IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MANZOOR AHMAD MALIK

CIVIL APPEAL NO.363-L OF 2015
(Against the judgment dated 13.9.2011 of the Lahore High Court, Lahore passed in RFA No.279/2009)

Ch. Nazir Ahmed

...Appellant(s)

VERSUS

Ali Ahmed and another

...Respondent(s)

For the Appellant(s): Mr. Muhammad Farooq Qureshi Chishti, ASC

For the Respondent(s): Mr. Alamgir, ASC
Mr. Mehmood-ul-Islam, AOR

On Court's call: Ms. Ayesha Hamid, Advocate
Amicus Curiae *(with the permission of the Court)*

Date of Hearing: 04.12.2015

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JUDGMENT

MIAN SAQIB NISAR, J.- Vide order dated 27.11.2015 leave in the matter was granted to consider:-

(i) whether a suit for dissolution and rendition of accounts of a partnership firm, which is not registered would be barred in terms of section 69 of the Partnership Act, 1932 and that the plaint should be rejected on that account under Order VII Rule 11 CPC and/or

(ii) if the suit is not for dissolution of partnership or rendition of accounts of an unregistered firm whether such suit is barred by law and thus the plaint could be rejected.

2. This appeal arises from the following facts:- that the appellant filed a suit for declaration that respondent No.1 be bound to act as per the partnership deed, specific performance *(of the partnership deed)*, rendition of

accounts, cancellation of document *(Waqaf-ul-Aulad)* and permanent injunction *(hereinafter the "**suit**")* on the basis of an **unregistered** partnership deed dated 22.02.1986 executed by and between the appellant and the respondent no.1 *(real brothers)* for the purpose of establishing and running a school. Upon the refusal of the respondent no.1 to pay profits after 2006 and upon learning that the school property of the partnership had been transferred by the respondent no.1 to the respondent no.2 *(his real son)* through a Waqaf-ul-Aulad in 2004, the appellant was constrained to file the suit. Vide order dated 28.04.2009 the Civil Court at Lahore accepted the respondents' application under Order VII, Rule 11 CPC and rejected the plaint on the basis that the suit is barred under section 69 of the Partnership Act, 1932 *(the Act)* as the noted firm is not registered with the concerned authority. This order has been upheld by the learned High Court through the impugned judgment dated 13.09.2011 when challenged by the appellant in RFA 279/2009.

3. The learned counsel for the appellant argued that the impugned judgments are against the law and facts. He submitted that the firm did not exist at the time of institution of the suit and therefore the appellant could sue for rendition of accounts under sub-section (3) of section 69 of the Act. He stated that the bar of section 69 *ibid* was not attracted. Whereas, the learned counsel for the respondents supported the impugned judgments. He argued that the bar of section 69 was absolute and the same was attracted to the suit. He submitted that the partnership deed was for a period of 30 years and this time period was set to expire in February 2016 at which time the plaintiff would be free to file a suit for accounts but that such a suit for accounts was barred till such time as the partnership was not dissolved. The appellant, rather than seeking dissolution had contrarily sought specific performance of the partnership. He relied on **The Australasia Bank Ltd. Vs. Messrs A. Ismail Ji & Sons**

and others (PLD 1952 Lah 314), **Lakhani Textile International through Partner Vs. Messrs Southern Agencies (Pvt.) Ltd. (2008 CLC 444)**, **Province of Sindh through Secretary, Public Work Department, Government of Sindh, Karachi and 6 others Vs. M/s Royal Contractors (1996 CLC 1205)**, **Syed Nazir Hussain Vs. Ahtisham Muhammad Ali and 2 others (1989 MLD 88)** and **Abdul Rehman Vs. Parvez Ahmed Butt and 2 others (1983 CLC 1740)**.

4. The amicus curiae submitted that the bar contained in Section 69(1) and (2) of the Act is **absolute** and during the subsistence of the partnership *(which is not dissolved)*, no suit of the nature mentioned therein can be filed, however from the language of sub-section (3)(a), three *(3)* exceptions have been drawn where the disability under this section will not operate i.e.:-

(a) the enforcement of any right to sue for the dissolution of a firm;

(b) for accounts of a dissolved firm; and

(c) any right or power to realize the property of a dissolved firm.

