

HIGH COURT FOR THE STATE OF TELANGANA

CIVIL REVISION PETITION NO.7522 OF 2018

Between:

B.Ramalinga Raju, s/o.B.Satyanarayana Raju,
Aged 36 years, r/o.1326, Road No.66,
Juilee Hills, Hyderabad.

..... Petitioner//petitioner/
Defendant no.2

and

M/s,.Price Waterhouse,
a Partnership firm registered with the
Institute of Chartered Accountants of India
bearing Registration No.007568S
having its Branch Office at 8-2-293/A/1131A,
Road No.36, Jubilee Hills, Hyderabad
and Head Office at the Millennia, 5th Floor,
Tower D, 1 and 2 Murphy Road,
Ulsoor, Bangalore, through its duly authorized
Partner Mr. N.K.Varadarajan, s/o.A.N.Krishnan,
Aged 44 years, R/o. Hyderabad and others.

.....Respondent/Respondent /
Plaintiff

M/s. Satyam Computers Services Ltd.,
through the Company Secretary, Unit 12,
Plot Nos.35 & 36, Hitech City Layout,
S.No.64, Madhapur, Hyderabad and others.

....respondents/respondents/
Defendants

DATE OF JUDGMENT PRONOUNCED : 14.03.2023

HONOURABLE SRI JUSTICE P.NAVEEN RAO

&

HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA

1. Whether Reporters of Local Newspapers : **Yes**
may be allowed to see the Judgments ?
2. Whether the copies of judgment may be : **Yes**
marked to Law Reporters/Journals
3. Whether Their Lordship wish to : No
see the fair copy of the Judgment ?

*** HONOURABLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA**

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!Counsel for the petitioner : Sri V.Ravinder Rao

Counsel for the Respondents : Sri Sunil G.Banu for 1st respondent;
Sri K.Vivek Reddy for 2nd respondent

<Gist :

>Head Note:

? Cases referred:

(2000) 3 SCC 250; (1998) 7 SCC 184; (2007) 15 SCC 58; MANU/SC/0368/2000= (2000) 5 SCC 712;
2022 SCC OnLine SC 114; (1998) 8 SCC 559; (2023) 1 SCC 216; 2001 SCC OnLine AP 1281

HONOURABLE SRI JUSTICE P.NAVEEN RAO
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CIVIL REVISION PETITION No.7522 of 2018

ORDER: (Per Hon'ble Sri Justice P Naveen Rao)

Heard learned senior counsel Sri V Ravinder Rao for revision petitioner; learned senior counsel Sri Sunil B.Ganu for first respondent and learned senior counsel Sri K.Vivek Reddy for second respondent.

2. On 07.01.2009 Sri B.Ramalinga Raju, the then Chairman-cum-Managing Director of the then Satyam Computer Services Limited (for short 'SCSL') released a letter addressed to the Board of Directors of SCSL revealing for the first time the financial mismanagement and several illegalities in operations of SCSL. The Price Water House, the plaintiff in OS.No.43 of 2012 was the statutory auditor to SCSL from April 2000 to February 2009.

3. According to plaintiff, the letter written by Sri Ramalinga Raju was shocking. However, it did not provide any details whatsoever, regarding deep complexity of the scheme, the then Chairman cum Managing Director and other Directors have orchestrated. The Regularity Authorities had to conduct detailed investigation spread over three years to unearth the deep fraud committed by the Directors of SCSL.

4. As assessed by these Authorities, the complexity of the fraud far exceeds the confession in the letter dated 07.01.2009. According to

plaintiff, the fraud committed by the then Managing Director and other Directors range from creation of false invoices, invention of customers, creation of false bank records, summary of false financial records and reporting, so on. Plaintiff alleges that the defendant forged the books and deceived the plaintiff to conceal the fraud. As a result of the fraud, perpetrated by the defendants on the plaintiff and due to their deceitful conduct, the professional practice and services rendered by the plaintiff to the clients in India and abroad has been severely affected, causing loss of clients and profits, suffered irreparable commercial damages on ongoing basis since the initial confession of Sri Ramalinga Raju. Even the ability to attract new clients has been severely impacted resulting in further commercial losses.

