASONS ADDITIONAL ISSUE No.1

11. This issue is considered first, because, it touches with the maintainability of the suit.

12. Plaintiff has filed the suit praying for recovery of money from defendants. Plaintiff is a partnership firm by name M/s.Durga Projects Inc. represented by its partner Niraj Jhunjhunwala has filed the present suit.

13. Under Order XXX CPC, any two or more persons claiming as partners and carrying on business in India, may sue in the name of firm of which such persons are partners at the time of accruing of cause of action.

14. Under Section 69 of the Partnership Act, if the partnership firm is not registered in accordance with the provisions of this Act, then suit to enforce a right arising from contract shall not be instituted in any court by any person suing as partner in the name of firm.

Section 69 of Partnership Act reads as follows:-

"S.69. Effect of Non-registration:-

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) .....

(4) ....."

15. Plain reading of S.69(2) of the Indian Partnership Act made it very clear that the suit to enforce right shall not be instituted in the name of firm if the firm is not registered against any third party



and the persons suing have to be shown in the Register of Firms as partners in the firm.

16. In the instant case, at the time of filing the suit, in the plaint pleadings, it is not stated that the plaintiff is the registered partnership firm. Even, defendants have not considered this aspect at the inception and have not taken any defence under S.69(2) of the Indian Partnership Act. Only when the case was posted for arguments finally, defendant Nos.4 and 5 have filed I.A. under Order XIV R.5 CPC for framing of additional issues and then filed I.A. U/O VI R.17 CPC to amend the written statement and then taken plea that plaintiff firm is not registered partnership firm as required under provisions of Indian Partnership Act; Niraj Jhunjjhunwala is not the manager partner of plaintiff firm. Afterwards, present issue is framed.

17. Whether defendants have taken said contention or not, as it is mandatory that only registered partnership firm can file suit in the name of firm and not otherwise; the court has to look into said aspect even without any such specific pleadings.

18. In this regard, counsel for defendant Nos.4 and 5 relied on the citation reported in AIR 1969 Guajrat 178 in "Bharat Sarvodaya Mills Co.,Ltd., Ahmedabad v/s M/s.Mohatta Brothers a Firm" wherein, their Lordships held as under:-

"Therefore, even though the cause title mentions the firm A, B, suing and even though name of the firm is used for bringing a suit, what is styled as a suit by the firm is really a suit instituted by all the partners who constitute the firm, at the time of the cause of action and on whose behalf the suit is instituted and whose names have to be furnished on demand and who are thereafter treated as named plaintiffs."

It is further held as under:-

"It was therefore, clear that the provisions of O.30, Rr.1 and 2 were enabling provisions to permit several persons who were doing business as partners to sue or be sued in the name of the firm."

19. In the above said citation, their Lordships clearly held that as per Order XXX R.1 & 2 CPC, several persons can file suit in the name of firm if the firm is registered one and in reality, such suit is instituted by all partners or on behalf of all the partners. The persons who are individually called partners are collectively called as firm, and the name under which their business is carried on is called the firm name. Hence, it is mandatory for plaintiff to show that plaintiff firm is a registered partnership firm as on the date of filing of the suit and Niraj Jhunjjhunwala who is representing plaintiff firm is its partner.

20. In this regard, after defendant Nos.4 and 5 have taken such contention by amending written statement, plaintiff recalled P.W.1 and produced partnership deed as per Ex.P.6 and Memorandum issued by Registrar of Firm as per Ex.P.7.

21. Ex.P.6 is the certified copy of partnership deed. Its original was produced before some other court. On careful perusal of Ex.P.6, it is clear that it was only a Notarized Partnership Deed before Notary in Kolkata. Ex.P.7 Memorandum is issued by the Registrar of Firms, West Bengal. It is printed in this document as follows:-

"The Registrar of Firms, West Bengal, hereby acknowledges receipt of the under mentioned document and intimates that it has been filed/recorded/registered pursuant to the Indian Partnership Act, 1932 (Act IX of 1932)."

There is a seal in this Ex.P.7 that "Statement Required For Registration (Form-I) Filed on 22/6/07."

It is written below this seal that "M/s.Durga Projects Incorporation Regn.No.172010." This document is having the round seal of Registrar of Firms, West Bengal, with printed form Kolkata dtd:6/11/2008 and it was issued to M/s.Durga Projects Incorporation, 21, Hemanta Basu Sasani, Kolkata-1.

22. On careful perusal of this Ex.P.7, it is crystal clear that M/s.Durga Projects Incorporation was registered before Registrar of Firms, West Bengal, with Regn.No.172010. This Regn. number is not mentioned in Ex.P.6. In Ex.P.6, 4 persons were shown as partners and 4th person was the Niraj Jhunjhunwala - the person who represents the plaintiff in this suit. This partnership deed mentions that partners named above started business as partners in the name and style of 'Durga Projects Incorporation'. In para No.2, the nature of business of partnership firm is stated and also stated that the firm shall be carried on its business with office at No.15, Bull Temple Road, Gandhi Bazaar, Basavanagudi, Bangalore-4; registered office will be at No.21, Hemant Basu Sarani, Opp.Great Eastern Hotel, 4th floor, Room Number 418, Kolkata-01 or at such other place or places or shall be of such other nature as the partners may decide from time to time.

23. As per S.58 of the Indian Partnership Act, the registration of the firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form containing the details as mentioned in S.58 of Indian Partnership Act.

24. As per S.59 of the Indian Partnership Act, when the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

25. The coupled reading of S.58 and S.59 of the Indian Partnership Act reveals that the firm may be registered in the place where it is doing its business with the Registrar and after Registrar being satisfied about compliance of the provisions of S.58, he shall register the same in accordance with law.

26. As stated above, in Ex.P.6, the place of business is shown as Basavanagudi, Bangalore, whereas, head office of the firm is shown as Kolkata and also stated that the firm may run its business in the above said place or in any other place which may be decided by partners. When the Head Office of

the plaintiff firm is in Kolkata, it gets registration in Kolkata. This court cannot decide the order passed by the Registrar of Firms as valid or invalid. It is only Registrar of Firms who can raise objections regarding the place of registration of the firm and not the court.

27. Under S.69 of the Partnership Act, there is only a bar not to institute suit by a firm which is not registered and partners name not shown in Registrar of Firms as partners.

28. P.W.1 has produced Ex.P.6 and Ex.P.7 and he was cross-examined in length pertaining to these documents. In the cross-examination, P.W.1 admitted that as on 12/3/2006, i.e., as on the date of transaction with defendants, plaintiff firm was not registered. Under S.69 of the Indian Partnership Act, the bar imposed is only to file the suit and not regarding cause of action. Indian Partnership Act does not bar unregistered firm to enter into contract with 3rd parties. Hence, non-registration of plaintiff firm as on the date of cause of action is not a bar to file suit by the plaintiff firm.

29. In the cross-examination, P.W.1 denied the suggestion that he is not the managing partner of plaintiff firm and plaintiff firm is not registered in accordance with the provisions of Indian Partnership Act.

