IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 01ST DAY OF AUGUST 20178

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

A.NO.715 OF 2017
AND
A.No.1206 of 2017
IN
C.S. No.922 of 2016

M/s.Sreedevi Video Corporation
represented by its Partner
Mr.Ghanshyam Hemdev
No.5/3 Muktha Garden,
Spurtank Road,
Chetpet, Chennai 600 031 .. Plaintiff

-Versus-

1 Google India Pvt Ltd.
rep. by its Managing Director
8th and 9th Floor Tower C,
Building No.8,
DLF Cyber City, Gurgaon 122 002

2 You Tube
rep. by its Manager,
DMCA Complaints You Tube (Google INC)
901 Cherry Avenue,
SAN Bruno, CA94066 USA

3 Bing
Rep by its Manager
Microsoft Corpn of india Limited,
4th floor, Usha Jublee Town -36,
8-2-293/82/A/1130/A, road No.36,
Jubilee Hills, Hydarabad-500 033

4 Yahoo India
rep. by Manager
Torrey Pines, EGL business Park,
Inter Mediate Ring Road,
Bengaluru, Karanataka-560 071

5 Bharat Sanchar Nigam Ltd.
rep. by General Manager
Bharat Sanchar Bhavan,
Harish Chandra Mathur Lane,
Janpath, New Delhi- 110 001

6 Mahanagar Telephone Nigam Ltd.
rep. by its General Manager
Jeevan Bharthi Towers -I
No.124 Connaught Circus,
New Delhi – 110 070

7 Bharti Airtel Ltd.
rep. by its Secretary
Bharti Crescent
No.1, Nelson Mandela Road
Vasant Kunj, Phase II,
New Delhi 110 070

8 Aircel cellular Ltd.
rep by its Secretary,
5th Floor, "Spencer Plaza,
No.769, Anna salai,
Chennai 600 002

9 Hathway cable and Datacom Ltd
rep. by its Secretary,
4th Floor, "Rajehas"
Main Avenue,
Santacruz (W),
Mumabi-400 054

10 Vodafone India Ltd.
rep. by its secretary,
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel,
Mumbai 400 013

11 Idea cellular Ltd.
rep. by its secretary
Suman towers Plot No.18
Sector 11, Gandhinagar 382 011
Gujarat

12 Reliance communications
rep. by its Secretary
Dhirubai Ambani Knowledge City,
Navi Mumbai 400 709

13 Tata Teleservices Ltd.
rep. by its Secretary
Jeevan Bharti Towre I
No.124 Connaught circus,
New Dlehi 110 065

14 M/s Culture Machine

Hi Tech Media,
Venkateswara Colony,
Nehru Nagar, Perungudi,
Chennai Tamil Nadu

15 M/s.Cine Curry Tamil
401 Agarwal golden chambers,
Fun Republic Road
Behind Balaji Telefilms,
Off Link Road,
Andheri (West)
Mumbai 400 053

16 M/s.Super Cinema
Sarika A Jain,
C4/104 Ambika Building,
Sector 8, Shanthi Nagar,
Mira Road, Thane,
Mumbai -401 107

17 M/s Super south Tamil
401 Agarwal Golden chambers,
Fun Republic Road.
Behind Balaji Telefilms,
Off LInk Road,
Andheri (West)
Mumbai 400 053

18 M/s Mishri Movies Tamil
21/9 Cenotaph Road
2nd lane Raj Paris Apt,
Alwarpet,
Chennai 600 018

19 M/s Picture Hall
Sarika A Jain,
C4/104 Ambika Building,
Sector 8,
Shanthi Nagar,
Mira Road, Thane,
Mumbai 401 107

20 M/s.Boxtv
Times Boxty Media Pte Ltd.,
Times tower 7th Floor,
Trade Gardens, Kamala Mills compound,
Lower Parel,
Mumbai-400 013

