



CRP.PD.No.1304/2019

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 04.02.2022

Delivered on 18.02.2022

CORAM

THE HONOURABLE Mr. JUSTICE S.S.SUNDAR

CRP.PD.No.1304/2019 & CMP.No.8523/2019

S.Sri Sagana

.. Petitioner

Versus

K.Padmavathi

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and final order dated 21.12.2018 made in IA.No.727/2018 in OS.No.99/2018 on the file of the learned District Munsif, Palladam.

For Petitioner : Mr.V.P.Sengottuvel

For Respondent : Mr.V.Raghavachari



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ORDER

- (1) The revision petitioner / defendant has preferred the above Civil Revision Petition against the order dated 21.12.2018 made in IA.No.727/2018 in OS.No.99/2018 on the file of the learned District Munsiff, Palladam dismissing the petition filed under Order 7 Rule 11 of CPC to reject the plaint.
- (2) The respondent filed the Suit in O.S.No.99/2018 for permanent injunction restraining the defendant or her authorised persons from interfering with her right to enter the partnership firm or looking after the administration as a partner holding 50% shares in the partnership firm and from evicting the plaintiff otherwise than due process of law. Contending that the Partnership Firm at hand is an unregistered Firm, the Revision Petitioner/defendant filed an application in IA.No.727/2018 under Order 7 Rule 11 of CPC, in the above mentioned suit praying for rejection of plaint as the suit is barred by law under Section 69[2] of the Partnership Act, 1932.
- (3) The said application filed by the revision petitioner/defendant was



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dismissed by the Trial Court. Aggrieved by the same, the above Civil Revision Petition is preferred.

- (4) The issue that is required to be decided in this revision petition is whether the plaint in the suit in OS.No.99/2018 is liable to be rejected under Order 7 Rule 11 of CPC as the Partnership Firm is an unregistered Firm. It is to be noted that though the plaint was sought to be rejected by quoting Section 69[2] of the Partnership Act,1932, [Hereinafter referred to as “the Act”] this Court is of the view that it would be appropriate that the objection should be under Section 69[1] of the Act.
- (5) Brief facts necessary for the disposal of this Civil Revision Petition are as follows.
- (6) The respondent in this Civil Revision Petition, as plaintiff, filed the suit in OS.No.99/2018 on the file of the learned District Munsif, Palladam, seeking a comprehensive prayer for permanent injunction restraining the defendant from interfering with the plaintiff's right to enter the Firm, to look after the administration and to conduct the business as a partner holding 50% shares and



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for restraining the defendant from evicting her otherwise than by due process of law. It is the case of the plaintiff that a Partnership Deed was executed between the plaintiff and defendant on 22.02.2015 to carry on business under the name and style of M/s.S.P.AQUA for conducting business in water purification. It was stated that while parents of the defendant agreed to spend for construction of building, the plaintiff undertook to do all other works relating to business.

- (7) From the plaint it is admitted that the building in which the Partnership Firm carries on its business, belonged to the parents of the defendant/revision petitioner. It is also admitted by the plaintiff that the parents of the defendant/revision petitioner died after the Partnership Firm was constituted and the defendant became the absolute owner of the property as legal heir. It is relevant to refer to paragraphs 29, 37 to 39 of the plaint, which are extracted for convenience:-

"29.மேலும் பிரதிவாதி தற்பொழுது நிறுவனத்தை விட்டு



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வாதியை வெளியேற்ற முயற்சி செய்தும் முடியாத பட்சத்தில் மேற்படி M/S.S.P.AQUA நிறுவனம் செயல்பட்டு வரும் கட்டிடம் பிரதிவாதியின் பெற்றோர்கள் இறந்து விட்டதால் வாரிசுரிமைபடி பிரதிவாதியின் பெயருக்கு தான் மேற்படி நிறுவன கட்டிடம் வரும் என்பதாலும் மேற்படி இடத்தை தனது உறவினர்களின் பெயர்களுக்கு மாற்றி வில்லங்கத்தை ஏற்படுத்தி வாதியை சட்டவிரோதமாக நிறுவனத்தில் இருந்து விரட்ட வேண்டும் என்ற எண்ணத்தில் பிரதிவாதி செயல்பட்டு வருகிறார்.

37.மேலும் வாதி தரப்பில் பணிந்து சமர்ப்பிப்பது யாதெனில் மேற்படி நிறுவனத்தை பொருத்து வாதியும் பிரதிவாதியும் செய்து கொண்ட ஒப்பந்தப்படி மேற்படி இடத்தில் தொடர்ந்து நடத்தவே விரும்புகிறார். மேலும் வாதியானவர் 50% பங்குதாரர் மற்றும் உழைப்பவர் என்ற அடிப்படையில் M/S.S.P.AQUA நிறுவனத்திற்கு வாதி தனது உரிமையை நிலை நாட்ட வேண்டியது அவசியமாகிறது. மேலும் வாதியானவர் பிரதிவாதிக்கு எந்தவித இடைஞ்சலோ செய்ய விரும்பவில்லை என்றும் தனது உரிமையை மட்டும் நிலை நாட்ட வேண்டியது அவசியமென்று கூறுகிறார்.

