

(2009) 09 MAD CK 0053

In the Madras High Court

Case No : C.R.P. (PD) No. 1529 of 2008 and M.P. No. 1 of 2008

S.B. Steel Industries

APPELLANT

Vs

India Re-Rolling Mills

RESPONDENT

Date of Decision : 02-09-2009

Acts Referred:

Chit Funds Act, 1982 — Section 25
Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 227
Partnership Act, 1932 — Section 58
Railways Act, 1890 — Section 77
Transfer of Property Act, 1882 — Section 108

Citation : (2009) 5 LW 422 : (2010) 1 MLJ 483

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Sivam, for Sivam Sundaraj, for the Appellant; M.S. Krishnan, for Asha, for Sarvabhuman Associates, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—The petitioner is challenging the Order dated 29.10.2007 made in I.A. No. 741 of 2004 in O.S. No. 243 of 2004 on

the file of the Principal District Judge, Coimbatore.

2. The defendants in O.S. No. 243 of 2004, on the file of the Principal District Judge, Coimbatore are the revision petitioners before this Court.

3. The facts which are necessary for the purpose of disposing of the above Civil Revision petition are as follows:

The respondent herein as plaintiff filed O.S. No. 1041 of 2000 for the following reliefs:

a) directing the defendants to deliver vacant possession of suit A schedule property in the same good condition in which the same was leased out

and also directing the defendant to deliver possession of B schedule property;

b) directing the defendants to pay plaintiff a sum of Rs. 5,60,000/- towards damages for use and occupation of A schedule property;

c) directing the defendants to pay plaintiff Rs. 20,000/- p.m. towards damages for use and occupation of the B schedule property from the date of suit till delivery of possession.

4. The plaintiff is a Partnership firm and according to the plaint averments, the plaintiff is the absolute owner of the properties described in Schedule

A and B. A lease arrangement was entered into under a registered lease deed dated 13.12.1980 between the plaintiff and the first defendant which

is also a Partnership firm. The rent originally fixed was Rs. 9000/- for a period of five years and subsequently the lease period was extended till

1994. The lease period is now over and the monthly rent which was last paid was Rs. 28,000/-. The defendants failed to deliver vacant possession

of the leasehold property, which is the property described in Schedule A and therefore, the plaintiff issued a notice dated 23.09.1998. The said

notice was received by the defendants on 26.09.1998. Subsequently, the defendants paid a sum of Rs. 56,000/- towards the rent for the months

of September and October 1998 which was received by the plaintiff without prejudice to their own contentions. Thereafter, no amount was paid

by the defendants and the balance payable by the defendants from 01.11.1998 to 1.07.2000 works out to Rs. 5,60,000/-. The said sum was

claimed by way of damages for use and occupation in view of the termination of tenancy. It is contended by the plaintiff that the possession of A

schedule property by the defendants after the notice to quit is wrongful.

5. It is the further contention of the plaintiff that the property described in Schedule B is adjacent to the property described in Schedule A and the

defendants unlawfully and stealthily encroached into B schedule property after the plaintiffs terminated the lease in respect of A schedule property.

On coming to know of the encroachment, the plaintiff issued a notice dated 10.04.2000 calling upon the defendants to pay damages for use and

occupation amounting to Rs. 4,76,000/- in respect of the property described in schedule A and also calling upon the defendants to comply with the

demands already made in the notice dated 23.09.1998 and also to deliver vacant possession of the B schedule property. A further sum of Rs.

20,000/- per month was demanded in respect of the B schedule property by way of damages for use and occupation. The defendants issued a reply dated 09.05.2000, wherein they admitted the fact that they received the notice dated 23.09.1998. Thus, the notice to quit has been served on the defendants on 24.09.1998 itself. The defendants set up an oral agreement to purchase the suit property and falsely claimed that they have already paid an advance of Rs. 5,00,000/-. In respect of B schedule property, the defendants set up a false plea that the said property was also taken on lease in 1984. With the above averments, the plaintiff filed O.S. No. 1041 of 2000 for the aforesaid reliefs.

6. The said suit was originally filed before the Sub Judge, Coimbatore and later transferred to the Principal District Court, Coimbatore which was re-numbered as O.S. No. 243 of 2004.

7. A written statement was filed on behalf of the first defendant and the same was adopted by the defendants 2 to 4. In the written statement, the first defendant raised a specific plea that the suit itself is not enforceable u/s 69 of the Indian Partnership Act 1932 and that the person who has signed the plaint as a partner has not been shown in the Register of Firms, as a Partner.

8. Thereafter, the defendants filed I.A. No. 741 of 2004 u/s 69(1) and (2) of the Indian Partnership Act 1932 to reject the plaint. In support of the claim, an affidavit has been sworn to by the first defendant wherein it is stated that the suit has been laid by a registered Partnership firm represented by its Partner Mr. VinodKumar Fateh Puria. The said person has also signed the plaint and the verification as Partner of the firm. The said person, who signed in the plaint as a Partner of the firm, had not been shown in the Register of firms as partner. Therefore, as per the provisions of the Indian Partnership Act, 1932 especially Section 69(1) and (2) of the Act, the plaint is to be rejected.