21 Mr.Gajendra Chavan-Manager Acquisition
Hungama Digital Media Entertainment Pvt Ltd.

F1, Ist Floor,
Laxmi Woollen Mills Estate,
Sakthi Mills lane
Off Dr.E.Moses Road,
Mahalaxmi,
Mumbai 400 011,

22 M/s.Gobindas Entertainment Pvt Ltd.
124 Line No.1 Anupam Gardens,
Sainik Farms,
Saidulajad New Delhi 110 068

23 M/s.Bigflix
4th Floor,
Infinity Mall, New Link Road,
Andheri (West)
Mumbai 400 053

24 iDream Media
Arora colony Road
Sri Nagar Colony
Aurora Colony,
Banjara Hills,
Hyderabad 500 073

25 Divo Tv Private Ltd.
19/10 1C Parangasupuram Street,
Kodambakkam,
Chennai 600 024

26 Chennai Films Tamil
Nirvana Digital,
10 L.N pappan Marg,
Upper Worli,
Worli, Mumbai

27 K.Rajashekar Reddy
M/s. Top Films,
H No.433/55 Hal Colony,
Old Bowenpally,
Secunderabad 500 011

28 Moviezz
Bada Collections Chennai Private Limited,
78/12 Ist Street, Kazura Garden,
Nilankarai,
Chennai 600 041

29 Mr.Ashok Kumar
Unknown Person India

30 Mr.Ashok Kumar
Unknown Person India

*31 K.P.Vincent, S/o.Porunju
H.No.110/17, Vannyer Street,
Kodambakkam, Chennai-600 024 ... Defendants

*Amended as per order in A.No.3908 of 2017, dated 10.08.2017 and time extended by orders dt.24.08.2017and 31.08.2017.

A.No.1206 of 2017:
Hathway cable and Datacom Ltd
4th Floor, "Rajehas"
Main Avenue,Santacruz (W),
Mumabi-400 054 ...Applicant/9th Defendant

-vs-

M/s.Sreedevi Video Corporation
represented by its Partner
Mr.Ghanshyam Hemdev
No.5/3 Muktha Garden,
Spurtank Road,
Chetpet, Chennai 600 031 ...Respondent/Plaintiff
(no relief is claimed against of the
other Defendants in the present application
and hence they are not arrayed as Respondents herein)

Application praying that this Hon'ble Court be pleased to reject the plaint in C.S.No.922 of 2016.

A.No.715 of 2017:
1.Ms. Super Cinema
Sarika A Jain,
C4/104, Ambika Building
Sector 8, Shanthi Nagar,
Mira Road, Thane, Mumbai 401107
and presently having office at
No.204, Reliable Business Centre,
Near Oshewala Police Station
Andheri West, Mumabi 53

2.M/s. Picture Hall
Sarika A.Jain,
C4/104, Ambika Building
Sector 8, Shanthi Nagar,
Mira Road, Thane, Mumbai 401107
and presently having office at
No.204, Reliable Business Centre,
Near Oshewala Police Station
Andheri West, Mumabi 53 ...Applicants

-vs-

M/s. Sreedevi Video Corpn,
Represented by its Partner
Ghanshyamhemdev
No.5/3,Muktha Gardens
Spurtank Road, Chetpet,
Chennai 600 031 ...Respondent

Application praying that this Hon'ble Court be pleased to reject the plaint in C.S.No.922 of 2016.

These Applications coming on this day before this court for hearing the court made the following order:

A.No.715 of 2017 has been filed under Order 7 Rule 11(d) of CPC to reject the plaint in CS.No.922 of 2016. This application has been filed by the 16th and 19th Defendants in the suit.

2. A.No.1206 of 2017 has been filed under Order 7 Rule 11 of CPC read with Section 69 of the Partnership Act and Section 52 of the Copyright Act, 1957, to reject the plaint in CS.No.922 of 2016. This application has been filed by the 9th Defendant in the suit.

