

Reserved On : 25/03/2026
Pronounced On : 23/04/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 4336 of 1997

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI **Sd/-**

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Approved for Reporting	Yes	No
	Yes	

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CHAIRMAN, GUJARAT HOUSING BOARD & ANR.

Versus

WESTERN BHARAT CONSTRUCTION CO.

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Appearance:

MR HS MUNSHAW(495) for the Appellant(s) No. 1,2
 SR. ADV. MR. B.B. NAIK & MR. P.Y. GOHIL assisted by
 MR. EKANT G. AHUJA(5323) for the Defendant(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE J. C. DOSHI

CAV JUDGMENT

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') takes exception to the judgment and decree passed in Special Civil Suit No.587 of 1988 by the learned Joint Senior Civil Judge, Vadodara (learned trial Court) dated 28.02.1997, whereby the suit filed by the respondent has been partly allowed and the appellant is directed to pay Rs.4,36,243/- along with 18% interest from the date of the suit till realization along with a sum of Rs.39,214.80/-.

2. The appellant is the original defendant and respondent is the original plaintiff. For brevity, they will be referred to as per their status before the trial Court.

3. The brief facts of the case, in a nutshell are as under:-

3.1 The plaintiff filed a suit for recovery of Rs.5,27,124.35/- from the defendant along with 18% interest per annum from the date of the suit till realization and with the averment that the plaintiff is a registered partnership firm and is a registered contractor approved in a list maintained by the Public Works Department (PWD, in short) as well as by the Gujarat Housing Board (GHB, in short).

3.2 In response to the tender floated by the GHB for construction of 284 TS under LIGH at Gotri, Vadodara, plaintiff applied and since his rate found competitive, the tender submitted by the plaintiff was accepted on 29.12.1981.

3.3 As per the terms and conditions of the tender, the plaintiff was required to pay a security deposit for due performance of the contract. Upon receipt of intimation, according to plaintiff, he paid Rs.45,902/- towards the security deposit initially and as per the terms and conditions, it was agreed to pay further Rs.45,902/- by deducting from the running account bill. Thus, in all plaintiff owes to pay Rs.91,804/- towards security deposit. The formal agreement was executed between the parties and consequently, plaintiff was issued a work order for construction of LIGH at Gotri

commencing from 21.01.1982 for a period of 18 months. The work was, therefore, to be completed before 31.07.1983.

3.4 The work, which was to be carried out, was amounted to Rs.39,93,430.50/-. Plaintiff claimed that the work contract given to the plaintiff creates bilateral and reciprocal mutual promises and obligations and some of them were first to be performed by the defendant and consequent to the performance by the defendant, plaintiff was required to perform his part of the reciprocal contract. It is governed by Section 52 of the Indian Contract Act, 1872 (hereinafter referred to as the 'Contract Act').

3.5 Plaintiff claimed that at the instances of the defendant, hindrance, hiccups and delay occurred in performing the part by plaintiff, which is the reciprocal promise, and thus, plaintiff could not complete the work within stipulated time period. Various reasons are stated by the plaintiff in para 6 of the plaint for non-completion of the work within the stipulated time period.

3.6 The plaintiff, due to the various circumstances, could not complete the work in the given time period, and therefore, he sought an extension for completion of the work. The extension was duly accorded by the Gujarat Housing Board till its completion i.e. 28.07.1984.

3.7 On the basis of the aforesaid averments, plaintiff preferred various claims in para 7 of the plaint for recovery of Rs.5,37,124.38/- along with interest.

3.8 Claim 1(A) was preferred for recovery of Rs.46,480/- on the ground that the claim was linked to item No.7 of the tender contract for 15 “Dia mm ‘A’ class GI pipeline with specials”. Plaintiff claimed that these charges consists of cost of ferrale and it is made from gun metal and 7 kinds of valve. Since it was not a GI material and was not covered under the tender item, the plaintiff claimed that, therefore, the charges for fixing the same was also not forming the part of the tender contract. Also, to fix the valve, the plaintiff had to dig the land. It was a special job. Similarly, for the cost of 0.5 MT of 15 Dia GI pipes provided and fixed by Vadodara Municipal Corporation, plaintiff averred that he has worked up to 0.5 meters away from main line. Plaintiff was then not permitted by the Deputy Executive Engineer to lay pipeline up to the main line, and thus, same was not executed and execution of such work from other agency was done without the knowledge of the plaintiff.