9. A counter statement has been filed by the plaintiff opposing I.A. No. 741 of 2004 wherein it is stated that the respondent firm has been represented by Thiru Vinod Kumar Fateh Puria who is duly authorised in that behalf. It is stated in the counter that he represented the firm as a Power agent, but, in the plaint filed, his name has been described as a partner. The description of Vinod Kumar Fateh Puria as a partner of the firm

is only a clerical error and it does not change the position.

10. It is further stated that they are taking steps to amend the plaint suitably by incorporating the name of the partner whose name is found in the

Register of firms.

11. The trial court by order dated 29.10.2007, dismissed I.A. No. 741 of 2004 by holding that the bar contemplated u/s 69(1) and (2) of the Act

will not apply to the facts of the present case as the plaintiff is only seeking a statutory remedy available to them under Transfer of Property Act.

12. Aggrieved by the order of the trial court, dated 29.10.2007, the defendants filed the above Civil Revision petition under Article 227 of the

Constitution of India.

13. Heard the learned Counsel for the revision petitioners and Thiru M.S.Krishnan, the learned Senior counsel for the respondent. I have also gone

through the entire documents available on record.

14. The learned Counsel for the revision petitioners submits that now it is an admitted position that Thiru Vinod Kumar Fateh Puria who signed the

plaint as a Partner of the plaintiff firm is not at all a partner and he is only a Power Agent and in such circumstances, the bar contemplated u/s 69(1)

and (2) of the Partnership Act is clearly applicable to the facts of the present case and the trial court has committed an illegality in not rejecting the

plaint. He further submits that even if the plaint is amended, as stated by the plaintiff, in I.A. No. 741 of 2004, the decision is still the same as once

it is found that Section 69(1) and (2) get attracted, it becomes incurable and the only way open is to reject the plaint. In support of his submissions,

the learned Counsel for the petitioners relies on the following decisions:

1. Firm Alwar Iron Syndicate Vs. Union of India (UOI),
2. Afsaar Hussain and Another Vs. Trilokchand Premchand,
3. Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others,
4. T. Savariraj Pillai Vs. R.S.S. Vastrad and Company,
5. Shreeram Finance Corporation Vs. Yasin Khan and Others,
6. M/s. K.R.M. Money Lenders Vs. Mr. A. Manoharan @ Doss,
7. 2001(4) C.T.C. 409 (V.V. Textiles v. Mahavir Fabrics)
8. AIR 2002 KER 33 (Popular Automobiles v. G.K.Chami)

9. Sri Balaji Traders Vs. United India Insurance Co. Ltd. and Another,

10. Selvam Estates Vs. L. Thangapandia Maharajan and Others,

15. Per contra, the learned Senior counsel for the respondent submits that the suit is only for recovery of possession and for other consequential

reliefs and therefore, the provisions of Section 69(1) and (2) will not get attracted as rightly held by the trial court. He points out that in this case,

the registration of the firm is not in question and what is being questioned is that the person who has signed the plaint is not a partner of the firm. In

such circumstances, according to the learned Senior counsel, the question of registration does not arise at all. He further submits that when even an

unregistered partnership firm can file such a suit for recovery of possession, it is not open to the defendants to question the signature of the person

on the ground that he is not a partner of the firm. In support of his submissions, he places his reliance on the following decisions:

1. M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property,

2. M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another,

3. 2003(2) L.W. 740 (S. Prakashchand v. Sha Harakchand Misrimull and 3 Ors.).

16. I have considered the rival submissions carefully with regard to facts and citations.

17. The only question that arises for consideration in the present case is that, whether the provisions of Section 69(1) and (2) of The Partnership

Act 1932 get attracted and consequently the suit filed by the plaintiffs to be rejected.

18. Before proceeding further, it is useful to refer to Section 69(1) and (2) of the Partnership Act 1932:

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.

19. Section 69(1) deals with institution of a suit to enforce a right arising from a contract or conferred by the Partnership Act 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.

20. Section 69(2) deals with institution of a suit to enforce a right arising from a contract in any Court by or on behalf of a firm against any third party.

21. A reading of Section 69(1) and (2) will make it very clear that in the facts of the present case, Section 69(1) will have no application and only Section 69(2) alone will get attracted.

22. In such circumstances, what is to be decided in this case is whether the suit filed by the plaintiff is barred by Section 69(2) of the Partnership Act.

23. A close reading of Section 69(2) will make it very clear that the bar contemplated in that proviso will become applicable only when; 1) a suit filed by a unregistered firm; 2) the suit is to enforce a right arising from a contract; 3) the suit is filed against a third party; and 4) the persons suing are not shown in the register of firms as partners in the firm. Thus, if all the above four ingredients are present in a suit, then only the bar contemplated u/s 69(2) will come into picture.

24. Now, let me consider the decisions relied on by both the parties to cull out the legal principles settled therein.

25. In Firm Alwar Iron Syndicate Vs. Union of India (UOI), , the Rajasthan High Court held as under:

6. It appears to me, however, that there is really no room for nay controversy in regard to the correct meaning and purpose of Sub-section (2) of

Section 69. It is well settled that a firm as such is not an entity in law and is not a ""person"" within the meaning of Section 4 of the Partnership Act.