39.மேற்படி பிரதிவாதியோ அல்லது அவரை சார்ந்த ஆட்களோ வாதியின் நிறுவனத்தின் 50% பங்குதாரர் என்ற அனுபத்திற்கு ஒரு இடைஞ்சலோ இடையூறோ செய்யக்கூடாது



என்ற எண்ணத்தில் நிரந்தர உறுத்துக்கட்டளை கோரி வாதி
இந்த வழக்கை தாக்கல் செய்கிறார்."

- (8) It is also relevant to refer to the relief prayed by the plaintiff in the suit, which is as follows:-

"1.பிரதிவாதியோ அல்லது அவரது அதிகாரம் பெற்ற
3ம் நபர்களோ வாதி நிறுவனத்திற்கு வரவோ அல்லது
நிர்வாகத்தை கவனிக்கவும் தொடர்ந்து நிறுவனத்தின் 50%
பங்குதாரர் என்ற முறையில் தொழில் நடத்த ஒரு இடைஞ்சலோ
இடையூறோ செய்யக்கூடாது என்றும் மேலும் வாதியை
சட்டத்திற்கு புறம்பாக வெளியேற்ற கூடாது என்றும் நிரந்தர
உறுத்துக்கட்டளை வழங்கியும்."

- (9) From the reading of the plaint and relief, the cause of action for the plaintiff to file the suit arise out of the Partnership Agreement alleged to have been entered into between the plaintiff and the defendant. The suit for an injunction is to enforce the plaintiff's right as a partner holding 50% of the share and to get a relief that the defendant shall not interfere with the right to administer the Partnership Firm. The prayer is also, of course, for restraining the defendant from evicting the plaintiff.

- (10) In the affidavit filed in support of the Interlocutory Application in



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IA.No.727/2018 under Order 7 Rule 11[d] of CPC, it is stated that a partner is not entitled to file a suit against another partner unless the Firm is registered. It is contended that the plaintiff cannot maintain a suit as against the another partner. It is stated in the affidavit that the Partnership has not done any business and the plaintiff has not contributed any funds. It is the specific case of the defendant in the Interlocutory Application that the Partnership business was abandoned in the year 2016 itself. It is also contended that the defendant is in possession as Proprietrix of M/s.S.P.AQUA and the Registration Certificate was issued in her name.

- (11) The said Interlocutory Application was contested by the plaintiff by stating that the plaintiff has obtained permissions and license by submitting applications with her signatures and that the defendant is trying to sell away the Partnership Firm to third parties. The plaintiff also referred to the criminal case that is pending on the basis of the complaint given by the plaintiff against the defendant. Even in the counter affidavit filed in IA.No.722/2018, it is stated



by the plaintiff in paragraphs No.18 and 19 as follows:-

"18.மேலும் பிரதிவாதி தற்பொழுது நிறுவனத்தை விட்டு வாதியை வெளியேற்ற முயற்சி செய்தும் முடியாத பட்சத்தில் மேற்படி S.P.AQUA நிறுவனம் செயல்பட்டு வரும் கட்டிடம் பிரதிவாதியின் பெற்றோர்களுக்கு சொந்தமாதாகும் பெற்றோர்கள் இறந்து விட்டதால் வாரிசுகரிமைப்படி பிரதிவாதியின் பெயருக்கு தான் மேற்படி நிறுவன கட்டிடம் வரும் என்பதாலும் மேற்படி இடத்தை தனது உறவினர்களின் பெயருக்கு மாற்றி வில்லங்கத்தை ஏற்படுத்தி வாதியை சட்டவிரோதமாக நிறுவனத்திலிருந்து விரட்ட வேண்டும் எண்ணத்தில் செயல்பட்டு வருகின்றனர்.

19.மேற்படி பிரதிவாதியோ அல்லது அவரை சார்ந்த ஆட்களோ வாதியின் நிறுவனத்தில் 50 சதவீத பங்குதாரர் என்ற அனுபவத்திற்கு எந்த வித இடைஞ்சலோ இடையூறோ செய்யக்கூடாது என்ற எண்ணத்தில் நிரந்தர உறுத்தக்கட்டளை வழங்க வேண்டியது அவசியமானது ஆகும்."

- (12) The Trial Court dismissed the Interlocutory Application on the ground that the issue cannot be adjudged as a pure question of law as the same has to be decided after receiving oral and documentary evidence. In other words, it is stated that whether the claim is barred under law, can be decided after a full-fledged trial as the



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equitable and contractual rights cannot be decided in a petition under Order 7 Rule 11 of CPC.

(13) It is not in dispute that the Partnership Firm is not registered. The cause of action alleged in the plaint, certainly indicate that the plaintiff has come forward with the suit to enforce his right under the Partnership Agreement as a partner holding 50% of the share and as a person carrying on business. The relief of injunction restraining the defendant from evicting the plaintiff from the premises other than by due process of law, is illusory as the Suit is not for enforcing any statutory right to be in possession of the premises. It is admitted by the plaintiff himself that the Partnership Firm has obtained a Lease Deed from the parents of the defendant for running the partnership business and the Suit is not on behalf of firm. There is no plea in the plaint regarding any right the plaintiff independently has in relation to the Suit property.