5. The plaintiff filed O.S.No.43 of 2012 in the Court of the VIII Additional District judge, Ranga Reddy District at L.B.Nagar praying to pass judgment and decree in favor of plaintiff and against defendants jointly and severally for a minimum sum of Rupees hundred crores together with interest at the rate of 18% per annum from the date of judgment and decree till the payment or realization. The then Chairman-cum-Managing Director Sri Ramalinga Raju is arrayed as 2nd defendant and other Directors as defendant Nos. 3 to 7. The SCSL is arrayed as 1st defendant.

6. On cause of action, according to plaintiff, the complex and elaborate nature of the fraud announced by Sri Ramalingaraju became clearer over a prolonged period of time pursuant to in-depth

investigations carried out into this fraud by the investigating and regulatory authorities during the ensuing months since January, 2009, and that the suit is filed within three years from the date of arising of cause of action.

7. In the suit the 2nd defendant filed I.A.No.3539 of 2012 under Order VII Rule 11(d) of CPC to reject the plaint on the ground that mandatory provisions and requirements under Section 69 of the Partnership Act, 1932 (for short 'Act, 1932') have not been complied and therefore suit is not maintainable.

8. In I.A.No.3539 of 2012 the trial Court rejected the plea of 2nd defendant that the suit is barred by Section 69(2) of the Act, 1932 and dismissed the I.A. Hence, this Revision.

9. According to Sri V.Ravinder Rao, learned senior counsel for petitioner/2nd defendant, plaintiff is not registered under the Act, 1932. He would submit that Sections 128 and 129 of the Companies Act, 1956 (old), cast upon the plaintiff statutory duty to undertake auditing of the 1st defendant – Company. However, between the plaintiff and 1st defendant, the relationship is one of contractual to undertake job of auditing of accounts of the Company. The issues raised in the plaint also flow out of said contractual relationship. Whereas, the plaintiff partnership firm was not registered. Section 69(2) of the Act, 1932, imposes clear prohibition to institute a suit to enforce a right arising out of a contract as the plaintiff firm is not registered under the Act.

9.1. Learned senior counsel placed reliance on the judgments of Hon'ble Supreme Court in **Haldiram Bhujiawala and Another Vs Anand Kumar Deepak Kumar and another¹; Raptakos Brett & Co Ltd Vs. Ganesh Property²; Purushottam and another Vs Shivraj Fine Arts Litho Works and another³** and judgment of Division Bench this Court in **The A.P. Co-op Wool Spinning Mills Ltd and another Vs. G Mahanandi and Co. Wool Merchants and others.**

10. *Per contra*, according to learned senior counsel Sri Sunil B.Ganu, appearing for plaintiff, Section 69(2) of the Act, 1932, has no application to the case on hand. When serious allegations of fraud are made, Section 69(2) is not applicable. He would further submit that plaintiff is seeking common law remedy to claim damages and therefore, suit is maintainable. He would submit that fraud cannot arise out of or in the performance of contract.

11. Learned senior counsel relied on judgments of the Hon'ble Supreme Court in **State of Andhra Pradesh Vs Challa Ramkrishna Reddy and others⁴; Shiv Developers Vs Aksharay Developers and others⁵; Delhi Development Authority Vs Kochhar Construction Work and another⁶; Devas Multimedia Private Limited Vs Antrix Corporation Limited and**

¹ (2000) 3 SCC 250

² (1998) 7 SCC 184

³ (2007) 15 SCC 58

⁴ MANU/SC/0368/2000= (2000) 5 SCC 712

⁵ 2022 SCC OnLine SC 114

⁶ (1998) 8 SCC 559

another⁷ and judgment of Division Bench of this Court in **S.Balakatamaiah Vs A.Mallanna and another**⁸.

12. In reply, learned senior counsel Sri V. Ravinder Rao submitted that as can be seen from the pleadings in the plaint from internal pages 5 to 8, the claims of plaintiff flow out of contract and in the course of business of the plaintiff. The test of right flowing out of contract and in the course of business are intertwined and therefore, the decision of the Hon'ble Supreme Court in **Shiv Developers** (supra) has no application. **Shiv Developers** concerns the issue in the course of business. He would further submit that letter for audit at page 54 of the CRP paper book clearly points out to contractual relationship.