30. The address of plaintiff firm is mentioned as Bull Temple Road, Basavanagudi, Bangalore in Ex.P.6 and also in Ex.P.1. However, the address of plaintiff firm is different in plaint cause title. In the plaint cause title, address of plaintiff firm is mentioned as No.703, 10th 'A' Main Road, Jayanagar 4th Block, Bangalore. But merely because address of plaintiff firm is changed, it cannot be held that the plaintiff firm is not registered in accordance with the provisions of Indian Partnership Act.

31. Learned counsel for defendant No.1 to 3 vehemently submitted that the name of plaintiff firm shown in the plaint is M/s.Durga Projects Inc. whereas, in Ex.P.6, name of firm is shown as Durga Projects Incorporation and in Ex.P.7, it is shown as M/s.Durga Projects Incorporation. Hence, there is difference amongst all the above three; hence, plaintiff firm is not registered one. He further argued that the words 'M/s.' is not found in Ex.P.6 and it is found in Ex.P.7. Hence, Ex.P.6 and Ex.P.7 are not pertaining to registration of plaintiff firm.

32. It is to be noted here that 'M/s.' is only a word added as a respect to the firm in Ex.P.7. Furthermore, 'INC.' is the abbreviation of the word 'Incorporation'. Hence, the above arguments of learned counsel for defendant of Nos.1 to 5 cannot be accepted as correct. Said argument holds no water.

33. The above discussion reveals that the persons mentioned in Ex.P.6 are the partners of plaintiff firm and their firm is registered in accordance with the provisions of law before Registrar of Firm, West Bengal.

34. As per Order XXX R.2 CPC, where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on

whose behalf the suit is instituted.

35. In the instant case, defendants have not demanded in writing the names of partners of plaintiff firm, their address, except suggesting to P.W.1 that he is not the partner of plaintiff firm. Defendant Nos.4 and 5 have only taken defence that the plaintiff firm is not registered and Niraj Jhunjhunwala is not its partner. However, they have not demanded in writing the names of partners of plaintiff firm as required under Order XXX R.2 CPC.

36. Defendant's counsel further submitted that as per Order VI R.15 CPC, if the plaint is presented on behalf of the firm, then, it shall bear seal of the firm, no such seal is found in the plaint or in the vakalathnama.

37. On careful perusal of O.VI R.15 CPC, this court found that no such mandatory provision is their in said provision. It is only stated in Order VI R.15 CPC that every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. Thus, the above arguments of learned counsel for defendants hold no water.

38. The learned counsels for defendant Nos.1 to 5 vehemently argued that there are several firms and companies by name M/s.Durga Project Incorporation, Durga Project Incorporation, M/s.Durga Projects Inc., Durga Projects Inc. and Durga Infrastructure and Company and it is not definite that which firm has filed the present suit. In this regard, they mainly relied upon Ex.P.3 to Ex.P.5, the bank account extract produced by plaintiff. On perusal of those documents, it is clear that Ex.P.3 is the bank account extract of Durga Infrastructure & Company; Ex.P.4 is the bank account extract of Durga Projects Inc. and Ex.P.5 is the bank account extract of and M/s.Durga Projects Inc.

39. Learned counsels for defendants No.1 to 5 further vehemently argued that there were several internal transactions in between these firms which could be noted from Ex.P.3 and Ex.P.5. On perusal of Ex.P.3 to Ex.P.5, this court found that from M/s.Durga Projects Incorporation, amount was transferred to Durga Projects Inc., or Incorporation. On perusal of Ex.P.4, it is an account extract of Durga Projects Inc., maintained by Axis Bank and from said account, the amount was transferred to Durga Infrastructure & Company. Likewise, amounts were transferred from bank account of M/s.Durga Projects Inc. maintained by Union Bank of India to Durga Project Inc.

40. The defendants' counsels vehemently argued that M/s.Durga Projects Inc. is different from Durga Projects Inc. and thus, it is not clear that plaintiff firm is in existence and it is a registered one.

41. If the amount from the account of M/s.Durga Projects Inc., maintained by Union Bank of India is transferred to Durga Projects Inc., it does not mean that both of them are different entities. Because, a person may have several accounts in several banks or several branches of the same bank and while transferring from one of his accounts to another of his account, definitely, his name may be shown in bank account extract. This does not mean that there are two persons exist. Likewise in the instant case, though Ex.P.4 and Ex.P.5 were maintained by different banks in the name of Durga

Project Inc., and M/s.Durga Projects Inc, there is no evidence to show that both of them are different firms. Hence, the above arguments of learned counsels for defendant Nos.1 to 5 cannot be accepted.

42. Learned counsels for defendant Nos.1 to 5 submitted that the plaint is silent regarding whether plaintiff firm is a proprietorship firm or partnership firm or a company and thus, the pleadings are not proper.

43. However, as already discussed above, plaint is filed by M/s.Durga Projects Inc. represented by its managing partner. The word 'managing partner' itself reveals that plaintiff firm is a partnership firm. Merely because, its registration number is not mentioned in the plaint, it cannot be said that plaint is not properly presented. Hence, this court holds that defendants failed to prove that plaintiff firm is not a registered firm and suit is hit by S.69(2) of the Partnership Act. Accordingly, additional issue No.1 is answered in negative.

### ADDITIONAL ISSUE No.3

44. Defendants took further contention that Niraj Junjjhunwala is not the managing partner of plaintiff firm and not authorized to file the suit against defendants. Ex.P.6 does not speak that Niraj Junjjhunwala is the managing partner of plaintiff firm, but he speaks that he is one of the partners of the plaintiff firm. As per provisions of Partnership Act, each and every partner is the principal as well as agent of other partners. Hence, Niraj Junjjhunwala need not be managing partner of plaintiff firm to file the suit. It is proved that he is one of the partners of plaintiff firm; which is sufficient for him to file the present suit.

45. In this regard, learned counsel for defendant Nos.4 and 5 relied on the citation reported in AIR 1961 SC Page 325 in "Purushottam Umedbhai and Company v/s M/s.Manilal and sons" wherein, their Lordships held as under:-

"(b) Civil P.C.(1908), O.6 R.15, O.3, R.2 -

Suit by firm - Plaint filed and verified by person having power of attorney executed in his favour by manager of firm - Power of attorney authorising him to sue for recovery of money due to firm from defendant, and also to appear and represent firm in any Court, in any jurisdiction and to make sign, verify, present and file any plaint - Suit is properly instituted - Each partner need not have signed the power of attorney since one partner is agent of firm."

46. In the above said citation, the suit was filed by person who was authorized by manger of the firm, but not partner of the firm. However, in the instant case, one of the partners of plaintiff firm has filed the suit and he need not be authorized by other partners of the firm. Even the plaintiff firm has produced Ex.P.8 authorization letter. It is in the letter head of one Durga dtd:1/3/2009. But as already discussed above, this document itself was not required to be filed, because, Niraj Junjjhunwala was shown as one of the partners of plaintiff firm in the partnership deed and he has produced the partnership deed stating that he is the partner of plaintiff firm. Hence, the above

contention taken by defendant Nos.4 and 5 in their written statement is not proved by them. Accordingly, this issue is answered in negative.