Its name is therefore a mere abbreviated name of all its partners: Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur, . It is

for this reason that special provisions have been made in Order 30, C.P.C. regarding suits by or against firms an persons carrying on business in

names other than their own. So it is beyond doubt that even if a suit is brought in the name of a firm, it is really a suit by all its partners under the

firm name. In other words, the persons suing are all the partners of the firm at the relevant date and none of them can, for obvious reasons, be left

out for purposes of the suit. So it is incorrect to say that Sub-section (2) Section 69 merely requires that only the persons or persons actually

signing the plaint on behalf of the firm should be shown in the Register of Firms as its partners. The word "persons" in the sub-section has been

used in the plural by design and serves as important purpose for it brings out the real nature of a partnership firm which cannot consist of a single

person. This is the view taken in *Kapur Chand Bhagaji, Firm v. Laxman Trimbak* AIR 1952 Nag 57 and *Dr. V.S. Bahal Vs. S.L. Kapur and Co.*,

. The decision in *Dr. V.S. Bahal Vs. S.L. Kapur and Co.*, does not appear to have been noticed in *Durga Das Janak Raj Vs. Preete Shah Sant*

Ram, on which reliance has been placed by Mr. J.P.Jain, but it has also been followed in *Hansraj Manot v. Gorak nath Champalal Pandey* (1062)

66 CWN 262 and, if I may say so with respect, these judgments lay down the correct law on the point.

26. In the above decision, the Rajasthan High Court held that the persons suing as partners of the firm are to be shown as partners in the register of

firms and in a suit filed by a partnership firm, if it is found disclosure of the names of the existing partners of the firm under Order XXX Rule 3

C.P.C. with the names of the some of the existing partners were not included in the register of firms, the suit is not maintainable.

27. In *Afsaar Hussain and Another Vs. Trilokchand Premchand*, , the Orissa High Court held as under:

8. The plaintiffs in this case are two partners. But they do not describe themselves as partners and have made no reference to the firm of four

partners carrying on mainly business at Jeypore in the name and style of *Kesarichand Umedmal*. Though they were two separate persons, the

verification in the plaint has been by one partner on behalf of *Trilokchand Premchand* as if that was a firm. The normal procedure for partners is to

file suits in the name of the firm when they want to enforce any right accrued to them as partners. The use of the name of the firm in any such case

is merely a collective way of naming the individuals who are members of the partnership. Order XXX of the C.P.C. in relation to suits of

partnership provides that it is permissible to partners to bring suits against third parties in the name of the firm and it is not necessary that the name

of every partner should be mentioned as a party to the suit if the business of the firm is carried on in India. In such a case a suit may be filed in the name of the firm even after the dissolution provided that the cause of action arises before dissolution of partnership and the fact that one of the partners has died before the institution of the suit or even during its pendency does not affect the right. But it is incumbent upon all the partners to join in a suit upon a contract. If a suit is brought by some of them only, it is liable to be dismissed as was held by a Bench of the Oudh High Court in AIR 1942 335 (Oudh) . The suit in this case as laid is, therefore, not maintainable in law and the plaintiffs were not entitled to have the benefit of the registration of the firm at Jeypore in the name and style of Kesarichand Umedmal. As already pointed out, the plaintiffs wanted to pass as a firm by the name and style of Trilokchand Premchand.

28. In the above judgment, the Orissa High Court held that on the facts of the case, the suit is not maintainable as the suit is brought by some of the partners only and not by all.

29. In Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others, , the Hon"ble Supreme Court held as follows:

20. Question 3 : For a proper determination of this question, it is necessary to refer to Section 69 of the Partnership Act, 1932, the relevant portion whereof is reproduced below for ready reference :

69. (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 dissolution of a firm or for accounts of

a dissolved firm, or any right or power to realise the property of a dissolved firm, or

21. A bare glance at the section is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act. In the instant case, Seth Sujan Chand had to admit in unmistakable terms that the firm "Sethiya & Co. was not registered under the Indian Partnership Act. It cannot also be denied that the suit out of which the appeals have arisen was for enforcement of the agreement entered into by the plaintiff as partner of Sethiya & Co. which was an unregistered firm. That being so, the suit was undoubtedly a suit for the benefit and in the interest of the firm and consequently a suit on behalf of the firm. It is also to be borne in mind that it was never pleaded by the plaintiff, not even in the replication, that he was suing to recover the outstandings of a dissolved firm. Thus the suit was clearly hit by Section 69 of the Partnership Act and was not maintainable.

30. In the above decision, the Hon"ble Supreme Court held that a partner of a unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act.

31. In T. Savariraj Pillai Vs. R.S.S. Vastrad and Company, , this Court observed as follows:

8. To counter the contentions of learned Counsel Mr. E.Padmanabhan based on these decisions; learned Counsel Mr. T.R.Rajagopalan, would submit that it is only a formal defect in view of the provisions found in Order 23, Rule 1(3)(b), C.P.C., and relied on Sri Saravana Chit Fund Co.