3. CS.No.922 of 2016 had been filed by the Plaintiff, M/s.Sreedevi Video Corporation, represented by its Partner, Ghanshyam Hemdev, against 32 Defendants. The suit had been filed under Sections 51, 52, 55 and 62 of the Copyright Act, 1957, read with the relevant provisions of CPC and Original Side Rules, seeking a judgement and decree, for the following reliefs:-

a) permanent injunction, forbearing the Defendants and other unknown persons known as Ashok Kumar, including other unknown persons, including their servants, subordinates, successors in interest, assigns or any one claiming through them from, infringing the copyrights owned by the Plaintiff in the Schedule mentioned films by copying, duplication, exhibition of images of the films in any medium which includes CDs, DVDs, Bluray Drives, VCDs, Multi Media Messaging Services, Television, Conditional Access Systems, Internet mediums in any dimension all through the world.

b) Mandatory injunction, by passing a direction against the intermediaries of interest services arrayed herein as the Defendants 1 to 13 and all websites which are described in the plaint Schedule here under and other unknown websites to block all Universal Resource Locators carrying the Schedule mentioned films through the medium of internet by uploading or downloading the same and permit only the Plaintiff and its licensees to exhibit and exploit the copyrights in the suit scheduled films.

c) directing the Defendants to pay costs.

4. In the Schedule-A to the plaint, a list of movies, TV Serials/drama, Malayalam films, Telugu films and glamour movies, had been given. They run to 1044 in number. Apart from that, in Schedule-B, a list of websites had been given and they run to 204 in number.

5. In the plaint, the Plaintiff had sought protection from infringing the copyrights owned by the Plaintiff in the movies mentioned in the Schedule and for mandatory injunction against the 1st to 13th Defendants and all the websites given in the Schedule to the plaint

to block the universal resource locators to prevent exploitation of the copyrights of the Plaintiff in the said movies.

6. The Plaintiff had claimed that they are in the business of marketing and distribution of cinematography films and other programmes. They have acquired copyrights. They are distributors of several movies, on which they held copyrights. The films and TV Serials/drama mentioned in the Schedule to the plaint are claimed to be owned by the Plaintiff since they claimed that rights have vested in them under the provisions of the Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012. They have also been assigned internet and other exploitation rights. The Plaintiff had claimed that online piracy and unauthorised downloads and websites hosted by various persons, reproduction of films through internet and online live streaming through devices, like, CDs, VCDs, DVDs and other hard drives, have infringed upon the copyrights of the Plaintiff. Pirated versions of the movies are sold through VCDs and DVDs. The piracy of creative works has caused loss of crores of rupees to the persons holding the copyright.

7. The Plaintiff has also stated that reproduction and copy of cinematography films and sound recordings of the works belonging to the Plaintiff has to be prevented. Such reproduction can be done only with licence or permission from the copyright holder. The Plaintiff has claimed that there is mass piracy committed in the internet domain. The Plaintiff had instituted the suit, seeking the reliefs as stated above. The Plaintiff had also sought John Doe injunctions against unknown persons. The Plaintiff impleaded as Defendants the persons/entities, of which they have direct knowledge. It is under these circumstances that the suit had been filed.

8. The Plaintiff had also filed applications, seeking interim injunctions. After notice had been served to the Respondent, the present applications have been filed. The 16th and 19th Defendants have filed A.No.715 of 2017 and the 9th Defendant has filed A.No.1206 of 2017. Both the applications have been filed, seeking to reject the plaint.

9. In the affidavit filed in support of A.No.715 of 2017, it had been stated that it had not been stated in the plaint whether the Plaintiff is a registered partnership firm. It had therefore been stated that since the plaint had been instituted by an unregistered partnership firm, the suit cannot be maintained against third parties. It had been further stated that a deed of partnership dated 1.4.1998 alone had been filed and it showed the principal place of business of Rajamundri though the stamp paper was purchased at Chennai. It had been stated that under Section 69(2) of the Indian Partnership Act, 1932, an unregistered firm cannot institute a suit. It had therefore been stated that the suit must be rejected.