13. The issues for consideration are:

(i) *Whether the relationship between the petitioner and the respondent/statutory auditor was contractual in nature?*

(ii) *Whether the bar under section 69 (2) of the Indian Partnership Act, 1932 is attracted in the present case?*

(iii) *Whether the Court below erred in dismissing the application filed under Order VII Rule 11 of the CPC?*

ISSUES (i) and (ii) :

⁷ (2023) 1 SCC 216

⁸ 2001 SCC OnLine AP 1281

14. The undisputed facts are, in the year 2000 the plaintiff was appointed as Auditor by the 1st defendant to conduct audit of the accounts of the 1st defendant. On 07.01.2009 the 2nd defendant addressed letter to the Directors of the 1st defendant admitting committing of malpractices and that 1st defendant's cash reserves were overstated. According to plaintiff, these revelations and subsequent unearthing of magnitude of fraud caused huge loss to the plaintiff in reputation and standing, affected its professional practice leading to huge financial loss and has become victim of fraud.

15. To fully understand whether the relationship between a statutory auditor and public limited company is contractual in nature, we have to first analyze the role of a statutory auditor with respect to any public limited company.

16. The definition of 'Audit' as explained in the Encyclopaedia Britannica (Vol. I-Micropaedia) is as follows:

*"Audit, examination of the activities, records, and reports of an enterprise by accounting specialists who are not the same accountants responsible for their preparation. Public auditing by independent accountants has acquired professional status and become increasingly common with the rise of large business units and the separation of ownership from control. **The public accountant performs tests to determine whether the management's statements fairly present the firm's financial position and operating results; such independent evaluations of management reports are of interest to actual and prospective shareholders, bankers, suppliers, lessors and government agencies.**"*

17. Given the facts and circumstances of this case, the provisions of the old Companies act, the Companies Act, 1956 would be applicable. It is important as well as interesting to note that in consequence of the large-scale financial fraud and mismanagement committed by the

present petitioner, lead to birth of the new companies Act, Companies Act, 2013.

18. The relevant provisions of Act, 1956 are Sections 224⁹, 226¹⁰, 227¹¹ and 230¹² of the Act, 1956.

⁹
S.224. APPOINTMENT AND REMUNERATION OF AUDITORS.

(1) Every company shall, at each annual general meeting, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting and shall, within seven days of the appointment, give intimation thereof to every auditor so appointed:

Provided that before any appointment or re-appointment of auditor or auditors is made by any company at any annual general meeting, a written certificate shall be obtained by the company from the auditor or auditors proposed to be so appointed to the effect that the appointment or re-appointment, if made, will be in accordance with the limits specified in sub-section (1B).

(1A) Every auditor appointed under sub-section (1) shall within thirty days of the receipt from the company of the intimation of his appointment, inform the Registrar in writing that he has accepted, or refused to accept, the appointment.

(1B) On and from the financial year next following the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), no company or its Board of directors shall appoint or re-appoint any person ¹[who is in full-time employment elsewhere] or firm as its auditor if such person or firm is, at the date of such appointment or re-appointment, holding appointment as auditor of the specified number of companies or more than the specified number of companies : ²**Provided** that in the case of a firm of auditors, "specified number of companies" shall be construed as the number of companies specified for every partner of the firm who is not in full-time employment elsewhere :]

Provided further that where any partner of the firm is also a partner of any other firm or firms of auditors, the number of companies which may be taken into account, by all the firms together, in relation to such partner shall not exceed the specified number in the aggregate.

Provided also that where any partner of a firm of auditors is also holding office, in his individual capacity, as the auditor of one or more companies, the number of companies which may be taken into account in his case shall not exceed the specified number, in the aggregate.

(8) The remuneration of the auditors of a company -(a) in the case of an auditor appointed by the Board or the Central Government, may be fixed by the Board or the Central Government, as the case may be ;

¹⁰
226. QUALIFICATIONS AND DISQUALIFICATIONS OF AUDITORS.

(1) A person shall not be qualified for appointment as auditor of a company unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949): **Provided** that a firm whereof all the partners practising in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company, in which case any partner so practising may act in the name of the firm.

(3) None of the following persons shall be qualified for appointment as auditor of a company - (a) a body corporate ; (b) an officer or employee of the company; (c) a person who is a partner, or who is in the employment, of an officer or employee of the company; (d) a person who is indebted to the company for an amount exceeding one thousand rupees, or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding one thousand rupees; (e) a person holding any security of that company after a period of one year from the date of commencement of the Companies (Amendment) Act, 2000. **Explanation.** - For the purposes of this section, "security" means an instrument which carries voting rights.] **Explanation.** - References in this sub-section to an officer or employee shall be construed as not including references to an auditor.