These exceptions are carved out to meet such types of exigencies where a partner of an unregistered firm files certain proceedings for enforcement of any right to sue for the dissolution of the firm or any proceedings to seek accounts or realize the property of a dissolved firm. She in the above context has relied on **Usman vs. Haji Omer (PLD 1966 SC 328)**, **Kantilal Jethalal Gandhi Vs. Ghanshyam Ratilal Vyas (AIR 1994 Guj 56)**, **Mahan Traders Vs. Amar Singh [2007 (2) RAJ 240 (Del)]**, **Mulakh Raj Vs. Shashi Rani [2005 [DB] AIR 2005 DELHI 374]**, **Vanita Ghambir Vs. District Judge, Delhi [2005 (1) ARBLR 166 Delhi]**, **Shukaran Devi Vs. Om Prakash Jain [2007 (1) RAJ 230 (Del)]**, **K.L. Verma and another Vs. Shri V.K. Sharma and another [2004 (1) RAJ**

309 (Del)] and **Prem Lata and another Vs. Ishar Dass Chaman Lal and others (AIR 1995 SC 714)**. Furthermore in order to highlight the true import, she has elucidated the scope and object of Section 69 *ibid (which as pleaded by her shall reflect in the succeeding part of this opinion)*. However she submitted that as many as five *(5)* reliefs have been sought by the appellant in the suit and the Court(s) has to determine the nature of the suit, in pith and substance and if the bar of section 69 is attracted to one or more of such claim/relief the Court may apply the rule of **severance** and save the plaint from rejection to the extent of that relief *qua* which the bar is not attracted. This according to her can be done by implying the dissolution of the firm.

5. Heard. Section 69 of the Partnership Act is as under:-

> *"**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 behalf of any person 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.*
>
> *(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) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, **but 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 release the property of a dissolved firm,** or*

(b) the powers of an official assignee, receiver or Court under the insolvency Federal Territory of Karachi 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 to partners in firms which have no place of business in Pakistan, or whose places of business in Pakistan are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) IX of 1887: to any suit or claim of set-off not exceeding one hundred rupees in value which, 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."

[emphasis supplied]

From the unambiguous language of the section the intent and purpose of the legislature is loud and clear, that is to make the adverse effects of non-registration so broad-based and comprehensive so as to make the provisions virtually compulsive. This seems to have been mandated with an unmistaken object to exert pressure which is to be brought to bear on the partners to have the firm and themselves registered. The section provides for the effect of non-registration of firms, in that sub-section (1) relates to suits by partners against firms or the partners and sub-section (2) relates to suits by firms against third person, as fatal, while sub-sections (3) and (4) lay down exceptions to the *(lethal)* effects of the non-registration of firms[1]. On account of the penal consequences provided by sub-sections (1)

[1] Partnership Law by P. N. Chada

and (2) of Section 69 there cannot be two opinions that the registration of the firm, though has been left optional for the partners and that the facility of registration has been provided without compulsion *(see Section 58 of the Act)*, for the purposes of suits falling within its purview the provisions of Section 69 are absolutely mandatory[2]. In this regard the outline of the provisions may be broadly captured as below:

(i) A partner of an unregistered firm cannot sue the firm or any of its partners, past or present, for enforcing a right conferred by the Act or arising out of the contract of partnership.

(ii) An unregistered firm cannot file a suit against any third person for enforcing a right arising out of a contract.

(iii) The above two disabilities also apply to a claim of set off or any other proceeding to enforce a right arising out of contract. But they do not apply to –

(a) the right to sue for dissolution or for accounts of a dissolved firm, or to realize the property of a dissolved firm; or

(b) the power to realize the property of an insolvent partner.

(iv) The section does not affect, –

(a) firms located in areas to which the Act does not extend or which are exempt from the operation of the Act;

(b) proceeding, etc. not exceeding Rs.100 in value.

In other words sub-sections (1) and (2) of Section 69 place a complete bar on every proceeding initiated vide a suit by an unregistered firm and its partners. However, as expressly provided by sub-sections (3) and (4), the aforesaid rules causing disabilities are not applicable to, and registration of a firm is not necessary in, the following cases:-

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[2] Law of Partnership by Avtar Singh

(1) where the suit is for the dissolution of a firm;

(2) where the suit is for rendition of accounts of a dissolved firm;

(3) where the suit is for realization of the property of a dissolved firm.