10. In the affidavit filed in support of A.N.1206 of 2017 filed by the 9th Defendant, it had been stated that it had not been stated in the plaint whether the Plaintiff is a registered partnership firm or not. It had therefore been stated that the suit ought to fail in view of Section 69 of the Partnership Act 1932. It has also been stated that the suit suffers by non joinder of necessary parties since the copyright owners are not before this Court as amended under Section 61 of the Copyright Act, 1957. It had been stated that there is a cloud over the right/entitlement of the Plaintiff over the films mentioned in the Schedule to the plaint. It had also been stated that the Plaintiff had not given the term/duration of the copyrights. It had been stated that most of the movies had been released in the 1950s and

consequently, as on date, there is no protection for cinematography films with respect to copyright. It had been further stated that the 9th Defendant is a internet service provider and does not post any content or directly communicate content infringing or otherwise. It had been further stated that under Section 52(1)(c) of the Copyright Act, 1957 in case there is infringing material uploaded, then a notice has to be issued by the Plaintiff. The Plaintiff had not issued any notice prior to institution of the present suit. The Plaintiff had not even intimated about any infringing material posted by the 9th Defendant. In view of these facts, it had been stated that the plaint must be rejected.

11. In the counter filed by the Plaintiff, with regard to the averments made in A.No.715 of 2017, it had been stated that the Plaintiff is a registered partnership firm and only upon production of acknowledgement of registration of the film, the suit itself was taken up by this Court. It had been stated that the suit had filed only for restraining the Defendants from infringing the Plaintiff's copyrights and the Plaintiff is seeking remedy under the Statute namely, Copyright Act, 1957 . Consequently, it had been stated that there is no bar to institute the suit.

12. In the counter affidavit, with respect to A.No.1206 of 2017, it had been again stated that the Plaintiff is a registered partnership firm and the suit had been taken on file only after production of the acknowledgement of registration of the film. It had also been stated that the suit had been filed, seeking the relief under the Copyright Act, 1957 and consequently, the Plaintiff has every right to maintain the suit.

13. With respect to the averments relating to Section 61 of the Copyright Act, 1957, it had been stated that only when an exclusive licensee initiated proceedings, the owner of the copyright will have to be

impleaded as a party to the suit. It had been claimed that the Plaintiff is the owner of the copyright. It had been stated that there was assignment of copyright in favour of the Plaintiff. It had also been stated whether it was an assignment or licence are issues to be decided in the plaint.

14. With respect to the fact that the 9th Defendant has no control over the websites that telecast the infringing contents, it had been stated that the Plaintiff had issued notice to various websites that carried infringing contents and only thereafter that they filed the suit. It had been stated that even after giving undertakings and order of interim injunction of this Court, the 9th Defendant had failed to block the websites carrying infringing contents. It had therefore been stated that there are no grounds to reject the plaint.

15. The Applicant in A.No.715 of 2017 had filed a reply affidavit to the counter filed by the Plaintiff. In the reply affidavit, it was stated that the fact that the Plaintiff is registered partnership firm cannot be true since a verification with the Registrar of Firms at Chennai had not revealed the name of the Plaintiff firm. It had been further stated that under Section 61 of the Copyright Act, 1957, the owner of the copyright has to be made a party to the suit and consequently, it had been stated that on that ground also, the plaint must be rejected.

16. This court heard the arguments advanced by Mr.K.Hari Shankar, the learned counsel for the Plaintiff, Mr.Manikandan, the learned counsel for the Applicant in A.No715 of 2017/16th and 19th Defendants and Mr.G.Rajkumar, the learned counsel for the Applicant in A.No.1206 of 2017/the 9th Defendant.