(4) A person shall also not be qualified for appointment as auditor of a company if he is, by virtue of sub-section (3), disqualified for appointment as auditor of any other body corporate which is that company's subsidiary or holding

19. From the scheme of the Act, 1956, on statutory Auditor, it is discernable that at the *Annual General Meeting* of the company, in the presence of shareholders and the board of directors, an auditor is selected for appointment. Thereon, an intimation is sent to the concerned auditor within seven days. On receiving the intimation, the auditor should submit his acceptance/rejection to the Registrar of the Companies within 30 days, by filling the Form 23B prescribed by the Companies (Central Government's) General Rules and Forms, 1956.

20. The Act envisages that the auditor has to conduct a true and fair review of all the financial aspects of the company, balance sheets, profit and loss accounts by complying with all the relevant accounting standards. He has right to inspect and examine the books of accounts, balance sheet and vouchers and other documents which are necessary for the purpose of drafting the audit report. Moreover section 230 states that all the members (shareholders) have a right to inspect the Auditor report, and the report would be read in front of the whole company.

company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company.

(5) If an auditor becomes subject, after his appointment, to any of the disqualifications specified in sub-sections (3) and (4), he shall be deemed to have vacated his office as such.

¹¹ **S.227. Specifies Power and Duties of Auditors.**

¹² **S.230. READING AND INSPECTION OF AUDITOR'S REPORT.** The auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

21. It is thus discernible that the service provided by an auditor is very unique, but most importantly statutorily mandated by the legislature. The above provisions show that the appointment of an Auditor is not just a regular outsourcing of a service by the company or employing an Auditor to do accounting work. An Auditor is required to act independent of the management of the company and has to critically analyse the financial position of the company. He has to discharge an onerous professional responsibility. He acts as custodian of faith of all shareholders, particularly small investors. He has a role and responsibility and acts as a trustee of shareholders in financial aspects of the company akin to the role played by the Comptroller and Auditor General of India in dealing with public funds. He has a fiduciary relationship with shareholders. Therefore, while acting as an Auditor, the Auditor has to be independent of the management of the company and cannot have any other relationship except discharging of his professional responsibilities.

22. That being so, if his relationship is treated as contractual, then he will lose his independence to thoroughly audit the accounts of the company and tie down to terms of the contract. Thus, by the very scheme of auditing envisaged by the Act, 1956, relationship of an Auditor with the company is professional and not contractual.

23.1. In ***Institute of Chartered Accountants of India v. P.K.Mukherjee and another***¹³, the Supreme Court discussed fiduciary responsibilities of Auditor towards the shareholders. The relevant para is extracted below:

“6. ...In other words, the auditing was intended for protection of the beneficiaries and the auditor was expected to examine the accounts maintained by the trustees with a view to inform the beneficiaries of the true financial position. The auditor is, in such a case, under a clear duty towards the beneficiaries “to probe into the transactions” and to report on their true character. In our opinion, the legal position of the auditor in the present case is similar to that of the auditor under the Indian Companies Act, 1956. In such a case the audit is intended for the protection of the shareholders and the auditor is expected to examine the accounts maintained by the Directors with a view to inform the shareholders of the true financial position of the Company. The Directors occupy a fiduciary position in relation to the shareholders and in auditing the accounts maintained by the Directors the auditor acts in the interest of the shareholders who are in the position of beneficiaries. In London Oil Storage Co. Ltd. v. Seear, Hasluck & Co. Lord Alverstone stated as follows:

“He must exercise such reasonable care as would satisfy a man that the accounts are genuine, assuming that there is nothing to arouse his suspicion of honesty and if he does that he fulfils his duty; if his suspicion is aroused, his duty is to probe the thing to the bottom, and tell the directors of it and get what information he can.”