#### ADDITIONAL ISSUE No.2

47. Defendant Nos.4 and 5 have taken one more contention in the written statement that as per provisions of Karnataka Land Reforms Act, a firm is not entitled to enter into agreement pertaining to agricultural property and hence, the suit filed by plaintiff for recovery of money based on Memorandum of Understanding as per Ex.P.1 is not maintainable.

48. Ex.P.1 is the Memorandum of Understanding executed in between plaintiff and defendants. Under this deed, plaintiff has paid some money to defendants and also agreed to get conversion of suit schedule property and after conversion, regular registered Joint Development Agreement will be entered into between parties and that may be submitted to BDA for sanction. Under these circumstances, Memorandum of Understanding is not entered between parties for agricultural property, but it is entered between parties only to get conversion of agricultural property in the name of defendants and only after such conversion, registered Joint Development Agreement would be executed between parties. Hence, the above contention taken by defendant No.4 and 5 in their written statement that the suit agreement is not enforceable as per provisions of Karnataka Land Reforms Act is not proper.

49. Furthermore, in the instant case, plaintiff has not filed the suit for enforcement of the agreement (Memorandum of Understanding), but it has filed the suit for recovery of money which was paid under said agreement. Hence, for this reason also, suit is definitely maintainable and not hit by any of the provisions of Karnataka Land Reforms Act. Accordingly, additional issue No.2 is answered in negative.

#### ISSUE No.3

50. Defendants have taken contention in the written statement that the suit is barred by limitation.

51. Plaintiff has filed the suit for recovery of the amount given by plaintiff to defendants under Memorandum of Understanding through cheques dtd:12/3/2006, 13/3/2006, 31/3/2006, 15/7/2006, 27/10/2006 and 16/11/2006.

52. Memorandum of Understanding as per Ex.P.1 reveals that plaintiff and defendants entered in to said Memorandum of Understanding for conversion of suit schedule property in to non-agricultural purpose and after such conversion, plaintiff and defendants have to enter into registered Joint Development Agreement. It is further agreed that the project shall be completed within 24 months from the date of sanction of Joint Development Agreement with grace period of 6 months. Plaintiff paid the money to defendants only as a part performance of the Memorandum of Understanding and it had to get conversion of the land through D.C. under this document.

53. It is the contention of the plaintiff that defendants have not furnished the relevant documents required for conversion, did not co-operate with plaintiff and they have suppressed the existence of several litigations pertaining to suit schedule property and hence, Memorandum of Understanding was cancelled and hence, plaintiff has prayed for refund of the advance amount paid by plaintiff to defendants with interest.

54. P.W.1 in his cross-examination has deposed that he came to know about the pendency of litigation pertaining to suit schedule property by one Smt.Narayanamma during September 2006.

55. Under Article 47 of the Limitation Act, period of limitation is 3 years from the date of failure for the money paid upon an existing consideration which afterwards failed.

56. In the instant case, Memorandum of Understanding was between parties for development of a property, but subsequent to Memorandum of Understanding, plaintiff came to know about existence of some litigation and also because of non co-operation from defendants, the Memorandum of Understanding could not go further. Hence, according to P.W.1, he came to know about the failure of Memorandum of Understanding during September 2006. As per Article 47 of the Limitation Act, he ought to have filed the suit before September 2009.

57. Plaintiff has filed P.Misc.9/2009 on 9/3/2009 stating that it was in financial stringency and could not mobilize funds immediately and hence, filed the suit as *informa pauperis* under Order XXXIII R.1 CPC. About one year afterwards, i.e., on 4/3/2010, plaintiff has paid the court fee by filing a memo and thus, suit was registered.

58. Defendant's counsel vehemently submitted that the limitation is to be reckoned up to the date of registration of the suit and thus either to consider from 12/3/2006 or from September 2006, suit is barred by limitation, as it is registered on 5/3/2010.

59. In this regard, learned counsel for defendant Nos.6 to 9 relied on the citation reported in AIR 2005 Kar 123 in "C.S.Ravishankar v/s Smt.Shobha Rani" wherein, their Lordships held as under:-

"Civil P.C. (5 of 1908), O.8, R.1, O.33, R.1 - Written statement - Filing of - Limitation - From when to be computed - Suit to sue as indigent person - Limitation would start from the date of order allowing to sue as indigent person - Fact that petitioner filed written statement within 90 days from order allowing to sue as indigent person - Order disallowing to take written statement on record - Improper - Further order allowing to sue as indigent person - Should be treated as date of service of summons - Plea that summons was not served in proper form - Not tenable."

60. In the above said citation, the period of limitation pertaining to filing of written statement was discussed and in that context, it was held that period of limitation to file written statement commences from the date of order allowing the plaintiff to sue as indigent person. However, that is not the situation in present case. Plaintiff has filed the suit as indigent person.

61. Learned counsel for defendant Nos.4 and 5 relied on another citation reported in AIR 1995 Kerala Page 86 in "M/s.Grand Buoy Enterprises v/s M/s.National Insurance Company Ltd., and another" wherein, their Lordships held as under:-

"Civil P.C. (5 of 1908), O.33, R.1 - Leave to sue as indigent person - Firm as such cannot claim to be an indigent person."

62. Learned counsel for defendant Nos.4 and 5 relied on the citation reported in AIR 2004 Karnataka page 33 in "Dr.D.Hemachandra Sagar and another v/s D.Prithviraj and another" wherein, their Lordships held as under:-

"(A) Civil P.C. (5 of 1908), O.33, R.1 -

Application to sue as indigent person -

Proof of indigency - Burden is on plaintiff applicant and not on defendant - Plaintiffs applicants failing to disclose their true assets and resources - Application liable to be dismissed."

63. To know whether suit is barred by limitation, the court has to first decide the date on which the suit was registered. Admittedly, the suit was registered on 5/3/2010, but it is also a fact that plaintiff has filed petition under Order XXXIII R.1 CPC to file the suit as indigent person.

64. In one of the above said rulings relied by the counsel for defendants, it is specifically held that firm cannot file suit as indigent person and it is clearly discussed in the said citation that under what context 'person' is used in Order XXXIII R.1 CPC.

65. From the above ruling, it is clear that firm cannot file suit as indigent person. However, in the instant case, based on the said principle, the court has not rejected the petition under Order XXXIII R.1 CPC in limine. On the other hand, the court has followed the procedure prescribed under Order XXXIII R.2 CPC. Immediately after filing this petition, court directed the Registrar to record the statement of petitioner as prescribed under Order XXXIII R.2 CPC i.e., to conduct inquiry. Hence, if really, the court had rejected the petition as not maintainable in limine on the date of filing the petition, then it could have been held that the date of registration of the suit be the date of limitation. However, as such act did not happen in this case, the above ruling is not helpful for defendants to prove that the suit filed by plaintiff is barred by limitation.

66. With this background, reading of Order XXXIII R.5 CPC is required. Under Order XXXIII R.5 CPC, the court shall reject the application for permission to sue as indigent person if it is not framed and presented in the manner prescribed by Rules 2 and 3 or where the applicant is not an indigent person or within 2 months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as indigent person. Thus, the rejection of application can be made on the date of presentation itself, if it does not follow the procedure prescribed under R.2 and 3 of Order XXXIII. However, in the instant case, the petition filed by plaintiff was not dismissed as stated above.