Vs. Sekudeen and Others, which deals with failure to issue the statutory notice u/s 25 of the Chit Funds Act, and on the suit being dismissed for want of notice, it was treated as a technical defect, and to prevent parties from suffering, permission was granted to withdraw the suit under Order 23, Rule 1(3), C.P.C. with liberty to file a fresh suit, so that there may not be miscarriage of justice. This decision of the learned Judge, could not

apply in relation to a suit covered by Section 69(2) of the Act, which had been held by the Supreme Court as mandatory; The concept of formal defect which could be available under Order 23, Rule 1(3), C.P.C. would have no relevance when a mandatory requirement is not complied with, for the institution of a suit. A learned Judge in Atul Krushna Roy Vs. Raukishore Mohanty and Others, , also took the same view in respect of Order 23, Rule 1(b), C.P.C. to the effect that a formal defect is a defect of form which is prescribed by rules of procedure such as misjoinder of parties, causes of action non-payment of court-fees, etc. And in a case where plaintiff fails to incorporate a prayer for dissolution of partnership in a suit for accounts, it would no doubt result in dismissal of suit, but it being a formal defect, plaintiff could be permitted to come again with a properly drafted plaint. This is again a decision, which does not deal with non compliance of a mandatory requirement.

9. Kamayya v. Papayya ILR Mad 259 is a Full Bench decision which dealt with the powers of an appellate Court to allow a suit to be withdraw with liberty to file a fresh suit, and hence, it has no application to the point involved in this revision. Therefore, those decisions do not in any manner enable the plaintiff to secure the withdrawal of the suit with permission to file a fresh suit.

10. Yet, learned Counsel Mr. T.R.Rajagopalan, would submit that, when the suit had been filed by the Firm, the fact that the Firm being represented by a partner whose name was not registered with the Registrar of Firms on the date of filing of the suit, would not make it a void suit, and that Section 69(2) would have no application. In the light of the decisions relied on by learned Counsel Mr. E.Padmanabhan, and which had been referred to above; such a distinction would not be available to salvage a suit of this nature, which is hit by the mandatory requirements of Section 69(2) of the Act. In this context, Shreeram Finance Corporation Vs. Yasin Khan and Others, requires to be referred to. It was held there in that a suit hit by Section 69(2) is not maintainable, because it is a mandatory requirement.

32. In the above decision, this Court held that the concept of defect which could be available under Order XXIII Rule 1(3) C.P.C. would have no relevance when a mandatory requirement is not complied with for the institution of a suit and once the suit is hit by Section 69(2) of the Partnership

Act, then it cannot be cured at all.

33. In *Shreeram Finance Corporation Vs. Yasin Khan and Others*, , the Hon''ble Supreme Court observed as follows:

6. In the present case the suit filed by the appellants is clearly hit by the provisions of Sub-section (2) of Section 69 of the said Partnership Act, as

on the date when the suit was filed, two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact,

partners, one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was

given to the Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the

Register of Firms. The result is that the suit was not maintainable in view of the provisions of Sub-section (2) of Section 69 of the said Partnership

Act and the view taken by the trial court and confirmed by the High Court in this connection is correct. Although the plaint was amended on a later

date that cannot save the suit. Reference has been made to some decisions in the judgment of the trial court; however, we do not find it necessary

to refer to any of them as the position in law, in our opinion, is clear on a plain reading of Sub-section (2) of Section 69 of the said Partnership Act.

34. In the above judgment, the Hon''ble Supreme Court reiterated the position that once the suit is barred by Section 69(2) of the Act, the same

cannot be rectified by way of an amendment later to save the suit.

35. In *M/s. K.R.M. Money Lenders Vs. Mr. A. Manoharan @ Doss*, , this Court held as under:

40. As rightly pointed out by the first appellate Court Ex.A.25 is a partnership deed relates to K.R.Murthayee Ammal Sankar and not to KRM

Money Lenders. The plaintiff had failed to establish that the firm is a registered partnership firm and Ex.A.25 is the partnership deed. This failure to

establish is fatal as in any suit by an unregistered partnership firm, as provided in Section 69, it is not only essential but also the requirement to

establish that the plaintiff is a registered firm and the plaintiff also should disclose who are all the partners who constitute the firm on the date of the

plaint. Merely because the defendants have not raised the plea in detail the plaintiff is not exonerated, nor it could be stated that the defendants

have waived such an objection. An objection which goes to the root of the matter

which relates to the registration and which if not answered in favour of the defendants would be hit by Section 69(2) and the very plaint itself is non est in law.

42. Merely because at the time of taking the plaint on file notice has been ordered and a copy of the registration had been produced and the plaintiff had been permitted to institute the suit, it cannot be assumed that the plaintiff is a registered firm and it is not as if the plaintiff is exonerated from establishing that it is a registered firm or that the suit has been validly instituted or no objection is permissible on any later date. The formality that has been complied with at the initial stage before taking the plaint on file and at the time of institution of the suit is always subject to all exceptions. Therefore, it follows that the defendants are entitled to raise such an objection in respect of the plaint which is non est in law. It cannot be said that the defendants have waived such an objection by their failure to raise or on the part of the court to frame an issue in this respect. The failure to establish that the plaintiff is a registered firm and the failure to establish that the power of attorney is competent to institute the suit, in my considered view and in the light of the above pronouncements render the suit plaint a nullity which cannot be cured. The failure on the part of the defendants will not eschew them and it cannot be stated that the defendants have waived their objection as Section 69(2) of the Partnership Act is a statutory bar.