Vide also the observations in ‘In re : London General Bank (No. 2)’;¹⁴— ‘In re Kingston Cotton Mill Co. (No. 2)’¹⁵, and — ‘In re : City Equitable Fire Insurance Co. Ltd.’¹⁶

23.2. Madras High Court in the case ***Commr. of Income-Tax v. G.M.Dandekar of Messrs M.K. Dandekar & Co., [1952 SCC OnLine Mad 121]***, discussed the duties of Auditors. The High Court also draws a parallel between the role of an Auditor and that of an Advocate,

“7. It is, therefore, necessary to ascertain what the duties of the respondent are as the auditor of Messrs A. Mohamed and Co. It is contended by the respondent that when an assessee engages him for auditing his accounts and preparing the income-tax returns for him, his duty is only to prepare the statements on the basis of the accounts produced by the assessee and that he is under no obligation to go further and enquire whether the account books maintained by the assessee are

¹³ AIR 1968 SC 1104

¹⁴(1895) 2 Ch 673

¹⁵(1896) 2 Ch 279

¹⁶(1925) Ch 407

reliable. The view taken by the Disciplinary Committee is that the respondent had not discharged his duty by merely preparing the abstracts from the accounts of the assessee, that it was further, his duty “to probe into the matter” and investigate whether the accounts were correct. **That such would have been his duty if he was auditing the accounts of a joint stock company, we do not doubt. In that case the audit is intended for the protection of the share-holders and the auditor is expected to examine the accounts maintained by the directors with a view to inform the share-holders of the true financial position of the company. The directors are in the position of trustees in relation to the share-holders and in auditing the accounts maintained by the directors the auditor acts in the interests of the share-holders who are in the position of beneficiaries. The auditor is, in such a case, under a clear duty to “probe into the transactions” and report on their true character...**”

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9. But the question is whether there is the same duty when the auditing relates to the accounts of individuals. In those cases the auditor acts only for those individuals and it is his duty to act on their instructions, and to audit the accounts produced by them and prepare statements from them. He is under an obligation to them to perform the auditing with due skill and diligence and if he does that it is difficult to see what further obligation he has in the matter and in favour of whom. Mr. Ramamurthier the learned advocate for the Council contended that the respondent was a representative of the assessee in the income-tax proceedings; that his position was analogous to that of an advocate appearing for a party in court and that he owed a duty to the income-tax department to act fairly in the presentation of the case of the assessee”.

23.3. In the case of **Hindustan Lever Employees' Union v. Hindustan Lever Ltd¹⁷**., the Apex Court briefly discussed the nature of the role of an Auditor appointed by a company,

“29. ...An officer or an employee of the company may not be appointed as an auditor. An auditor must be independent of the Board of Directors of the company. He is expected to play the role of a watchdog on behalf of the shareholders of the company...”

23.4. Lord Alverstone, Chief Justice, in the case reported at **[1904] 31 Accntt. LR 1 London Oil Storage Co. Ltd. v. Seear, Hasluck and Co.**, while deciding on a suit for damages for alleged negligence by the auditor, while auditing the plaintiff company's accounts, observed:

¹⁷ 1995 Supp (1) SCC 499

*"The auditor is an officer contemplated by law to protect the interest of the company and its shareholders as such; he is there having certain duties prescribed by the Act The auditor has got to bring to bear upon those duties reasonable and watchful care, he has got to discharge those duties remembering that the company look to him to protect their interests. He is not, however, supposed to be a man constantly going about suspecting other people of doing wrong If circumstances of suspicion arise, it is the duty of the auditor, in so far as those circumstances relate to the financial position of the company, to probe them to the bottom The conduct of the director is no answer to any breach of duty by the defendant, but it is a circumstance you must take into consideration because if you are of opinion that the loss was occasioned by a man stealing the money in consequence of there being want of proper control over him, then the fact of there being a breach of duty by the auditor is what we lawyers call a *causa causans*, which contributed to, but would not be the cause of the loss."*

23.5. In the case of **Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd: 1958**, Lord Denning stated the following about functions of an Auditor,

"What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations, and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetic computations. He is not to be written off as a professional 'adder-upper and subtractor'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform his task properly, he must come to it with an inquiring mind – not suspicious of dishonestly, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none."