(14) Referring to the cause of action paragraph in the plaint, the learned counsel for the revision petitioner submitted that the Court below failed to see that the plaintiff has filed the suit to enforce his right



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arising from a contract and therefore, Section 69[1] of the Act, is attracted. Though the learned counsel has made submissions on the merits of the case, this Court is of the view that it is not necessary to deal with the other contentions as the issue, whether the suit is barred under law or not, should be decided based on the averments in the plaint and not by facts or statements put forth by the defendant. The learned counsel appearing for the revision petitioner/defendant fairly admit that the application ought to have been filed by referring to Section 69[1] of the Act as the provisions of Section 69[2] of the Act is not applicable having regard to the admitted position that the suit is not by the Firm against a third party to the Firm.

- (15) ***Per contra***, Mr.V.Raghavachari, learned counsel appearing for the respondent/plaintiff submitted that the plaintiff is entitled to enforce his right under common law and the suit is not barred if the plaintiff has come forward to enforce his common law right. Learned counsel relied on a few judgments of the Hon'ble Supreme Court and this Court and contended that the Hon'ble Supreme



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Court has distinguished in several cases, the right available to one under the contract and the remedy available to a partner under common law. The learned counsel then submitted that the question whether a Firm is registered or not is a question of fact and unless the fact is enquired into and decided, the bar under Section 69 of the Partnership Act, cannot be invoked by any of the parties to the suit. Learned counsel also submitted that the plaintiff filed the suit as an individual and he has not described himself as a partner in the cause title.

(16) The learned counsel for the respondent/plaintiff relied upon a few judgments, in support of his contentions and they are dealt with in the following paragraphs.

(a) The decision of this Court in the case of *N.A.Munavar Hussain Sahib and Another V. E.R.Narayanan and Others* reported in *AIR 1984 Mad 47 : 1983 SCC Online Mad 89*, wherein the Division Bench of this Court has held in paragraph No.19 as follows:-

"19. Under Order 8, R. 2, C.P.C. the



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defendant must raise in his written statement all matters which could show how the suit is not maintainable and in this case, the written statement filed by the appellants in O.S. No. 671 of 1978 does not disclose that any objection had been raised by them regarding the maintainability of the suit based on Section 69 of the Indian Partnership Act. Mulla on Civil Procedure Code (19th Edition, page 769) states that a question of fact which had not been put forward in the written statement cannot be allowed to be raised later and cites as example the plea of non-registration of a partnership. Further, the plea regarding the maintainability of the suit by reason of the operation of Section 69 of the Partnership Act is a mixed question of fact and law and if such a plea is not raised at all, there will be no evidence relating to that aspect with the result that facts necessary for its determination would be absent. It is on account of this that courts have consistently taken the view that if the plea had not been raised in the written statement, it would not be allowed to be raised at a later stage in the proceedings. Further, unlike the provisions in the Limitation Act, there is no provision in the Partnership Act which compels the



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Court to dismiss the suit on the ground of non-registration of the firm suo motu, even if no plea in that regard had been raised by the defendants in the suit. We may now briefly refer to a few decisions on this aspect. Abdur Rahman and Somayya, JJ. in Goverdhandoss Takersey v. M. Abdul Rahiman, (AIR 1942 Mad 634) pointed out that it is not easy to accept the view that the Court is bound to dismiss a suit on the ground of non-registration of a firm suo motu, even if no plea had been raised by any of the defendants in the suit. In Mohamad Ali v. Kariji Kondho Rayaguru, (AIR 1945 Pat 286), the objection based on S. 69 of the Partnership Act was not permitted to be taken on the ground that it was not taken before the lower courts and being a mixed question of fact and law. Cannot be decided without a finding of fact on the basis of materials placed in that regard. Indeed, the decision proceeds to the extent of holding that a defendant who intends to contest the performance of a condition precedent viz., the registration of the firm, should raise this point in the pleadings and if it was not so raised, the question was not before the Court at all. Kalyan Sahai v. Firm Lachminarain Shambhulal, (AIR 1951



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Raj 11) had to deal with a similar question and it was pointed out that whether a firm is registered or not is a question of fact and unless this fact is enquired into and decided, the restrictions regarding the filing of suits under S. 69 of the Partnership Act, cannot be invoked by any of the parties to the suit. The decision in Chiman Ram Bhatar v. Ganga Saha, (AIR 1961 Orissa 94) also took the view that the plea that a suit as laid is not maintainable by reason of S. 69 of the Partnership Act is a mixed question of fact and law and such a plea cannot be allowed to be raised, when it was not pleaded in the written statement. In Jalal Mohammad Ibrahim v. Kakka Mohammed Ghouse Sahib, (84 Mad LW 654): (AIR 1972 Mad 86), a Division Bench of this Court to which one of us was a party, the question arose whether the defence regarding the non-registration of a firm and the invalidity of the decree passed in a suit relating to such a firm can be permitted to be raised in a separate suit. On a consideration of some of the decisions referred to earlier, the Division Bench held that the defence of non-registration of a firm is a plea that has to be raised in the suit itself and if it had not been so raised, it could not be



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permitted to be raised for the first time and more so it cannot be permitted to be raised in a separate suit. Bearing in mind the principles laid down in the decisions referred to above and the omission on the part of the appellants to raise a specific plea in that regard, we are of the opinion that it will not be open to the appellants at this stage to urge that the suit in O.S. No. 671 of 1978, Sub-Court, Madurai, is not maintainable by reason of S. 69 of the Partnership Act. We have therefore no hesitation in rejecting this contention of the learned counsel for the appellants in A.S. No. 529 of 1982."