43. In terms of Order 7, Rule 1 a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In the present case Sub section (2) of Section 69 is a bar and the very plaint itself should have been rejected as pointed out by Sathiadev. J., in *Savariraj Pillai T. v. R. SS. Vastred & Co.* 1989 (2) L.W.418, and by A.R. Lakshmanan, J., in *Selvam Estates v. Thangapandia Maharajan* 1991 TLNJ

107. The very plaint and institution of the suit is non est and the court has no jurisdiction to proceed with the trial of such suit is non est and the court has no jurisdiction to proceed with the trial of such suit as the condition precedent to institute a suit has not been fulfilled in this case. Any amount of waiver will not cure such inherent defects as the defendant renders the very plaint non est and it cannot at all be proceeded. The plaint instituted is no plaint in the eye of law.

44. It is also axiomatic that having sustained such a contention put forward by the defendant even if the other defendants have not challenged the judgement and decree of the trial court, the decree has to be set aside, less it will be a mockery of the system and there cannot be two different decrees on the same point though the cause of action may be different, and the claims or reliefs are different. Where the very institution is inherently defective, the very plaint is non est and barred by Section 69(2) of the Partnership Act, this Court cannot appreciate the view taken by the first appellate court in this respect that the plaint is valid in respect of other defendants and it is inherently defective in respect of the 9th defendant alone. Any other defect or irregularity which could be waived or given up could be put against the defendants and not such an inherent defect which renders the very plaint itself non est in law besides being without jurisdiction and barred by Section 69(2) of the Act.

45. In exercise of inherent powers, this Court set aside the judgment of the two courts below. This Court is conscious that the other defendants namely defendants 1 to 8 and 10 and 11 have not preferred an appeal. They have not been made as parties to the first appeal as well as to the second appeal. But at the same time, there could be no decree based upon a plaint which is non est and the inherent defect goes to the very root of jurisdiction and it is hit by Section 69(2) of The Partnership Act.

36. In the above decision, this Court held that an objection which goes to the route of the matter which relates to the registration and which if not answered in favour of the defendant would be hit by Section 69(2) and the very plaint itself is non-est in law and therefore, it cannot be cured at all.

37. In 2001(4) C.T.C. 409 (cited supra), this Court observed as follows:

39. Thus,

(1) the Registration of a firm is a condition precedent for the launching of a suit by the firm as per Section 69(2) of the Partnership Act. Subsequent registration cannot cure the defect.

(2) The objection regarding non-registration has to be specifically pleaded. Once pleaded it is incumbent on the plaintiff to prove the same and failure is fatal.

(3) If non-registration is not specifically pleaded no evidence can be let in for the plea raised. The objection regarding non-registration can be

waived. Unless the waiver of the right or the absence of the right makes any particular matter illegal, or where the benefit is conferred by a statute

which has public policy for its object, and,

(4) such waiver can be expressed or be inferred from the facts and circumstances of the case.

38. In AIR 2002 KER 33, the Kerala High Court observed as follows:

6. Therefore, it is clear that u/s 69(2) of the Partnership Act no suit can be filed by or on behalf of a firm unless the person suing is or has been

shown in the register of firms as partner of the firm. In this case the person verified and signed the plaint is admittedly not a partner of the firm. But

according to the plaintiff the plaint is signed by the Manager of the firm as authorised by one of its partners.

13. Therefore, it is clear that compliance of the provisions of Section 69(2) of the Indian Partnership Act is mandatory and as the person who has

verified and signed the plaint was not shown as a partner in the register of firms and no Power of Attorney is given by the partner of the firm to him

to verify and sign the plaint on behalf of the firm, the very institution of the suit is bad for non-compliance of the mandatory provisions of Section

69(2) of the partnership Act. Therefore, that defect cannot be cured by subsequent amendment incorporating that the suit is verified and signed by

a partner of the firm.

39. In the above judgment also, the Kerala High Court took the settled view that once the suit is bad for non compliance of the mandatory

provisions of Section 69(2) of the Partnership Act, then, the defect cannot be cured by subsequent amendment.

40. In Sri Balaji Traders Vs. United India Insurance Co. Ltd. and Another, , a Division Bench of this Court held as under:

9. But, the learned Counsel appearing for the first respondent submitted, that the question of maintainability of the suit, for non-compliance of

Section 69(2) of the Act, is purely a question of law, which could be raised even without any plea and in this way, making submission, an attempt

was made, to non suit the plaintiff. Therefore, we have to see the effect of Section 69 of the Act, as well as the procedure contemplated under

C.P.C. for the suits to be filed by or against firms and persons carrying on business in names other than their own.

10. Section 69(2) of the Act reads:

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.

