
(1969) 12 RAJ CK 0007

In the Rajasthan High Court

Case No : Civil Regular First Appeal No. 49 of 1956 in Civil Suit No. 3 of 1945

Seth Sobhag Mal Lodha and Others

APPELLANT

Vs

Edward Mills Co. Ltd. and Others

RESPONDENT

Date of Decision : 19-12-1969

Acts Referred:

Partnership Act, 1932 — Section 69, 69(3)

Citation : (1972) 42 CompCas 1 : (1970) RLW 549 : (1969) WLN 498

Hon'ble Judges : L.S. Mehta, J; L.N. Chhangani, J

Bench : Division Bench

Advocate : Thanchand Mehta and Narain Chand Mehta, for the Appellant; M.B.L. Bhargava, S.N. Bhargava and Doonghar Singh, for the Respondent

Final Decision : Dismissed

Judgement

L.S. Mehta, J.—On July 6, 1906, Seth Guman Mal Lodha, one of the proprietors and a nominee of the firm, Kamal Nayan Hamir Singh of Ajmer and Kunwar Ram Swarup, son of Rai Bahadur Seth Champalal of Beawar, executed an agreement. Its relevant terms and conditions were as follows:

" It was executed for the purpose of establishing a cloth mill at Beawar. The concern was to be started in the name of the Edward Mills Company Ltd., Beawar. The two parties would invest the bulk of the money and the management would also remain in their hands. They would keep their shares separate which would not be of the value of less than rupees one lakh. The rights of both the parties would be equal and both the parties would have jointly and severally the rights of becoming manager, chairman, secretary, treasurer, etc. These rights would be exercised half and half by both the parties and they would be entitled to get the income in equal shares in respect of all the commissions, salary or any other kind of income. According to the terms of the memorandum and articles of association the rights of the chairman and managing director would jointly be exercised by Seth Guman Mal, proprietor of the firm Kamal Nayan Hamir Singh, and Kunwar Ram Swarup. After the registration of the

memorandum and the articles of association in the first general meeting, Guman Mal, proprietor of the firm Kamal Nayan Hamir Singh, would discharge the duties of the chairman and would continue to do so for the full term of three years. During this period, Ram Swarup would continue to act as managing director. Thereafter, Seth Guman Mal would hold the office of the managing director and Ram Swarup would act as chairman and that procedure would be followed in future. The work and the rights of the secretary, treasurer and agent would be joint and would be carried on in the joint names of the parties. All the rights which the executants of the agreement acquired would not only be enjoyed by them till their lifetime, but they would also devolve upon their heirs, successors and administrators or upon those persons who might be their legal heirs and legal representatives."

2. In pursuance of the above agreement the Edward Mills Co. Ltd. was incorporated on August 9, 1906. The substance of the agreement found place in Clause VI of the memorandum of association. It runs as follows:

" VI. Seth Guman Mal, son of Seth Raj Mal Lodha, proprietor of the firm of Kamal Nayan Hamir Singh of Ajmer, and Kunwar Ram Swarup, son of Rai Bahadur Seth Champalal of Beawar, or their heirs, executors, administrators, successors, representatives or their duly authorised agents or such other person or persons as may from time to time be appointed by them, shall be agents, secretaries, treasurers, the chairman and the managing director of the company, and shall not be required to vacate the said offices until they resign of their own accord, and as a remuneration for their services a fixed amount of Rs. 250 per month shall from the date of commencement of the business up to the date the machinery may begin to work, be given to them ; and afterwards the said Seth Guman Mal, proprietor of the firm of Kamal Nayan Hamir Singh of Ajmer, and Kunwar Ram Swarup, son of Rai Bahadur Seth Champal of Beawar, shall be allowed 16 per cent, only on the net profits of the earnings of the company as their commission. As to the way in which the respective duties of the chairman and the managing director shall be discharged, Seth Guman Mal and Kunwar Ram Swarup will from time to time settle between themselves and inform the office of the company of the same."

3. Articles 60 and 75 of the articles of association substantially convey the same terms and conditions. Under Article 60 of the articles of association, Seth Guman Mal and Ram Swarup were to be appointed ex-officio directors as also the chairman and managing directors of the company, respectively. It also provided that their heirs, executors, etc., as appointed by them, would be able to act as such. As to the way in which their respective duties would be discharged Seth Guman Mal and Ram Swarup would, from time to time, decide and settle between themselves and inform the company's office of the same. Article 75 lays down that Seth Guman Mal and Ram Swarup or their heirs, executors, etc., would be the chairman and managing director of the company and would not be required to vacate the office until they resigned of their own accord. They would

get Rs. 250 per month from the date of the commencement of the business till the date the machinery started working. Thereafter, they would get 16% on the net profits of the company as their commission.

4. The defendant No. 1 company's business was carried on in the manner as set out above and both Seth Guman Mal and Ram Swarup obtained commission at the rate of 16% on the net profits of the company. The commission was credited in the name of the firm, Kamal Nayan Hamir Singh and Champalal Ram Swarup.

5. Seth Guman Mal died on November 11, 1914. Thereafter, the members of the firm Kamal Nayan Hamir Singh nominated Seth Gadh Mal Lodha as their representative and by their letter, dated May 4, 1915, they informed the directors of the company accordingly. The company by its extraordinary general meeting held on July 23, 1915, passed a special resolution which was confirmed in the next meeting, held on August 16, 1916, appointing Seth Gadh Mal in place of Seth Guman Mal.

6. Ram Swarup died on January 5, 1916. His younger brother, Motilal, defendant No. 2, was appointed in his place by a special resolution of the company, which was confirmed at the extraordinary general meeting held on June 8, 1916.

7. Till the end of June, 1938, Gadh Mal and Motilal acted, respectively, as chairman and managing director of the company. The firm, Champalal Ram Swarup, defendant No. 2, and other members of his family were adjudicated insolvent by the Bombay High Court on July 1, 1938. Thereupon defendant No. 2, Motilal, vacated the office of the managing director and Seth Gadh Mal Lodha remained the sole chairman and the managing director. The adjudication was subsequently annulled by the above court.

8. Gadh Mal died on January 11, 1942. The board of directors of the company appointed Seth Sobhag Mal Lodha on January 17, 1942, in place of Seth Gadh Mal, deceased, as chairman and managing director of the company. This appointment was temporary and was subject to the confirmation of the company. An extraordinary general meeting of the company for making the appointment was convened on February 8, 1942. The meeting was held in the office of the company and Seth Sobhag Mal Lodha first occupied the chair. Before the meeting could transact the business, it was dissolved by Seth Sobhag Mal and his supporters left the meeting. The rest of the shareholders continued the meeting under the chairmanship of K.K. Bhargava, advocate, and passed a resolution appointing defendant No. 2, Motilal, as the agent, secretary, treasurer, chairman, and managing director of the company for a period of 20 years. It was further resolved in the meeting that he would be entitled to get remuneration at the rate of 10% on the net profits of the company every year and that he would also act as an ex-officio director till he held the above-named offices.