23.6. **Haldiram Bhujawala** is a leading judgment of the Apex court discussing scope of Section 69(2) of the Partnerships Act, 1932. The brief facts of the case are that one Ganga Bishan also known as Haldiram, started a retail namkeen and sweet shop business. Thus, he had constituted a partnership firm along with his two sons Moolchand, Shiv Kishan and his daughter-in-law Devi in 1965. In the year 1974, the above partnership was dissolved, where the conditions of the

dissolution were that one son, Moolchand would get the trademark rights for Haldiram's for the whole of India, except for the state of West Bengal, which would go to the Daughter-in-law, Devi. Moolchand's sons pursuantly entered into another partnership deed, and started a Haldiram Shop in Chandni Chowk, Delhi since 1983. Around the same time, the son of Daughter-in-law, constituted a new firm, and opened another shop under the name of Haldiram in another locality in Delhi. Subsequently, the sons of Moolchand who had acquired the rights of the Haldiram trademark from the dissolution deed for whole of India (except West Bengal), filed a suit for injunction and damages. The defendant filed application for rejection of plaint for the reason that the plaintiff was not a registered partnership firm on the date of the filing of the suit. The apex court held that the bar under 69(2) of the Partnership Act 1932 will only be attracted, when the contract in dispute entered between the partnership firm and third party, must also be entered into by the plaintiff firm in the course of its dealings of business. It was also held that, even in the cases of an unregistered firm, Section 69(2) does not act as a bar, as long it is the case of the enforcement of a common law right or a statutory right. It is said:

“8. The points that arise for consideration are:

(i) Whether Section 69(2) bars a suit by a firm not registered on the date of suit where permanent injunction and damages are claimed in respect of a trademark as a statutory right or by invoking common law principles applicable to a passing-off action?

(ii) Whether the words “arising from a contract” in Section 69(2) refer only to a situation where an unregistered firm is enforcing a right arising from a contract entered into by the firm with the defendant during the course of its business or whether the bar under Section 69(2) can be extended to any contract referred to in the plaint unconnected with the defendant, as the source of title to the suit property?”

9. The question whether Section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a common law right is being enforced came up directly for consideration in this **Court in *Raptakos Brett Co. Ltd. v. Ganesh Property***. In that case, Majmudar, J. speaking for the Bench clearly expressed the view that **Section 69(2) cannot bar the enforcement by way of a suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right “arising from a contract” but was a common law right or a statutory right under the Transfer of Property Act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference.** Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

10. The next question is **as to the nature of the right that is being enforced in this suit. It is well settled that a passing-off action is a common law action based on tort (vide *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co.*)**. Therefore, in our opinion, a suit for perpetual injunction to restrain the defendants not to pass off the defendants' goods as those of the plaintiffs by using the plaintiffs' trademark and for damages is an action at common law and is not barred by Section 69(2). The decision in *Virendra Dresses v. Varinder Garments* and the decision of the Division Bench of the Delhi High Court in *Bestochem Formulations v. Dinesh Ayurvedic Agencies* state that Section 69(2) does not apply to a passing-off action as the suit is based on tort and not on contract. In our opinion, the above decisions were correctly decided. (Special Leave Petition No. 18418 of 1999 against the latter was in fact dismissed by this Court on 28-1-2000.) The learned Senior Counsel for the appellants no doubt relied upon *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar*. That was an arbitration case in which the words “arising out of a contract” were widely interpreted but that decision, in our view, has no relevance in interpreting the words “arising from a contract” in Section 69(2) of the Partnership Act.”

11. Likewise, if the reliefs of permanent injunction or damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is, in our view, not barred by Section 69(2).”

12. For the aforesaid reasons, in both these situations, the unregistered partnership in the case before us cannot be said to be enforcing any right “arising from a contract”. Point 1 is therefore decided in favour of the respondent-plaintiffs.”
(emphasis supplied)

23.7. In this case the Apex Court also followed the principles laid down by the Supreme Court in the case of ***Raptakos Brett & Co. Ltd*** (*supra*).

It is held:

“22. In *Raptakos Brett and Co.* it was clarified that the contractual rights which are sought to be enforced by the plaintiff firm and which are barred under Section 69(2) are “rights arising out of the contract” and that it must be a contract entered into by the firm with the third-party defendants. Majmudar, J. stated as follows: (SCC p. 191, para 9)

“A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred....”(emphasis supplied)

From the above passage it is firstly clear that a contract must be a contract by the plaintiff firm not with anybody else but with the third-party defendant.”

24... The real crux of the question is that the legislature, when it used the words “arising out of a contract” in Section 69(2), it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its defendant customers and the idea is to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business.

23.The further and additional but equally important aspect which has to be made clear is that the contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third-party defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third-party defendant.