From the facts that could be easily understood from the above judgment, the objection regarding maintainability of the suit was raised not before the Trial Court, but before this Court in the Appeal Suit. In the case on hand, it is not in dispute that a Partnership Firm was formed between the plaintiff and the defendant and it is not registered. Therefore, the said judgment may not have any relevance or will lend any support to the respondent/plaintiff.

(b) ***S.Ashok Kumar V. Mrs. Jasoda Bai and Another*** reported in ***2000 [3] MLJ 223***. A Learned Single Judge of this Court has held



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that a plaint which has not been filed by a Firm cannot be rejected under Section 69[2] of the Act. It is seen that the suit referred to in the said judgment was filed in the name of two individuals who do not describe themselves as partners. From the averments in the plaint, the Court noticed that the rental advance was paid to the owner of the premises even prior to the Partnership Deed. After finding that the cause of action was the interference of the defendants with the plaintiff's possession, the suit for injunction restraining the defendants from interfering with the possession of plaintiff otherwise than due process of law, is not barred under Section 69[2] of the Act. This judgment has no application to the present case.

(c) The decision of the Hon'ble Supreme Court in the case of ***Haldiram Bhujawala and Another V. Anand Kumar Deepak Kumar and Another*** reported in ***2000 [3] SCC 250***. This was a case where the suit is filed for permanent injunction restraining the defendants from infringing with the trademark/name "Haldiram Bhujawala" and for



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using the same. The plaintiffs also claimed a huge amount by way of damages. After referring to the cause of action, reliefs and facts, the Hon'ble Supreme Court held that the suit is not barred by Section 69[2] of the Act. The Hon'ble Supreme Court has held that the action for injunction relating to passing-off is a common law right based on tort and is also a statutory right under Trademarks Act. Stating that the suit is based upon common law principles of tort applicable to passing of actions and that the suit is not for enforcement of any right arising out of a contract entered into by or on behalf the unregistered Firm with the third parties in the course of the Firm's business transactions, the Hon'ble Supreme Court has held that the suit is not barred by Section 69[2] of the Act. It is relevant to extract paragraphs No.24 to 27 of the said judgment:-

"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



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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



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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



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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



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not barred by Section 69(2)."

(d) The High Court of Calcutta in the case of ***Humayun Properties Limited V. Commonwealth Jewellers*** reported in ***2003 SCC Online Cal 387 : 2004 [1] ICC 201 [Cal]/[DB]***, has dealt with a situation where a similar objection was raised referring to Section 69[2] of the Indian Partnership Act, 1932. Paragraphs No.7 to 9 are extracted for convenience:-

“7. That apart, the contract that is unenforceable by an unregistered partnership firm in terms of Section 69(2) of the Partnership Act is that which relates to its business. It does not include any contract relating to common law right unconnected with the business of the firm. Inasmuch as the contract referred to is to be interpreted in the context in which it has been used. Section 69(2) of the Partnership Act prohibits enforcement of contract by unregistered firm. Therefore, it must be a contract, which is related to the scope with which the statute deals. The statute deals with the rights and liabilities and the regulations of the affairs of the partners and partnership firms. Therefore, such contract is to be a contract having nexus with the



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scope and ambit of the statute and not otherwise. This was so held in Haldiram Bhujiawala v. Anand Kumar Deepak Kumar, (2000) 3 SCC 250. In that case, it was a suit for permanent injunction from infringing the trademark of the appellant which was held to be a common law right. In the said decision, it was held that the real crux of the question is that the legislature, when it used the words 'arising out of a contract under Section 69(2) of the Partnership Act' is referring to a contract entered into in course of business transaction by the registered plaintiff firm with its defendant customers and the idea is to protect those in commerce who deal with such partnership firm in business. It was further held that Section 69(2) of the Partnership Act 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 never be as a historical fact.

8. Be that as it may, whether the contract is entered into in course of business or it is a contract in relation to common law right is not apparent from the averments made in the plaint itself, then the



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matter is to be established by evidence. When the Court deals with a question in the light of Order 7 Rule 11 CPC, the Court cannot look into any material other than the averments made in the plaint. No evidence nor other material nor any defence by way of written statement or opposition can be looked into. Neither it needs any evidence to be recorded.

9. Prima facie, however, we are of the view that even if any tenancy is pleaded that would not be a contract in relation to its business since admittedly, the partnership firm is carrying on business in jewellery and not of any tenancy. The plaint does not disclose that a business in tenancy is being carried on by the appellant.”

(e) The decision of the Bombay High Court in the case of ***Mangilal Jagrupji Jain Vs. Bharat Shankarlal Dhakad [HUF] and Others*** reported in **2012 [1] Mh.LJ 587** was also relied on by the learned counsel for the respondent/plaintiff. The defendant who has lost in his application filed under Order 7 Rule 11[d] of CPC, preferred a Revision before the High Court of Bombay. The Suit is for specific



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performance based on an agreement. The Agreement indicated that the plaintiffs along with the revision petitioners are Partners of an unregistered Firm. Since the defendants failed to perform their part, a suit was filed by the plaintiffs in their individual capacity. It is held that "the issue cannot be decided in a petition under Order 7 Rule 7 of CPC in view of the nature of dispute involving several factual controversies".