In a nutshell, it is claimed that the defendant did not measure the 0.5 MT GI pipeline and the same was not paid to the plaintiff. Therefore, the defendant has no right to recover the said amount for the said work as risk and cost. Therefore, the recovery of Rs.46,480/- found to be excessive and it was the claim number 1(A).

3.9 Octroi charges were claimed as claim number 1(B). Plaintiff claimed that the cement required to be issued to the contractor was fixed at Rs.425/- per metric ton, FOR Baroda. The GHB carried higher billing for the cement procured, in turn, plaintiff was required to pay the extra octroi charge to the Vadodara Municipal Corporation, which is a breach of the terms

and condition and plaintiff, therefore, was required to be refunded Rs.20,016.14/- which he paid towards the extra octroi charge.

3.10 Claim 1(C) was made in regards to sum of Rs.15,797.92/- on the ground that delivery of the cement, as per Schedule-A attached with the plaint, was to be delivered on the terms of FOR Vadodara. However, the cement was supplied to the plaintiff directly on the site and was unloaded on the site. Therefore, the defendant did not incur any expense for delivering the cement to the plaintiff's site and yet, the defendant has recovered the delivery charges in the tune of Rs.15,797.92/-, which is in defiance of the terms and conditions of the contract.

3.11 Claim 1(D) was preferred on the ground that defendant delayed in releasing the final bill and security deposit. Loss of Rs.50,000/- has been claimed towards delay in releasing of final bill and security deposit.

3.12 Claim 2 was separated into multiple parts. Claim 2(A) is made about Rs.1,77,000/- and this claim was made on account of delay in completion of the work and loss suffered. Plaintiff claimed that failure to meet with the promise made by the defendant and reciprocating the contract, plaintiff could not complete the work within the stipulated time period and as such, suffered the loss to the tune of Rs.1,77,000/-. Moreover, rise in material, labour and petroleum etc. was to the tune of 15% and this is claimed as additional expenditure incurred.

Claim 2(B) is regarding the overhead expenditure for a prolonged period is claimed as Rs.1,76,950.50/-.

Claim 2(C) was in respect to claim of interest at the rate of 12% from the defendant on sum of Rs.82,283 from 23.01.1986 till 05.07.1988 amounting to Rs.24,687.90/- and further, the plaintiff is entitled for an interest on sum of Rs.4,86,244.56/-. The Gujarat Housing Board has allegedly illegally and unwarrantedly withheld the said amount. Thus, a total sum of Rs.40,879.82/- is claimed on account of interest.

3.13 Plaintiff, making aforesaid averments, claimed recovery of Rs.5,27,124.38/- from the defendant with interest and cost.

3.14 The defendant, having been served, filed a written statement at Exhibit-9 raising multiple contentions with the root contention that the plaintiff – partnership firm, without joining the partner, having no legal entity cannot maintain a suit against the defendant. It is not entitled to recover any amount towards compensation for damage until the breach of the contract on the part of defendant is occasioned and proved and secondly, until proving actual damage, the plaintiff is not entitled to claim any amount on speculation or estimation. It is contended that the plaintiff has not deposited security deposit of Rs.45,910/-, but it was given by a bank guarantee. Therefore, the actual cheque never came to the defendant. The remaining part of the security deposit has been deducted to the tune of Rs.43,902/- from running bills of the plaintiff. It is denied that work was not completed due to fault of the defendant. It is also

denied that the plaintiff was first required to perform his part and then only the defendant is to perform his part subsequently, and further claimed that no such terms and conditions are engrossed in the 'Contract Act'.

3.15 The defendant denies delay, hiccups, hindrances and glitches alleged to have been committed by the defendant, but rather puts it on the shoulders of the plaintiff that he seeks extension for completion of the work, and therefore, the plaintiff cannot now throw burden upon the defendant to say that the contract was not completed within the stipulated time period because of delay, hindrances and hiccups or obstacles committed by the defendant – GHB.

3.16 It is further contended that, though it is responsibility of the GHB to supply the cement, it is always subject to availability of cement with State Government and that being a specific stipulation in the terms and conditions, will not give a reason to claim the breach of terms and conditions.

3.17 All other allegations leveled in the plaint are ultimately denied by the GHB. The GHB submitted to dismiss the suit.

3.18 The learned trial Court fixed the issues and ultimately granted Rs.82,293/-, towards Claim No.1(A), 1(B), 1(C) & 1(D) and Rs.3,53,950/- towards Claim No.2(A), 2(B), 2(C) and passed the decree in the aforesaid terms.