9. On an application submitted by Sobhag Mal on February 11, 1942, u/s 79(3) of the Indian Companies Act, the District Judge, Ajmer, Mr. K.R. Damle, ordered that the meeting of the company should be held on February 12, 1942, under the

chairmanship of Seth Sobhag Mal. On April 8, 1942, Motilal went up in revision to the Court of the Judicial Commissioner, Ajmer, against the above order of the district judge. He also made an application for interim injunction restraining Sobhag Mal Lodha from acting as managing agent, chairman and director, but that application was disallowed on May 8, 1942. On May 15, 1942, the Judicial Commissioner, Ajmer, granted an interim stay of the order of the district judge and further directed that the resolution of the extraordinary general meeting, dated February 8, 1942, electing Seth Motilal, was to be acted upon until further orders. On June 3, 1942, that order was made absolute and since then Motilal, defendant No. 2, acted as the managing director, etc., of the company.

10. Seth Kanmal, one of the proprietors of the firm, Kamal Nayan Hamir Singh and father of the plaintiffs Nos. 8 and 9, filed Suit No. 867A/1934 for partition of the joint family property in the Calcutta High Court. By an order dated April 1, 1935, Seth Gadh Mal was appointed a receiver of the estate and joint properties including the joint business with power to carry on the existing joint business. On his death Seth Sobhag Mal, plaintiff No. 1, was appointed in his place by an order, dated January 16, 1942. Thereafter, Seth Sobhag Mal Lodha filed the present suit with the leave of the Calcutta High Court. The plaintiffs Nos. 2 to 9 and the defendants Nos. 4 to 6 are the other proprietors of the firm, Kamal Nayan Hamir Singh.

11. The case set up in the plaint is as follows :

The families of the plaintiffs and the defendants Nos. 3 to 6 carried on business under the name and style of M/s. Kamal Nayan Hamir Singh. The joint family of the defendant No. 2 also carried on the business under the name and style of M/s. Champalal Ram Swarup of Beawar. It was decided by the two families that in the matter of holding offices of the managing director, managing agent, etc., they should act through their nominees and pursuant to that decision Seth Guman Mal of the plaintiffs' family firm and Ram Swarup of the defendant No. 2's family firm were, respectively, appointed nominees and representatives of the said firm for the purpose of managing the business of the company as chairman and managing director. On the death of Guman Mal, Gadh Mal was nominated by the proprietors of the firm, Kamal Nayan Hamir Singh, in his place. Similarly, on the death of Ram Swarup, defendant No. 2, Motilal, was nominated by the firm, Champalal Ram Swarup. At the commencement of the extraordinary general meeting held on February 8, 1942, Seth Sobhag Mal Lodha, as chairman, directed the secretary of the company to record the names of the shareholders who were present. Thereupon, some of the shareholders in collusion with and at the instigation of Motilal, defendant No. 2, and the members of his family created pandemonium and obstructed the secretary from discharging his duties. They also wanted to remove Seth Sobhag Mal Lodha forcibly from the chair. Thereupon Mr. Lodha dissolved the meeting and he and his supporters left the place. The rest of the shareholders insisted upon conducting an extraordinary general meeting under the chairmanship of Mr. K.K. Bhargava, advocate, and passed a

resolution appointing Motilal, defendant No. 2, as the managing director and chairman. According to the plaintiffs, this resolution being not valid is not binding upon the company or the plaintiffs or the defendants Nos. 3 to 6 as the same was not passed in a properly convened meeting and as no proper notice for the purpose had been given to the shareholders. The meeting of February 8, 1942, was not convened for altering the memorandum or the articles of association regarding change in the commission rate. The plaintiffs further averred that the orders passed by the Judicial Commissioner on May 15, 1942, and June 3, 1942, were without jurisdiction, null and void and were not binding upon the plaintiffs and the defendants Nos. 3 to 6.

12. On April 1, 1942, the adult members of the firm, Kamal Nayan Hamir Singh, sent a letter to the directors of the company, informing them that they had nominated Seth Sobhag Mal as their representative in place of Seth Gadh Mal with the same rights and privileges. The board of directors in a meeting held on April 18, 1942, passed a resolution appointing Seth Sobhag Mal Lodha as secretary, treasurer, agent, managing director, etc., of the Edward Mills Company Ltd., Beawar. Despite the above resolution, defendant No. 2, Motilal, was wrongfully in the sole management and possession of the said company, and was not permitting the plaintiff's representatives to participate in the management of the company.

13. The firm, Kamal Nayan Hamir Singh, received payment of half the commission from defendant No. 1 up to December 13, 1939, and the plaintiffs and the defendants Nos. 3 to 6 were entitled to Rs. 23,061, as their share in the commission for the years 1940 and 1941. They are further entitled to commission from January 1, 1941, up to the date of the suit. Further, the plaintiffs are entitled to a moiety of the commission from January 1, 1942, up to the date of the suit @ 16% which amounts to Rs. 3,00,000.

14. The firm, M/s. Kamal Nayan Hamir Singh, is a family firm having business at Ajmer and other places in India. The deceased, Seth Kan Mal Lodha, father of the plaintiffs Nos. 8 and 9, filed a civil Suit No. 867/A of 1934 for partition in the Calcutta High Court and late Rai Bahadur Seth Gadh Mal Lodha was appointed as receiver of the firm and its business by an order dated February 20, 1935. On his death, the plaintiff, Seth Sobhag Mal Lodha, was appointed a receiver in his place. The defendant-company could not terminate the agency of the plaintiffs without their consent and in any case u/s 87A of the Indian Companies Act. The plaintiffs were, therefore, entitled to be associated with defendant No. 2 in performing the duties of the chairman, managing director, etc. In the alternative, the plaintiffs were entitled to recover from the defendant-company a sum of rupees 5 lakhs by way of damages for wrongful exclusion and dismissal from the offices of the managing director, etc. In the end, the plaintiffs claimed the following reliefs :

(a) That, it may be declared that on the death of R.B. Seth Gadh Mal Lodha, the plaintiffs' family firm, Kamal Nayan Hamir Singh, having appointed Seth Sobhag

Mal Lodha as the nominee to act for them and the board of directors of the defendant-company having accepted the nomination, Seth Sobhag Mal Lodha was entitled to be in management and control of the affairs of the defendant-company jointly with defendant No. 2.

(b) That it may be declared that the resolution purporting to have been passed on the 8th February, 1942, at the extraordinary general meeting of the company held by the partisans of the 2nd defendant, who broke up the meeting, being ultra vires and invalid is not binding on the plaintiffs and the defendant-company.

(c) That it may be declared that the orders, exhibit F, passed by the Judicial Commissioner of Ajmer-Merwara in respect of the resolution purported to have been passed by the said meeting of the shareholders held on the 8th February, 1942, are without jurisdiction, null and void and not binding on the parties hereto.

(d) That the defendants Nos. 1 and 2 may be ordered to hand over the management and charge of the affairs of the 1st defendant-company to Seth Sobhag Mal Lodha on behalf of the plaintiffs' said family firm in accordance with the memorandum and articles of association of the defendant-company.