6. In view of the above, it may be pointed out *(reiterated)* that though the Act places no prohibition upon an unregistered partnership making contracts either *inter se* the partners or with some third party, nor forbids an unregistered partnership acquiring property or assets, all Section 69 does is to make a suit instituted by an unregistered partnership to recover property or enforce rights, unenforceable and precluded. This undoubtedly is a penal provision, therefore on this account it must be construed strictly. In other words the registration of a firm is a condition precedent and *sine qua non* to the right to institute a suit by or on behalf of the firm or its partner(s) as the case may be and any suit instituted against the mandate of law shall be barred, with the obvious consequences of rejection of the plaint by the Court as per Order VII Rule 11(c), CPC which provides *"where the suit appears from the statement in the plaint to be barred by any law"*. The purpose of section 69 would appear to be that in the event of a dispute the aggrieved party should be able to easily identify the name and details of persons who would eventually be liable for discharging the obligations of the firm and enforcing their rights against the firm and its partners, because unlike a company, a partnership firm is not a distinct legal entity and its partners remain personally liable for all the liabilities and debts of the firm subject to their *inter se* contract and proportions under thereto. Sub-section (2) of Section 69 in particular seems to have been enacted in the interest of strangers dealing with the partners representing a firm to ensure the responsibility of the firm and the respective partner(s) **and in this context and for that purpose the**

registration of the firm has been made compulsory *(note:- only for the legal proceedings)* but it is further required that the persons suing on behalf of the firm should be shown in the "Register of the Firms" as partners in the firm. This section as mentioned above is mandatory in character and its effect is to render a suit by a plaintiff *(the firm or partners)* barred in respect of a right available to it/him under the contract(s) or the law.

Our above view is fortified by the law already laid down in a judgment of this Court reported as **Usman vs. Haji Omer (PLD 1966 SC 328)**, wherein it has been held:-

> *"…….Non-registration of the firm under section 69 of the Partnership Act does not affect the validity of the partnership or prevent any of the partners from suing for the dissolution of the firm or for accounts or the realization of the property of a dissolved firm. This section only bars a suit for enforcing a right arising out of a contract against either the firm or any past or present member of it or against any third party……."*

We also find force in the judgment reported as **The Australasia Bank Ltd. Vs. Messrs A. Ismail Ji & Sons and others (PLD 1952 Lah 314)** holding:

> *"…….It has been consistently held that subsection (2) of section 69 of the Partnership Act, is mandatory and makes a suit instituted by an unregistered firm entirely invalid and that subsequent registration of the firm is of no avail…….Courts are not makers but only interpreters of law and cannot water down the effect of a provision of a statute, because the interpretation based on well established principles is likely to work hardship in some cases falling within the plain meaning of that provision…….The language of subsection (2) of section 69 leaves no room for doubt that if a suit falling within subsection (2) of section 69 of the Partnership Act is instituted by a firm which is not registered at the time of the institution of the suit, the plaint*

> *must be rejected and the subsequent registration of the firm cannot validate the proceedings which were invalid in their inception".*

To the same effect are some other judgments from foreign jurisdictions cited by the learned amicus *(note:- Section 69 of Indian Partnership Act is pari materia to our provision)* and we feel inclined to quote a portion from **Prem Lata vs. Ishar Das Chaman Lal (AIR 1995 SC 714)** which reads as:

> *"……Sub-section (3)(a) carves out three exceptions to sub-sections (1) and (2) of section 69 and also to the main part of sub-section (3) of section 69, namely, (1) the enforcement of any right to sue for the dissolution of firm; (2) for accounts of the dissolved firm; and (3) any right or power to realise the property of the dissolved firm. Having excluded from the embargo created by the main part of sub-section (3) or sub-section (1) and (2) of S.69, the right to sue would not again to be construed to engulf the exceptions carved out by sub-section (3) or sub-section (4) of S.69 of the Act. Any construction otherwise would render the exceptions, legislature advisedly has carved out in sub-sections (3) and (4) of S.69, otiose. The object appears to be that the partnership having been dissolved or has come to a terminus, the rights of the parties are to be worked out in terms of the contract of the partnership entered by and between the partners and the rights engrafted therein. The exceptions carved out by sub-section (3) are to enforce those rights including the rights to dissolution of the partnership despite the fact that the partnership firm was an unregistered one……"*