3.19 Being aggrieved, the original defendant preferred the present first appeal.

4. It is in aforesaid background, learned advocate Mr. H.S. Munshaw appearing for the appellant - Gujarat Housing Board filed the written argument notes. In the written arguments, mainly it is contended that the plaintiff - Western Bharat Construction Company, though is a registered partnership firm, it has no legal entity and filing of the suit without joining the partners or through the partners is hit by provision of Section 69(1) of the Indian Partnership Act, 1932 (hereinafter referred to as 'the Act'). This being a vitally important issue touching the jurisdiction of the first appeal is sufficient alone to allow this first appeal and to quash and set aside the impugned judgment.

4.1 In support of this argument, he relied upon the judgment of the Supreme Court in the case of ***M/s. Malabar Fisheries Co. Calicut v. Commissioner of Income Tax, Kerala***, reported in **(1979) 4 SCC 766**.

4.2 It is further contended that trial Court committed serious and manifest error in not just granting the interest, but also of 18% interest, without having any contract executed between the parties and without referring to any such clauses of the contract is a manifest error. He would submit that at the most, any interest is to be paid would be 6% to 7% being a statutory interest.

4.3 He would further submit that to sustain the claim No.2 i.e. Rs.1,77,000/- on account of delay in completion of the work, and loss suffered as well as claim No.2(B), i.e. of

Rs.1,76,950.50/- due to rise of price of the material, labor and petroleum in the amount of work executed beyond prescribed time limit is concerned, in absence of iota of evidence or material evidence, which established the actual damage, the plaintiff cannot succeed in getting the compensation or damage of both the item under Section 73 of the 'Contract Act'.

4.4 It is further submitted that, as per the terms and conditions of the contract, GHB was required to supply the cement bags FOR Baroda, instead GHB supplied the cement on the site at Baroda. Thereby, saved the transportation cost to be borne by the plaintiff, and therefore, charging of the transportation from Baroda to site and directly at the site and adding the same on the bill is just the correct approach on the part of the GHB. It cannot be considered to be an illogical deduction.

4.5 Payment of first octroi is an issue between the plaintiff and the Vadodara Municipal Corporation and it cannot be said that due to some higher amount of cement, the plaintiff was required to pay extra octroi and therefore, he is required to receive the amount from the GHB.

4.6 In nutshell, it is argued that, in absence of any actual proof of damages, the grant of compensation for the alleged breach of the terms and conditions of the contract is an erroneous approach on the part of the trial Court.

4.7 Mainly upon aforesaid arguments, learned advocate Mr. H.S. Munshaw would submit to allow this appeal and to

quash and set aside the impugned judgment and decree and to dismiss the suit of the plaintiff.

5. Learned Senior Counsel Mr. B.B. Naik assisted by learned advocate Mr. P.Y. Gohil for learned advocate Mr. Ekant G. Ahuja appearing for the respondent – plaintiff, also filed the written arguments with the main contention that the plaintiff is undoubtedly a registered partnership firm, registration certificate of which is produced at Exhibit-17, thereby it is established that the plaintiff, being a registered partnership firm, is entitled to sue and be sued in the name of the partnership firm. Therefore, there is no breach of the provision of law and thereby, no jurisdictional issue arises in the matter.

5.1 It is further contended that upon floating of the tender, plaintiff being a successful bidder was issued the work for LIGH, Gotri at Vadodara at sum of Rs. 39,93,430.50/- is an undisputed fact. The plaintiff was required to complete the work within 18 months ensuing from 21.01.1982 completing on 31.07.1983 is also an undisputed fact. Alike the contract between the parties, bilateral, mutual and reciprocal, creating promises and obligations between the parties is also unquestionable.

5.2 The plaintiff has to seek for extension for completing the said work on various reasons, whereby mainly the defendant was at fault and accordingly, the extension was also recommended up to 28.03.1984, again is undisputed.

5.3 Treating aforesaid facts as undisputed aspects, learned Senior Counsel for plaintiff mainly argued that considering the rival evidence led by the learned advocates for both the sides, it is evidently proved that the plaintiff has succeeded in proving the claim Nos.1 and 2.

5.4 The various documentary evidence produced on record sufficiently say that plaintiff suffered loss on account of the delayed completion of the work, whereby delay is attributable to the defendant.