(e) That the defendants or such of them as may be held liable may be ordered to pay to the plaintiffs and defendants Nos. 3 and 4 Rs. 3,73,061, the commission on net profits up to the date of the suit.

(f) That in the alternative the defendant-company may be ordered to pay to the plaintiffs on behalf of the plaintiffs' said family firm damages to the tune of Rs. 5 lakhs for wrongful dismissal and exclusion of the plaintiffs' nominee from the management and control of the 1st defendant.

(g) That the defendants Nos. 1 and 2 or one or more of them may be ordered to pay the plaintiffs costs of the suit.

(h) That such further and other reliefs as the circumstances of the case may require may be granted to such of the plaintiffs and in such capacity as may be found to be entitled thereto against such of the defendants as may be held liable.

15. The defendants Nos. 1 to 3 contested the suit. Defence of the defendants Nos. 1 and 2 are substantially the same. According to them, Seth Guman Mal and Ram Swarup were the promoters of the company in their individual and personal capacity. They were agents, secretary, chairman, managing director, etc., in their individual and personal capacity and not as the nominees or representatives of their respective firms. The company was the sole and the final authority to make the appointment and the right never vested in any other person or family. The appointments of Seth Gadh Mal Lodha and Seth Motilal were not virtually by nominations made by the respective firms, but because of the fact that the company chose them by resolutions adopted in its extraordinary general meetings. They did not hold the position identical to those occupied by Seth Guman Mal and Ram Swarup. No disorder or confusion prevailed at the

meeting of February 8, 1942. There was no apprehension of breach of the peace at that time, nor was any attempt made to remove Seth Sobhag Mal Lodha forcibly from the chair. The shareholders made proposals for electing the chairman of the meeting. Sobhag Mal Lodha, however, illegally insisted on occupying the chair and, finding the majority against him, he left the meeting along with his supporters. The meeting could not have been dissolved by Seth Sobhag Mal Lodha under any circumstances. The shareholders were within their rights to elect the chairman for the meeting and to proceed with the business. After Seth Sobhag Mal Lodha had walked out, the resolution, dated February 8, 1942, was perfectly valid and did not violate the memorandum of association or the articles of association. The resolution of the board of directors of April 18, 1942, appointing Seth Sobhag Mal Lodha was without jurisdiction and inconsistent with the company's resolution of February 8, 1942. R.S. Motilal was the only person legally entitled to be in the sole management and charge of the defendant-company. The defendants further pleaded that the plaintiffs were not entitled to any damage or commission whatever. The suit related to the appointment and dismissal by a company of its managing agent, etc., and that matter pertained to the internal affairs of the company and as such they were outside the purview of the court. The suit was barred by Section 11, Civil Procedure Code, on account of the decision of the Judicial Commissioner, Ajmer, and was bad for mis-joinder of the parties. Clause VI of the memorandum of association did not operate in law to create any agreement or contract between the company and the persons named therein and was, therefore, not binding upon the company. There was no privity of contract between the plaintiffs and the defendants Nos. 3 to 6 on the one hand and defendant-company on the other and, therefore, the suit for appointment of plaintiff No. 1 as also for the recovery of the damages was not maintainable. The suit was barred by Section 69 of the Indian Partnership Act, 1932, as the firm, Kamal Nayan Hamir Singh, was a partnership firm and not a joint Hindu family firm and it could not have filed a suit without registration. Defendant No. 2 also pleaded that the plaintiffs had not come with clean hands as they themselves were guilty of repeated breaches of the contract. On more than one occasion they transferred shares to others in contravention of term No. 5 of the agreement dated July 6, 1906. Seth Gadha Mal on the annulment of the attachment order did not take the answering defendant No. 2 in the joint management of the company in contravention of the Clause 1 of the agreement and deprived him of his due shares of the managing agency commission for the years 1937 and 1938. The agreement between Seth Guman Mal Lodha and Seth Ram Swarup was in substance a partnership agreement. The partnership must be deemed to have come to an end on the adjudication of the defendant No. 2 and other members of his family as insolvent and, therefore, no suit on the basis of the agreement could lie. The plaintiff and the defendants Nos. 3 to 6 did not constitute the firm as there have been many deaths in the family since 1936. In any case, the plaintiffs had no right to bring the suit after the death of Seth Gadha Mal Lodha.

16. Defendant No. 3 contested the suit on the ground that he had been wrongly impleaded and the plaintiffs are not entitled to get any relief.

17. The District Judge, Ajmer, framed as many as 31 issues. The plaintiffs examined 6 witnesses. The defendants produced 5 witnesses. Both the parties also produced a large number of documents in support of their respective pleas. The relevant documents have been referred to in the paper book.

18. The trial court gave the following finding:

1. That the family firm of Seth Guman Mal and that of Ram Swarup were the promoters of the company, defendant No. 1, and the agreement, dated July 6, 1906, was executed by Seth Guman Mal Lodha and Ram Swarup on behalf of their respective families.

2. That no partnership came into existence between the two families and the partnership created by the agreement of July 6, 1906, was between Seth Guman Mal and Kunwar Ram Swarup only, carrying with it the necessary incidence and the resolution on the demises of the partners, if it could be deemed to have continued after their deaths, stood dissolved u/s 42 of the Indian Partnership Act on defendant No. 2's adjudication as insolvent

3. That the provisions in the memorandum of association and the articles of association of the company relating to the management are merely details of the management for the purpose of carrying on business of the company and that the company was entitled to regulate details in such manner as it liked. Therefore, Clause VI of the the memorandum of association and Articles 60 and 75 of the articles of association could not be specifically enforced and they did not give any cause of action to the plaintiffs.

4. That the company recognised the rights of the firm, Kamal Nayan Hamir Singh, to the extent that its nomination of Seth Gadh Mal as its representative in place of Seth Guman Mal was accepted by the resolution, dated July 3, 1915, and July 23, 1915. Though half the commission was credited to the firm, Kamal Nayan Hamir Singh, it would not amount to any implied agreement entitling the firm to take part in the management of the company.

5. That there was no rowdyism or disorder in the general meeting of the company, held on February 8, 1942, so as to result in a breach of the peace and that the shareholders were entitled to elect the chairman. Seth Spbhag Mal was not justified in asserting his right to preside over the meeting as he himself was a candidate for the office of the chairman, etc. The meeting of the shareholders, dated February 8, 1942, therefore, was proper and justified, appointing defendant No. 2 as chairman and managing director.

6. That the plaintiffs are not entitled to be associated with defendant No. 2 as agents, etc.

7. That with the institution of the suit for partition in the Calcutta High Court by

Seth Kan Mal the status of the joint family, even if it was joint, was changed and thereafter as the business was carried on jointly, the firm became an ordinary partnership concern subject to the Indian Partnership Act. As the firm was not registered, Section 69 of the Partnership Act stood in the way of filing the suit without the registration of the firm.

8. That in the balance-sheet a sum of Rs. 2,015-6-6, as a moiety of the commission from January 11, 1942, is credited to Seth Gadh Mal and the same amount to Seth Motilal. Similarly from January 17, 1942, to February 8, 1942, during which time Sobhag Mal remained chairman, etc., half the amount of commission of Rs. 3,706-2-6 was credited to Seth Sobhag Mal. These amounts can be recovered by the heirs of Seth Sobhag Mal or by the firm, Kamal Nayan Hamir Singh.

