**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO.227 OF 2009**

Mrs. Malati Kashinath Singh .. Applicant
Vs.
Shri Bhikari Kedar Singh and Ors .. Respondents

**WITH**

**CIVIL REVISION APPLICATION NO.173 OF 2009**

Saastha Warehousing Limited ..Applicant

Vs
Shri Bhikari Kedarsingh and Ors .. Respondents

Mr. Ajay Basutkar i/b Mr. B.S.Nayak, Advocate for Applicant in CRA/227/2009.

Mr.Mohit Arora i/b Nitin Mulye for Applicant in CRA/173/09

Mr. Atul Damle, Senior Advocate i/b J.P.Singh, Advocate for Respondents no.1 to 3.

CORAM : R.G.KETKAR,J.
DATE : 15/11/2016

**PC**:

1. Heard Mr. Ajay Basutkar, learned counsel for the applicant in C.R.A.No.227 of 2009, Mr. Mohit Arora, learned counsel for the applicant in C.R.A.No.173 of 2009 and Mr. Atul Damle, learned senior counsel for respondents no. 1 to 3 at length.

2. Both these Applications are directed against the Judgment and order dated 9.3.2009 passed by the learned Civil Judge, Senior Division, Panvel below Exhibits-33 and 34 in Special Civil Suit No. 444 of 2007. By that order, the learned trial Judge rejected the application-Exhibit-33 filed by defendant no.1 as

also rejected the application-Exhibit-34 filed by defendant no.3 under Order VII, Rule 11(d) of C.P.C. for dismissing the suit on the ground that the suit is instituted by partners of plaintiff no.3 which is unregistered firm against defendants no. 1 and 2 who are also partners of the said firm. In view of Section 69(1) of the Indian Partnership Act, 1932 (for short, 'Act'), suit is not maintainable. Parties shall, hereinafter, be referred to as per their status in the trial Court.

3. Plaintiffs have instituted suit, inter-alia, praying for declaration that the lands, more particularly described in Schedule 'C' to the plaint (for short, 'suit property'), are of the common ownership of partners of plaintiff no.3-Shree Developers and each of the plaintiffs and defendants no.1 and 2 have undivided 1/4$^{th}$ share in the said property individually as partners of plaintiff no.3; for declaration that sale deed dated 22.12.2006 executed by defendant no.1 in favour of defendant no.3 is executed by committing fraud and to the detriment of the interest of the other co-owners; for declaration that the sale deed executed by defendant no.1 in favour of defendant no.3 dated 22.12.2006 is void, illegal and not binding on the plaintiffs to the extent of their ½ share in the suit property; for cancellation and setting aside sale deed dated 22.12.2006 to the extent of plaintiffs' undivided half share in the suit property; for partition and separate possession of undivided half share of the plaintiffs;

for direction to defendant no.1 to give account of compensation money received from Hindustan Petroleum and Reliance Company for allowing right of user for the said companies under Petroleum Pipe Line Act,1962; for payment of half amount out of that amount to the plaintiffs from defendant no.1; for damages of Rs. 1,00,000/- for loss of income and damages for the year 2006-2007 and future mesne profits, among other reliefs.

4. In paragraph no.1, the plaintiffs contended that plaintiffs no.1 and 2 and defendants no.1 and 2 were acquainted with each other. They decided to have a joint venture project of selling developed plots of land to intending buyers. Plaintiff no.1 and defendant no.1 formed a partnership. Accordingly, a deed of partnership was drawn on 9.1.1996. It was drafted by defendant no.2. In pursuance of the deed of partnership, application for registration of the firm was sent to Registrar of Firms on 29.2.1996. Receipt of even date by depositing Rs.150/- for registration of the said partnership firm under Section 58 of the Act was obtained.

5. It was further asserted that on 9.5.1996, a fresh deed of partnership was drawn between the plaintiffs and defendants no.1 and 2 and Shri Sushil R. Jain. The said partnership deed was intimated to the registrar of Firms, Mumbai with appropriate form singed by all concerned and amount of Rs. 21/- was paid on 8.8.1996 and to that effect receipt was issued by Registrar of

Firms, Maharashtra, Mumbai in the name of plaintiff no.3. On 31.12.1997, Shri Sushil R. Jain retired from the said partnership. The necessary intimation was given to the Registrar of Firms, Mumbai.