5.5 He would further submit that since the defendant was in a master position and plaintiff has to carry out his work, defendant has wrongly deducted amount of GI pipe work, payment of octroi charges, transportation, etc. and plaintiff genuinely suffered loss of escalation of the price and interest as the work got delayed.

5.6 Supporting the impugned judgment, it is argued that the learned trial Court has comprehensively discussed the reasons to decide the suit. Therefore, in the first appeal, the Court should refrain from interfering with the well reasoned judgment and decree passed by the learned trial Court.

6. Apt to note that, first appeal is a valuable right and the parties have the right to be heard both on question of law and on facts and the judgment in the first appeal, therefore, must address itself to all the issues of law and fact and has to be decided by giving reasons in support of the finding. The appellate Court, while exercising the appellate jurisdiction, is required to

discuss in detail the various aspects. Though while confirming an issue, there may not be necessity for repeating the reasons and the appeal, in such circumstances, be disposed of by briefly describing the pointed issue, reasoning adopted by the Court below in a view of affirmation by the appellate Court, but where the reasoning on fact and the reason of the law, both intended to be upset, it is desirable that reasons should be ascribed in support of the view and the conclusion.

7. First appellate Court is last Court of facts and thus, it is a duty of the first appellate Court to scrutinize the order impugned and then decide the rival contention in background of analysis of evidence again. Even an appeal could be entertained by the first appellate Court only on the question of law as the first appeal is a creature of statute.

8. In the backdrop of the aforesaid legal provision, let first notice issues framed by the learned Court below vide Exhibit-10:-

“(1) Whether the plaintiff proves that, it is a registered partnership firm?”

“(2) Whether the plaintiff proves that, they have entered into the agreement with the defendants?”

“(3) Whether the plaintiff proves that on account of delay, hindrance and breaches committed by the defendant, the which was delayed and the work was ultimately completed on 28-7-84 ?”

“(4) Whether the plaintiff proves that the claim as narrated in para-7, claim No.1(a), (b), (c), (d) are are tenable and payable ? If yes, to what extent?”

(5) Whether the plaintiff proves that claims are narrated in para-7, claim no.2(a), (b) and (c) are tenable and payable? If yes, at what extent?

(5/1) Whether this suit can be proceed without notice under section -71 of Gujarat Housing Board Act?

(6) What order?"

9. Plaintiff – Maganbhai Zhaverbhai Patel entered into the witness-box at Exhibit-13. He placed on record the documentary evidence from Exhibits-17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29 & 30 and Mr. Inami Gulamhusain Surati for the GHB entered into the witness-box at Exhibit-61.

10 After permitting both the parties to lead the evidence, Issue Nos.1 to 3, 5.1 are answered in affirmative. Issue No.4 and 5 are also answered in affirmative to the tune of Rs.82,283 and Rs.3,53,950/-. The suit was decreed in view of answer to issue No.6.

11. From the rival contention of the parties, the issues, which arise for determination of this appeal, are that:-

i) Whether the plaintiff being a registered partnership firm equate with the term 'legal entity' and can file suit without joining the partners?

ii) Whether the plaintiff, not having objected to deduction of the amount towards octroi charges or towards laying down of GI pipes or towards transportation charge during the work, can

question the same after completion of the work and can claim a damage claiming it to be a breach of terms and agreement of the contract?

iii) Whether in absence of any actual evidence in regards to liquidated damage, whether the plaintiff can claim damage, as claimed in claim 2(A), including interest ?

iv) What order ?

12. The first issue touches the root of the case. Admittedly, the suit has been filed by the Western Bharat Construction Company claiming itself as a registered partnership firm and was signed by some person as a *per-pro* partner.

13. Learned advocate Mr. H.S. Munshaw appearing for the appellant - Gujarat Housing Board raised the issue on maintainability of the suit arguing that plaintiff, though is a registered partnership firm has no legal entity, it cannot file the suit without joining the partner/s thereof.

14. It is admitted position that the plaintiff is a registered partnership firm. The registration certificate is produced at Exhibit-17. Again, it is an admitted position that on the plaintiff's side, except Western Bharat Construction Company partnership firm, no other person claiming to be a partner of the Western Bharat Construction Company has sued the defendant. It is again an undisputed fact that plaintiff is seeking the

recovery of damage arising out of breach of the contract with defendant.

15. At the outset, I may refer to Section 2A, which defines the 'Act of a firm' of 'the Act' as under:-

“2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) an“act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;”

16. Section 4 is also important to read, which reads as under:-

“4. Definition of “partnership”, “partner”, “firm” and “firm name”.—“Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”.”