67. For rejection of petition under other grounds, the inquiry should be conducted by the court. In the instant case, as stated above, it was ordered to the Registrar of the City Civil Court to record the sworn statement of petitioner. However, on 2/4/2009, 22/4/2009 and on 8/6/2009 and 5/8/2009 it was not recorded. Only on 5/8/2009, the Registrar made an endorsement that party has not appeared. Hence, the sworn statement is not recorded. Even on next date, i.e., on 14/10/2009 a specific direction was issued from the court to send the file to Deputy Registrar for compliance and on the next date, the Presiding Officer was on leave and on the next date i.e., on 4/3/2010, plaintiff's counsel files Demand Draft towards court fee and submitted that petitioner is ready to pay the court fee and it was received by the court and afterwards on 5/3/2010, direction was issued to office to collect D.D. from the petitioner and close the petition and then, registered it in suit register. Accordingly, the suit was registered on 5/3/2010.

68. No order regarding petition under Order XXXIII R.1 CPC was made by the court, because it was still under the stage of enquiry and the sworn statement of the petitioner and in that period only, petitioner mobilized the funds and paid the court fee. Hence, petition was closed. In other words, it is to be held that petition was rejected.

69. Under Order XXXIII R.8 CPC, if the application filed under said order was allowed, then it shall be deemed as plaint in the suit and suit shall proceed in all other respects as the suit instituted in the ordinary manner except plaintiff is not liable to pay the court fee. If the petition U/O.XXXIII R.1 CPC is rejected, then, as per S.13 of the Limitation Act, said period spent for prosecuting the petition is to be excluded.

S.13 of the Limitation Act reads as follows:-

"13. Exclusion of time in cases where leave to sue or appeal as a pauper is applied for:- In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the Court may, on payment of the Court-fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the Court-fees had been paid in the first instance."

70. According to this Section, in computing period of limitation prescribed for the suit, where an application for leave to sue or appeal as a pauper has been made and rejected and the time during which the applicant has been prosecuting in good faith, his application for such leave shall be excluded. Thus, according to this S.13, period spent in prosecuting petition under Order XXXIII R.1 CPC is to be excluded in computing the period of limitation if the plaintiff establishes that he prosecutes the said application in good faith.

71. In the instant case, as already discussed above, plaintiff specifically stated in para No.15 of the petition that the properties belonging to plaintiff firm i.e., A, B & C mentioned in said para were given as performance guarantee for the job undertaken by Anil Gupta with Sri.Sesha Kalyan Manyam and all the original documents were handed over to Sri.Sesha Kalyan Manyam and hence,

petitioner is unable to mobilize funds to make court fee; petitioner has not liquidity; without original documents the property cannot be sold or loan cannot be raised and petitioner tried to raise funds in the business circle from the friends and relatives of the partners of the petitioner, but in view of slump in the market and knowing that petitioner is doing business in construction and real estate, nobody have come forward to pay the loan and hence, petitioner was unable to raise funds for payment of court fee. Thus, all the required ingredients of Order XXXIII R.1 CPC were made in this petition.

72. As already discussed above, petitioner was not examined on this statement, but petitioner specifically stated the reasons for not paying court fee at the time of filing of the suit. Hence, it is clear that he prosecuted the present petition in good faith and hence, the period spent by him for prosecuting this petition is to be excluded while computing the period of limitation.

73. In this regard, plaintiff's counsel relied on the citation reported in AIR 1973 SC 2508 in "Jugal Kishore v/s Dhanno Devi (Dead) by Lrs" where, their Lordships clearly held as under:-

"(i) Civil - suit by pauper - Sections 26 and 149 Order 1 Rule 10, Order 7 Rule 11, Order 9 Rule 9, Order 33 Rules 1, 2 and 5 of CPC, 1908 - whether a suit could be held to have been instituted when a petition to sue as pauper was presented -

suit by a pauper must be regarded as instituted on date of presentation of application for permission to sue in forma pauperis as required by Rules 2 and 3 of Order 33."

74. Learned counsel for plaintiff further relied on the citation reported in 1970 KLJ 290 in "Thomman Thayamma and others v/s Poulo Thomas and another" wherein, their Lordships held as under:-

"The petition to sue in forma pauperis, though termed as petition, has to contain all material averments which have to be contained in a plaint and has also to be signed and verified as in the case of a plaint. For the purpose of limitation, a pauper suit is taken as instituted as on the date of petition if leave to sue as pauper is granted. This may not help in the determination of the question whether the suit must be deemed to have been instituted on the date of filing of the petition because it is by a special statutory provision made in Section 3 of the Limitation Act 36 of 1963 that, for the purpose of limitation, the suit is taken to be instituted when the application for leave to sue as a pauper is filed. Therefore, what has to be considered is really the nature of the petition filed under Order XXXIII of the Civil Procedure Code seeking permission to sue in forma pauperis. Bearing in mind that Section 26 of the Civil Procedure Code permits the institution of a suit otherwise than in the manner contemplated in Order IV Rule 1, Civil Procedure Code, the rules in Order XXXIII will have to be considered. It would appear that what is instituted as a petition to sue in forma pauperis is a plaint along with a petition to excuse payment of court fee, such excuse being sought on the ground that the person who seeks to sue is unable to pay court fee for the suit. Therefore, it is a composite document, a plaint as well as a petition for permission to

sue without payment of court fee. It is kept on the file of the court without being registered and numbered until after adjudication by the court as to the question whether the petitioner is a pauper. It does not mean that it becomes a plaint in a suit only when it is actually numbered and registered on the grant of the pauper petition under Order 33 Rule 7(3) or that it would become a plaint only on payment of court fee when such payment is directed, finding that the petitioner is not a pauper. From the very date of institution of the petition it has to be treated as the plaint in a suit and the suit is to be deemed to have been on the file of the court for the very many purposes under the C.P.C. It is now well settled that a petition filed for permission to sue in forma pauperis under Order 39 C.P.C. is really a composite document. It is a plaint as well as a petition seeking permission to sue without payment of court fee and the suit must be deemed to have been instituted on the date of petition is filed and it is one of the modes of institution as contemplated under Section 26 C.P.C."

75. In 1st of the above 2 citations, it is clearly held that it is to be held that suit shall be instituted when a petition to sue as pauper was presented and suit by a pauper must be regarded as instituted on date of presentation of application for permission to sue in forma pauperis as required by Rules 2 and 3 of Order XXXIII CPC. Hence, it is to be held that the suit is filed on 9/3/2009 on which date the plaintiff has filed petition under Order XXXIII CPC. In the end of said citation also, it is clearly held that from the very date of institution of the petition, the petition is to be treated as plaint in a suit and suit is to be deemed to have been on the file of the court. Hence, it is very clear that as on 9/3/2009 itself, plaintiff has filed the suit. To know the period of limitation, the date of registration of the suit cannot be considered as the date of filing of the suit; but the date of presentation of petition under Order XXXIII R.1 CPC is to be considered as the date of filing of the suit. Hence, as on 9/3/2009, the suit was not barred by limitation, but it was well within limitation. Hence, this court holds that suit is not barred by limitation. Accordingly, issue No.3 is answered in negative.

