

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.191 OF 2021

Amrut Mala Patel (Patni), Partner
of Shivraj Enterprises .. Applicant

Vs.

Shailesh Mansukh Jiواني,
Partner of Shivraj Enterprises & Anr. .. Respondents

...

Mr. Pradeep Thorat with Mr. Santosh Pathak for the applicant.

Mr. P.K. Dhakephalkar, senior counsel with Mr. Girish B.
Badiger for respondent No.1.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 13TH OCTOBER, 2021.

P.C:-

1. In the civil revision application, the applicant poses a challenge to the order dated 10/02/2021, below Ex-23, in Regular Civil Suit No.1343 of 2019 passed by the 20th Joint Civil Judge, Senior Division, Pune.

2. By the said order the application preferred by defendant No.1 under Order 7, Rule 11(d) of the Code of Civil Procedure came to be rejected. Clause (d) was sought to be invoked on the

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ground that there is a bar imposed by virtue of Section 69(1) of the Partnership Act in instituting a suit seeking a declaration, which has been prayed by the plaintiff in his suit. Regular Civil Suit No.1343 of 2019 is instituted by Shailesh Jiواني-Patel (respondent herein), where after disclosing the cause of action, in paragraph No. 34, the relief of declaration was ought to declare that the partnership existed between the plaintiff and defendant No.1 in the name of Shivraj Enterprises since 2007 and a further declaration that the plaintiff shall be declared as 50% partner in the said partnership firm. The second relief sought by the plaintiff is for rendering accounts of the partnership firm since 2010 and, by clause (c), a relief is claimed that the existing partnership between the plaintiff and defendant No.1 shall be dissolved.

3. In the said suit, an application was preferred by defendant No.1 purportedly under Order 7 Rule 11 of the CPC, wherein it is denied that any such firm by name 'Shivraj Enterprises' ever existed or it does exist. It is denied that there is no such partnership ever entered into between the plaintiff and the defendant and a specific plea is taken that 'Shivraj Enterprises' is a proprietary firm of the defendant and, the plaintiff was working as a servant in the said firm. The existence of cause of action is also sought to be denied and the bar of law is also pleaded to be a ground for rejection of plaint. The impugned order is passed on the said application and the application is rejected.

4. I have heard learned counsel for the applicant and learned senior counsel for the respondent No.1. The question of law, which was deliberated upon by the learned Civil Judge, Senior Division, is no more *res integra* and the learned Judge has rightly relied upon the decision of the Apex Court in **Mukund Balkrishna Kulkarni v. Kulkarni Powder Matallurgical Industries & Anr.** reported in **(2004) 13 SCC 750** and based on the said authoritative pronouncement, the learned Judge rendered a finding that the suit filed by the plaintiff that he is a partner of the partnership firm of 'Shivraj Enterprises' and the defendant would not be entitled for rejection of the plaint on the ground of being barred by law, specifically by invoking Section 69(1) of the Partnership Act.

5. The decision relied upon by learned Judge in case of **Mukund Balkrishna Kulkarni (supra)** deals with identical facts, which were posed for challenge in the application preferred under Order 7 Rule 11 of the CPC before the learned Judge. The observations of the Hon'ble Apex Court in **Mukund Balkrishna Kulkarni (supra)** will have to be read in the backdrop of the facts, which are narrated in the said judgment. The claim was set up by the appellant to the effect that he had invested monies pursuant to an agreement to take part in the business of the firm and though respondent No.2 specifically denied that the business was a partnership business, the court recorded that the suit was

filed for a declaration that respondent No.1 was a partnership business, in which both the appellant as well as respondent No.2 have equal shares and, a prayer was made for dissolution and for account and payment of amounts on taking such accounts. The suit came to be contested by the opponent by denying the existence of the partnership. In the backdrop of the aforesaid facts, Their Lordships of the Apex Court in paragraphs 8 to 10 have culled out the position of law flowing from a bar created under Section 69(1) of the Partnership Act. The said section read with sub-section (3) and in particular, clause (9) has been succinctly elaborated in paragraph Nos. 9 and 10 of the said decision, which read thus:

“9. The sub-section contains embargos which must coexist before a plaintiff can be non-suited under that sub-section. The two embargos relevant for this case are : (1) that the suit should be filed by person “suing as a partner in a firm” and (2) that the suit must be to enforce a right arising from a contract. The submission of the respondents which was accepted by the High Court was that the prayer of the appellant, namely, for a declaration of the existence of the partnership and the share between the parties was a suit to enforce a right under a contract against the firm. A prayer for such declaration could not be said to be made by person suing as a partner. It was a prayer to be a partner and is therefore no debarred under the provisions of Section 69(1). Furthermore, what was in fact being prayed for by the appellant was a

declaration of the existence of a contract between the parties. That could not be said to be a suit to enforce a right arising from a contract. The second prayer of the appellant was not to continue as a partner of the firm but to dissolve the firm. To that extent the appellant was suing “as a partner”. This he was entitled to do under Section 69(3)(a) which insofar as it is relevant, reads as follows:

*69(3) The provisions of sub-sections
(1) ... shall not affect -*

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm”.

10. The right of partner to ask the dissolution of a firm is a right the enforcement of which is otherwise forbidden under Section 69(1). It is because of the exception under sub-section (3) of Section 69 that a person suing as a partner can enforce a right under the contract for dissolution of the firm and accounts. The claim for a half share in the firm’s assets would be a necessary corollary to a prayer or dissolution. Without the prayer for specified shares in the firm’s assets and business, the relief that may be granted in a suit for dissolution would be ineffective. In the circumstances of the case, we allow the appeal and set aside the decision of the High Court and affirm the decision of the first appellate court. There will be no order as to costs.”

6. The position of law emerging in the peculiar factual context has been elaborated by the Hon'ble Apex Court with the special emphasis on the mandate of sub-clause (a) in sub-section (3) of Section 69 of the Partnership Act and the area in which it shall operate. The clarification is to be found in paragraph No.9, where it is succinctly held that the embargo contained in sub-section must coexist before a plaintiff can be non-suited being - suit should be by a person suing as partner of a firm and that the suit must be to enforce a right arising from the contract. A prayer for declaration of existence of a partnership and for share, is not by a person suing as partner and if it is a prayer to be a partner, then it is not debarred under Section 69(1). As far as the second prayer of dissolution of the partnership firm is concerned, sub-clause (a) of sub-section (3) of Section 69 of the Partnership Act is a remedy which can be enforced by a person, who is suing a partnership for its dissolution and for accounts.

7. In the light of the aforesaid pronouncement and since the law has been very well settled on the said point, I see no legal infirmity in the conclusion arrived in the impugned judgment, which has rightly capitulated the findings of the Hon'ble Apex Court in the peculiar facts. The impugned judgment therefore deserves to be upheld and the civil revision application is liable to be dismissed and is dismissed, accordingly.

8. Though a request is made by learned counsel for the applicant to continue the stay operating in the suit, I see no reason to grant such relief particularly when the suit is of the year 2019.

[SMT. BHARATI DANGRE, J.]