- (f) In yet another decision of the High Court of Calcutta in the case of ***Arun Chorone Roquitte & Another Vs. Oriental Venetian & Another*** reported in ***2015 CAL 86 : 2015 [3] CHN [CAL] 371***, the Calcutta High Court held that the suit is not hit by Section 69[2] of the Act on the ground that Section 69[2] of the Act cannot cover a contract relating to common law right unconnected with the partnership business. There, the case of the plaintiff in the plaint was that the suit property was let out to a Partnership Firm and the lease was monthly. After referring to the judgment of the Hon'ble Supreme Court in ***Humayun Property Limited Vs. Commonwealth Jewelers [cited supra]*** reported in ***LNIIND 2003 SCC Online Cal***



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387 : 2004 [1] ICC 201 [Cal][DB], and a few other judgments, it was held that Section 69[2] of the Act does not make any and every type of contract unenforceable at the instance of an unregistered Firm. It was specifically held that Section 69[2] of the Act bars a suit to enforce a contract relating to the business dealings or business affairs of an unregistered Firm and that a suit to enforce a contract of tenancy by claiming a declaration and other consequential reliefs would not be hit by Section 69[2] of the Act.

(g) A Division Bench of the Bombay High Court in the case of **Romesh S.Sharma V. Raja Construction Company** reported in **LNIIND 2005 Bom 550** relied upon by the learned counsel for respondent, has held that the maintainability of suit for want of registration by referring to Section 69[2] of the Act would require evidence and therefore, it should be decided at the time of trial. It is to be noted that in the said judgment, the Bombay High Court noticed serious disputes on facts about the registration of the plaintiff's Firm under the Partnership Act.

(h) In yet another case in **Prabhakar Tulshiram Shegaonkar and**



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Another V. M.A.Haffis and Another reported in *2013 SCC Online Bom 2127 : 2014 [1] AIR Bom R 47 : 2014 AIR CC 545*, the Bombay High Court refused to entertain a plea referring to Section 69[2] of the Act after finding that the suit was not one by or on behalf of the Partnership Firm.

- (i) Learned counsel also relied upon a recent judgment of the Hon'ble Supreme Court in the case of *Shiv Developers Through its Partner Sunilbhai Somabhai Ajmeri Vs Aksharay Developers and Others* in Civil Appeal No.785/2022 dated 31.01.2022. The appellant before the Hon'ble Supreme Court was an unregistered Partnership Firm by name "Shiv Developers". The appellant filed a suit against the Partnership Firm "M/s.Aksharay Developers" and others, who are all partners in the defendant Firm. It was the case of the appellant/plaintiff therein that the appellant and respondents 2 and 3 purchased a property through a registered Sale Deed and that the appellant Firm has 60% share and respondents 2 and 3 were having 20% share each. The suit was filed against another Firm in which the respondents 2 and 3 are partners. It is the further case of the



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appellant/plaintiff that respondents 2 and 3 therein had fraudulently constituted a different Firm and got it registered and conveyed the property fraudulently in the newly formed Partnership Firm. Therefore, the suit was filed to declare the Sale Deed as null and void, apart from seeking compensation. It was contended on behalf of the contesting defendants that the appellant Firm being an unregistered Partnership Firm, the suit is barred by Section 69[2] of the Act. The Trial Court dismissed the application filed under Order 7 Rule 11 of CPC. However, the High Court took a contrary view and allowed the application and held that the rejection of application under Order 7 Rule 11 of CPC is unsustainable. After relying upon the judgment in the case of *Purushottam and Another V. Shivaraj Fine Art Litho Works and Others* reported in 2007 [2] GLH 406 : 2007 [15] SCC 58 and a few other judgments of the Hon'ble Supreme Court including the judgment in *Haldiram Bhujiawala [cited supra]* and the judgment in *Raptakos Brett & Co. Ltd V. Ganesh Property* reported in 1998 [7] SCC 184, the Hon'ble Supreme Court has held as follows:-



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*"19. Taking up the facts of the present case, one of the significant features herein is that the transaction in question, i.e., sale of its share by the plaintiff firm to the contesting defendants has not been the one arising out of the business of the plaintiff firm. This factual aspect is apparent from the basic plaint averments and is fortified by the concurrent findings of the Trial Court as also of the High Court. Though the High Court endorsed the finding that the transaction in question was not arising out of the business of the plaintiff firm but, it appears that the implication of this crucial finding has not acquired the requisite attention of the High Court. The decision of this Court in the case of **Purushottam** (supra) was cited before the High Court but, while referring to the same in paragraph 33 of the impugned judgment, the High Court probably looked only at the editor's headnote and in any case, missed out the ratio and principles therein, as reiterated with reference to the previous decisions. The decision in **Haldiram Bhujawala** (supra) seems to have not gone into consideration of the High Court although this decision formed the sheet anchor of the order of the Trial Court.*



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19.1. *As noticed, the crucial and key factor in the present case remains that the sale transaction in question is not arising out of the business of the appellant firm. Equally significant fact is that the subject Suit is for enforcing a right of avoidance of a document on the ground of fraud and misrepresentation as also the statutory rights of seeking declaration and injunction. Significantly, the composition of defendant firm “Aksharay Developers” (defendant No.1) has itself been questioned by the plaintiff – appellant while alleging that on 22.04.2014, this firm was constituted with four partners but later on, the defendant Nos.2 and 3 (respondent Nos.2 and 3 herein), constituted another firm in the same name with themselves as partners while leaving aside the other two.*