25. Further, Section 69(2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could only be as a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a motor car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, — it is clear that the relief for possession against the defendant in the suit does not arise from any contract which the defendant entered into in the course of the plaintiff firm's business with the defendant but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a suit would be maintainable and Section 69(2) would not be a bar, even if the firm is unregistered on the date of suit. The position in the present case is not different.

26. In fact, the Act has not prescribed that the transactions or contracts entered into by a firm with a third party are bad in law if the firm is an unregistered firm. **On the other hand, if the firm is not registered on the date of suit and the suit is to enforce a right arising out of a contract with the third-party defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm subject of course to the law of limitation and subject to the provisions of the Limitation Act. This is so even if the suit is dismissed for a formal defect.** Section 14 of the Limitation Act will be available inasmuch as the suit has failed because the defect of non-registration falls within the

words “other cause of like nature” in Section 14 of the Limitation Act, 1963. (See *SurajmalDagduramji Shop v. ShrikisanRamkisan.*)”

(emphasis supplied)

23.8. In **Shiv Developers** (supra) the plaintiff filed a suit for declaration of the sale deed as null and void and perpetual injunction against the respondent builder-developer Aksharay Developers. The Respondent builder filed an application to reject the plaint under Order VII Rule 11(d), Order XXX Rules 1 and 2 and Section 151 of the Civil Procedure Code, 1908 read with Section 69 of the Indian Partnership Act, 1932, on the ground that the suit filed was by an unregistered partnership and hence barred by law. The trial court, rejected this application, holding that the subject matter of the validity of sale deed is in dispute, hence section 69(2) would not be applicable. The Gujrat High Court reversed the trial court order and held that, since the plaintiff is an unregistered partnership firm, would be barred from enforcing a right arising out of the terms of contract owing to section 69(2) of Partnership Act, 1932. The Supreme Court, in this case reiterated and affirmed the principles laid down in, **Haldiram Bhujawala, Raptakos Brett & Co. Ltd** (supra) and **Raptakos Brett & Co Ltd** (supra). It is held that Section 69(2) will only be attracted when, the contract in question is entered into by the firm with a third party; it has been entered into in the course of business dealings and it is for the enforcement of statutory/common law right. Moreover the Supreme court held that, the transaction of this case does not arise from business of the firm, as the firm dealt with the sale of the firm’s share in property, and the suit

was filed for remedies under the Specific Relief Act, 1963 and the Transfer of Property Act, 1882, and not for enforcement of a right arising out of a contract. Hence, judgment of the Gujrat High Court was set aside and the trial court order was restored by the Supreme Court. The relevant paras of the judgment are extracted hereunder:

“35. In our view, the questions arising in this matter could be directly answered with reference to the principles enunciated by this Court in the case of *Raptakos Brett & Co. Ltd. v. Ganesh Property* : (1998) 7 SCC 184, which have further been explained and applied by this Court in the cases of *Haldiram Bhujiawala and Purushottam* (supra). We may take note of the principles vividly expounded in the case of *Haldiram Bhujiawala* (supra) **that to attract the bar of Section 69(2) of the Act of 1932, the contract in question must be the one entered into by firm with the third-party defendant and must also be the one entered into by the plaintiff firm in the course of its business dealings; and that Section 69(2) of the Act of 1932 is not a bar to a suit filed by an unregistered firm, if the same is for enforcement of a statutory right or a common law right.”**

41. Taking up the facts of the present case, one of the significant features herein is that the transaction in question, i.e., sale of its share by the plaintiff firm to the contesting defendants has not been the one arising out of the business of the plaintiff firm. This factual aspect is apparent from the basic plaint averments and is fortified by the concurrent findings of the Trial Court as also of the High Court. **Though the High Court endorsed the finding that the transaction in question was not arising out of the business of the plaintiff firm but, it appears that the implication of this crucial finding has not acquired the requisite attention of the High Court.** The decision of this Court in the case of Purushottam (supra) was cited before the High Court but, while referring to the same in paragraph 33 of the impugned judgment, the High Court probably looked only at the editor's headnote and in any case, missed out the ratio and principles therein, as reiterated with reference to the previous decisions. **The decision in Haldiram Bhujiawala (supra) seems to have not gone into consideration of the High Court although this decision formed the sheet anchor of the order of the Trial Court.**

42. As noticed, the crucial and key factor in the present case remains that the sale transaction in question is not arising out of the business of the appellant firm. Equally significant fact is that the subject suit is for enforcing a right of avoidance of a document on the ground of fraud and misrepresentation as also the statutory rights of seeking declaration and injunction. Significantly, the composition of defendant firm “Aksharay Developers” (defendant No. 1) has itself been questioned by the plaintiff-appellant while alleging that on 22.04.2014, this firm was constituted with four partners but later on, the defendant Nos. 2 and 3

(respondent Nos. 2 and 3 herein), constituted another firm in the same name with themselves as partners while leaving aside the other two.