76. These issues are considered together as they require common discussion. On behalf of plaintiff, the partner of plaintiff firm by name Niraj Jhunjjhunwala is examined as PW-1. On behalf of defendant Nos.1 to 3, 3rd defendant is examined as D.W.1; on behalf of defendant Nos.4 and 5, their power of attorney holder is examined as D.W.2 and on behalf of defendant No.6 to 9, 9th defendant is examined as D.W.3.

77. The admitted facts of the case are that Memorandum of Understanding as per Ex.P.1 dtd:12/3/2006 was executed in between plaintiff and defendants and under Memorandum of Understanding, plaintiff has paid Rs.2,00,000/- each to all the defendants through cheques dtd:12/3/2006/13/3/2006. It is also an admitted fact that even subsequent to Memorandum of Understanding, plaintiff has paid further advance amount of Rs.2,00,000/- through cheque dtd:31/3/2006 in favour of 10th defendant and Rs.1,00,000/-, Rs.2,00,000/- Rs.2,00,000/- through cheques dated 31.03.06 and 15.07.06 to 9th defendant; Rs.2,00,000/- each through two cheques dtd:15/7/2006 to 6th defendant and Rs.2,00,000/- to 10th defendant through cheque dtd:15/7/2006; Rs.5,00,000/- each to defendant No.1 to 3 through cheques dtd:27/10/2006 and Rs.4,00,000/- by way of cash to 9th defendant on 16/11/2006. Thus, in all, plaintiff paid Rs.52,00,000/- to defendants. Defendants have not disputed these payments.

78. Both parties admitted Memorandum of Understanding as per Ex.P.1. Recitals of Ex.P.1 are very important to be looked in to at this stage. According to this Memorandum of Understanding, defendants agreed to give their share of land to plaintiff on joint development basis having 39% towards them and balance 61% towards plaintiff. It is further agreed that on signing of the Memorandum of Understanding and after receiving cheques for Rs.2,00,000/- each, defendants shall hand over all the documents as detailed in Annexure-I as required by advocate to enter into Joint Development Agreement. This Annexure-I is marked as Ex.P.2. According to this Annexure-I, defendants have to hand over EC from 1/4/1970 till date, latest tax-paid receipt, index of land, record of rights, mutation register extract, family tree, occupancy certificate, certified copy of order sheet issued by Spl.DC in Case No.79/1959-60, sketch, extent of purchased land and boundary of the property, papers in original suit for partition between the sons of V.Narayana Reddy and Venkataswamy Reddy and his sons, papers in original suit O.S.No.10272/87, partition deed, RTCs, etc. i.e. totally 35 documents.

79. It is further agreed under Memorandum of Understanding that plaintiff shall apply for DC conversion at its cost and after getting the same, registered Joint Development Agreement will be entered and application will be submitted to BDA for sanction.

80. On careful perusal of all the above conditions in Memorandum of Understanding, it is crystal clear that at first, defendants have to hand over all relevant documents to plaintiff and then, plaintiff has to made endeavour to get conversion of land from agricultural purpose to non- agricultural purpose before D.C. and only afterwards, Joint Development Agreement is to be executed between parties. The share of plaintiff and defendants was also decided under this Memorandum of Understanding.

81. The contention of plaintiff is that defendants have not handed over documents to plaintiff mentioned in this Annexure-I as per Ex.P.2. Though Annexure-I is marked as Ex.P.2, defendant Nos.6 to 9 have taken contention that Ex.P.2 is a concocted and created one and it is not the original annexure of Ex.P.1 and in this regard, in the cross-examination at para No.7, D.W.3 has deposed that he was having the original annexure of Ex.P.1; but, now it is with his earlier advocate and not with him.

82. If really, D.W.3 was possessed the actual annexure of Ex.P.1 and given it to his earlier advocate, nothing prevented him to obtain the same from his earlier advocate and he could have produced it before the court to prove that Ex.P.2 is not the actual annexure to Ex.P.1 and Ex.P.2 is concocted document.

83. On the other hand, D.W.2 in his cross-examination at page No.2, categorically admitted that they have admitted under Ex.P.1 that the documents shown in Annexure-I would be handed over to plaintiff; and Ex.P.2 is said Annexure-I. This shows that Ex.P.2 is the Annexure to Ex.P.1 and D.W.3 has not produced any materials to disbelieve it.

84. According to D.W.2, the documents shown in Annexure-I were handed over to plaintiff by defendant Nos.1 to 3 and not by him. But, D.W.2 is not having any document to show that those

documents were handed over to plaintiff.

85. D.W.1 in his affidavit evidence has stated that he is giving evidence only on behalf of defendant Nos.1 to 3. He has stated that when they have submitted all the necessary documents of the land in question and at the insistence of the plaintiff, a partition was also registered amongst them and defendant Nos.1 to 4 on 23/7/2006 showing the exact area of land owned by them in Sy.No.74 of B.Narayanapura. However, to substantiate that all the documents were furnished to plaintiff, D.W.1 has not produced any materials before this court. In the cross-examination, he denied the suggestion that he has not furnished any one of the documents referred and required in Ex.P.1 i.e., shown in Ex.P.2. In further cross-examination, D.W.1 has deposed that he has not taken any endorsement from plaintiff for handing over documents shown in Ex.P.2. Thus, it is crystal clear that D.Ws.1 and 2 have not produced any documents to show that they have handed over the required documents to plaintiff for conversion of property to non-agricultural use.

86. D.W.3 has taken some other version that they have already issued notice to plaintiff calling upon it to perform its part of contract as per Memorandum of Understanding. In the cross-examination, D.W.3 has deposed that they have furnished Ex.D.1-partition deed, RTC pertaining to their share i.e., to the share of defendant Nos.6 to 9 and G.Tree to plaintiff during 2006. Except these documents, no other documents were furnished by this D.W.3 to plaintiff. However, as already stated above, in Ex.P.2 so many other documents are to be handed over to plaintiff by defendants.

87. In Ex.P.1, at page No.2, it is declared by defendants that the property is free from all types of acquisition and encumbrance and litigation and will be handed over to the plaintiff. Furthermore, as already stated above, in its Annexure, i.e., in Ex.P.2, defendants were to hand over papers pertaining to partition suit pending between defendant Nos.1 to 3 and other defendants and they also have to hand over papers pertaining to O.S.No.10272/1987. But, there is no evidence to show that these papers were handed over by defendants to plaintiff. Though in the Memorandum of Understanding, it is stated that there is no litigation pertaining to the property in question, it is the contention of plaintiff that there was suit filed by Smt.Narayanamma against defendants pertaining to suit Sy.No.74 and some other suits were also pending and these facts were suppressed by defendants at the time of entering into Memorandum of Understanding.