7. Be that as it may, having laid down the law that section 69 *ibid* is mandatory and penal in nature, the bar to the suit(s) falling within the ambit thereof is absolute and unequivocal and that the three (3) exceptions are prescribed to such absolute rule *(bar)*; we may mention that these

exceptions, are akin to a proviso to a provision, thus per the law meant for the purposes of interpretation thereof the exceptions should be strictly construed and applied. However, before examining whether the statement of plaint in the present case is hit by the said bar *(section 69)*, or qualifies the test of exceptions, it must be prescribed that the partners of a firm, whether registered or not, stand in a fiduciary relationship to each other and Section 9 of the Act imposes a statutory duty upon them *"to render true accounts"*. Section 12(d) of the Act provides *"every partner has a right to have access and to inspect and copy any of the books of the firm"*. In terms of section 18 of the Act a partner is an agent of the firm. Further, in terms of section 46 of the Act, on dissolution of a firm every partner is entitled to have the firm's property applied towards payment of debts and to have the surplus distributed. These noted provisions are sufficient to establish the rights which a partner(s) possesses and the duties which the other owes *(vice versa)* especially for seeking and rendering the accounts of the firm. It may also be mentioned that regardless of the above the relationship between partners is fiduciary in nature making them liable to provide accounts to each other, in the same manner as a bank is obliged to render true and faithful accounts to its customer for the amounts deposited by the latter with the bank, or for the financial facilities availed by the borrower *(customer)* and the amounts which are repaid by him for the discharge of his obligation towards the bank for the repayment of the debt/financial facility and/or seeking justification(s) for any questionable, unjustified or unauthorized claim or entry made/reflected in the statement of accounts and/or accounts/ledger books maintained by the bank/financial institution.

8. A suit for accounts shall thus be competent by the partner(s) against the other, however with the clear limitation and qualifier that the firm should have already been dissolved and if not so, be first sought to be dissolved, because an exclusive and simple suit for the rendition of

accounts while the partnership/firm is in existence shall not be competent in view of the absolute bar contained in section 69 *ibid*. As shall be explained in the succeeding part of this opinion, such suit *(rendition of accounts simpliciter)* on the principle of strict interpretation and application of the **exceptions** shall not fall within the stringent connotation of any one of the three exceptions mentioned above.

9. Be that as it may, before proceeding to examine if the instant case on the basis of its own facts falls within the exceptions, it seems relevant to mention here, that there are basically three means *(mediums)* as to how a firm *(even unregistered)* stands dissolved, **first** if it was constituted and meant for a specific purpose which is accordingly achieved/accomplished and that was so mentioned in the partnership instrument, or the purpose is frustrated, **secondly** if it was for a fixed period of time upon the expiry of such period and **lastly** if not covered by the above two aspects and eventualities it was a "partnership at will" *(see Section 7 of the Act)* and was so dissolved.

10. Attending now to the aspect as to whether the present case qualifies the strict test of the exceptions laid down above, we have examined the pith and substance of the appellant's suit *(whether it falls within the three exceptions highlighted above)* and for this purpose, at the cost of repetition, are resorting to the exceptions contemplated by sub-section (3)(a) of Section 69 of the Act one by one. The interpretation of the first exception, *"the enforcement of any right to sue for the dissolution of a firm"*, seems quite simple in that where the firm has not been dissolved prior to the institution of the suit as per any of the three noted modes, the partner(s) may sue for the dissolution of the firm simpliciter and may not ask for any other relief such as the rendition of accounts, but it does not mean that the relief of rendition etc. as ancillary, incidental or consequential relief flowing on account of dissolution cannot be sought for. Therefore a composite suit in

this behalf can always be filed. But where the accounts are being sought for an existing firm which is not yet dissolved the suit shall be barred because of the clear expression of the statute i.e. *"for accounts of a dissolved firm"* which is preceded by the word OR meaning that the words "dissolved firm" can neither be held to be superfluous, redundant nor can be read down or watered down or ignored or expunged to stultify the effect thereof; rather the expression *(dissolved firm)* has to be given its due meaning, which obviously is that the firm for which the accounts are being sought must be one which is **"dissolved"**. Thus, the condition precedent for seeking the accounts of the firm is the dissolution of the firm itself prior to the institution of the suit. If however the firm was not dissolved, in such an eventuality a composite suit can be filed by any of the partner(s) to seek the dissolution of the firm and at the same time ask for the rendition of accounts. As regards the third exception seeking enforcement of *"any right or power to release the property of a dissolved firm"*, again in view of the clear language of the exemption the condition is the same i.e. the **"dissolved firm"**, postulating that the firm should have been dissolved as a prerequisite for the enforcement of the right of realizing the property etc. or a composite suit should be filed. It may be pertinent to state here that in case of a dispute between the parties as to whether a firm has been dissolved or not, where the dissolution is not being sought by the plaintiff rather the other reliefs falling within the exceptions are sought, the court shall primarily consider and determine this aspect of the matter *(i.e. the dissolution of the firm)* and depending upon the positive outcome in favour of the plaintiff shall consider and grant the second *(or ancillary)* relief(s) of rendition of accounts, or realization of property etc. as the case may be. It may be noted that in order to cross the bar of section 69 when it is set out as a defence by the other side the plaintiff can always seek amendment of the plaint and ask for dissolution at the appropriate stage of the proceeding;