19.2. *We are not commenting on the merits of the case of either of the parties but this much is apparent from a look at the frame and contents of the plaint as also the prayers therein that the present one cannot be said to be such a Suit by the unregistered firm which would attract the bar of Section 69(2) of the Act of 1932.*

20. *To put it differently, the relevant*



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principles, when applied to the facts of the present case, leave nothing to doubt that the transaction in question was not the one entered into by the plaintiff firm during the course of its business (i.e., of building construction); and it had been an independent transaction of sale, of the firm's share in the Suit property, to the contesting defendants. The bar of Section 69 (2) is not attracted in relation to the said sale transaction. Moreover, the subject Suit cannot be said to be one for enforcement of right arising from a contract; rather the subject Suit is clearly the one where the plaintiff seeks common law remedies with the allegations of fraud and misrepresentation as also of the statutory rights of injunction and declaration in terms of the provisions of the Specific Relief Act, 1963 as also the Transfer of Property Act, 1882 (while alleging want of the sale consideration). Therefore, the bar of Section 69(2) of the Act of 1963 does not apply to the present case."

- (17) Since the judgment of the Hon'ble Supreme Court in ***Raptakos Brett case [cited supra]*** has been referred to in many of the judgments and in the said judgment, several other precedents are



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also referred to, this Court is inclined to consider the principle of law laid down and the legal impact of the said judgment as a binding precedent. It is relevant to refer to the facts in brief that were discussed by the Hon'ble Supreme Court in ***Raptakos Brett case [cited supra]*** reported in ***1998 [7] SCC 184***. The plaintiff in a suit, leased out the suit property to the defendant on a monthly rent of Rs.2045/- by a registered Sale Deed dated 16.03.1964. The lease was for a period of 21 years commencing from 16.03.1964 to 15.03.1985. On the expiry of the lease period, the plaintiff, an unregistered Firm, filed a suit for possession as well as for damages @ Rs.200/- per day for illegal occupation of the premises by the defendant. It is to be seen that the suit was filed after termination of tenancy in accordance with law. The defendant contended that after the expiry of the lease period, it had continued to be a tenant by holding over under Section 116 of the Transfer of Property Act, 1882. A defence was also taken by the defendant referring to Section 69[2] of the Act. A separate application was also filed under Order 7 Rule 11[d] of CPC on the



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ground that the suit for possession as filed by the plaintiff which is an unregistered Partnership Firm, is not maintainable. The Trial Court decreed the suit for possession after holding that the defendant is in unlawful possession after the expiry of the lease period and that the suit is not hit by Section 69[2] of the Act. The High Court confirmed the judgment and decree of the Trial Court and dismissed the appeal. Aggrieved by the same, the defendant was before the Hon'ble Supreme Court on the ground that the plaintiff who has filed the suit to enforce the right arising out of the contract of lease between the parties, is not maintainable as the plaintiff was not a registered Partnership Firm. The appeal before the Hon'ble Supreme Court was defended by the plaintiff's counsel by submitting that on a conjoint reading of the relevant clauses in the plaint, it has to be held that the suit was not filed for enforcing any right arising from a contract which was already at an end by the efflux of time and that the suit was not based on any contractual terms. The Hon'ble Supreme Court after referring to the relevant paragraphs in the plaint and the cause of action



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paragraph, has held in paragraphs No.22 to 24 as follows:-

22. The net effect of this discussion, therefore, is that the plaint as framed by the plaintiff-respondent is based on a composite cause of action consisting of two parts. One part refers to the breach of the covenant on the part of the defendant when it failed to deliver vacant possession to the plaintiff-lessor on the expiry of the lease after 15-3-1985 and thereafter, all throughout, and thus it was guilty of breach of Covenants 14 and 17 of the lease. The second part of the cause of action, however, is based on the statutory obligation of the defendant-lessee when it failed to comply with its statutory obligation under Section 108(q) read with Section 111(a) of the Property Act. So far as this second part of the cause of action is concerned, it cannot certainly be said that it is arising out of the erstwhile contract.

23. However, one contention of learned Senior Counsel for the appellant is required to be noted so far as this second part of the cause of action is concerned. It was submitted that Section 108(q) of the Property Act itself provides that it is subject to the contract or local usage to the contrary and that



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Section 4 of the Property Act lays down that the chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. Our attention, in this connection, was also invited to Section 1 of the Indian Contract Act, 1872 which provides that:

“Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.”

We fail to appreciate how these provisions are of any assistance to the learned Senior Counsel for the appellant. Section 108 of the Property Act lays down that in the absence of a contract to the contrary, the rights and liabilities of the lessor and lessee would be those which are covered by the rules mentioned in that section. Consequently it must be held that as compared to what is laid down by this section by way of rights and liabilities to the lessor and lessee, if the contracting parties have not provided anything to the contrary to such statutory rights and liabilities in their contract, then these statutory rights and liabilities would prevail. But if



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any contrary provision is mentioned in the contract qua such rights and liabilities, then because of Section 4 of the Property Act, such a contrary provision in the contract will get saved on the combined operation of Section 4 of the Property Act and Section 1 of the Indian Contract Act, 1872. But that would also be subject to the rider that such an inconsistent contract should not be inconsistent with the provisions of the Indian Contract Act. Thus in the absence of any contrary provision in the contract, Section 108 will operate on its own. If there is any contrary provision in the contract, it will prevail over the provision in Section 108, provided such contrary provision in the contract is not inconsistent with the main provision of the Indian Contract Act. The combined operation of Section 108 and Section 4 of the Property Act and Section 1 of the Indian Contract Act can be better visualised by illustrations. Clause (b) of Part (A) of Section 108 deals with the statutory rights of a lessor to put the lessee in possession of the property leased at the lessee's request. That is the mandate of the aforesaid statutory provision. This statutory right of the lessee and the corresponding liability of the lessor can be