19. Aggrieved against the above judgment, the present appeal has been filed on behalf of the plaintiffs.

20. Before the main points raised on behalf of the appellants in the course of the arguments are set out, it may be stated that Seth Sobhag Mal died in the course of the pendency of the appeal. In paragraph 49 (a) of the plaint it is mentioned that it may be declared that on the death of Seth Gadh Mal Lodha the plaintiffs' family firm having appointed Seth Sobhag Hal to act as nominee for them, Seth Sobhag Mal Lodha was entitled to be in the management and control of the affairs of the company, jointly with defendant No. 2. In the case of personal action, i.e., in an action where the relief sought is personal to the deceased, the right to sue will not survive to or against his representative. A right intimately connected with the individuality of the deceased will not survive on the basis of the well known maxim *actio personalis moritur cum persona* (a personal right of action died with the person). However, if emoluments are attached to the office, the right to sue will survive and the suit will not abate. As has been conceded by learned counsel for the appellants no useful purpose is likely to be served by declaring at this stage that the deceased, Seth Sobhag Mal Lodha, was entitled to be in the management and control of the affairs of the company jointly with Seth Motilal, defendant No. 2. We are, therefore, not required to give any finding on this aspect of the matter.

21. Learned counsel for the appellants raised the following main points in the course of his arguments :

(1) That the resolution of the company, dated February 8, 1942, appointing Motilal was not valid, as the general meeting of the shareholders which had stood dissolved, was not to continue and approve of the appointment of defendant No. 2.

(2) That Section 69 of the Partnership Act, 1932, does not apply to the case and that even if it is applicable, the plaintiffs' case fell within the exception provided by Sub-section (3).

(3) That there was an implied agreement between the plaintiff and the defendant-company, as the latter ratified or acted upon the terms of the agreement, dated July 6, 1906, arrived at between the nominees of the two firms, Kamal Nayan Hamir Singh of Ajmer and Champalal Ram Swarup of Beawar.

(4) That the plaintiffs-appellants and the defendants Nos. 3 to 6 are entitled for the years 1940 and 1941 to the moiety of commission of a sum of Rs. 23,061 having not been contested by the defendants Nos. 1 and 2 and having been wrongly rejected by the trial court.

22. We may now take up the first point pressed on behalf of the appellants. Learned counsel for the appellants has argued that by virtue of the agreement of July 6, 1906, Seth Guman Mal was appointed as chairman. After his death on November 11, 1914, Gadh Mal was appointed to the office on July 23, 1915, and that appointment was duly confirmed by the company in its extraordinary general meeting, held on August 16, 1915: vide annexure "A ". On the death of Gadh Mal occurring on January 11, 1942, the board of directors passed a resolution on January 17, 1942, appointing Seth Sobhag Mal in his place till the appointment was duly made by the extraordinary general meeting of the company. Thereafter, notice, exhibit 5, dated January 22, 1942, was issued in connection with that appointment. In pursuance of the notice a meeting of the shareholders was convened on February 8, 1942. Owing to the pandemonium in the meeting, Seth Sobhag Mal was constrained to dissolve it. After its dismissal Sobhag Mal and his supporters left the place. Thereafter the remaining shareholders continued the meeting and passed a resolution appointing defendant No. 2, Motilal, as chairman, etc. Such a meeting conducted after its dissolution, according to the learned counsel, was illegal, as it could not have been presided over by a person other than Sobhag Mal and as no prior notice had been issued for the purpose, the shareholders had also no authority to reduce the amount of the commission to 10% from 16% payable to the chairman and managing director, according to the terms of the memorandum and articles of association without issuing a specific notice in respect thereto.

23. The agreement, dated July 6, 1906, is the basis of the suit. That indenture was entered into between Guman Mal, representing the firm, Kamal Nayan Hamir Singh, and Ram Swarup, nominee of the firm Champalal Ram Swarup of Beawar. According to this covenant certain arrangements had been arrived at in respect of the management of the company which was still in embryo or rudimentary stage, and which was incorporated subsequently, i.e., on August 9, 1906. Under the agreement each one of the promoters was to purchase a certain number of shares and was to pay at least a sum of Rs. 1 lakh. Both the parties, the agreement provided, were entitled jointly or severally to the rights of membership, chairmanship, etc., as also to equal remuneration. Whatever rights accrued to the parties by virtue of the agreement or partnership was not limited to their lifetime. But they devolved upon their legal representatives, heirs, executors and administrators. Clause VI of the memorandum of association and

articles 60 and 75 of the articles of association are also to this effect. It was that a fixed amount of Rs. 250 per month was payable to the parties as remuneration for their services from the date of commencement of the business up to the date of the actual starting of the work. Thereafter they were to get 16% of the net profits of the earnings of the company as their commission. This commission was divisible between the two parties half and half. Guman Mal and Ram Swarup took over the management after the company began to function. Guman Mal died on November 11, 1914 (vide paragraph 9 of the plaint). After his death, a letter was written on May 4, 1915, by the family members of the firm, Kamal Nayan Hamir Singh of Ajmer, nominating Gadh Mal in place of the deceased. This communication was put up before the meeting of the company. The company made the appointment of Gadh Mal on July 23, 1915. That appointment was confirmed by the company at its extraordinary general meeting held on August 16, 1915 (vide paragraph 11 of the plaint). Thus, after the death of Guman Mal, Gadh Mal stepped into the shoes of the original promoter and the company clothed him with all the rights and the powers as contained in clause VI of the memorandum of association and Articles 60 and 75 of the Articles of association. Ram Swarup died on June 5, 1916, whereupon Seth Motilal was nominated by the members of the joint family firm, Champalal Ram Swarup, as successor of Ram Swarup and the defendant-company passed a special resolution which was confirmed at the extraordinary meeting of the company held on June 8, 1916 (see special resolution forming part of annexure "A"). As a result of these proceedings, the defendant No. 2, representing his family firm, occupied the same position as Ram Swarup as contemplated by the memorandum or Articles of association of the company : vide paragraph 12.

24. The above was the position in so far as Gadh Mal and Motilal were concerned. On the death of Gadh Mal on January 11, 1942, trouble ensued. Certain important events took place in the firm of Champalal Ram Swarup in the year 1938. The joint family of the defendant No. 2, Motilal, became heavily indebted. By its order, dated July 1, 1938, the High Court of Bombay, in its insolvency jurisdiction, adjudicated the firm, M/s. Champalal Ram Swarup, as insolvent. On its insolvency its property vested in the official assignee of the High Court. The office of the managing, director of the defendant-company occupied by defendant No. 2 on behalf of the joint family firm was vacated by virtue of Article 68 of the Articles of association and Section 87 of the Indian Companies Act (see paragraph 15 of the plaint). In this context the legal position, as emerged (1) on account of the death of Gadh Mal, and (2) by the adjudication of the insolvency, was that the two parties lost their original characteristics.