but this has not been so done in the present case. It may be candidly specified that this second relief(s) in all the cases falling within exception is subservient and is circumscribed by the dissolution of the firm in the first instance and is not an independent and separate relief(s) by itself. In case the firm is not dissolved, such relief(s) being hermetically insulated thereto cannot be granted and the plaint is liable to be rejected as the suit shall be barred by law *(section 69 ibid)*.

11. In the instant case when we look at the contents of the plaint, not only from the title of the suit but also from the averments made therein it is unmistakably clear that the appellant is seeking a declaration to the effect about the existence of the firm which means the firm is existent; for the specific enforcement of his rights under the partnership deed and performance of respondents duties on that basis, as also in relation to the business of the firm, again with the clear assertion that the firm is intact, and then for the rendition of accounts and the cancellation of the document vide which the respondents has created a Waqaf-ul-Aulad of the firm property(ies) to his son which the appellant claims to be violative of his rights under the deed and for permanent injunction. All those statements and the relief(s) are not in consonance with and do not fall strictly within the exceptions created by law. In this context it shall be quite relevant to reproduce the prayer clause of the plaint, which reads as below:-

> *"1. It be declared that the defendants are bound to act upon the partnership deed dated 22-02-1986 executed between the plaintiff and the defendant No.1 in its true letter and spirit.*
>
> *2. It be declared that defendant No.2 has got nothing to do with the suit property and defendant No.1 is bound to perform his part of the partnership deed supra and to act upon and perform his obligations towards the plaintiff. That the defendants be*

ordered to pay the due profits to the plaintiff till the expiry of partnership deed and also to pay the net price of the construction building according to new construction this time, 30% of the goodwill of the school thereon the plot/land according to terms and conditions of partnership deed dated 22-02-1986.

3. *That alleged document of waqaf Ali-ul-ulad dated 20-01-2004 executed by the defendant No.1 in the favour of defendant No.2 is liable to be cancelled qua the rights of the plaintiff and to pay the requisite profits qua the school by way of rendition of account. It also be declared that document waqaf-ul-ulad dated 20-01-2004 executed by the defendant No.1 in the favour of the defendant No.2 is totally based on malafides, ulterior motives just to grab the rights of the plaintiff qua the school concern and to avoid the partnership deed.*

4. *That defendants be ordered not to violate and to infringe the terms and conditions qua the rights of the plaintiff by any way.*

5. *That the defendants be restrained by way of permanent injunction not to alter, change the structure and status of the school by any way or to cause any sought of lien qua the school in question."*

Obviously, on account of the nature of the suit, the statement(s) contained therein, and the prayer made or the reliefs claimed in the plaint, the plaint falls within the purview of the clear bar contemplated by Section 69(1) and (2) and as per the law declared in **Usman vs. Haji Omer (PLD 1966 SC 328)** and the law being expressed vide this opinion. Such bar being absolute, unequivocal and categorical, and as the case of the appellant does not fall within the strict exceptions of the law, explained above, which we have already held should be construed on the standards

meant and are akin to the rules of interpretation of a proviso attached to a provision *(section)*; and it is settled law that such exception or proviso should be strictly construed and applied. Applying this principle to the case in hand from the clear wording of the exceptions *(reproduced above)* the case of the appellant does not fall within those. As regards the submission of the learned amicus that the rule of severance may be applied and that the partial rejection of plaint is not permissible, suffice it to say that though the pleas may be worthy of consideration and resolution in some other case but in view of the ratio of this opinion the same can be skipped. In light thereof, we do not find any force in this appeal which is liable to be dismissed. It may however be observed that we agree with the submission of the learned counsel for the respondents that the appellant may either file a fresh suit first seeking dissolution of the firm or wait for the dissolution thereof till February next year, which in any case shall give him a fresh cause of action and the bar of section 69 and for that matter the period of limitation shall obviously not come in his way. Before parting we may express our appreciation for the valuable and able assistance provided by the learned amicus. The appeal is dismissed.

JUDGE

JUDGE

JUDGE

Announced in open Court
on **23.12.2015** at **Lahore**
Approved For Reporting
Waqas Naseer / *