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subject to a contract to the contrary. If under the contract of lease, the parties have agreed to a stipulation that the lessor will put the lessee in possession after a period, say, three or four months within which the lessor will effect necessary repairs to the premises by way of whitewash, etc., then the statutory right of the lessee to be put in possession on the extent of the lease as per the said sub-section (b) would get curtailed or superimposed by the contractual right of the lessor to wait for the aforesaid period of delay and it will simultaneously cut across the statutory right of the lessee to be put in possession on the latter's request. Such a contrary provision in the contract will in its turn be saved by Section 4 of the Property Act read with Section 1 of the Contract Act as it in its turn is not inconsistent with any of the provisions of the present Indian Contract Act. We may take another illustration. Part B of Section 108 deals with the rights and liabilities of the lessee. When we turn to clause (q) thereof, we find that there is a statutory obligation of the lessee on the determination of the lease to put the lessor in possession of the property. There can still be a contract between the parties at the time of entering



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into lease or even thereafter that on the determination of the lease, the lessee will be given six months' time to remove his fixtures and to vacate the premises and when such a locus poenitentiae is given to the lessee under the contract by the lessor, the statutory obligation of the lessee flowing from Section 108(q) immediately to put the lessor in possession of the property on the determination of the lease would get superseded and postponed by six months as stipulated in the contract. This will be a contract contrary to what is statutorily provided under Section 108(q). It is such a contract to the contrary which would be saved by Section 4 of the Property Act as such a contract to the contrary is expressly saved by Section 108 and it also cannot be said to be consistent with any of the provisions of the Indian Contract Act. Hence Section 1 of the Contract Act also will not hit the said contract to the contrary. Thus on a conjoint reading of the statutory scheme of Section 108 and Section 4 of the Property Act and Section 1 of the Contract Act, it must be held that in the absence of such contrary legally permissible contracts, the statutory rights and liabilities of the lessors and lessees as laid down under Section 108



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of the Property Act, especially Section 108(q) in the present case, would remain fully operative by force of the statute itself. It is not the contention of either side that there was any contract to the contrary which permitted the lessee to continue in possession after the determination of the lease by the efflux of time even for a day more. In this connection, we may usefully refer to a decision of this Court. While interpreting the phrase “contract to the contrary” as found in Section 108 of the Property Act, this Court in the case of Madan Lal v. Bhai Anand Singh [(1973) 1 SCC 84] speaking through Shri Beg, J., held that if the tenant on the determination of the lease wants to show that he is not bound to hand over the vacant possession forthwith to the landlord as he has paid the market value of the construction put in by him on the leased premises, there should be an express term to the contrary in the contract of tenancy which would override Section 108(q) obligation and as in the case before this Court, there was no such express term to the contrary in the lease deed, it was held that the obligation under Section 108(q) had to be complied with by the tenant. In this connection, the following pertinent observations



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were made in para 4 of the Report as under: (SCC pp. 86-87)

“If this had really been the intention of the parties, there was nothing to prevent them from inserting such a term in the deed so as to make that intention explicit. It appears to us that the more natural construction of the clause is that rights of ownership, including the right to take possession of the building, would become vested in the lessor at the expiry of the period of the lease, and that 50% of the market value of the building, which was to be paid in any case, became a condition attached to this ownership of the building when it vested in the lessee. The lessor was, in any case, to pay 50% of the market value of the structure, and, in the event of a sale, the payment of this amount became a first charge on the proceeds of sale. It is also significant that it is not mentioned in the deed that a purchaser of the cinema house, who would presumably prefer to obtain possession so as to be able to run it, could not get possession of it until the market value was ascertained or 50% of it was paid. Possession of a cinema house after the expiry of a building lease involving the passing of ownership of the building on



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such expiry is, after all, an important matter. In view of Section 108(q) of the Transfer of Property Act the burden of proving 'a contract to the contrary' was on the lessee; and, something to indicate an agreement to the contrary should be there, on such a matter involving a valuable right before this burden could be held to have been duly discharged."

On the facts of the present case it has to be held that there is no further locus poenitentiae given to the tenant to continue to remain in possession after the determination of the lease by the efflux of time on the basis of any such contrary express term in the lease. Consequently, it is the legal obligation flowing from Section 108(q) of the Act which would get squarely attracted on the facts of the present case and once the suit is also for enforcement of such a legal right under the law of the land available to the landlord, it cannot be said that the enforcement of such right arises out of any of the express terms of the contract which would in turn get visited by the bar of Section 69 sub-section (2) of the Partnership Act. Consequently it has to be held that when para 2 of the plaint in addition made a reference to the right of the plaintiff to get