17. A conjoint and harmonious reading of Section 2A with Section 4 of 'the Act' implies that, 'act of firm' means any act or omission by all the partners or by any of the partners or agent which gives a rise to a right enforceable by or against the firm. Partnership is thus, a relation between the persons, who have agreed to share the profit or loss of a business carried on by all or any of them acting for all. The persons, who enter into

the partnership firm, individually are called 'partners' and collectively are called 'firm', and under the name they carry the business is called the 'firm name'.

Thus, it is clear that a partnership firm by itself is not a legal entity like a company. It's a group of individual partners. **[See: Comptroller & Auditor General v. Kamlesh Vadilal Mehta, reported in (2003) 2 SCC 349].**

What could be culled out, therefore, that the firm name is only a compendious name given to a partnership and the partners are the real owners of asset and partnership firm is not a legal entity **[See: N. Khadervali Saheb (Dead) By Lrs. And ... v. N. Gudu Sahib(Dead) And Ors, reported in (2003) 3 SCC 229].**

18. In view of Section 5 of 'the Act', the partnership is not created by status.

"5. Partnership not created by status.—The relation of partnership arises from contract and not from status;

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business."

19. Worthy reference can be made in the case of **Bhagwanji Morarji Goculdas v. Alembic Chemcial Works Co. Ltd.**, reported in **AIR 1948 Privy Council 100**, whereby the Privy Council in para 10 of the judgment has observed as under:-

"Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession. (Emphasis supplied)."

20. In **Addanki Narayanappa & Anr. v. Bhaskara Krishnappa and Ors.**, reported in **AIR 1966 SC 1300**, the Supreme Court after quoting the aforementioned passage occurring in the Lindley on Partnership, 12th Edition, made the following observations in the context of partners' right during the subsistence as well as upon the dissolution of a firm:

"No doubt since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own nor can he assign his interest in a specific item of property of any one. His right is to obtain such profits, if R any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in clause (a) and sub- clauses(i), (ii) and (iii) of clause(b) of Section 48."

21. In **M/s. Malabar Fisheries (Supra)**, after surveying previous authoritative pronouncements, the Supreme Court in para 18 observed as under:-

“Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property. Or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequences of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of s. (47) of the Act. In our view, therefore, there is no transfer of assets involved even in the sense of any extinguishment the firm's rights in the partnership assets when distribution takes place upon dissolution.”

22. It makes it evidently clear that partnership firm or the firm name is a compendious title of a group of individual or it may be a consortium working under a particular name, whereby group of people or group of individuals are in relation and have agreed to share the profit or loss to carry any business. It does not by legal means a legal entity.

23. At this juncture, worthy reference can be made to the recent judgment of this Court in the case of **Gujarat Water Supply & Sewage Board v. Evergreen Trading & Construction Company**. This Court addressed the very same issue. Relevant observation and finding are as under:-

“10. At this stage, it would be appropriate to refer to Sections 69(1) of the Indian Partnership Act, which read as under:-:-

‘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’.

11. Section 69(1) of the Indian Partnership Act, stipulates that even if the firm is registered, a suit to enforce a right arising from a contract or conferred by the Partnership Act, shall be instituted in any Court by or on behalf of any person suing in a firm against the firm or any person alleged to be or to have been partner in the firm. Thus, it is evident that even in the case of a registered partnership firm, the suit must be instituted by one or more partners on behalf of any person is required to be brought on behalf of the firm.

12. It would also be relevant to refer Rule (1) & (2) Order XXX of the Code of Civil Procedure, 1908, which reads as under:-

Suits by or against Firms and Persons carrying on business in names other than their own

1. Suing of partners in name of firm. -

(1) Any two or more persons claiming or being liable as partners and carrying on business, in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case

apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice such pleading or other document is signed, verified or certified by any one of such persons.

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2. Disclosure of partners' names.—(1) *Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demanding writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.*

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1) all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1) the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

[Provided that all proceedings shall nevertheless continue in the name of the firm, but the name of the partners disclosed in the manner specified in sub-rule (1) shall be entered in the decree.]