6. In paragraph 16, the plaintiffs asserted that vide sale deed dated 22.12.2006, defendant no.1 sold the land that was purchased by plaintiff no.3 to defendant no.3. Defendants no.1 and 3 executed the sale deed in collusion and conspiracy between them. Defendant no.1 represented that she is a partner of plaintiff no.3 in the body of the sale deed. In the sale deed, defendant no.1 represented that if objections are raised, defendant no.1 being partner will clear those objections.

7. In paragraph 18, the plaintiffs asserted that defendant no.1 had no authority to enter into said transaction with defendant no.3. There was no unanimity of decision among the four co-owners of the land as partners of plaintiff no.3. Defendant no.1 has committed fraud in disposing of the land belonging to other partners of plaintiff no.3, i.e. plaintiffs and defendant no.2.

8. In paragraph 24, the plaintiffs asserted that defendant no.3 has not exercised due care and caution as a purchaser. Defendant no.3 is not a bonafide purchaser for value without notice. Defendant no.3 has not acquired any title in pursuance of the sale deed executed by defendant no.1 in its favour. In paragraph 25, the plaintiffs asserted that defendant no.1 has

deposited sale proceeds in saving bank Account no.4943 of the Bombay Mercantile Cooperative Bank, Branch Takka Panvel. Saving account cannot be operated or opened by partnership firm. Defendant no.1 along with her husband has opened the said account in personal capacity and has deposited cheque of sale proceeds of partnership property. Defendant no.1 is not entitled to appropriate the said amount.

9. Defendant no.1 filed application Exhibit-33 under Order VII, Rule 11(d) of C.P.C.. Defendant no.3 filed application Exh.34 under Order VII Rule 11(d). Defendants no.1 and 3 mainly contended that in view of Section 69 of the Act, suit instituted by unregistered partnership firm and its two partners primarily against its other two partners is not maintainable. Plaintiffs filed reply Exhibit 38 resisting the applications. By the impugned order, the learned trial Judge has rejected the applications. It is against this order, defendants no.1 and 3 have instituted above Civil Revision Applications.

10. In support of C.R.A. No.173 of 2009, Mr. Arora strenuously contended that before the learned trial Judge, decisions in Gandhi Company Vs. Krishna Glass Pvt Ltd, 1983 Mh.l.J. 1036 as also of the Apex Court in the case of Shriram Finance Corporation Vs. Yasin Khan, 1989 Mh.L.J. 849 were referred to contend that in view of Section 69 of the Act, suit by unregistered partnership firm is not maintainable. He has taken me through

plaint as also sale deed dated 22.12.2006 executed by defendant no.1 in favour of defendant no.3 as also partnership deeds dated 9.1.1996 and 9.6.1996. He submitted that while rejecting the applications, the learned trial Judge referred to the decision of the Apex Court in the case of Haldiram Bhujiawala Vs Anand Kumar Deepak Kumar, (2000) 3 SCC 250. He submitted that the said decision is not applicable to the facts of the present case. He submitted that in that case, the Apex Court has held that suit is not barred by section 69(2) of the Act if a statutory right or common law right is being enforced. In that case, the question that fell for consideration before the Apex Court was as to the nature of right sought to be enforced in that suit. It was held that a passing off action is a common law action based on tort. Therefore, a suit for perpetual injunction restraining the defendants not to pass off the defendants' goods as those of the plaintiffs' trademark and for damages as an action at common law and is not barred by Section 69(2). He submitted that the learned trial Judge quoted paragraph 25 of the said decision and in paragraph 8 merely observed that the facts in the present case are not different than those reported in paragraph 25 of Haldiram's case. The observations made in paragraph 25 are fully applicable to the present case. The learned trial Judge accordingly rejected the applications. He, therefore, submitted that the impugned order is liable to be set aside.

11. On the other hand, Mr. Damle supported the impugned order. He has taken me through paragraphs 16 and 23 to 25 of the plaint. He submitted that basically the suit property belongs to the partnership firm. Defendant no.1 was not authorized to dispose of the suit property to defendant no.3 as there was no unanimity of decision among 4 co-owners of the land as partners of plaintiff no.3. Defendant no.1 has committed fraud in disposing of the suit property belonging to other partners of plaintiff no.3, i.e. Plaintiffs and defendant no.2. He also invited my attention to paragraph 25 of Haldiram's case and submitted that the learned trial Judge rightly came to the conclusion that the suit does not arise from any contract which defendant no.1 entered into in the course of the plaintiff's firm business with defendant no.3. The suit is based on the sale deed executed by defendant no.1 illegally and without any authority of law.

12. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have referred to the partnership deed dated 9.1.1996 entered into by and between plaintiff no.1 and defendant no.1 and subsequent partnership deed dated 9.5.1996 entered into among plaintiffs no.1 and 2 and defendants no.1 and 2. Plaintiffs have also challenged the sale deed dated 22.12.2006 which is executed by plaintiff no.3 Shree Developers through its partner defendant

no.1 Malti Kashinath Singh in favour of M/s Sastha Warehousing -defendant no.3. Defendants no.1 and 3 filed applications under Order VII, Rule 11(d) contending that in view of Section 69 of the Act, suit to enforce a right arising from a contract or conferred by the Act cannot be instituted in any Court by or on behalf of a firm against any third person unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. Prima facie, plaintiff no.3 is not a registered firm though the plaintiffs came with the case that they have made application for registration as contemplated by Section 58 of the Act. Prima facie, as on date plaintiff no.3 is not a registered partnership firm. Perusal of the impugned order shows that on behalf of the defendants, reliance was placed on the decision of this court in Gandhi Company (supra) wherein it was held that two conditions prescribed by section 69(2) of the Act, namely, that 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. Both these conditions are required to be satisfied before suit can be properly instituted.

13. Defendants also relied upon the decision of the Apex Court in the case of Shriram Finance Corporation (supra) wherein it was held that on the date when the suit was instituted on behalf of

partnerships, current partners on the date of suit were not shown in the register of Firms. Suit as was filed was not maintainable under section 69(2) of the Act. Amendment on a later date of the plaint cannot save the suit. In paragraph 7, the learned trial Judge referred to the submissions advanced on behalf of the parties and reproduced paragraph 25 of Haldiram's case. In paragraph 8, the learned trial Judge observed thus:

> "8. Relying upon the above observation of the Hon'ble Supreme Court in recent case law of year 2000, there is no bar of section 69 when the suit is filed in respect of property owned by the unregistered firm against the partner of the said firm. The position in the present case before this court is not different than reported in paragraph 25 of the above case law. Hence, the above observation is fully applicable to the present case. Hence, relying upon the above said case law in Haldiram Bhujiawala Vs Anand Kumar Deepak Kumar, reported in 2000 DGLS (Soft) 425, the bar of section 69(1) and (2) is not attracted to the present suit, hence, I pass the following order."

14. Perusal of paragraph 8, extracted herein above, shows that the learned trial Judge rejected the applications mainly on the ground that the observations made in paragraph 25 of Haldiram's case and the position in the present case are identical and therefore the observations are fully applicable to the present case. In my opinion, the learned trial Judge ought to have considered the assertions made in the plaint as also documents referred in the plaint and the sale deed dated 22.12.2006 which is challenged in the suit. Impugned order is far from satisfactory. The learned trial Judge has also not dealt with the decisions in

Gandhi Company (supra) and Shriram Finance Corporation (supra). As the learned trial Judge has not considered the applications in terms of Order VII, Rule 11 (d), the impugned order is liable to be set aside thereby restoring applications Exhibits 33 and 34 for deciding it afresh. I have deliberately not dealt with merits of the case, lest any finding recorded herein may influence the learned trial Judge.

15. During the course of hearing, the learned counsel appearing for the parties assured that they will appear before the learned trial Judge on 5.12.2016 and for that purpose no fresh notice be issued to them. Learned counsel for the parties jointly requested to direct the learned trial Judge to dispose of the applications in a time bound manner. Hence, the following order.

(i) Impugned order dated 9.3.2009 is set aside.

(ii) Applications Exhibit-33 and 34 are restored to the file of the trial Court for deciding it afresh.

(iii) Parties agree that they will appear before the learned trial Judge on 5.12.2016 and for that purpose no fresh notice be issued to them.

(iv) Learned trial Judge is requested to decide the applications as expeditiously as possible and preferably within five weeks from the date of appearance of the parties.

(v) All contentions of the parties on merits are expressly kept open. Rule is made absolute in the above Applications with no order as to costs.

(R.G.KETKAR, J.)