This Section has two limbs and the first one is, the firm should be registered and the second is, that the persons suing are or have been shown in the

register of firms as partners in the firm. The plaintiff/appellant had satisfied the first requirement, which is conceded. It seems, the plaintiff has not

produced the extract of register of firms, where we could see the names of the partners, as on the date of filing of the suit. In the absence of

production of the extract of the register of firms, it is not possible to say, whether the partner who has filed the suit, representing the firm, is shown

as partner in the firm, on the date of filing of the suit. Only on this technical ground, a submission was made by the learned Counsel for the first

respondent, that in view of the fact, the copy of register of firms has not been produced, to satisfy the second requirement, the suit is not

maintainable. By going through the provisions of the above said Section, as well as guided by the judicial precedent, and the inaction on the part of

the first respondent, to raise this plea, at the first instance before the trial Court, we are unable to persuade ourselves, to subscribe the above said

view, in order to say that the suit is not maintainable and the same should be dismissed though it is a technical ground.

41. In the above decision, the Division Bench while upholding that a suit is bad in law, if Section 69(2) of the Partnership Act gets attracted, held

that the question of such bar and maintainability u/s 69(2) of the Act could be waived and the same should not be raised to non suit the plaintiff at

the Appellate stage.

42. In 1991(1) M.L.J. 421 (cites supra), this Court observed as under:

16. I have carefully considered the rival submissions made by the learned Counsel for the plaintiff and the learned Counsel for the respective

defendants. The above review of the case law on the subject shows that the views held by practically all the High Courts in India is that the

registration of the firm is a condition precedent to its right to institute a suit of the nature mentioned in Section 69(2) of the Partnership Act and that

the registration after the institution of the suit cannot cure the defect of non-registration before the date of the suit. It follows from this that the

plaintiff is not entitled to withdraw the present suit and file a fresh suit on the same cause of action, since in my opinion, the defect pointed out by

the defendant is not a formal defect but goes to the root of the matter. Hence, I have no jurisdiction to proceed with the trial when the condition

precedent to the right to institute a suit has not been fulfilled in this case. Hence, the question of withdrawing a void plaint does not arise since it is

not a form defect. If the plaint is treated as a void plaint the question of granting permission does not arise at all. As stated above, the plaint was

filed on 9.2.1987. However, the plaintiff has filed the present suit and also impleaded other defendants and obtained various interim orders on the

basis of a void plaint. The defendants have been made to incur legal expenses and oppose the plaint and other interim applications, time and again

on the basis of a void plaint. Hence, in my opinion, the defendants have to be compensated with costs. I order a sum of Rs. 1,000 to the first

defendant and Rs. 1,000 to defendants 3 to 5 as costs. Thus, I hold that the suit filed is void and hence the permission to withdraw the suit with

liberty to file a fresh suit on the same cause of action is not necessary. Both the application and the suit are dismissed with costs as stated above. All

the interim orders passed by this Court pending suit, are hereby dissolved.

43. In this decision also, this Court reiterated the position that once the suit is bad on the ground of Section 69(2) of the Partnership Act, the plaint

is treated as void once and hence, the permission to withdraw the suit with liberty to file a fresh suit on the same cause of action is not necessary.

44. In 1999(1) C.T.C. 175 (cited supra), the Hon'ble Supreme Court observed as under:

13. In view of the aforesaid settled legal position, it must be held that on the expiry of the period of lease, the erstwhile lessee continues in

possession because of the law of the land, namely that the original landlord cannot physically throw out such an erstwhile tenant by force. He must

get his claim for possession adjudicated by a competent court as per the relevant provisions of law. The status of an erstwhile tenant has to be

treated as a tenant at sufferance akin to a trespasser having no independent right to continue in possession.

14. However, the aforesaid conclusion will not clinch the matter one way or the other. The reason is obvious. While considering the question

whether the suit as filed is hit by Section 69 Sub-section (2) of the Partnership Act or not, we have to see what the plaintiff claims as his cause of

action. It is obvious that if the suit is based solely on the ground that the erstwhile tenant-defendant unlawfully remained in possession after the

expiry of the lease and is required to hand over possession to the plaintiff, the suit can be said to be based on the sole cause of action for

enforcement of a right arising at general law and under the Transfer of Property Act in favour of the plaintiff and against the defendant who was

earlier protected by the contract between the parties. Shri Nariman in this connection was right when he contended that the aforesaid decisions of

this Court only decide the status of such an erstwhile tenant and there cannot be any dispute that the appellant on the expiry of the lease, especially

when there was no evidence to show that he was a tenant by holding over, had continued in occupation as a tenant at sufferance. However, the

nature of the right sought to be enforced by the plaintiff has to be culled out from the recitals in the plaint even against such a tenant at sufferance.

19. It is difficult to see how these observations of the learned Judge can advance the case of the appellant. The obligation to restore possession by

the ex-lessee will flow from the statutory provisions and not from any term of the contract.

20. Even these observations do not in any way dilute the contention of learned Senior Counsel for the respondent that when the plaintiff has relied

on the law of the land, any implied covenant as contemplated by the statutory provisions of Section 108(q) would still remain in the domain of

statutory obligation on the part of the appellant to hand over vacant possession to the respondent on the determination of the lease by the efflux of

time. Consequently, the decisions of the Travancore and Karnataka High Courts which have taken the view that there is an implied term in the

contract of lease that after the expiry of the lease period, the lessee would put the lessor in possession would not be of any assistance to the

appellant. It has to be noted that so long as this implied term runs parallel to the statutory obligation of such erstwhile lessee as per Section 108(q),

it cannot be said that the said statutory obligation gets obliterated and repealed merely because such implied term can be culled out from the

contract itself. Such an implied obligation or term in the contract cannot in any way reduce the legal efficacy of the statutory obligation foisted upon

such a lessee by the express provisions of Section 108(q) read with Section 111(a) of the Property Act.