17. The suit had been filed, seeking protection of the copyrights which the Plaintiff claims in the movies/serials mentioned in the Schedule to the

plaint. According to the Plaintiff, they had been assigned exclusive internet and other exploitation rights by M/s.Giza Impex Private Limited, Ms.Bina Ganshyam, M/s.Ryale Blue Investments Private Limited (formerly known as West Top Investments (India) Private Limited and Ghanshyam Hemdev, vide agreements dated, 19.06.2015 and 14.10.2015.

18. The Plaintiff claimed that they had also acquired rights in television serials/drama and they had also acquired rights in the films which are in Tami, Malayalam and Telugu languages and also other languages. The applications filed mainly challenged the right of the Plaintiff to institute the suit since it is claimed by the Applicants that the Plaintiff is not a registered partnership firm.

19. The Plaintiff had filed a deed of partnership dated 11.10.1979. This has been challenged by the Applicants, stating that the partnership firm is not a registered partnership firm. This fact has been countered by the learned counsel for the Plaintiff who claimed that the Plaintiff is a registered partnership firm.

20. Whether the Plaintiff is a registered partnership firm or not is a matter to be decided at the time of trial. However, the right of a partnership firm even if it is not registered, to institute a suit when it claims a right under a Statute, has been examined by the Honourable Supreme Court in **2000 3 SCC 250 (Haldiram Bhujiawala and another Vs. Anand Kumar Deepak Kumar and Another)**, where in paragraphs 8 to 27, it was stated as under:-

> "**8.** The points that arise for consideration are:-

> (i) Whether Section 69(2) bars a suit by a

firm not registered on the date of suit where permanent injunction and damages are claimed in respect of a trademark as a statutory right or by invoking common law principles applicable to a passing-off action?

(ii) Whether the words "arising from a contract" in Section 69(2) refer only to a situation where an unregistered firm is enforcing a right arising from a contract entered into by the firm with the defendant during the course of its business or whether the bar under Section 69(2) can be extended to any contract referred to in the plaint unconnected with the defendant, as the source of title to the suit property?

Point 1:-

9. The question whether Section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a common law right is being enforced came up directly for consideration in this Court in Raptakas Brett Co. Ltd. v. Ganesh Property [(1998) 7 SCC 184] . In that case, Majmudar, J. speaking for the Bench clearly expressed the view that Section 69(2) cannot bar the enforcement by way of a suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right "arising from a contract" but was a common law right or a statutory right under the Transfer of Property Act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference. Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

10. The next question is as to the nature of the right that is being enforced in this suit. It is well settled that a passing-off action is a common law action based on tort (vide Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co. [(1997) 1 SCC 99]). Therefore, in our opinion, a suit for perpetual injunction to restrain the defendants not to pass off the defendants' goods as those of the plaintiffs by using the plaintiffs' trademark and for damages is an action at common law and is not barred by Section 69(2). The decision in Virendra Dresses v. Varinder Garments [AIR 1982 Del 482 : (1982) 21 DLT 472 : (1982) 84 Punj LR (D) 89] and the decision of the Division Bench of the Delhi High Court in Bestochem Formulations v. Dinesh Ayurvedic Agencies [RFA (OS) 17 of 1999 dated 12-7-1999 (Del) (DB)] state that Section 69(2) does not apply to a passing-off action as the suit is based on tort and not on contract. In our opinion, the above decisions were correctly decided. (Special Leave Petition No. 18418 of 1999 against the latter was in fact dismissed by this Court on 28-1-2000.) The learned Senior Counsel for the appellants no doubt relied upon Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar [AIR 1952 SC 119 : 1952 SCR 501] . That was an arbitration case in which the words "arising out of a contract" were widely interpreted but that decision, in our view, has no relevance in interpreting the words "arising from a contract" in Section 69(2) of the Partnership Act.

11. Likewise, if the reliefs of permanent injunction or damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is, in our view, not barred by Section 69(2).