88. In the written statement, defendant Nos.1 to 3 have stated at para No.3 that the suit filed by sisters of the defendants is also within the knowledge of plaintiff and the plaintiff has agreed to settle the matter with sisters of these defendants. By stating so, defendant Nos.1 to 3 in the written statement categorically admitted about the existence of suits between defendant Nos.1 to 3 and their sisters.

89. With this background, cross-examination of D.W.1 is to be looked in to. In the cross-examination, D.W.1 has stated that his sisters are Yashoda, Sarojamma and Meenakshi. At first, he denied the suit for partition filed by his sisters against him and also denied the suit filed by defendant Nos.4 and 5 against him. But in the subsequent cross-examination, he admitted that his sisters i.e., Smt.Yashoda, Sarojamma and Meenakshi have filed suit claiming partition in the site situated at Jogupalya of Ulsoor and it was intimated to plaintiff. He further deposed that the

plaintiff asked whether any suit or proceeding is pending in respect of the property given to the plaintiff and therefore, they disclosed that one suit is pending. He again deposed that it was not intimated to plaintiff. Thus, the evidence of D.W.1 on this fact is very shaky. He is not definite about the existence of suit pertaining to suit schedule property or for any other property by his sisters. However, D.W.3 in the cross- examination has deposed that defendant Nos.4 and 5 have filed suit against defendant Nos.6 to 9 and others praying for the relief of partition and said suit was filed prior to Ex.P.1 and it is still pending before Mayo Hall courts. But he has not remembered the number of said suit and according to him, said suit is nothing to do with the property mentioned in Ex.P.1.

90. D.W.2 in the cross-examination at page No.5 has deposed that Yashoda, Sarojamma and Meenakshi are the sisters of defendant Nos.1 to 3, but he does not know that they have filed suit for partition.

91. D.W.2 has deposed that O.S.No.16483/2004 was filed by defendant Nos.4 and 5 for partition and it was told to plaintiff. According to him, he himself told the pendency of said suit to plaintiff. But, after showing Ex.P.1, he admitted that there is recital in Ex.P.1 that no suit is pending and he has deposed that they have decide to compromise the suit by themselves and hence, there is such recital in Ex.P.1.

92. The above evidence of D.Ws.1 to 3 and written statement of defendant Nos.1 to 3 made it very clear that the sisters of defendant Nos.1 to 3 have filed the suit for partition; defendant Nos.4 and 5 have filed the suit for partition. It is the contention of defendants that the suit schedule property is not included in those suits and hence, there was no bar for plaintiff to continue with Memorandum of Understanding. However, none of these defendants have made any efforts to produce the certified copies of plaints in those suits to know whether the present suit schedule property was not the suit schedule property in those suits.

93. It is also an admitted by D.Ws.1 to 3 that one Smt.Narayanamma has filed suit against defendant Nos.1 to 3 pertaining to Sy.No.74. A portion of Sy.No.74 is the suit schedule property. Further D.W.1 specifically deposed that said suit was pertaining to northern portion of Sy.No.74 and not pertaining to present suit schedule property. Defendants have produced RTCs pertaining to said Sy.No.74 as per Ex.D.4 and Ex.D.5. They reveal that Sy.No.74 of B.Narayanapura totally measures 5 acres 8 guntas. The present suit schedule property is only 1,08,000 sq.ft. out of this Sy.No.74. The schedule of Memorandum of Understanding reveals that this 1,08,000 sq.ft. property was bounded on East by same survey number and road, West by Industrial Estate, North by Road and remaining portion of the same survey number. Thus, it is clear that only a portion of Sy.No.74 is the property involved in the present suit. But, if plaints of all the above suits were produced by defendants, then, it could be gathered that whether the present suit schedule property was part and parcel of those suits or not. D.W.1 admitted that Smt.Narayanamma has filed suit against defendant Nos.1 to 3 in respect of Sy.No.74 and he also admitted that this was not disclosed to plaintiff. He also admitted that the suit filed by Narayanamma reached Hon'ble High Court of Karnataka.

94. D.W.2 in his cross-examination has deposed that Narayanamma has not filed suit against him, but it was filed against defendant Nos.1 to 3 and filing of said suit by Narayanamma was known to him before execution of Ex.P.1. He does not know whether Narayanamma has filed suit pertaining to suit schedule property.

95. D.W.3 in his cross-examination at para No.10 has deposed that Smt.Narayanamma has not filed suit against defendant Nos.6 to 9 and he does not know whether she filed suit against other defendants or against his father. But in the further cross-examination at Para 13, he has deposed that the suit filed by Narayanamma is dismissed and she was evicted from the property which was in her possession. In the subsequent para No.16, he has deposed that Narayanamma vacated the property in the year 2015. Thus, it is crystal clear that Narayanamma has filed suit pertaining to Sy.No.74, but it is for defendants to prove that said suit is not pertaining to suit schedule property. However, by non-production of plaint of said suit, defendants failed to prove that said suit is not pertaining to suit schedule property. Then it is to be presumed that Narayanamma has filed suit pertaining to suit schedule property only.

96. The above discussion reveals that there were 3 suits filed in between defendant Nos.4 and 5 and other defendants, sister of defendant Nos.1 to 3 against defendant Nos.1 to 3 and Narayanamma against defendant Nos.1 to 3. Under these circumstances, definitely, plaintiff could not have completed the Memorandum of Understanding as required under Ex.P.1.

97. P.W.1 was cross-examined in length by defendants on these points. P.W.1 in the cross-examination has specifically deposed that he has not issued notice to defendants calling upon them to furnish documents mentioned in Ex.P.2; he has not issued notice to defendants that he was ready and willing to execute Joint Development Agreement and he has not issued notice to defendants calling upon them to perform their part of contract. Hence, learned counsel for defendants vehemently submitted that it is the plaintiff who is in fault in performing its part of the contract and hence, they are not liable to pay back the amount to plaintiff.

98. Learned counsel for defendant No.6 to 10 further submitted that they have issued legal notice to plaintiff calling upon them to perform its part of the contract and it was not replied by plaintiff and it also substantiate their above contention.

99. The copy of said legal notice was marked through D.W.3 as per Ex.D.7. Ex.D.7 is dtd:3/4/2009. This legal notice was issued on behalf of defendant Nos.6 to 10. In this legal notice, it is stated that plaintiff has not completed the project as agreed under Memorandum of Understanding and has not taken steps for development of the land; they should not tolerate it and thus, they have suffered loss mentally and physically and claimed damages of Rs.5,000/- per day and to commence the development work within one month.

100. While discussing issue No.3, this court already held that the suit instituted by plaintiff on 9/3/2009 for all practical purposes. Thus, it is only after filing the suit, said notice was issued by defendant Nos.6 to 10. Hence plaintiff has not given reply to it.

101. The contention of plaintiff is that as there were litigations pertaining to suit schedule property, plaintiff has not issued notice to defendants calling documents from them and demanding them to perform their part of the contract or showing his readiness and willingness.

102. In the above discussion, this court already held that there were litigations pertaining to suit schedule property. Hence, plaintiff has not made efforts to continue the Memorandum of Understanding. However, it is to be noted here that even with the available documents, plaintiff has applied for conversion before D.C. and then, officials of D.C. office have visited the suit schedule property and at that time, Narayanamma has not allowed them to survey the suit schedule property.