13. Recently, this Court in the case of **Jayantilal Hargovandas Thakkar Vs. Gram Panchayat, Ratangadh**, reported in **2026(0)AIJEL-HC253062**, had occasion to interpret the identical arguments, in paragraph Nos.11 to 17, this Court has observed as under:-

“11. The core dispute between the parties is whether the partnership firm, as plaintiffs, have filed the suit are three brothers as co-owners have filed suit? The title of the plaint indicates that plaintiff Nos.1, 2, and 3 have filed the suit as persons carrying on business under the name and style of Jayantilal Hiralal & Amrutlal Company. This suggests that the suit has been filed in terms of Order XXX of the Code of Civil Procedure. However, the averments in the plaint do not clearly specify whether the plaintiffs have filed the suit as partners of a partnership firm or in the individual capacity in the name and style of the business under the ownership. In the absence of specific pleadings, describing the title in the name of a firm without clarification would suggest that the suit has been filed by a partnership firm as contemplated under Order XXX of the CPC.

12. It is an admitted position that the plaintiffs did not produce the registration certificate of the partnership firm along with the plaint. The plaintiffs have also failed to plead the date of registration of the partnership firm or disclose the names of its partners. Plaintiff No.2 entered into the witness box at Ex.66 as P.W.1. In cross-examination, he admitted that, at the time of filing the suit, the partnership firm was unregistered. Simultaneously, he did not clarify whether the suit had been filed by the firm or by three brothers in their individual capacity as co-owners. Such silence assumes significance as Ratangadh Gram Panchayat in its written statement raised this issue with specific contention. He further admitted that he was unaware whether the partnership firm is registered. In the cross-examination by the learned advocate for defendant No. 2, he admitted that the public auction took place on 16th June, 1981, and the partnership firm came into existence in 1984. Thus, at the time of the public auction, the partnership firm was not in existence. He further admitted that although the firm was not in existence, there was an understanding of partnership among the three brothers prior to the auction. It was also admitted that such partnership was not registered at the time of the auction and was registered subsequently. Apt to note that the

written statements filed by defendant Nos.1 and 2 raised a specific objection that the partnership firm was unregistered.

13. In the backdrop of the aforesaid pleadings and factual aspects as well as evidence, reference made to Section 69(2) of the Indian Partnership Act, which reads as under:-

‘69(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.’

14. The plain reading of Section 69(2) of the Act stipulates that the suit to enforce a right arising from a contract shall not be instituted in any Court by or on behalf of a firm against the third party unless the firm is registered and the persons suing are or have been shown in the register of firm as partners in the firm.

15. The Hon’ble Supreme Court, in the case of **M/s Shriram Finance Corporation (supra)**, in para 6, has explained the effect of Section 69(2) of the Partnership Act, which is as under:-

‘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 regard- ing 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.

16. Yet in judgment in the case of **Purshottam (supra)**, in para 8, the Hon'ble Apex Court has held as under:-

"8. The question as to whether the subsequent registration of the firm would cure the initial defect in the filing of the suit arose for consideration in D.D.A. Vs. Kochhar Construction Work and Anr. (1998) 8 SCC 559. This Court held that in view of the clear provision of the Act it was not possible to subscribe to the view that subsequent registration of the firm may cure the initial defect, because the proceedings were ab initio defective as they could not have been instituted since the firm in whose name the proceedings were instituted was not a registered firm on the date of the institution of the proceedings. This Court also noticed the difference of opinion amongst the High Courts and concluded thus:- (SCC P.562 para 4)

"4. Counsel for the respondents, however, invited our attention to two decisions which take a view that subsequent registration of the firm can cure the initial defect provided the registration is before the period of limitation has run out. Our attention was drawn to M.S.A. Subramania Mudaliar Vs. East Asiatic Co. Ltd. and Atmuri Mahalakshmi Vs. Jagadeesh Traders. However, the High Court of Patna in Laduram Sagarmal Vs. Jamuna Prasad Chaudhuri and the High Court of Madras in T. Savariraj Pillai Vs. R.S.S. Vastrad & Co. take a contrary view and hold that the suit is incompetent ab initio. We have considered these decisions, but in the light of the plain language of Section 69 of the Partnership Act read with Section 20 of the Arbitration Act and in view of the decision of this Court reported in Shreeram Finance Corpn. We are clearly of the opinion that proceedings under Section 20 of the Arbitration Act were ab initio defective since the firm was not registered and the subsequent registration of the firm cannot cure that defect".

The same view was also reiterated in U.P. State Sugar Corpn. Ltd. v. Jain Construction Co.