12. For the aforesaid reasons, in both these situations, the unregistered partnership in the case before us cannot be said to be enforcing any right "arising from a contract". Point 1 is therefore decided in favour of the respondent-plaintiffs.

13. Question however arises as to what is the scope of the words "enforcing a right arising under the contract" used in Section 69(2)? Learned Senior Counsel for the appellants repeatedly drew our attention to the allegation in the plaint at various places that it was only under the deed of dissolution dated 16-11-1974 that Moolchand, — the father of the partners of the 1st plaintiff firm and the 2nd plaintiff — became proprietor of the trademark for the whole of India (except West Bengal). That right devolved on the plaintiffs on the death of Moolchand. Therefore, it was contended that the 1st plaintiff firm was definitely seeking to enforce a right "arising from a contract", namely, the contract of dissolution dated 16-11-1974. It was argued that the 1st plaintiff could not claim any injunction or damages unless reliance was placed on the said contract and hence the suit was barred by Section 69(2).

14. For the purpose of deciding this point, it is necessary to go into the question as to what the legislature meant when it used the words "arising from a contract" in Section 69(2).

15. In our view, it will be useful in this context to refer to the Report of the Special Committee (1930-31) which examined the Draft Bill and made recommendations to the legislature.

16. Before going into the above Report of the Special Committee which preceded the Partnership Act, 1932, it will be necessary to refer to the case in CITv. Jayalakshmi Rice and Oil Mills Contractor Co. [(1971) 1 SCC 280] where this Court refused to refer to this very Report for construing Section 59 of the Partnership Act. But, in our view, that decision is no longer good law as it was clearly dissented on this aspect in the judgment of the Constitution Bench in R.S. Nayak v. A.R. Antulay [(1984) 2 SCC 183 : 1984 SCC (Cri) 172] . In a number of later judgments, this Court has referred to the reports of similar committees or commissions (vide G.P. Singh's Interpretation of Statutes, 7th Edn., 1999, pp. 196-97). In the latest case in Hyderabad Industries Ltd. v. Union of India [(1999) 5 SCC 15] (SCC para 15) notes on clauses were relied upon by the Constitution Bench for understanding the legislative intent. The English law has changed completely after Pepper v. Hart [(1993) 1 All ER 42 : 1993 AC 593 : (1992) 3 WLR 1032 (HL)] in favour of admissibility of such material. A restricted view was no doubt expressed in P.V. Narasimha Rao v. State [(1998) 4 SCC 626 : 1998 SCC (Cri) 1108] in SCC (at pp. 691-92) that such reports can be looked into for the purpose of knowing the historical basis or mischief sought to be remedied, but not for construing the provision unless there is ambiguity. Even going by this restricted view, we find that there is considerable ambiguity in Section 69(2) (unlike the English Statute of 1916 and 1985) as to what is meant by the words "arising out of a contract" inasmuch as the provision does not say whether the contract in Section 69(2) is one entered into by the firm with the defendant or with somebody else who is not a defendant, nor to whether it is a contract entered into with the defendant in business or unconnected with business. Hence, in our view, it is permissible to look into the Report even for purpose of construing

Section 69(2).

17. We may state that it was on the basis of the Report of the Special Committee that the Partnership Act, 1932 was later passed by the legislature. The Committee consisted of Sir Brojendra Lal Mitter, Sir Dinshah F. Mulla, Sir Alladi Krishnaswamy Iyer and Mr Arthur Eggar. Para 16 of the Report states that the "Bill seeks to overcome this class of difficulty by making registration optional, and by creating inducements to register which will only bear upon firms in a substantial and fairly permanent way of business". Paras 17, 18 and 19 of the Report are important (see Mulla: Partnership Act, 1st Edn., 1934, p. 167, at pp. 176-77). Para 17 reads:

"17. The outlines of the scheme are briefly as follows. The English precedentinsofar as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small or ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claim against third parties in the civil court; and any partner who is not registered will be unable to enforce his claims either against third parties or against fellow partners."