25. On January 17, 1942, a meeting of the directors was convened by Sobhag Mal. The board of directors appointed Sobhag Mal as chairman, etc., till such time as the appointment was duly made. A notice was issued to the shareholders of the Edward Mills Co. Ltd., Beawar, that an extraordinary general meeting of the company would be held on February 8, 1942, at 1 P.M. for making the appointment of Sobhag Mal: vide exhibit 5, annexure "D". The notice suggests

three things, namely :

1. That Seth Sobhag Mal was the representative of the firm, Kamal Nayan Hamir Singh of Ajmer.
2. That the appointment of Sobhag Mal was ad hoc till such time as it was duly made.
3. That for the sake of appointment, an extraordinary general meeting of the company was necessary.

26. Article 72 of the Articles of association provides that the permanently appointed chairman of the company was also to be the chairman in the meetings of the board of directors and in his absence the managing director would preside. In the absence of both of them, the directors present would elect a chairman from amongst themselves for the said meeting. Article 49 provides that the chairman would preside over every general meeting and in his absence the managing director would preside. In the absence of both of them one of the directors present would be elected as the chairman for the time being and in the absence of the directors or if the director present declined to preside over the meeting, the shareholders present would choose one of their own members as the chairman of the meeting. According to these provisions the only person who had a right to preside was the permanent chairman and in his absence the managing director.

27. From a perusal of the notice referred to above, it is clear that Sobhag Mal was not the permanent chairman. He had, therefore, no right to preside over the meeting. The right to appoint the chairman vested in the shareholders. Sobhag Mal Lodha, by virtue of his temporary appointment, insisted that he had the sole right to preside over the meeting. Since he had not been appointed as permanent chairman, it was within the right of the general body of the company to choose first a director to function as chairman and in his absence any one of the shareholders could have been taken as chairman. Sobhag Mal could not have insisted that it was he alone who could preside over the meeting and when he was not permitted to exercise that right he unauthorisedly declared the meeting dissolved. Sobhag Mal had no legal right to insist upon presiding over the meeting, specially when the issue of his own appointment was under hot discussion. The shareholders, however, went ahead with the meeting under the chairmanship of K.K. Bhargava, advocate. The company resolved that Motilal should be appointed chairman, secretary, managing agent, etc of the company for a period of 20 years with effect from the date of the resolution and that he was to be paid only 10% of the net profits of the company every year instead of 16% as previously drawn by the persons concerned. It may be mentioned here that by this time the order of adjudication had been annulled by the Bombay High Court on April 15, 1941.

28. It is settled law that when once a meeting is called, no chairman can arbitrarily dispose of it. Its continuance or dispersion rests entirely on the will of

the shareholders. It is mentioned in the Law and Practice of Meetings by Frank Shackleton, 3rd edition, page 69, that a chairman cannot adjourn a meeting at his own will and pleasure without the consent of the members unless the business for which it was convened has been concluded. That means that a chairman has no power to adjourn the meeting at his own choice. The power of adjournment vests in the majority of those present at the meeting. If a chairman should vacate the chair or adjourn the meeting regardless of the views of the majority, those remaining, even if a minority, can appoint a chairman and conduct the business left unfinished by the former chairman: see *Catesby v. Burnett* [1916] 2 Ch. 325. This point was also considered by a Division Bench of this court in *Deodutt Sharma Vs. Zahoor Ahmed Zaid and Others*, and it was held that :

" Once a meeting had been properly called and it meets, the chairman of the meeting can only adjourn it with the consent of the majority of the members if the chairman adjourns a meeting contrary to the wishes of the members present and thereby interrupts or leaves unfinished the business for which the meeting was summoned, the remaining members can lawfully continue the business ; and in the absence of their proper chairman it is open to them to elect another chairman to act as his substitute and continue the business and any business which was duly notified in the notice for the meeting could be transacted to completion, and if it is so transacted it would be valid. "

29. Similar views were expressed in *Stoughton v. Reynolds*[1736] 2 Stragge 1044 in *Nation Dwelling Society v. Sykes*, [1894] 3 Ch. 159 and in *Catesby v. Burnett* quoted supra. In the last case there was much opposition in the meeting. There was considerable uproar when the chairman declared the auditors elected and he declared the business to be closed and left the chair and the hall. The remaining members continued the business and elected Catesby to the chair and some new directors were also elected. The question arose, whether the proceedings after the chairman had vacated the chair and dissolved the meeting were valid. It was held that the proceedings were regular and that the appointment of the new directors was valid.

30. The above cases clearly established the principle that where a meeting is unlawfully adjourned by the chairman thinking that he is not likely to succeed in his object, the remaining members do possess the right to continue the meeting and conduct the business left untransacted by the chairman.

31. Contention of learned counsel for the appellants is that owing to the utter confusion and disorderliness the chairman was constrained to dissolve the meeting. The plaintiffs have given evidence to prove that there was disorderliness and uproar in the meeting. To make out this fact the plaintiff, Seth Sobhag Mal, who was obviously the best person to prove the circumstances in which the meeting was dissolved, did not come forward to give evidence on the point. Under illustration (g) to Section 114, Evidence Act, the court may presume that the evidence which could be and is not produced, would, if

produced, be unfavourable to the person who withholds it. The Judicial Committee of the Privy Council has, in several cases, strongly condemned the practice of parties to a suit withholding from the court the evidence which may throw light on the point for determination: vide *Murugesam Pillai v. Gnanasambandha Pandara Sannadhi* AIR 1917 P.C. 6 : 39 I.C. 659 and *Ram Prakash Das v. Anand Das* AIR 1916 P.C. 256 : 33 I.C. 583 . Similar are the views of their Lordships of the Supreme Court in *Hiralal and Others Vs. Badkulal and Others*, It appears from the evidence of Seth Kaluram, P.W. 1, that disorder was created in the meeting and that the shareholders were protesting against Seth Sobhag Mal being on the chair. This disorder continued till 3 or 4 P. M. It is not clear from the statement of this witness that there was such a disorder as to give rise to the apprehension of breach of the peace. The witness also appeared as a witness against Motilal in a criminal case on behalf of the prosecution. The other witness is P. W. 3, Mithan Lal, advocate, who has stated that an objection was raised about the election of the chairman. When the situation grew tense, the Lodha party decided to dissolve the meeting. The witness appeared as a counsel for Sobhag Mal in the revision petition before the Judicial Commissioner. He does not remember the names of the shareholders who were present in the meeting. He also does not recollect the agenda of the meeting held on February 8, 1942. He cannot recall the names of those who were participating in the discussion on behalf of the Beawar firm. The other witness on the point is Narain Das Mohta, P. W. 5. He says that the supporters of Motilal began to say in the meeting that Seth Sobhag Mal should not occupy the chair and that the meeting should elect its own chairman. He further says that it was not possible to continue the meeting. In the cross-examination he admits that Sobhag Mal's sister's daughter was married to his son. The witness in the cross-examination admits that he was sitting at a distance of 5 or 6 feet from Seth Sobhag Mal and that the members appeared to be gentlemen. He then says that he inferred that there might be violence. He also admits that he did not sit in the meeting continuously and that he came out of the meeting after 5 or 7 minutes.