17. In view of the aforesaid aspect, according to this Court, the plaintiffs have miserably failed to establish their right to file the suit for enforcement of a contractual right. It implies that the learned Trial Court has not committed any error in deciding the issue against the plaintiffs. The contention of the learned advocate Ms. Acharya that the plaintiffs were carrying on business as co-owners appears to be an afterthought. The pleadings and evidence on record clearly indicate that the suit has been filed by a partnership firm which was not registered on the date of institution of the suit. Even though the firm was subsequently registered, such registration does not cure the defect under Section 69(2) of the Partnership Act. Accordingly, the first contention raised by the learned advocate Ms. Acharya, is rejected.

14. The Hon'ble Supreme Court in case of **Dhanasingh Prabhu (supra)** while dealing with the related issue under Section 141 of the Negotiable Instruments Act, 1881, made important observations in paragraph Nos.7.2 to 7.11 which read as under:

“7.2 Section 4 of the Partnership Act defines a partnership, partner, firm and firm name as follows:

“4. Definition of “partnership”, “partner”, “firm” and “firm name”-

“Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”.

(underlining by us)

7.3 The definition in Section 4 of the Partnership Act is a departure from the erstwhile definition of partnership in Section 239 of ICA. A significant departure, inter alia, is the insertion of “acting for all” which brings in the concept of agency. An amendment

of substantial import carried out by the Special Committee was with the intent to elucidate clearly the fundamental principle that the partners when carrying on the business of the firm are agents as well as principals.¹ Pollock & Mulla also notes the salient distinction between the meanings of 'partnership' and 'firm'. Tracing from Section 4, Pollock & Mulla clarifies that the word "partnership" is used throughout the Partnership Act in the defined sense of a relationship and where the partners are referred to 1 Chapter 2, Pollock & Mulla, *The Indian Partnership Act*, 8th Edn. Lexis Nexis Butterworths. collectively, the word "firm" is used. It is pertinent to recall that Explanation to Section 141 of the Act provides that for the purposes of that section, a company includes a firm or other association of individuals. Nevertheless, the distinction is crucial because it lends credence to the interpretation that reference in Section 141 is as much to the partners of the firm as it is to directors of a company.

7.4 According to Pollock and Mulla, 8th Edition, the definition of partnership in Section 4 of the Partnership Act contains three elements; (i) there must be an agreement entered into by all the persons concerned; (ii) the agreement must be to share the profits of a business; and (iii) the business must be carried on by all or any of the persons concerned, acting for all. All these elements must be present before a group of associates can be held to be partners. These three elements may appear to overlap, but they are nevertheless distinct. The third element shows that the persons of the group who conduct the business do so as agents for all the persons in the group and are therefore liable to account for all. This Court while elaborating the third essential element has held that the position of a partner in the firm is thus not of a master and a servant or employer and employee which concept involves an element of subordination, but that of equality. It may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status or bring him within the definition of

employee, vide Regional Director, Employees' State Insurance Corporation vs. Ramanuja Match Industries, (1985) 1 SCC 218, Paras 4 and 9.

7.5 In Section 4 of the Partnership Act, it is clearly stated that persons who have entered into partnership with one another are individually called partners and collectively a firm and the name under which their business is carried out is called a firm name. Thus, while partnership is the relation between persons who have agreed to share profits of the business carried on by all or any of them acting for all, the persons are collectively called a firm and the name of the firm is the firm name which is a compendious or collective term of partnership of the partners. The said Section also clearly implies that a firm or partnership is not a legal entity, separate and distinct from its partners.

7.6 As already stated above, the firm is a compendious term not distinct of the individuals who compose the firm. In other words, partnership is merely a convenient name to carry out business by partners. Thus, a firm is not an entity of persons in law but is merely an association of individuals and firm name is only a collective name of those individuals who constitute the firm. In other words, the firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership.

Thus, a firm may not be a legal entity in the sense of a corporation or a company incorporated under the Companies Act, 1956 or 2013, but it is still an existing concern where business is done by a number of persons in partnership.

7.7 Insofar as the statutory definition of a company is concerned, the legislature has found it particularly cumbersome to provide a descriptive and inclusive definition. Perhaps this is why the Parliament in its wisdom defined 'company' in Section 2(2) of the Companies Act, 2013 ('Companies Act') not by enumerating the essential features of a company but

“as a company incorporated under this Act or under any previous company law”.² Keeping aside the omnibus statutory definition, several jurists have attempted to outline a definition of a company for doctrinal and precedential analysis. Lindley, a Jurist and Judge defined a company in the following terms:

‘A company is an association of many persons who contribute money or monies worth to a common stock and employed in some trade or business and who share the profit and loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute to it or to whom it pertains are members. The proportion of capital to which each member is entitled is his share. The shares are always transferable although the right to transfer is often more or less restricted.’³

Section 9 of the Companies Act, 2013 provides as follows:

“9. Effect of registration

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name”.