It will be noticed that the above extract refers to the English precedent which is partly not followed and which is partly followed. We shall be referring to the said English precedent shortly but before we do so, we have also to refer to paras 18 and 19 of the said Report.

18. The Report states in paras 18 and 19 as follows:-

"18. Once registration has been effected the statement recorded in the register regarding the constitution of the firm will be conclusive proof of the facts therein contained against the partners making them and no partner whose name is on the register will be permitted to deny that he is a partner — with certain natural and proper exceptions which will be indicated later. This should afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm.

19. …On the other hand, a third party who deals with a firm and knows that a new partner has been introduced can either make registration of the new partner a condition for further dealings, or content himself with the certain security of the other partners and the chance of proving by other evidence, the partnership of the new but unregistered partner. A third party who deals with a firm

without knowing of the addition of a new partner counts on the credit of the old partners only and will not be prejudiced by the failure of the new partner to register."

Similarly, para 23 also refers to those who deal with the firm.

19. The English precedent referred to in para 17, which has been not followed in part but followed in part in drafting Section 69(2) is the one contained by the Registration of Business Names Act, 1916. Section 7 of that Act refers to penalties for default in registration. As stated in the Report, the penalty part of that Act has not been introduced in India but the provisions of Section 8 creating disabilities in the way of the firm in default is adopted. Section 8 of the above English Act is relevant and it speaks of "the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished" (see Halsbury Statutes, 3rd Edn., Vol. 37, p. 867).

The above provision clearly signifies that the right that is sought to be enforced by the unregistered firm and which is barred must be a right arising out of a contract with a third-party defendant in respect of the firm's business transactions.

20. The Business Names Act, 1985 has replaced the above Act of 1916 and Section 4 of the new Act refers to the "civil remedies for breach of Section 4". It provides for dismissal of the action "to enforce a right arising out of a contract made in the course of a business" if the firm is not registered (see Halsbury Statutes, 4th Edn., Vol. 48, p. 101).

21. The above Report and provisions of the English Acts, in our view, make it clear that the purpose behind Section 69(2) was to impose a disability on the unregistered firm or its partners to enforce rights arising out of contracts entered into by the plaintiff firm with the third-party defendants in the course of the firm's business transactions.

22. In Raptakos Brett and Co. [(1998) 7 SCC 184] it was clarified that the contractual rights which are sought to be enforced by the plaintiff firm and which are barred under Section 69(2) are "rights arising out of the contract" and that it must be a contract entered into by the firm with the third-party defendants. Majmudar, J. stated as follows: (SCC p. 191, para 9)

"A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred…." (emphasis supplied)

From the above passage it is firstly clear that a contract must be a contract by the plaintiff firm not with anybody else but with the third-party defendant.

23. The further and additional but equally important aspect which has to be made clear is that the contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third-party defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third-party defendant.

24. It will also be seen that the present defendants who are sued by the plaintiff firm are third parties to the 1st plaintiff firm. Section 2(d) of the Act defines "third parties" as persons who are not partners of the firm. The defendants in the present case are also third parties to the contract of dissolution dated 16-11-1974. Their mother, Kamla Devi was no doubt a party to the contract of dissolution. The defendants are only claiming a right said to have accrued to their mother under the said contract dated 16-11-1974 and then to the defendants. In fact, the said contract of dissolution is not a contract to which even the present 1st plaintiff firm or its partners or the 2nd plaintiff were parties. Their father Moolchand was a party and his right to the trademark devolved in the plaintiffs. The real crux of the question is that the legislature, when it used the words "arising out of a contract" in Section 69(2), it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its defendant customers and the idea is to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business.

25. Further, Section 69(2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could only be as a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a motor car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, — it is clear that the relief for possession against the defendant in the suit does not arise from any contract which the defendant entered into in the course of the plaintiff firm's business with the defendant but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a suit would be maintainable and Section 69(2) would not be a bar, even if the firm is unregistered on the date of suit. The position in the present case is not different.

