

Form No: HCJD/C-121**ORDER SHEET****IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT****W.P No.25955-2012.**

Creative Electronic

Vs

Commissioner Lahore etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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**12.04.2013. Mr. Mansoor Usman Awan, Advocate for the
Petitioner.
Mr. Waqas Qadeer Dar, AAG.**

Through this petition the Petitioner seeks a decision on an application pending before the DCO requesting him to pay the outstanding amount for supply of diesel generators by the Petitioner. Learned counsel pressed for notice to be issued and a report be called for as to why the Respondent has not made the payment due to the Petitioner.

2. At the very outset, learned Law Officer raised an objection with respect to the maintainability of the instant petition. The learned Law Officer's objection was that the Petitioner has not been duly authorized to file this Petition; that the Petitioner has not annexed any document to show that it is a partnership concern; that no registered partnership deed has been filed and the Petition suffers from non-joinder of necessary parties.

3. The Petitioner has placed documents before this Court through C.M.No. 3/12 consisting of an authority letter from two other partners and a Deed of Association of Persons. It was explained that the Petitioner is a partnership firm engaged in the business of supply of power electronics and information technology. Again learned Law Officer raised an objection that the Petitioner could not file any document to show that he is duly authorized as it was a fundamental preliminary issue and

could not be rectified through a subsequent application. The Law Officer argued that if no authorization was appended with the petition it was fatal to the Petition. Reliance is placed upon the cases titled “Muhammad Ayub & Brothers through Partner Vs Province of Sindh through Secretary Irrigation and Power Department, Karachi and others” (2009 CLD 194) “Messrs Nishat Chunnian Ltd Vs Province of Punjab through Secretary, Local Government and 2 others” (2012 CLD 1288).

4. The question before this Court is whether the Petitioner stating to be a partnership firm can file a constitutional petition without a registered Deed of Association and a resolution or authority letter permitting the partner to this effect. The second question is whether the partners can rectify the filing of a constitutional petition subsequently by ratifying the act of the parties.

5. On the question that the Petitioner has not filed the registered Deed of Association, Section 69 of the Partnership Act 1932 is relevant which is reproduced as under:-

Section 69 “Effect of non-registration. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

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

(3) The provisions of sub-section (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver of Court under the Insolvency (Karachi Division x x x x) Act, 1909 or the Provincial Insolvency Act, 1920 to realize the property of an insolvent partner.

(4) This section shall not apply—

(a) to firms or to partners in firms which have no place of business in Pakistan, or whose places of business in Pakistan are situated in areas to which, by notification under (section 56) this Chapter does not apply,

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which is not of a kind specified in the second Schedule to the Provincial Small Cause Courts Act 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.”

In terms of Section 69, no suit can be instituted in any Court on behalf of a partner unless the firm is registered and the persons suing is shown as a partner in the Register of Firms. Similarly, no suit to enforce a contractual right can be instituted by an un-registered firm. A review of Section 69 shows that there is nothing in the stated section which is applicable to constitutional petitions. It has been held in a case titled “Muslim Commercial Bank Limited Karachi Vs Haji Shaikh Yaoinuddin and 2 others” (PLD 1992 Karachi 314) that the bar under Section 69 (3) of the Partnership Act 1932 *does not extend to constitutional jurisdiction or even to rent cases because Section 69 is applicable specifically to suits, claim of set off or other proceedings to enforce a right under a contract.* A bare reading of Section 69 (1) and (2) reveals that for filing a suit or for the enforcement of a right under the Partnership Act 1932, the firm must be registered. Sub-section 3 provides that it shall apply to a claim of set off or *other proceedings* to enforce a right arising from a contract. The use of the word “*other proceedings*” when interpreted, applying the rule of ejusdem generis would mean that *other proceedings* will not include constitutional jurisdiction as this jurisdiction, created by the Constitution of Islamic Republic of Pakistan, 1973 cannot be equated with suits or claim of set off. Therefore, I am of the opinion that Section 62 of the Partnership Act 1932 will not apply to the instant petition.

6. Having said that, with respect to the instant Petition the name of the Petitioner as given in the file of the Petitioner does

not disclose that it is a partnership firm nor is there any document appended with the Petition to show that it is a partnership firm and Mr. Sajjad Muhammad Khan is a partner, duly authorized by the firm to file the instant Petition. Learned Law Officer argued that in the case of a company or registered society, the Memorandum and Articles of Association are filed along with the petition and due authorization has to be filed. In the same way with respect to a partnership firm if a partner does not append the Deed of Association and his authorization the petition would not be maintainable.

7. Conversely, learned counsel for the Petitioner argued that under the Partnership Act 1932, the partners of a firm do not require to file an authorization in the same way as a registered society or limited liability company. He argued that a firm is distinct from a society and a company as the rights and liabilities of a partner are enforceable against him individually. In the case of a society or a company the person filing the petition must show that he has been duly authorized by the members or the board of directors as they are not enforcing a personal right. They are acting on behalf of the society or the company which is a legal entity and from whom they have to be authorized. In such cases it is necessary that the management who is acting on behalf of the members or share holders to duly authorize a person to file a constitutional petition. In the case of a firm since it is an individual right that a partner is seeking to enforce he does not require authorization to file the constitutional petition. Learned counsel relied upon Sections 19 and 22 of the Partnership Act 1932 to argue that the same permit the individual partner to file a petition on behalf of a firm. He argued that the partners have implied authority under section 19 (2) of the Partnership Act, 1932, therefore, a partner can invoke constitutional jurisdiction on behalf of the firm without placing any authorization on the file and without appending the Deed of Association. In this case, he argued that Sajjad Muhamad Khan was the Managing Partner of the firm

who has been given authority for filing the instant petition. He relied upon the documents subsequently filed.