32. From the nature of the above evidence, given by the plaintiff's witnesses, it is not made out satisfactorily that the meeting was rough and that the rowdy elements continuously interrupted it. Defendant's witness, Shirdhar Lal, says that no shareholder obstructed the recording of the proceedings. Similarly the witness, Kaushal Kishore, deposes that there was no pandemonium or apprehension of breach of peace. Another defendant's witness, Mahesh Dutt Bhargava, advocate, testifies that there was no danger of any breach of the peace. To the same effect is the testimony of Chand Mal Bajaj, who says that there was no rowdyism in the meeting. From this evidence it is apparent that no uncontrollable rowdyism was created in the meeting and that Seth Sobhag Mal could not have dissolved it without the consent of the shareholders present on the spot. In this view of the matter, the trial court rightly held that it was the privilege and the right of the shareholders assembled at the meeting to decide that they should continue its business.

33. Learned counsel for the appellants has further urged that no proper notice in regard to the appointment of Motilal had been issued and, therefore, the meeting could not have taken up that question for consideration. In support of his argument he relied upon *Narayanlal Bansilal v. Maneckji Petit Mfg. Co.* [1931] 1 Comp. Cas. 377 : AIR 1931 Bom. 354. In that case a company was incorporated in 1876, and its Articles of association, which was then registered, having become out of date, the directors desired to substitute for them a new set of up to date articles. At the same time the managing agents of the company, who had acted as such for 50 years, desired to have an agreement with the company fixing the duration of the agency and defining their powers. The directors convened an extraordinary general meeting of the shareholders to pass the necessary resolution for carrying out the said purpose. The notice convening the meeting set out necessary resolutions and was accompanied by circular, but sufficient particulars regarding important changes to be effected were not set out. The resolutions were passed and confirmed. In a suit by a shareholder suing on behalf of himself and other shareholders for declaring that the resolutions were inoperative on the ground of insufficiency of the notice and for injunction restraining the directors from acting upon them, it was held that the notice should have given sufficiently full and frank disclosure of the facts and the effect of the resolutions and the agreement and consequently the resolutions were inoperative and not binding upon the company. In the present case the notice, annexure "D", dated January 22, 1942, contained that the directors appointed Seth Sobhag Mal Lodha in place of late Rai Bahadur Seth Gadha Mal Lodha till such time the appointment was duly made. It further incorporated that an extraordinary general meeting would be held at the registered office of the company at Beawar, on February 8, 1942, for making the above appointment. The notice suggested that the meeting was called for the appointment of the chairman, managing director, etc. The directors could not have bound the company to appoint only the person nominated by the directors and fettered its discretion. It was within the discretion of the shareholders to make appointment of a person of their choice for the above post. In substance, the notice was for the appointment of chairman, managing director, etc., and the shareholders considered the suggestion of the directors and made an appointment of defendant No. 2, Moti Lal. Under the circumstances, it cannot be said that the shareholders travelled beyond the agenda fixed for holding the meeting. There was nothing wrong if the shareholders reduced the emoluments of the managing directors, etc., while making his appointment. The Bombay authority, under the special circumstances of this case, does not come to the aid of the appellants. Be that as it may, it cannot be said that the resolution passed by the company, appointing the defendant No. 2, Motilal, on February 8, 1942, was ultra vires or illegal for want of proper notice. Notice is simply an intimation to all concerned that a particular body is going to meet at a particular place, time and date for transacting a particular business. Here, the particular subject according to the notice was the appointment of a chairman, etc. Simply because the shareholders appointed another person for the post does not mean that the meeting went

beyond the notice.

34. We may now switch over to the second point raised on behalf of the appellants. It pertains to the applicability of Section 69 of the Indian Partnership Act, 1932. Learned counsel for the appellants has argued that the agreement of 1906 was not between the two joint family firms. The partnership agreement properly described was between the two members of the two families and that it is inappropriate to describe such a partnership as one between the two Hindu undivided families. The partnership in fact was created between Seth Guman Mal and Ram Swarup only for carrying on the business of managing agency, etc. On the death of Seth Guman Mal and Ram Swarup, the partnership was dissolved. Even if the partnership continued after their death, it stood dissolved u/s 42 of the Indian Partnership Act on the adjudication of the defendant No. 2, Motilal, as insolvent. Learned counsel further urged that as the original agreement was between 2 individuals, Section 69 of the Indian Partnership Act, 1932, would not apply to this case. According to him even if it is held that there existed a partnership, the exception incorporated in Sub-section (3) to Section 69 of the Act would apply to this case and under this sub-section the plaintiffs are entitled to realise the property of the dissolved firm. Another suit had been brought by Sobhag Mal and others as partners and proprietors of Kamal Nayan Hamir Singh of Ajmer. Paragraph 33 of the plaint mentions that the firm of M/s. Kamal Nayan Hamir Singh is a family firm doing business at Ajmer and at other places in India. The plaintiff No. 1 along with the other plaintiffs or defendants Nos. 3 and 4 are the members of the said firm. Paragraph 34 of the plaint provides that Seth Sobhag Mal is competent to file the suit on behalf of the firm, Kamal Nayan Hamir Singh, and that with a view to avoid all future disputes and complications all the members of the firm have been impleaded as parties to the suit. It is also stated in paragraph 33 of the plaint that Kan Mal Lodha, father of the plaintiffs Nos. 8 and 9, filed a suit No. 867A of 1934 for partition in the Calcutta High Court and the late Seth Gadh Mal Lodha was appointed receiver of the assets and business of the said firm by an order dated February 20, 1935. On his death, the plaintiff, Sobhag Mal, was appointed receiver in his place by the High Court, vide its order dated January 13, 1942, a copy of which is marked exhibit 1. The agreement, dated July 6, 1906, incorporates that Seth Guman Mal, proprietor of the firm, Kamal Nayan Hamir Singh, Ajmer, and Ram Swarup of the firm Rai Bahadur Seth Champalal Ram Swarup of Beawar, representing the two firms, agreed to start a mill at Beawar. Clause VI of the memorandum of association provides that Seth Guman Mal, proprietor of the firm, Kamal Nayan Hamir Singh of Ajmer, and Ram Swarup, son of Rai Bahadur Seth Champalal of Beawar, would be allowed 16% of the net profits of the earnings of the company as their commission. It further lays down that Seth Guman Mal and Ram Swarup, their heirs, executors, administrators, successors, representatives or the duly authorised agents or such other person or persons, as may, from time to time, be appointed by them, would be the chairman, etc. On the death of Guman Mal the members of the Lodha family nominated Gadh Mal, on May 4, 1915: vide

exhibit 6. In annexure " C" it is mentioned that the deceased, Guman Mal, was a coparcener in the joint and undivided family and was one of the proprietors of the said family firm. He represented the said firm of Kamal Nayan Hamir Singh as a trustee thereof and in that capacity he enjoyed powers and privileges including the right to act as chairman, managing director, etc. Similar was the position in regard to Ram Swarup. Ram Swarup died on June 5, 1916, and Motilal was appointed in his place. It is also in evidence from the record that the commission earned by Gadh Mal and Ram Swarup were credited to their respective firms. That shows that Gadh Mal and Motilal represented the two family firms and that other members of the firm were equally interested in the share of the commission. The suit has been filed on behalf of the firm, Kamal Nayan Hamir Singh. A partition suit was also filed in the High Court of Calcutta and Seth Gadh Mal was appointed receiver of the said business and on his death Sobhag Mal was appointed receiver in his place (see paragraph 33 of the plaint).