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possession under the law of the land, the plaintiff was seeking enforcement of its legal right to possession against the erstwhile lessee flowing from the provisions of Section 108(q) read with Section 111(a) of the Property Act which in turn also sought to enforce the corresponding statutory obligation of the defendant under the very same statutory provisions. So far as this part of the cause of action is concerned, it stands completely outside the sweep of Section 69 sub-section (2) of the Partnership Act. The net result of this discussion is that the present suit can be said to be partly barred by Section 69 sub-section (2) so far as it sought to enforce the obligation of the defendant under clauses 14 and 17 of the contract of lease read with the relevant recitals in this connection as found in para 2 of the plaint. But it was partly not barred by Section 69 sub-section (2) insofar as the plaintiff based a part of its cause of action also on the law of the land, namely, the Transfer of Property Act whereunder the plaintiff had sought to enforce its statutory right under Section 108(q) read with Section 111(a) of the Property Act. Enforcement of that right had nothing to do with the earlier contract which had stood



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determined by the efflux of time. The first point for determination, therefore, has accordingly to be held partly in favour of the plaintiff and partly in favour of the defendant. As the decree for possession is passed on the basis of both parts of causes of action, even if it is not supportable on the first part, it will remain well sustained on the second part of the very same cause of action.

24. In view of our conclusion on Point 1, though the appellant partly succeeds thereon, the ultimate decree for peaceful possession against the appellant would remain well sustained.”

- (18) While discussing the legal principles by referring to several precedents, the Hon'ble Supreme Court has reiterated the position that the suit, filed on a cause of action for enforcement of a right arising under common law or a statutory right is not barred by in view of Section 69[2] of the Act. Though the suit was filed by admitting a contract on lease, the Hon'ble Supreme Court considered the second limb of the cause of action which is available to the plaintiff after the expiry of the lease period and which arises to the plaintiff after the termination of the contract



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under common law for recovery of possession by enforcing his statutory right under the provisions of the Transfer of Property Act, particularly Section 111 read with Section 108[q] of the said Act. From the judgments relied upon by the learned counsel for the respondent and the judgments discussed above, the legal principles reiterated by Courts can be summarised as follows:-

- (a) A suit by an unregistered Firm against a third party based upon a common law principles of tort not arising out of a contract entered into by or on behalf of unregistered Firm with third party in the course of Firm's business is not barred by Section 69[2] of the Indian Partnership Act.
- (b) A suit filed by an unregistered Firm against a third party purely for enforcement of a right under common law or a statutory right *dehors* a right arising out of a contract in the course of business of the Firm is not barred by Section 69[2] of the Indian Partnership Act.
- (c) A petition filed under Order 7 Rule 11[3] of CPC, on the ground that suit is barred under Section 69[2] or Section 69[1] of the Act



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cannot be entertained in a case where the issue has to be decided based on several factual controversies.

- (19) None of the judgments above referred may have any application to the facts of the present case, where the plaintiff herein has filed the suit for an injunction to enforce his right as a partner having 50% share in the Partnership Firm as per the Partnership Agreement. Learned counsel for the respondent/plaintiff referring to the second portion of the relief submitted that the plaintiff has sought for an injunction that he should not be evicted otherwise than due process of law. This Court is unable to find any substance in the argument of the learned counsel for the respondent/plaintiff.
- (20) As seen from the various paragraphs in the plaint, the plaintiff has not filed the suit praying to protect his physical possession of the property. The plaintiff, as an individual, has no right to be in possession of the property. He does not claim any right to be in possession of the property. The plaintiff himself admitted that the property originally belonged to the parents of the defendant and



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that it was leased out to the partnership Firm for running its business. The relief claimed in the suit, is therefore, cannot be interpreted to be one relation to the leasehold right of the individual. When that is very clear, this Court is of the opinion that none of the judgments relied upon by the learned counsel for the respondent/plaintiff is helpful to the plaintiff.

- (21) Section 69[1] and [2] of the Indian Partnership Act, 1932, is extracted below for convenience:-

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 a behalf of any persons 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 : **Provided** that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the*



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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) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of setoff or other proceedings to enforce a right arising from a contract but shall not affect,--

(a) the firms constituted for a duration upto six months or with a capital upto two thousand rupees; or;

(b) the powers of an official assigned, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply, --

(a) to firms or partners in firm which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56 this Chapter does not



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apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

- (22) Though the petition filed by the revision petitioner/defendant before the Lower Court was under Section 69[2] of the Partnership Act, the provision that is attracted is only Section 69[1] of the said Act. From the reading of Section 69[1] of the Act, it is evident that the suit to enforce a right arising from a contract or conferred by Partnership Act, cannot be instituted in any Court by or on behalf of any person as a partner in a Firm against the Firm or any person alleged to be or to have been a partner in the Firm, is maintainable unless the Firm is registered and the persons who



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is/are shown with Registrar of Firms as Partners.

- (23) As held earlier, the suit is to enforce the right of respondent as a partner arising out of the contract of Partnership against the other partner. Hence, Section 69[1] of the Act is attracted.
- (24) In view of the foregoing discussions, this Court has no hesitation to hold that the Court below has erroneously dismissed the application filed by the revision petitioner/defendant and finds that the order of the Court below, impugned herein, is unsustainable.
- (25) In the result, the Civil Revision Petition stands **allowed** setting aside the fair and final order dated 21.12.2018 made in IA.No.727/2018 in OS.No.99/2018 by the learned District Munsif, Palladam. Consequently, the plaint in OS.No.99/2018 on the file of the learned District Munsif, Palladam stands rejected. No costs. Consequently, connected miscellaneous petition is closed.

18.02.2022

AP

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To
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S.S.SUNDAR, J.,

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