103. In the cross-examination, D.W.1 admitted that plaintiff has applied for conversion. He also admitted that BDA authorities have come for inspection of the suit schedule property after applying for conversion. But, he denied the suggestion that Narayanamma drove out plaintiff and BDA authorities by holding chopper when they came for inspection. D.W.2 has deposed that he does not know about it. D.W.3 also admitted that Narayanamma filed suit against defendant Nos.1 to 3. Thus, it is clear that Narayanamma had filed suit and when plaint of said suit is not produced, suit filed by her might be pertaining to suit schedule property. It is very clear that the plaintiff had made efforts to get land converted for non- agricultural purpose. Because of litigation, it has not completed the said project. Furthermore, plaintiff has not filed the present suit for specific performance of the agreement i.e., for enforcement of terms and conditions of Memorandum of Understanding, but filed the present suit only for recovery of amount paid under Memorandum of Understanding by plaintiff.

104. Defendant Nos.1 to 3 took contention that they are owners in possession of only 33,000 sq.ft. and other defendants are owners of the remaining property and it was known to plaintiff. To substantiate this contention, defendants have relied upon Ex.D.1-certified copy of Regd. Partition Deed dtd:27/3/2006. On perusal of this document, this court noticed that defendant Nos.1 to 3 on one part and remaining defendants on other part have partitioned the properties which include the suit Sy.No.74. There is reference of earlier partition deed dtd:21/12/1998 in this Regd. Partition Deed. But, according to this document, there were some few changes in the schedule and hence, they have entered into this new Regd. Partition Deed. Thus, it is very clear that this partition amongst defendant Nos.1 to 10 took place only after execution of Memorandum of Understanding dtd:12/3/2006. Hence, as on the date of Memorandum of Understanding, it is to be presumed that defendant Nos.1 to 10 were joint owners of suit Sy.No.74 and accordingly, they have executed Memorandum of Understanding. Even in Memorandum of Understanding as per Ex.P.1, there is no recital about the earlier partition deed dtd:21/12/1998. But, only in the Annexure, it is mentioned about the sketch which is part and parcel of partition deed dtd:21/12/1998 was to be produced by defendants. All the defendants together were 1st party and plaintiff was 2nd party in the Memorandum of Understanding. It is recited that 1st party is the owner of the suit schedule property and they entered agreement with plaintiff.

105. Defendants have also produced the copy of the sketch as per Ex.D.2. This is not part and parcel of Ex.D.1. It is not mentioned in the affidavit evidence of D.W.1 or in his examination-in-chief of D.W.1 that Ex.D.2 is the part and parcel of Ex.D.1. Ex.D.2 is not authenticated document. Because, it



is not bearing the seal or signature of any revenue authorities. It is only a copy containing the carbon copies of signatures of defendants. Even by looking in to Ex.D.2, it is not possible to ascertain that what was the property agreed to be given to plaintiff.

106. Ex.D.4 and Ex.D.5 are RTCs of suit Sy.No.74. They reveal that as per partition MR 21/2005-06 dtd:3/8/2006, Sy.No.74 was mutated in to the respective names of defendant Nos.1 to 3 together and defendant Nos.4 to 10 together i.e., only after execution of memorandum of understanding. As already discussed above, amongst defendant Nos.4 to 10 itself, there is dispute and the partition suit amongst them is still pending. When there is no consensus of mind amongst defendant Nos.1 to 10, then, it is not possible for plaintiff to get the land converted for non-agricultural purpose. Defendant Nos.4 to 10 along with children of Ramareddy partitioned the properties as per Registered Partition Deed dtd:23/10/2006. But even after this partition deed, suit amongst them is not concluded and it is still in force, which is clear from cross-examination of D.W.3. Thus, it reveals that there is still dispute amongst defendant Nos.4 to 10 interse.

107. Plaintiff has produced Ex.P.3 to Ex.P.5, the bank account extracts. Ex.P.3 is the bank account extract of Durga Infrastructure and Company at Axis Bank. Ex.P.4 is the bank account extract of Durga Projects INC at Axis Bank. Ex.P.5 is the bank account extract of M/s.Durga Projects Inc. at Union Bank of India. The address of the parties mentioned in Ex.P.3 and Ex.P.4 is one and the same and that is the plaint cause title address. The address in Ex.P.5 is No.15, Bull Temple Road, Basavanagudi, Gandhi Bazar, Bangalore which is the address mentioned in partition deed as per Ex.P.6.

108. While discussing additional issue No.1, this court has made reference about these 3 documents in detail. P.W.1 was not cross-examined about Ex.P.3 to Ex.P.5 in earlier cross-examination held on several dates. Only after P.W.1 has produced partition deed and other allied documents, learned counsel for defendant Nos.4 and 5 intended to cross-examine P.W.1 about Ex.P.3, but it was not allowed, because, he was recalled only regarding evidence on additional issues. Thus, as it is, there is no cross-examination to P.W.1 on Ex.P.3 to Ex.P.5.

109. At the time of arguments, learned counsel for defendants vehemently submitted that Ex.P.3 is not pertaining to plaintiff firm. However, some amount to defendants was disbursed from said bank account. Hence, defendants cannot repay the amount to plaintiff. However, it is pertinent to note here that in the written statement, defendants have categorically admitted the receipt of payment from plaintiff under Memorandum of Understanding and subsequently as discussed earlier. Furthermore, while cross-examining P.W.1 also, there are specific suggestions to him which reveals that defendants admitted the receipt of money from plaintiff itself.

110. The name in Ex.P.3 itself reveals that said Durga Infrastructure Company might be the sister concern of plaintiff firm. However, we are not concerned about it. Because, though some amounts were paid through another company, defendants admitted receipt of this payment even by endorsing in Ex.P.1 and making suggestions to P.W.1. The admitted facts need not be proved.

111. In this regard, learned counsel for plaintiff relied on the citation reported in AIR 1992 P & H 252 in "Mahant Mela Ram Chela Mahant Inder Dass v/s Shiromani Gurudwara Parbandhak Committee, Amritsar" wherein, their Lordships held as under:-

"The statement of this witness in examination-in-chief that the Mahants of the Dera worship Baba Siri Chand and Gola Sahib and that they are Udasis by faith was not assailed in cross-examination. It is well established rule of evidence that a party should put to each of its opponent's witness so much of his case as concerns that particular witness. If no such questions are put, the Courts presume that the witness account has been accepted."

112. In the above said ruling, their Lordships have clearly held that if no questions are put to witness, the Courts presume that the witness account has been accepted by the opposite party.