21. So far as the applicability of the bar of Section 69 Sub-section (2) of the Partnership Act is concerned, it is true that it is a penal provision

which deprives the plaintiff of its right to get its case examined on merits by the court and simultaneously deprives the court of its jurisdiction to

adjudicate on the merits of the controversy between the parties. It will, therefore, have to be strictly construed. It is also true that once on such

construction of this provision, the bar u/s 69(2) of the Act gets attracted, then the logical corollary will be that the said provision being mandatory in

nature would make the suit incompetent on the very threshold. Consequently, it is not necessary for us to examine various decisions of this Court

rendered in connection with Section 80 of the CPC or Section 77 of the Indian Railways Act, 1890 to which our attention was invited by learned

Senior Counsel, Shri Nariman. We may proceed on the basis that for sustaining a suit which falls within the sweep of Section 69 Sub-section (2),

the condition precedent is that the firm must be registered at the time of filing of the suit. If it is not registered, the suit must be held to be

incompetent from the inception. In this connection, we may refer to a decision of the Division Bench of the Calcutta High Court in the case of

Gorakhnath Champalal Pandey v. Hansraj Manot which had confirmed the decision of the learned Single Judge of the same High Court in the case

of Hansraj Manot v. Gorakhnath Champalal Pandey. It was held in the said decisions that the conditions of Section 69 Sub-section (2) were

mandatory in nature. However, it must be observed that the said decisions were rendered in an entirely different fact situation wherein during the

subsistence of the contract of tenancy, the tenant had failed to pay rent and consequently the landlord had filed the suit for possession on the

ground that the tenant had committed breach of the term of tenancy about regular payment of rent. The said suit obviously was a suit for

enforcement of the right arising out of a contract of tenancy for regular payment of stipulated rent which was subsisting between the parties. The

said suit filed by the plaintiff-unregistered firm was rightly held to be barred by Section 69 Sub-section (2) of the Partnership Act. In this

connection, we may also refer to a decision of the Patna High Court in Padam Singh Jain v. Chandra Bros. wherein a learned Single Judge of the

Patna High Court had taken the view that after the expiry of the contractual tenancy when the tenant had continued in occupation as a statutory

tenant and when the landlord based his suit for possession on any of the grounds available under the Rent Act, it cannot be said to be a suit for

enforcement of a right arising from the contract of tenancy. The said decision rendered on its own facts cannot advance the case of either side.

Similarly, the aforesaid decisions of the Calcutta High Court equally cannot advance the case of either side. In the present case, we are concerned

with the lease which has come to an end and the erstwhile tenant has remained in occupation as a tenant at sufferance. Under the law, the erstwhile

landlord is entitled to the restoration of possession by enforcement of statutory obligation of the erstwhile tenant as statutorily imposed on him u/s

108(q) read with Section 111(a) of the Property Act. The non-compliance of the statutory obligation by the defendant when made the subject-

matter of a corresponding legal right of the erstwhile landlord cannot be said to be giving rise to enforcement of any contractual right of the plaintiff

arising from the expired contract of tenancy. As seen earlier, the controversy would have clearly ended in favour of the respondent and against the

appellant if the plaint had referred to only the law of the land under which the defendant was required to be evicted on the expiry of the lease. But

unfortunately for the plaintiff, the suit is also based on the breach of the covenant of the lease as seen from para 2 of the plaint. It is, therefore, not

possible to interpret the averments with reference to the covenant of the lease only as referring to a historical fact as tried to be submitted by Dr

Singhvi for the respondent.

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 u/s 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. 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 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 u/s 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 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.

45. This decision was very much pressed into service by the learned Senior counsel for the respondent. In the above judgment, the Hon"ble

Supreme Court held that;

(1) On the expiry of the period of lease, the erstwhile lessee continues in possession because of the law of the land and the status of an erstwhile

tenant has to be treated as a tenant at sufferance akin to a trespasser having no independent right to continue in possession.

(2) If the suit is based solely on the ground that the erstwhile tenant unlawfully remained in possession and is required to hand over possession then

the suit can be said to be based on the sole cause of action for enforcement of a right arising on general law and under the transfer of property act.

(3) The obligation to restore possession by the ex-lessee will suffer from the statutory provisions and not from any terms of the contract.

(4) An implied obligation or a term in a contract in any way reduce the legal efficacy of the statutory obligation foisted upon such a lessee by the

express provisions of Section 108(q) read with Section 111(a) of the Transfer of Property Act.

(5) Section 69(2) of the Partnership Act being a provision will have to be strictly construed and once the bar u/s 69(2) of the Act gets attracted,

then the suit becomes incompetent on the very threshold itself.

(6) When the cause of action is based on the statutory obligation of the defendant/lessee when he failed to comply with the statutory obligation u/s

108(q) read with 111(a) of the Property Act, it cannot be said that the suit is based on the erstwhile contract.

(7) Enforcement of the statutory right under the transfer of property Act has nothing to do with the earlier contract which stood determined by

efflux of time.

