

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 717 of 2024

[Century Roller & Stone Flour Mill (Pvt.) Ltd. v. Muhammad Asif & others]

Plaintiff : Century Roller & Stone Flour Mill (Pvt.) Ltd. & others through M/s. Mian Raza Rabbani, Saalim Salam Ansari & M. Zeeshan Abdullah, Advocates alongwith Mr. Okash Mustafa & Sidra Hussain, Advocates.

Date of hearing : 09-07-2024

Date of decision : 15-07-2024

## ORDER

Adnan Iqbal Chaudhry J. - The main prayer in the suit is for cancellation of 42 cheques, some given by the Plaintiff No.1 and some by four partnership firms separately to the Defendants 1 to 7 towards the price for delivery of wheat which the latter allegedly failed to deliver. The Plaintiffs do not pray for damages for non-delivery. Admittedly, the cheques have already been presented once to the Plaintiffs' bank, but were not honoured due to unavailability of funds. The four partnership firms who issued the cheques are not registered under the Partnership Act, 1932, and on their behalf the suit is filed by the individual partners as Plaintiffs 2 to 6. By order dated 01-07-2024, this Court raised a question to the maintainability of the suit by the Plaintiffs 2 to 6 in view of the bar in section 69(2) of the Partnership Act which reads:

"69(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."

Though there are certain exceptions to the above in sub-sections (3) and (4) of section 69 of the Partnership Act, but admittedly those exceptions are not attracted here.

2. The first submission of learned counsel for the Plaintiffs is that the bar in section 69(2) of the Partnership Act is for a 'firm' and not for partners of the firm who may sue as individuals. If that submission were to be accepted then the words 'by or on behalf of a firm' in said provision would become redundant. The submission also does not take into account the other requirement of the provision *viz.* that the persons suing must be shown in the Register of Firms as partners in the firm, which too is not met by the Plaintiffs 2 to 6. It was categorically held by Justice Salim Akhtar in *Overseas Containers Ltd. v. Muhammad Iqbal* (1988 CLC 461) that: "The partners of an unregistered firm cannot file a suit under a contract in their own name." The matter now rests with the case of *Ch. Nazir Ahmed v. Ali Ahmed* (PLD 2016 SC 214 = 2016 CLD 338) where the Supreme Court discussed the intent behind section 69 of the Partnership Act and observed that the bar to a suit thereby attracts both to an unregistered firm "and its partners". It was held:

"5. .... On account of the penal consequences provided by subsections (1) 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. ....

In other words subsections (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 subsections (3) and (4), the aforesaid rules causing disabilities are not applicable to, and registration of a firm is not necessary in, the following cases:-

- (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), C.P.C. 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. Subsection (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."

3. To argue that the bar in section 69(2) of the Partnership Act can be avoided if the partners of the unregistered firm sue in their individual capacity, learned counsel relied upon *Ardeshir Cowasjee v. KBCA* (PLD 2003 Karachi 314). In that case a learned Division Bench of this Court made the following observation while remanding a suit in appeal:

"The plaintiff in Suit No. 1793 of 1999 shall file the amended plaint. In place of Peace Developers, the unregistered partnership, all the partners shall be substituted, as plaintiffs so that the legal lacuna pertaining to the maintainability of suit is removed."

Firstly, the above observation in *Ardeshir Cowasjee* was not the *ratio decidendi* of the case, but only *obiter dicta*. That much was also noted by a learned single Judge of this Court in *Danyal Enterprises v. A.G.E & Sons (Pvt.) Ltd.* (2015 YLR 1507). Secondly, the case of *Ch. Nazir Ahmed* decided by the Supreme Court is overriding and binding precedent. Thus, the Plaintiffs 2 to 6 cannot get around the bar in section 69(2) of the Partnership Act by suing as partners instead of the partnership firms.

4. The second argument of learned counsel was that the bar in section 69(2) of the Partnership Act attracts only if the suit is “to enforce a right arising from a contract”. Per learned counsel, the Plaintiffs 2 to 6 do not seek to enforce any such right as they do not pray for delivery of the contracted wheat, rather they pray for cancellation of cheques under section 39 of the Specific Relief Act, 1872.