113. In the instant case also, as discussed above, defendants have not disputed Ex.P.3 to Ex.P.5 and they have not specifically put suggestion to P.W.1 regarding these documents. In cross-examination at Page No.12, it was specifically suggested to P.W.1 that at the time of Ex.P.1, he paid Rs.2,00,000/- each to defendant Nos.1 to 10 through cheques dated: 12/3/2006 and 13/3/2006 and P.W.1 admitted this suggestion. In the further cross-examination at page No.16, P.W.1 deposed that he has paid Rs.5,00,000/- each to defendant Nos.1 to 3 subsequently. Further suggestion was put to P.W.1 in cross-examination at page No.27 that he has not demanded defendant Nos.4 and 5 or issued notice within 3 years from 12/3/2006 and hence, suit against defendant Nos.4 and 5 is barred by limitation and this witness denied the said suggestion. But, by putting such suggestion, defendant Nos.4 and 5 clearly admitted the payment. Furthermore, in the earlier cross-examination itself, P.W.1 has deposed that as told by defendants, they split the amount and issued cheques for Rs.2,00,000/- each in favour of all defendants.

114. In the cross-examination at Page No.2, D.W.1 admits the receipt of Rs.2,00,000/- each initially to him and defendant Nos.1 and 2; and also admits receipt of Rs.5,00,000/- each to him and defendant Nos.1 and 2 subsequently from plaintiff. D.W.2 in the cross-examination admitted that under Ex.P.1-Memorandum of Understanding, plaintiff has paid Rs.2,00,000/- to him and defendant No.5.

115. D.W.3 in the cross-examination at page No.8 at para No.16 admitted that plaintiff has given amount to him towards consideration for execution of Joint Development Agreement. In the written statement also defendant Nos.6 and 8 have admitted the receipt of amount to them and also to other defendant Nos.7, 9 and 10. Hence, it is crystal clear that plaintiff has paid the amount totally amounting to Rs.52,00,000/-.

116. It was suggested to P.W.1 that there is no recitals in Ex.P.1 that in case of failure, the plaintiff is entitled for refund of the amount and P.W.1 admitted it.

117. Learned counsel for defendants vehemently submitted that as per Ex.P.1, Rs.45,00,000/- payable by plaintiff was non-refundable deposit and hence, they are not liable to pay the suit claim.

It is an admitted fact that there is such recital in Ex.P.1. It is admitted by both parties that Memorandum of Understanding was executed between parties only to get conversion of suit schedule property and there afterwards, they intended to develop the land and intend to get Registered Joint Development Agreement. It is an admitted fact that such Joint Development Agreement has not come into existence. This is because of the litigations which were pending pertaining to suit schedule property. When the plaintiff has paid the amount only towards consideration for execution of Joint Development Agreement, if Joint Development Agreement had been executed and the land was developed as agreed, definitely, then Rs.45,00,000/- would be non-refundable deposit, but when JDA was not at all executed, defendants cannot claim that Rs.45,00,000/- was non-refundable deposit and hence, they are not liable to pay it. Furthermore, defendants cannot enrich by their own fault.

118. Further contention raised by defendants is that they are liable to pay only the amount which was received by them and not the amount received by other defendants. In this regard, they mainly relied upon Ex.D.1 and Ex.D.6 Registered Partition Deeds and contended that because of these partition deeds, their properties are already divided and it was known to plaintiff and hence, they are not liable to pay respective claim of other defendants.

119. In this regard, P.W.1 was cross-examined in length by the counsels of defendant Nos.1 to 3, 4 & 5, 6 to 9. In the said cross-examination, it was specifically suggested to P.W.1 that defendant Nos.1 to 3 are owners of 33,000 sq.ft. and defendant Nos.4 to 10 had given 75,000 sq.ft. in 2 bits for Joint Development Agreement, but P.W.1 denied the said suggestion. P.W.1 denied the suggestion that defendant Nos.4 to 10 agreed to give only 56,000 sq.ft. in one place and 93,000 sq.ft in another place. He has deposed that he was not aware about the partition amongst defendants.

120. As already discussed above, defendants together being 1st party have executed Memorandum of Understanding in favour of plaintiff and hence, defendants together are liable to pay the amount received by them and they are jointly and severally liable to pay the amount.

121. Plaintiff claims interest on this Rs.52,00,000/- at 18% p.a. from 12/3/2006. However, admittedly plaintiff has not paid the entire Rs.52,00,000/- on one single day to all the defendants, but amount was paid on different dates in installments to different defendants. Hence, plaintiff is not entitled to claim interest from 12/3/2006 on entire amount.

122. The transaction between plaintiff and defendants was commercial in nature. It is an admitted fact that plaintiff is doing business. There is no written agreement between parties, plaintiff is entitled for interest at 10% p.a. and not at 18% p.a. as claimed in the suit. If the plaintiff had kept the amount in Fixed Deposits in any of the nationalized banks, plaintiff would get minimum interest at 10% p.a. Hence, plaintiff is entitled for Rs.52,00,000/- with interest at 18% p.a. from respective dates of payments till realization. Accordingly, issue Nos.1 & 2 are answered partly in affirmative.

ISSUE No.4

123. In view of findings on Issue Nos.1 to 3 and additional issue Nos.1 to 3; this court holds that plaintiff is entitled for judgment and decree partly. Accordingly, this issue is answered partly in affirmative.

#### ISSUE No.5

124. In view of findings on issue Nos.1 to 5 and additional issue Nos.1 to 3, this court proceeds to pass the following:-

ORDER Suit is partly decreed with costs against all the defendants for a sum of Rs.52,00,000/- with interest at 10% p.a. from respective dates of payments till realization.

All the defendants are jointly and severally liable to pay the decretal amount.

(Dictated to the Judgment Writer, transcribed and computerized by her, corrected and then pronounced by me in the open Court on this the 17th day of October, 2015).

(K.B.GEETHA) XIX ADDL.CITY CIVIL & SESSIONS JUDGE, BANGALORE CITY.

ANNEXURE I. List of witnesses examined on behalf of :

(a) Plaintiff's side :

P.W.1 - Niraj Jhunjunwala

b) Defendants' side :

D.W.1 - N.Prakash Reddy D.W.2 - G.Pradeep Reddy D.W.3 - V.Mallesw Reddy II. List of documents exhibited on behalf of :

(a) Plaintiff's side :

Ex.P.1	Memorandum of Understanding dtd: 12/3/2006
Ex.P.2	Annexure-I attached to Memorandum of Understanding

Ex.P.3	Axis Bank Statement of accounts for the period from 1/3/2006 to 28/2/2007
Ex.P.4	Statement of account of Axis Bank for the period from 11/7/2006 to

- 11/11/2006
- Ex.P.5 Statement of account of Union  
Bank of India for the period from  
1/3/2006 to 6/5/2006
- Ex.P.6 Certified copy of the Partnership  
Deed dtd: 24/1/2005
- Ex.P.7 Memorandum issued by Registrar  
of Firms
- Ex.P.8 Resolution of plaintiff firm

(b) Defendants' side : -

- Ex.D.1 Certified copy of the Partition Deed  
dtd: 27/3/2006
- Ex.D.2 Copy of sketch
- Ex.D.3 GPA executed by defendant Nos.4  
and 5
- Ex.D.4 & 2 RTCs
- Ex.D.5
- Ex.D.6 Certified copy of Partition Deed  
dtd: 23/10/2003
- Ex.D.7 Xerox copy of legal notice dtd:  
3/4/2009

(K.B.GEETHA)  
XIX ADDL.CITY CIVIL & SESSIONS JUDGE,  
BANGALORE CITY.

GVU/-