46. In M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak

Kumar and Another, , the Hon''ble Supreme Court reiterated the position that a suit by an unregistered firm is not barred u/s 69(2) of the Partnership Act if a statutory right or a common law right is being enforced.

47. In 2003(2) L.W. 740 (cited supra), this Court observed as under:

9. Section 69(2) of the Act contemplates three conditions namely (i) no suit to enforce a right arising from a contract shall be instituted on behalf of a firm against third part (ii) unless a firm is registered and (iii) and the persons suing are or have been shown in the Registrar of Firms as partners in the firm.

10. Before analysing the first condition namely ""arising out of a contract"", we look into the other two conditions. Admittedly, the plaintiff firm was registered with the Registrar of firms as such the second condition is complied with.

11. The third condition namely ""persons suing are or have been shown in the Registrar of Companies as Partners in the firm"" is concerned, that the first and second plaintiffs name were admittedly found in the Registrar of Firms. The plaintiffs 3 and 4, though became partners of the company as early as on 22.10.1979, their names did not find place in the said register. Pending suit, their names were incorporated as per Section 59 of the Partnership Act. Section 59 contemplates that when the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement. u/s 58 of the act, necessary application has been forwarded by the plaintiffs firm intimating the date when the partners namely plaintiffs 3 and 4 joined the firm.

13. The first condition that ""enforcing a right arising out of a contract"" is concerned that the contract even by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in the course of the business dealing with the plaintiffs firm with such third party defendant. The Hon''ble Supreme Court has decided in "" M/s.

Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, "" that 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 transaction by the unregistered plaintiff firm with its customers/ defendants and the idea is to protect those in commerce, who deal with such a partnership firm in business. Such said third parties, who deal with the partners ought to be enabled to know what the names of the partners of the firm before they deal with them in business". It is evident that Section 69(2) is not attracted to any and every contract.

14. Admittedly, in this case, the suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the plaintiffs firm with the defendant in the course of business transaction. Moreover, Section 69(2) does not bar a suit to enforce common law right even if the firm is unregistered on the date of the suit. Hence, the suit is not barred by Section 69(2) of the Partnership Act. With the result, all the other substantial questions of law are answered in favour of the Respondents/Plaintiffs.

48. In the above decision, a similar contention as raised by the revision petitioner before this Court has been raised and this Court held that the bar contemplated u/s 69(2) of the Partnership Act will not get attracted if the suit is being filed even by an unregistered firm to enforce common law right.

49. In the light of the above settled legal principles as culled out from the above judgments, if the facts of the present case are considered, I am of the considered view that the trial Court has rightly dismissed I.A. No. 741 of 2004.

50. It is not in dispute that the plaintiff is a registered firm. It is also not in dispute that the said Thiru Vinod Kumar Fateh Puria is not a partner and his name is not found in the register of firms. When it was pointed out by the revision petitioners, the respondent/plaintiff informed that it was only a clerical error and the said Thiru Vinod Kumar Fateh Puria is only a power agent of the firm. The main contention of the learned Counsel for the revision petitioners is that, once it is established that the person who is suing on behalf of the firm is not a partner or his name is not found in the register of firms, then the bar u/s 69(2) of the Partnership Act will apply with all its force and the suit is to be held as void one.

51. I am unable to accept these submissions of the learned Counsel for the petitioners.

52. The bar contemplated u/s 69(2) of the Act will come into picture only when the suit is filed to enforce a right arising from a contract against a third party. In the present case, the suit has been filed for recovery of possession of A and B schedule properties and to pay damages for use and occupation. If that being so, as rightly pointed out by the learned Senior counsel for the respondent, the suit is to enforce a statutory right available to the plaintiff under the provisions of the Transfer of Property Act and the suit is not the one to enforce a right arising from a contract entered into between the parties. The decisions relied on by the learned Senior counsel for the respondent would make it very clear that Section 69(2) being penal in nature should be strictly construed and if strictly construed, Section 69(2) will get attracted only when the suit is filed to enforce a right arising from a contract and not to a suit filed to enforce any common law right. If the suit is for enforcing a common law right, then, even an unregistered firm can do so and in that event, Section 69(2) will not get attracted. In the present case, it is no doubt as stated that the suit is only for recovery of possession and therefore, it is not a suit to enforce the terms of the contract entered into between the plaintiffs and defendants. Then, such a suit could be filed even by an unregistered firm. Admittedly, the plaintiff is a registered firm. When such a suit could be filed even by an unregistered firm, there is no substance in the contention of the revision petitioners that the suit is to be rejected as the said Thiru Vinodkumar Fateh Puria is not a partner of the firm and his name is also not found place in the register of firms.

53. Therefore, I do not find any merits in the contention of the revision petitioners and accordingly, the Civil Revision petition is dismissed upholding the order of the trial court, dated 29.10.2007 made in I.A. No. 741 of 2004.

54. In the result, the Civil Revision petition is dismissed. No cost.

55. As the suit was originally filed before the Sub Court in the year 2000, I direct the trial court to take up the matter as expeditiously as possible and to conduct the trial preferably on a day to day basis and try to dispose of the suit itself within a period of three months from the date of receipt of a copy of this order.