* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision : 14th November, 2022***

\+ **CS(COMM) 66/2015 & CC(COMM) 108/2017**

ALMASS INDIA ..... Plaintiff
Through: Mr. Anand Mishra and Ms. Ayushi Rajput, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION ..... Defendant
Through: Mr. Sanjay Poddar, Senior Advocate with Mr. Mukesh Gupta, Standing Counsel, Mr. Pratish Goel and Mr. Mayank Ahuja, Advocates for SDMC.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

CS(COMM) 66/2015

1. Briefly, the case of the plaintiff is that after participating in a tender, it was allotted a unipole 'Opposite Indian Oil Corporation Bhawan, FTC AHMS'. Accordingly, the plaintiff a entered into the agreement dated 16th December, 2013 with the defendant. The plaintiff claims that the site allotted was in violation of the Outdoor Advertisement Policy, 2007 (OAP) of the defendant, inasmuch as the site hindered the right of way and was in the middle of the road. It is further stated that the grievances of the plaintiff were not resolved and thus, the plaintiff surrendered the site in July/August, 2014.

2. Hence, the present suit was filed seeking the following reliefs:

"i. Pass a declaratory decree declaring the contract/agreement as well as the allotment letter dated 30.12.2013 as null and void ab initio being illegal and contrary to the provisions of the Outdoor Advertising Policy, 2007 and in violation of the order dated 06.05.2015 passed by the Hon'ble High Court of Delhi in WP(C) No.3367 of 2015;

ii. Pass a decree for recovery of a sum of Rs.58,79,832/- in favour of the Plaintiff and against the Defendant alongwith pendente lite and future interest @24% pa for the loss and damage caused to the Plaintiff by the Defendant through their illegal and wrongful acts;

iii. Pass a declaratory decree declaring the demand of Rs.53,63,610/- by the Defendant vide letter dated 18.06.2015 being arbitrary and illegal being in violation of the law;

iv. Pass a decree for recovery of sum of Rs.17,49,625/- towards security and advance MLF alongwith pendente lite and future interest @24% p.a. in favour of Plaintiff and against the Defendants which has been illegally forfeited by the Defendant;

v. Pass a decree/order for permanent injunction restraining the Defendant from taking any coercive action against the Plaintiff for recovery of any amount as license fee, damages or otherwise arising out of the contract in dispute"

3. The defendant has filed its written statement to the suit along with a counter claim.

4. Issues were framed in the suit on 13th November, 2018. The following issue, being issue no.1, was ordered to be tried as a preliminary issue:

"1. Whether the suit filed by an unregistered partnership firm is maintainable in view of the bar imposed by Section 69 of the Indian Partnership Act, 1932? OP"

5. Written submissions along with judgments in support with respect to the above issue have been filed on behalf of both the counsels along with the documents in support.

6. It is the contention of the plaintiff that the present suit is not barred under Section 69(2) of the Indian Partnership Act, 1932 as in the present suit, the plaintiff is not seeking to enforce the right arising from a contract. In fact, the plaintiff is seeking enforcement of a right under common law and therefore, the bar under Section 69(2) would not apply in the present case. Reliance is placed on the judgment of the Supreme Court in ***Raptakos Brett & Co.* v. *Ganesh Property***, (1998) 7 SCC 184 to submit that the reference to the contract is only by way of an historical event, the same would not be hit by the bar under Section 69(2) of the Partnership Act. Reliance is also placed on the judgment of ***Haldiram Bhujiawala* v. *Anand Kumar Deepak Kumar***, (2000) 3 SCC 250 to submit that where the plaintiff seeks enforcement of a statutory right or a common law right, the bar under Section 69(2) of the Partnership Act, 1932 would not apply.

7. *Per contra,* the senior counsel appearing on behalf of the defendant has drawn my attention to averments made in the plaint to submit that the cause of action raised in the plaint arises on the basis of a contract. Reference in this regard has been made to paragraphs 17, 18 and 32 of the plaint.

8. It is submitted on behalf of the defendant that in order to determine whether the contract was illegal or void, reference would have to be made to the terms of the contract. There is no averment made in the plaint that the dispute arises out of a common law right. The plaintiff is seeking enforcement of rights under the contract and the reference to the contract is

not in a historical context. Reliance is placed on the judgments of Coordinate Benches of this Court in ***Anil Kumar* v. *Anuradha Singh***, 2016 (232) DLT 150 and ***Sai Nath Enterprises* v. *North Delhi Municipal Corporation***, 2015 SCC OnLine Del 14400.

9. I have heard the counsels for the parties.

10. To appreciate the submissions made on behalf of the parties, a reference may be made to Section 69(2) of the Partnership Act.

> *"69. Effect of Non-Registration.*
> *...*
> *(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."*

11. In ***Sai Nath Enterprises*** (supra), a Coordinate Bench of this Court was seized of a dispute, wherein the defendant, MCD had invoked the bar under Section 69(2) of the Partnership Act for dismissal of the suit and the plaintiff therein raised a similar plea that the reliefs sought in the suit did not arise from a contract and therefore, the suit was not barred under Section 69(2) of the Partnership Act.

12. The relevant observations of the Court in ***Sai Nath Enterprises*** (supra) with regard to the bar under Section 69(2) of the Partnership Act are as under:

> *"89. The provisions of Sub-sections (1) and (2) of Section 69 are substantive provisions intended to discourage the non-registration of firms. The provision in Section 69 (2) is mandatory. The Partnership Act is a special Act which makes the registration of a firm a condition precedent to the institution of a suit of the nature mentioned in it by or on behalf of a firm against a third party. It deals with the question as to when a firm can sue, or be sued by, a third party in respect of a right arising from a contract, and*

provides certain requirements as conditions precedent for the institution of the suit, viz. (a) that the firm is a registered firm, and (b) the persons suing are or have been shown in the Register of Firms as partners in the firm.