35. The above documents suggest that the suit has been filed on behalf of the firm. On the filing of the partition suit No. 867A of 1934 in the High Court of Calcutta by the deceased, Kan Mal Lodha, father of the plaintiffs Nos. 8 and 9, the joint family firm continued carrying on business and a receiver was appointed to manage the estate and its business. With the filing of the partition suit, the status of the joint family underwent a change and the business became a partnership business. u/s 69 of the Indian Partnership Act, 1932, no suit could have been instituted unless the partnership was registered. Section 69 of the Indian Partnership Act, 1932, runs as follows :

" (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 realise the property of a dissolved firm, or

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

(4) This section shall not apply--

(a) to firms or to partners in firms which have no place of business in the (State) or whose places of business in (the State) are situated in areas to which, by notification u/s 56, this chapter does not apply, or

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

36. This section, speaking generally, bars certain suits and proceedings as a consequence of the non-registration of the firms. Sub-section (1) prohibits the institution of a suit between partners inter se or between partners and the firm for the purpose of enforcing a right arising from a contract or conferred by the Partnership Act, unless the firm is registered and the person suing has been shown in the register of firms as a partner in the firm. Sub-section (2) similarly prohibits a suit by or on behalf of the firm against a third party for the purpose of enforcing rights arising from a contract 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. Under the third sub-section a claim of set-off which is in the nature of a counter-claim is also similarly barred. Then that sub-section bars other proceedings. The sub-section, however, does not affect power to realise the property of a dissolved firm. Here, according to the plaint, the suit in substance was filed on behalf of the firm. There was, therefore, no question of realising the property of a dissolved firm. After the partition suit the firm began to be governed by the Indian Partnership Act. In this view of the matter, Subsection (3) of Section 69 will not apply to this case to enable the plaintiffs to file a suit without the registration of the firm.

37. In support of the above proposition a reference is made to *Mst. Jatti v. Banwari Lal* AIR 1923 P.C. 136. In that case it has been held by Lord Dunedin that where a separation is effected between brothers and the business is carried on by the brothers the business becomes an ordinary partnership subject to the Partnership Act. In *Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury*, his Lordship, Shah J., speaking for the court, observed that partition may ordinarily be effected by institution of a suit, by submitting the dispute as to the division of the properties to arbitrators, by a demand for a share in the properties or by conduct which evidences an intention to sever the joint family ; it may also be effected by agreement to divide the property. His Lordship has further pointed out that merely because one member of the family severs his relation, there is no presumption that there is severance between the other members. In *Baij Nath Prasad and Others Vs. Ram Gopal Lachhmi Narayan and Others*, a Division Bench of the Calcutta High Court comprising Costello, Actg. C.J. and McNair J., considered the point in issue and observed that the institution

of a suit for partition by a member of the joint family is an unequivocal intimation of his intention to separate and that there is consequently a severance of his joint status from the date when the suit is instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by assertion of his right to separate, whether he obtains a consequential decree or not. It has further been laid down in that case that a joint Hindu trading family governed by Mitakshara law carried on business in different groups at various places in India. Subsequently, a member of the family instituted a suit for partition and if the business of the family was still being carried on as before without any change until final partition decree was passed, there was in fact a contractual partnership based upon an agreement to be implied from the conduct of the case. There is also an instructive judgment on the point in *Kesrimal and Another Vs. Dalichand and Others*, . In that case Modi J. observed that before a partner of the firm can maintain a suit to enforce a right arising from a contract against any third party, two conditions must be fulfilled. Firstly, that the firm should be registered, and where a partner thereof happens to have died, a fresh or de nova registration of the firm need not be insisted upon as a matter of law and the firm can still be considered to be a registered one. Secondly, that the person or the persons on whose behalf the suit is or has been brought must have been shown as a partner in the register of firms at the time of the institution of the suit. If both these conditions are not fulfilled, such a suit must be held to be bad and unmaintainable and would have to be dismissed. To the same effect is the decision of a Division Bench of the Bombay High Court in *Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal*, wherein it has been pointed out that a suit instituted on behalf of an unregistered partnership must be immediately dismissed. In *Govindmal Gianchand Vs. Kunj Biharilal and Others*, Tendolkar J., while dealing with Section 69 of the Partnership Act, 1932, illustrated that the provisions of Section 69 are mandatory and unlike their counterpart in England there is no power to grant to the defaulting partnership any relief against the disability imposed by the section. The section debars an unregistered firm from filing a suit. Its effect is that a suit by an unregistered firm is at its inception bad, and the moment the court is satisfied that the plaintiffs are an unregistered firm, it must treat the suit as not having been filed and dismiss it.

38. There is a recent decision of a Division Bench of the Gujarat High Court in *Bharat Sarvodaya Mills Co. Ltd. Vs. Mohatta Brothers*, wherein it has been held that Section 69 bars a suit against a third party if it is for enforcing a right arising from a contract. Two mandatory requirements must be fulfilled before such a suit can be instituted to enforce contractual rights of the firm or on behalf of the firm. They are: (1) that the firm must be a registered firm, and (2) that the persons suing are or have been shown in the register of firms as partners of the firm. The requisite conditions will have to be treated as mandatory conditions. Unless these two conditions are fulfilled, there would be a fatal bar to

the entire suit and it would be wholly incompetent in a court of law.

39. From the above authorities it is clear that where, as here, severance of the joint family took place by the filing of a partition suit and when the family business continued to be conducted as before, a contractual partnership based upon an implied agreement came into existence and when such a partnership was formed, Section 69 of the Indian Partnership Act, 1932, would govern the case and no suit could have been instituted by or on behalf of the firm without registration.

40. Learned counsel for the appellants cited *Daitari Mohapatra v. Brundaban Matia* AIR 1059 Ori. 110. In that case the plaintiff alleged that there was a partnership between him and the defendant for the purpose of doing repair work to Khera Bridge in 1944, and that the work was completed in due course on June 5, 1944. The execution of the repair work was entrusted to the defendant and the plaintiff's function as a partner was to contribute certain sums of money and also to maintain accounts. The plaintiff further alleged that, though the work was completed on June 5, 1954, the defendant evaded paying the net sum due to him on some pretext or other. He, therefore, brought the suit claiming a sum of Rs. 689-9-6. The defendant pleaded that the suit was barred u/s 69(3)(a) of the Partnership Act, 1932. The High Court held that the suit was in essence a suit for the recovery of some money due to the plaintiff on final settlement of accounts of the partnership business between him and the defendant. Therefore, the non-registration of the firm under the Partnership Act would not operate as a bar to the maintainability of the suit in view of Clause (a) of Sub-section (3) of Section 69 of the Act. The facts of that case are obviously distinguishable from those of the present one, inasmuch as in the Orissa case the partnership had already been dissolved after the completion of the work. Therefore, that case does not in any manner help the appellants.