7.8 While modern legislations and instruments have outlined and carved out more complex features, rights and obligations of a ‘company’, the fundamentals of Lindley’s definition continue to hold ground. The salient distinctions between a company and a partnership, including the rights and obligations flowing therefrom which are fundamental to common

law, as well as the relevant statutes promulgated by the Parliament could be discussed at this stage.

Separate Legal Personality:

7.9 A partnership firm, unlike a company registered under the Companies Act, does not possess a separate legal personality and the firm's name is only a compendious reference for describing its partners. This fundamental distinction between a firm and a company rests on the premise that the company is separate from its shareholders. In that context, the words of Lord **Macnaghten in Salomon vs. Salomon & Co. Ltd., [1897] AC 22 (HL), ("Salomon")** are instructive:

"the company is at law a different person altogether from the subscribers.....; and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the proceeds, the company is not in law, the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

7.10 This distinction does not, however, continue to hold true for a partnership firm. In the seminal case of Bacha F. Guzdar vs. CIT, (1954) 2 SCC 563, this Court had an opportunity to briefly address this distinction between a partnership firm and a company, wherein it was observed thus:

"13. It was argued that the position of shareholders in a company is analogous to that of partners inter se. This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders."

*7.11 The partnership name being only a compendious method of describing the partners, it stands to reason that a reference to the partners in their capacity as partners of the firm will be sufficient to impute liability on the partners themselves, whereas directors of a company are made liable vicariously through the company, upon whom falls the primary liability. Thus, the partners and the partnership firm are one and the same. Unlike a company, a partnership firm has no independent corporate existence and has no distinct legal persona independent of its partners. Similarly, the partners of a firm are co-owners of the property of the firm unlike shareholders in a company who are not co-owners of the property of the company. This principle was also explained by the Calcutta High Court in *Re: The Kondoli Tea Co. Ltd.*, (1886) ILR 13 Cal 43 where the transferors of a tea estate claimed that they were eligible to claim exemption from payment of ad valorem duty because the transferee was a company in which they themselves were shareholders. Negating this contention, it was held that the company was a separate person and the transfer of the tea estate was a conveyance and in substance, a transfer to another person.*

15. In the present case, the suit has been filed in the name of firm alone without impleading any partner is not maintainable. In other words, partnership firm believing to have legal identity, has filed suit on its own name, and not through a partners. According to this Court, the learned Trial Court has committed a serious and manifest error in allowing the suit. Since the suit itself is not maintainable, this being a core jurisdictional issue that ought to have been decided in favour of the appellant herein, this Court does not deem it necessary to decide the merits of the case.”

24. In the present case, learned Senior Counsel, though argued that the plaintiff firm is a partnership firm, could not capitalize that why the partners have not brought the suit and in

what circumstances, 'partnership firm', which lacks legal personality to act independently alike company has alone sued the defendant for the recovery of the damage on allegation of contractual breach. 'Partnership firm' name is convenient way to conduct business. It does not provide independent corporate existence to act like company. Thus, the suit deserves to be dismissed only on the jurisdictional count that the plaintiff's suit has not been instituted on account of following the correct statutory provisions. Thus, there is fundamental jurisdictional flaw. The suit was incompetent from inception. That jurisdictional issue touches the root of the core and can be decided in first appeal. In view of the finding, the appeal deserves to be allowed only on this ground, without delving into the further merits of the case.

25. Since there is a jurisdictional error in the institution of the suit, this Court is not required to touch other merits or demerits of the claim advanced by the plaintiff and the reasons assigned by the learned trial Court in granting the decree in favor of the plaintiff as the suit instituted before the Court was bad on the count of jurisdictional error itself, and was not maintainable.

26. Therefore, this Court, without touching other issue, which are even otherwise not required to be discussed, I thought it fit to allow this appeal.

27. Consequently, this appeal is allowed and the impugned judgment and decree passed in Special Civil Suit No.587 of 1988 is quashed and set aside.

28. Decree to be drawn accordingly. Record & Proceedings to be sent back to the concerned Court forthwith.

Raj

Sd/-
(J.C. DOSHI, J.)