90. It is evident that a suit by an unregistered firm is not maintainable and the bar under Section 69 of the Act hits at the very root or the very institution of the suit. If a firm is not registered or if the conditions specified in Section 69(2) are not complied with, the partners of the firm may file a suit, but then all of such partners will have to be joined as plaintiffs. When the conditions specified in Section 69(2) are satisfied, i.e. the firm must be registered and the persons suing must be or have been shown in the Register of Firms as partners of the firm, then a suit can be instituted by or on behalf of the partnership firm in the name of the firm."

13. In ***Sai Nath Enterprises*** (supra), reference was made to judgment of the Supreme Court in ***Purushottam* v. *Shivraj Fine Art Litho Works***, (2007) 15 SCC 58, wherein the Supreme Court had explained the rationale behind the enactment of Section 69 of the Partnership Act. The relevant portion of the judgment is set out below:

"97. …

21. It would thus appear that registration of a firm was conceived as a protection to third parties dealing with a partnership firm. Registration ensured the certainty of existence of the firm and its membership, so that later an unsuspecting third party contracting with the firm may not run the risk of being defeated on discovery that neither the partnership firm nor its partners existed in fact. On the other hand, an unregistered firm could not bring a suit for enforcing its right arising from a contract."

14. The plaintiffs in ***Sai Nath Enterprises*** (supra) had also placed reliance on the judgments in ***Haldiram Bhujiawala*** (supra) and ***Raptakos Brett & Co.*** (supra). The Court held that the judgments in ***Haldiram Bhujiawala***

(supra) and ***Raptakos Brett & Co.*** (supra) would not advance the case of the plaintiff as the dispute sought to be adjudicated in the suit was based on a contract. Accordingly, the suits were held to not be maintainable under Section 69(2) of the Partnership Act.

15. In ***Anil Kumar*** (supra), a plea was taken on behalf of the plaintiff therein that the plaintiff was not enforcing any right arising from a contract but only a right under common law and therefore, the suit would not be hit by the bar under Section 69(2) of the Partnership Act. A Coordinate Bench of this Court, while taking note of the judgments of the Supreme Court in ***Haldiram Bhujiawala*** (supra) and ***Purushottam*** (supra) and relying upon ***Sai Nath Enterprises*** (supra) upheld the dismissal of the plaint by holding that as per the averments in the plaint, the dispute clearly arose on the basis of a contract between the parties. Therefore, the bar contained in Section 69(2) of the Partnership Act would be squarely applicable.

16. Applying the aforesaid legal position to the facts of the present case, it has to be determined whether the cause of action raised in the present case arises from (i) the contract entered into between the parties as contended by the defendant; or (ii) on account of common law rights as contended by the plaintiff. The fact that the contract was entered into between the parties on 16th December, 2013 is not disputed by the plaintiff. It is the case of the plaintiff that the aforesaid contract was void as it was in violation of the OAP of the defendant. To determine whether or not the aforesaid contract was in violation of the OAP, a reference would have to be made to the terms of the contract. Similarly, if something was done or not done in terms of the agreement, reference would have to be made to the terms of the contract.

17. The relief claimed in prayer clause 'i' is to declare the

contract/agreement and allotment letter dated 30th December, 2013 as null and void *ab initio*. Prayer clause 'ii' of the plaint is in respect of loss of profits on account of breach of the agreement. Prayer clause 'iii' of the plaint is towards demand of contractual dues raised by the defendant. Relief has also been sought by the plaintiff in prayer clause 'iv' against the forfeiture of the security deposit and advance license fee/MLF by the defendant. Therefore, it cannot be gainsaid that all the aforesaid reliefs arise out of the contract between the parties and to decide the same, reference would have to be made to the terms of the contract.

18. In paragraph 32 of the plaint, it has specifically been pleaded by the plaintiff that the suit is arising out of a contract and therefore, is a commercial suit. Senior counsel for the defendant has correctly stated that no averment has been made in the plaint with regard to the cause of action arising under common law or under any statutory right. From the discussion above, it is apparent that the dispute raised in the present case arises out of the contract between the parties and the reference to the contract has not been made as a historical fact. Therefore, the judgments in ***Haldiram Bhujiawala*** (supra) and ***Raptakos Brett & Co.*** (supra) would not be of any assistance to the plaintiff.

19. Accordingly, the present suit is not maintainable in view of the bar under Section 69(2) of the Partnership Act. The aforesaid preliminary issue no.1 is decided in favour of the defendant and against the plaintiff.

20. Consequently, the suit along with pending applications is dismissed.

CC(COMM) 108/2017

21. Pleadings are complete.

22. Issues no. 9 to 12 framed by this Court on 13th November, 2018 relate to the counter claim filed on behalf of the counter claimant/defendant. The same are set out below:

> *"9. Whether the defendant is entitled to recover any amount on account of arrears of Monthly Licence Fee and, if so, to what amount? OPD*
> *10. Whether the defendant is entitled to claim damages in terms of the counter-claim and, if so, to what amount? OPD*
> *11. Whether the defendant is entitled to claim interest on the said amount and, if so, at what rate? OPD*
> *12. Relief."*

23. Parties shall file their respective list of witnesses within eight weeks.

24. The counter claimant/MCD shall file its evidence by way of affidavit.

25. List before the Joint Registrar on 30th January, 2023.

AMIT BANSAL, J.

NOVEMBER 14, 2022
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