8. After hearing both the counsels and reviewing the law, it is clear that there is a distinction between a company which files a constitutional petition through its Director and a partner who files a petition on behalf of the firm. Under Section 196 of the Companies Ordinance 1984, the share-holders of the company act through the board of directors. The board members are not the owners of the company and therefore, they cannot initiate proceedings on behalf of the company in their individual capacity unless they are expressly authorized by a board resolution. The same principle would apply to a society registered under the Co-operative Societies Act 1925. Under Section 23 of the said Act a registered society is a body corporate with perpetual succession with the power to file or defend itself in a suit. A member of the society is not an agent of the society nor does he own the society, hence, he would have to be authorized by the society in accordance with its memorandum of association before instituting any proceedings in any Court. A firm on the other hand is different. The partners are the owners of the firm and the rights and liability of the firm are the rights and liability of the partners. Each partner is an agent of the firm under Section 18 of the Partnership Act 1932. Under Section 19 of the said Act, each partner has the implied authority to carry on business in the usual way and bind the firm. Section 19(2) provides for the exclusions to the implied authority. Under these Sections implied authority does not empower a partner to submit a dispute relating to the business of the firm for arbitration, or relinquish any claim by the firm, admit any liability in a suit by or against the firm or withdraw the suit proceedings filed on behalf of the firm. These subject matters have been specifically excluded from the implied authority of a partner. Filing of a constitutional petition has not been mentioned in the exclusion clauses. These clauses relate specifically to contractual disputes of the firm. In the instant petition, the Petitioner seeks to enforce a right against the

Respondent to make certain payments which are due to it. In this regard, the Petitioner seeks a direction to the Respondents to decide upon its application pending before the Respondents. Therefore, since a partner has the implied authority to act and carry on business in the usual way and can bind his firm, Mr. Sajjad Ahmad Khan can file this constitutional petition on behalf of the other partners without written authorization from the other partners.

9. The next question that arises is whether his act can be subsequently ratified by the other partners. It has been held in the cases titled "Rala Singh and others Vs Babu Bhagwan Singh & sons" (AIR 1925 Rangoon 30) and "Muhammad Azam Muhammad Fazil & Co, Karachi Vs Messers N.A Industries, Karachi" (PLD 1977 Karachi 21) that submission to arbitration by one partner can be ratified by a co-partner so as to be binding on the firm. It was held that such authorization need not be formal or in writing. By reading sections 18 and 19 of the Partnership Act, 1932 together I find that the Partnership Act declares every partner to be an agent of the firm for the purpose of business of the firm and every act of the partner which is done to carry on business, in the usual way, binds the firm. The partnership business belongs to each and every partner jointly and severally. Hence, there is no distinction between the partner and the firm. In such a situation there is no requirement under the law that one partner be duly authorized by the other partner in writing to file a constitutional petition. This is because one partner can seek to enforce a right on behalf of all the partners, through a constitutional petition. In such cases, authority can be implied or inferred from the conduct of the partners. In the instant case the Petitioner has placed on file the Deed of Association of Persons as well as a copy of an earlier petition filed by the partnership to show that the same partners previously had also instituted a writ petition through same partner. Therefore, the said partner was authorized by the other partners to institute the instant petition.

10. The final objection raised was with respect to the subsequent filing of documents by the partner by the firm and non-joinder of parties. The subsequent filing of documents arose on account of the fact that the title of the Petitioner does not disclose that it is a partnership firm hence, this Court at the very outset asked the Petitioner to explain its legal status as the same was not clear from the contents of the Petition. Learned Law Officer objected on the ground that in terms of the given title of the petitioner it appears that the Petitioner is a proprietor. Furthermore, no document has been appended to show that the Petitioner is a partnership. Learned Law Officer then objected that consequence of subsequent filing would create serious disability to raise objections, if they are allowed to be rectified by placing documents before the Court.

11. To my mind, in the instant case, this amounts to a technical objection. No doubt the Petitioner is not described as a partnership firm in the petition and it is only upon being questioned that it became apparent that this petition has been filed by a partner of a partnership firm. However, since the main objection with respect to the authorization of the partner filing the petition and the documentation required for the purpose of filing the petition has been decided in favour of the Petitioner, therefore, subsequent filing of the documents will not have a critical effect on the maintainability of the writ petition. In any event the Hon'ble Supreme Court of Pakistan has held time and again that if technicalities can be avoided. Reliance is placed to cases of Brig. Muhammad Bashir vs. Abdul Karim (PLD 2004 SC 271), Sajawal Khan vs. Wali Muhammad (2002 SCMR 134) and M/s Al-raham Travels and Tours Pvt. Ltd vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others (2011 SCMR 1621).

12. The subsequent filing of Deed of Association and ex-post facto rectifications by the partner is accepted. As such it has cured the technical defects in filing of the instant petition.

13. Now to come up for arguments on 16-05-2013.

(AYESHA A. MALIK)
JUDGE

Tahir.

APPROVED FOR REPORTING

JUDGE