41. We may now deal with the third point raised on behalf of the appellants regarding the liability of the company in terms of the agreement of 1906, which was in existence prior to its incorporation. Learned counsel for the appellants has submitted that the agreement of 1906 was the basis of the suit. This very agreement was subsequently ratified by the company and was acted upon by it and, therefore, the company is liable for the suit amount. In this connection it may be pointed out that ratification can only be by a person ascertained at the time of the act done, i.e., by a person in existence either actually or in contemplation of law : vide *Kelner v. Baxter* ILR [1866] C.P. 174. A contract entered into on behalf of a company before its incorporation is not binding upon the company. After the company comes into existence the company cannot ratify the contract entered into prior to its incorporation. It can, of course, enter into a new contract upon the same terms. In this connection a reference is made to *In re Northumberland Avenue Hotel Company* [1886] 33 Ch. D. 16. In that case an agreement was entered into between W on the one part and D on the other for an intended company to be incorporated. The company was registered on the

following day. The memorandum of association provided that the company should carry the agreement into effect. No fresh agreement with W was signed or sealed with the company. The company took possession of the land, expended money on the building and acted on the agreement, which they considered to be binding on them. The company failed to complete the building. W took out a summons to be allowed to prove for damages against the company for the breach of the agreement. It was held that the agreement having been entered into before the company was in existence, was incapable of confirmation and that the acts of the company, having evidently been done under the erroneous belief that the agreement between W and D was binding on the company, was not evidence of a fresh agreement having been entered into between W and the company and there was, therefore, no agreement between W and the company and that the summons must be dismissed. Another important case on the point in issue is in *Ram Kumar v. Sholapur Spg. and Wvg. Co.*[1934] 4 Comp. Cas. 481 : AIR 1934 Bom. 427. In that case Beaumont C.J. pointed out that a company cannot be bound by a contract entered into on its behalf before it was formed, and it is not competent to bring a company into existence bound to enter into a contract with a third party, the terms of which have been arranged before the company is formed. It is for the company to consider after its formation whether it will enter into the contract or not. A condition in a memorandum of association which is nothing more than a detail of management for the purpose of carrying on the business of the company, cannot be considered to be a vital condition. Learned counsel for the appellants has submitted that there was an agreement entered into between Guman Mal and Ram Swarup in the year 1906 when the company was not in existence. Soon after the company was incorporated, it incorporated the terms of the agreement in the memorandum of association and the articles of association and the company also acted accordingly by appointing chairman and the managing directors in accordance with the terms of the contract and it also paid commission from time to time. It should, therefore, be assumed, the counsel adds, that there was an implied agreement. The court does not interfere with the internal management of the affairs of the company. The memorandum of association does not constitute a contract between a company and a third party who may be named therein. It is for the company to enter into a new contract upon its formation. That being the legal position, the third contention of learned counsel for the appellants lacks substance and is hereby repelled.

42. Coming now to the last point in regard to the decree for a sum of Rs. 23,061, learned counsel has submitted that specific issue No. 12 was framed by the trial court. The finding on that issue runs as follows:

"The claim of the plaintiffs and the defendants Nos. 3 to 7 for a sum of Rs. 23,061 is not denied by the defendants Nos. 1 and 2. In fact a cheque for the amount was given but it was not encashed."

43. Despite this finding, the trial court, the counsel submits, did not pass any

decree on account of this amount. Learned counsel for the side opposite contended that this amount was not admitted by the defendants in their written statement, and as the plaintiffs-firm is not registered, they are not entitled to obtain a decree for the item in question. Paragraph 31 of the plaint runs as follows:

"31. That the firm of Kamal Nayan Hamir Singh has received payment of the one-half of the commission from defendant No. 1 up to December 31, 1939. The plaintiffs and defendants Nos. 3 and 4 are now entitled to Rs. 23,061 on account of their moiety of the commission for the years 1940 and 1941."

44. Paragraph 21 of the written statement filed by the defendant No. 1, Edward Mills Co. Ltd., Beawar, is in the terms set out below:

"21. That paragraph 31 of the plaint is not admitted. The claim advanced is vague particularly as to how the plaintiffs and defendants Nos. 3 and 4 claimed to be entitled to any amount that may be payable to the deceased, R.B. Seth Gadh Mal Lodha. The plaintiffs have not stated as to how Rs. 23,061 claimed are made up."

45. Paragraph 22 of the written statement filed by Motilal is as under :

"22. That paragraph 31 of the plaint is not admitted. The claim advanced is vague particularly as to how the plaintiffs and defendants Nos. 3 and 4 claim to be entitled to any amount that may be payable to the deceased, R.B. Seth Gadh Mal Lodha. The plaintiffs have not stated as how Rs. 23,061 claimed are made up."

46. From the above pleadings it is not clear that the defendants admitted the claim of Rs. 23,061. Order 12, Rule 6, Civil Procedure Code, provides :

" Judgment on admissions :--Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just." The use of the words " or otherwise" without the words " in writing" which are used in Rule 1 of Order 12 shows that a judgment may be given even on a verbal admission. (See *In re Beeny: French v. Sproston*[1894] 1 Ch. 499 . and *Premasuk Das v. Udairam* AIR 1918 Cal. 467 : 44 I.C. 233. Rule 6 of Order 12 is wide enough to afford relief not only in cases of admissions made in the pleadings but also in cases of other admissions. The object of Order 12, Rule 6, Civil Procedure Code, is to enable a party to obtain speedy judgment at least to the extent of the relief which, according to the admission of the defendant, the plaintiff is entitled to and the rule has been made wide enough to afford relief not only in cases of admissions made in the pleadings but also on admission de hors the pleadings. To limit the rule to cases where the plaintiffs accept the admission of the defendant as a

whole would be to deprive the rule of its utility : vide *Tahilram v. Vassumal*. Keeping in view the finding of the trial court while dealing with issue No. 12, it is clear that the defendants did not deny the claim of the plaintiffs for Rs. 23,061, in the course of their arguments before it. On the basis of such an admission the trial court could have passed a decree for the said amount irrespective of the implications of other issues framed, specially when the claim is severable and the defendants admitted their liability in respect of the fragment of the claim. A court has jurisdiction under Order 12, Rule 6, Civil Procedure Code, to enter a judgment for the plaintiffs to pass a decree on the admitted claim with liberty to the plaintiffs to proceed with the suit in the ordinary way as to the remainder of the claim.

47. In the result, we partly accept this appeal and pass a decree for an additional sum of Rs. 23,061, on account of the commission for the year 1940-41 in favour of the plaintiffs and the defendants Nos. 3 and 4 against defendant No. 1, the company. In other respects, the appeal is dismissed. In the special circumstances of the case, the parties are left to bear their own costs.