44. To put it differently, the relevant principles, when applied to the facts of the present case, leave nothing to doubt that the transaction in question was not the one entered into by the plaintiff firm during the course of its business (i.e., of building construction); and it had been an independent transaction of sale, of the firm's share in the suit property, to the contesting defendants. **The bar of Section 69(2) is not attracted in relation to the said sale transaction. Moreover, the subject suit cannot be said to be the one for enforcement of right arising from a contract; rather the subject suit is clearly the one where the plaintiff seeks common law remedies with the allegations of fraud and misrepresentation as also of the statutory rights of injunction and declaration in terms of the provisions of the Specific Relief Act, 1963 as also the Transfer of Property Act, 1882 (while alleging want of the sale consideration). Therefore, the bar of Section 69(2) of the Act of 1932 does not apply to the present case.**

45. The upshot of the foregoing discussion is that, for the purpose of Section 69 of the Act of 1932, the present case is governed by the principles laid down in Raptakos Brett & Co. Ltd. (supra), as further expounded in Haldiram Bhujawala (supra). Hence, the bar of Section 69(2) is not attracted to the suit filed by the appellant. The Trial Court had rightly appreciated the facts of the case and had rightly rejected the baseless application moved by the contesting respondents. The impugned order of the High Court, being not in conformity with the applicable legal principles, is required to be set aside.” (emphasis supplied)

24. On analyzing the principles and ratio laid down by the Supreme Court in the above cases, it is apparent that only under the following circumstances a bar to file a suit under section 69 (2) of the Indian Partnership Act, 1932 will be attracted:

- (i) When there exists a contract and that contract is entered by the firm with a third party;
- (ii) That the contract should have been entered during the course of business dealings;
- (iii) That the contract is entered with an intention to enforce a statutory right or a common law right.

25. In the case on hand, it is safe to assume that an Auditor, more particularly Statutory Auditor is not accountable to the board of

directors of the company, rather, given the nature of job of auditor, he is directly accountable to the shareholders and public at large. The Statutory Auditor might have been appointed by the board of directors, but once he steps into the shoes of a statutory auditor, he becomes an extension of the very statute. There exists no official contract or agreement between the Auditors and company, but only a letter of appointment and the Form 23B. All the rights, powers, duties and responsibilities flow from the relevant provisions of the Companies Act. Thus, it would be grossly incorrect to interpret that his duties and responsibilities would arise from a contractual obligation, rather his duties, role and obligations purely flow from the statute and the duty is to conduct an independent, transparent and clean audit for the welfare of the shareholders in particular and public at large. However, as noted from precedent decisions, both Indian and Foreign, the Auditor is the watchdog acting on behalf of the shareholders. Such role cannot be performed if the Auditor is tied down by terms of contract.

26. Once this cloud of uncertainty is wiped, the picture is clear. In the instant case, no agreement was entered into between the plaintiff and 1st defendant. The plaintiff was appointed as envisaged by the Act, 1956. Therefore, there is no scope to assume contractual relationship between plaintiff and 1st defendant as sought to be urged by learned senior counsel for second defendant. Such an assumption is contrary to statutory scheme and the role of an Auditor as propounded by

precedent decisions, noted above. Therefore, section 69(2) of Partnership Act is not attracted. The issues are answered accordingly.

ISSUE (iii):

27. Having regard to above analysis of facts and law, we are of the opinion that the trial Court rightly dismissed the application to reject the plaint on this ground.

28. In the result, the Civil Revision Petition fails and it is accordingly dismissed. No costs. Miscellaneous applications, if any shall stand closed.

P.NAVEEN RAO, J

NAGESH BHEEMAPAKA, J

Date: 14.03.2023

Kkm/tvk

Note: LR copy to be marked: Yes

**HONOURABLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA**

CIVIL REVISION PETITION NO.7522 OF 2018

Date: 14.03.2023

Kkm/tvk