5. There can be no cavil with the submission that the bar in section 69(2) of the Partnership Act is to a suit brought ‘to enforce a right arising from a contract’. That much had been observed by the Supreme Court in *Usman v. Haji Omer Haji Ayub* (PLD 1966 SC 328). It was further held by the Supreme Court of India in *Raptokas Brett Co. Ltd. v. Ganesh Property*, [1998] 7 SCC 184, that section 69(2) also does not bar a suit to enforce a statutory obligation owed to a plaintiff such as that by a tenant under section 108(q) of the Transfer of Property Act, 1882 to deliver possession of a premises on determination of its lease by efflux of time. Again, in *Haldiram Bhujiaiwala v. Anand Kumar v. Deepak Kumar* (AIR 2000 SC 1287), the Supreme Court of India held that section 69(2) does not bar a suit to enforce a statutory right such as to injunct trademark infringement under the Trademark statute, or a right at common law as against the tort of passing-off. More significantly, after taking aid of the report of the Special Committee which examined the draft Bill of the Partnership Act, *Haldiram* went on to hold that: “..... the purpose behind section 69(2) was to impose a disability on the unregistered firm or its partners to enforce rights arising out of contracts entered into by the plaintiff firm with third party-defendant in the course of the firm's business transactions.”

6. We are therefore down to the question is whether the Plaintiffs 2 to 6 do not seek to enforce a right arising from a contract ? In that regard, the case-law cited by learned counsel is as follows.

In *Province of West Pakistan v. Asghar Ali Muhammad Ali & Co.*, (PLD 1968 Karachi 196) the facts were that iron scrap was auctioned by the Province at a price above the notified control price. The

purchaser, an unregistered partnership firm, sued for refund of the price paid over and above the control price. Upon the objection that the suit was barred by section 69(2) of the Partnership Act, a learned Division Bench of this Court held that the contract of sale over and above the notified control price was void, and therefore the suit was not for enforcement of any term of the contract but for enforcing the obligation under section 65 of the Contract Act *viz.* to restore an advantage received under a void agreement.

In *Nazir Ahmed Khan v. Muhammad Ashraf Khan* (PLD 1975 Karachi 598) an un-registered partnership firm had sued for possession of buses forcibly taken from it after it had purchased the same under a contract. It was in such circumstances that it was held that a suit for taking back possession of those buses was not barred by section 69(2) of the Partnership Act. Similarly, in *Abid Ali v. Bazar-E-Faisal Builders and Developers* (2015 CLC 1074), the suit by the unregistered firm was for possession under section 9 of the Specific Relief Act after it had been dispossessed by force, and hence held to be maintainable.

In *Muhammad Junaid v. Karachi Electric Supply Corporation Ltd.* (2010 YLR 952), it was held that section 69 of the Partnership Act was not attracted when the suit was for enforcement of a statutory obligation owed by the defendant to the plaintiff.

7. Admittedly, the cheques sought to be cancelled by the Plaintiffs were given by them as payment under a contract for supply of wheat. The case of the Plaintiffs is that since the wheat was not delivered, they are not liable for payment and hence the suit to cancel those cheques. The Plaintiffs do not seek damages for non-delivery. Unlike the case of *Asghar Ali Muhammad Ali & Co.*, the case here is not that the contract of supply of wheat was void to begin with so as to attract section 65 of the Contract Act. Nor is the suit brought to enforce any statutory obligation owed to the Plaintiff as in the cases of *Raptokas* and *Muhammad Junaid*, or to enforce a statutory right or a common-law right as in the case of *Haldiram*. Clearly, the right to stop payment

on the subject cheques on account of non-delivery, and consequently to sue for a declaration under section 42 of the Specific Relief Act that the cheques are held unlawfully by the supplier, and/or to sue for cancellation of those cheques under section 39 of the Specific Relief Act, all emanate from the contract of supply itself. In other words, this is not a case where the suit for the reliefs of declaration and cancellation is brought independent of the contract. It is, in fact, a suit to enforce a right arising from a contract, and since the suit by the Plaintiffs 2 to 6 is on behalf of unregistered partnership firms, to that extent it is barred by section 69(2) of the Partnership Act, 1932.

8. In view of the foregoing, the suit is dismissed to the extent of the Plaintiffs 2 to 6. The Plaintiff No.1 may file an amended plaint in two weeks to confine the suit to itself. As observed in *Haldiram's* case, subject to the law of Limitation, the four partnership firms of which the Plaintiffs 2 to 6 are partners may file a fresh suit after registration under the Partnership Act, 1932.

**JUDGE**

Karachi:  
Dated: 15-07-2024