26. In fact, the Act has not prescribed that the transactions or contracts entered into by a firm with a third party are bad in law if the firm is an unregistered firm. On the other hand, if the firm is not registered on the date of suit and the suit is to enforce a right arising out of a contract with the third-party defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm subject of course to the law of limitation and subject to the provisions of the Limitation Act. This is so even if the suit is dismissed for a formal defect. Section 14 of the Limitation Act will be available inasmuch as the suit has failed because the defect of non-registration falls within the words "other cause of like nature" in Section 14 of the Limitation Act, 1963. (See Surajmal Dagduramji Shop v. Shrikisan Ramkisan [AIR 1973 Bom 313 : 1973 Mah LJ 624] .)

27. For all the reasons given above, it is clear that the suit is based on infringement of statutory rights under the Trade Marks Act. It is also based upon the common law principles of tort applicable to passing-off actions. The suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the unregistered firm with third parties in the course of the firm's business transactions. The suit is therefore not barred by Section 69(2).”

21. In the judgement which had been extracted above, the Honourable Supreme Court had examined in detail the issues whether Section 69(2) bars a suit by a firm which is not registered on the date of the suit when permanent injunction and damages are claimed in respect of trademark as a statutory right and whether the words “arising from a contract ” given in Section 69(2) refer to a situation where an unregistered firm is enforcing a right arising from a contract.

22. In the present case, the Plaintiff has also instituted the suit, seeking to enforce its right as a copyright holder. Consequently, the ratio directly applies.

23. It had also been stated by the learned counsel for the Plaintiff that the Plaintiff is actually a registered partnership firm and if it is a registered partnership firm, then the entire issue fades. But, even assuming that the Plaintiff is an unregistered partnership firm, since it is claiming a right under a Statute, naturally the Plaintiff's suit cannot be said to be barred. The ratio of the judgement referred to above is directly applicable to the present case.

24. The other aspect that when an exclusive licensee initiated proceedings, the owner of the copyright will have to be impleaded as a party to the suit, it has been claimed by the Plaintiff that he is the owner of the copyrights. Section 61 of the Copyright Act, 1957 is as follows:-

“**61. Owners of copyright to be party to the proceeding. -** (1) In every civil suit or

> other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.
>
> (2) Where any civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceeding in respect of the same cause of action shall lie at the instance of the owner of the copyright.

25. It has been provided under Section 61 of the Copyright Act, 1957 that the owner of the copyright shall be made a Defendant. It has been claimed by the Applicants herein that the owner of the copyright has not been impleaded as a party. Along with the plaint, the Plaintiff has filed a licence agreement and an assignment agreement. Arguments had been advanced whether the Plaintiff is the owner of the copyright or a licensee or an assignee. These are issues which can be determined only during the trial. The Plaintiff will have to subject themselves to cross examination and only then, can the actual fact be determined. The agreement will have to be admissible in nature, marked during the course of trial and its relevancy and proof must be spoken by the witnesses. Even before undertaking such an exercise, this Court can never rely on the agreements. Prima facie, the Plaintiff has produced certain documents. It is only during trial that their admissibility and relevancy and proof can be decided. At that particular point of time, if it is held that the Plaintiff is not

the owner of the copyright, then naturally they will suffer consequential orders. If the Plaintiff is able to establish that they are the copyright owner, then they will be the beneficiary of the orders passed therein. But, however, at the threshold the plaintiff cannot be ousted from Court. I hold that there being triable issues, the suit will have to be proceeded in its normal course. Consequently, I am unable to agree with the contentions raised by the Applicants in these applications.

26. In the result, these applications are dismissed. No costs.

Sd/.C.V.K.J
01.08.2018

//Certified to be a true copy//

Dated this the th day of 2018.

KY/20.08.2018 COURT OFFICER

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