

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2019

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CRL.O.P No.13147 of 2015
and CrI.M.P.Nos.1 and 2 of 2015

1.Rangabashyam

2.V.Rajeshwari

...Petitioner

Vs.

Ramesh

...Respondent

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records on the file of Judicial Magistrate No.I, Villupuram in C.C.No.550 of 2012 and quash the proceedings.

For Petitioners : Mr.V.V.Sairam

For Respondent : Mr.V.S.Sivasundaram

ORDER

This petition has been filed seeking to call for the records on the file of Judicial Magistrate No.I, Villupuram in C.C.No.550 of 2012 and quash the proceedings.

2. An interesting issue has come up for consideration before this Court. The question involved in this case is whether an unregistered Partnership Firm can also be brought within the purview of Section 141 of the Negotiable Instruments Act, and in such cases whether the Partnership Firm must be made as an accused along with the other partners, in order to maintain a complaint for an offence under Section 138 of the Negotiable Instruments Act ?

3. The brief facts of the case are that the respondent has filed a complaint against the petitioners for an offence under Section 138 of the Negotiable Instruments Act on the ground that he was a partner in the firm named as 'Laxmi Agencies' and he was compelled to retire from the Partnership Firm. There were certain amounts due and payable to the respondent and towards the discharge of the said liability, the accused persons namely the petitioners issued a cheque for a sum of Rs.3,00,000/- (Rupees three lakhs only). The said cheque was dishonored on the ground of in-sufficiency of funds and after the issuance of the statutory notice, the respondent proceeded to file a complaint against the petitioners.

4. The petitioners who are shown as accused persons in this complaint, have filed this petition to quash the proceedings primarily on the ground that the cheque in question was drawn in favour of the respondent only on behalf of the partnership firm. Therefore, the complaint cannot be maintained without issuing the statutory notice to the partnership firm and making the partnership firm as an accused in the complaint.

5. The learned counsel for the petitioners submitted that the provisions of Section 141 of the Negotiable Instruments Act, which deals with offences by Companies, will equally apply to the partnership firm also by virtue of the explanation given under the said provision. The learned counsel further submitted that the Hon'ble Supreme Court has now settled the law to the effect that the complaint under Section 138 of the Negotiable Instruments Act, cannot be maintained against the directors of the Company, without making the Company as an accused. This law has now been extended to Partnership Firm also. Therefore, the learned counsel submitted that without arraying the firm as an accused in the complaint, the partners cannot be prosecuted by the respondent since admittedly the

cheque was issued by the Partnership Firm represented by its partners.

6. The learned counsel appearing on behalf of the respondent submitted that Section 141 of the Negotiable Instruments Act, will apply only to those Partnership Firms which satisfies the requirements of a legal entity. The learned counsel submitted that if the Partnership Firm is not registered, it cannot be recognized as an entity. In the present case, the Partnership Firm has not been registered and therefore the respondent has proceeded to file the complaint as against the petitioners who were the partners in the firm. The learned counsel submitted that since the Partnership Firm has not attained the status of a legal entity, there is no requirement to make the Partnership Firm as an accused and the complaint is maintainable as against the petitioners.

7. The learned counsel for the petitioners in reply to the submissions, submitted that the registration or non-registration of a partnership firm is immaterial insofar as Section 141 of the Negotiable Instruments Act, is concerned. Section 69(2) of the Partnership Act cannot be read into Section 141 of the Negotiable Instruments Act. In order to substantiate his submissions, the learned counsel for the petitioners relied upon the

Judgment of the Kerala High Court in the case of *Abdul Gafoor Vs Abdurahiman reported in 1999(4) Crimes 98* and the Allahabad High Court in the case of *Gurcharan Singh Vs. State of U.P. and another reported in 2002(4) Crimes 165*.

8.This Court has carefully considered the submissions made on either side.

9.There is no dispute on facts and therefore this Court will straight away venture into the legal issue that has been raised in this case.

10. The Hon'ble Supreme Court in *Aneeta Hada .Vs. Godfather Travels and Tours Private Limited* reported in *2012(5) SCC 661*, has now settled the law to the effect that a complaint under Section 138 of the Negotiable Instruments Act, cannot be maintained without issuing a statutory notice to the Company and without adding the Company as an accused, only as against the directors of the Company. The same law has been made applicable even to the partnership firm in *N.Elangovan .Vs. C.Ganesan* reported in *2014(4)MLJ (Crl) 517*.

11. The issue involved in this case is that the partnership firm is an unregistered firm and therefore according to the learned counsel for the respondent, the firm need not be made as an accused and the complaint can be filed straight away against the partners.

12. Section 69(2) of the Indian Partnership Act, 1932 deals with the effect of non registration. Section 69(2) Act, specifically provides for a bar in maintaining a suit where

- (i) Suit is by an unregistered firm
- (ii) Suit is to enforce a right arising from a contract
- (iii) Suit is filed against a third party and
- (iv) persons suing are not shown in register of firms as partners in firm.

It is to be borne in mind that the bar contemplated under Section 69(2) of the Indian Partnership Act will come into play only when the Suit is filed to enforce a right arising from a contract against a third party.

13. This Court had an occasion to deal with a case where this bar Section 69(2) of the Indian Partnership Act, was sought to be invoked while enforcing a common law right. This Court dealt with the issue in detail and

held that the bar Section 69(2) of the Indian Partnership Act, will not apply while enforcing a common law right. The relevant portion of the Judgment is extracted hereunder.

"46. In M/s. Haldiram Bhujjawala and another v. M/s. Anand Kumar Deepak Kumar and another, AIR 2000 SC 1287, the Hon'ble Supreme Court reiterated the position that a Suit by an unregistered firm is not barred under Section 69(2) of the Partnership Act if a statutory right or a common law right is being enforced.

47. In S. Prakashchand v. Sha Harakchand Misrimull and 3 others, 2003 (2) LW 740, this Court observed as under:

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

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

11. The third condition namely "persons suing are or have been shown in the Registrar of Companies as Partners in the firm" is concerned, that the first and second plaintiffs

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

13. The first condition that “enforcing a right arising out of a contract” is concerned that the contract even by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in the course of the business dealing with the plaintiffs firm with such third party defendant. The Hon'ble Supreme Court has decided in “Haldiram Bhujjawala v. Anand Kumar Deepak Kumar, AIR 2000 SC 1287” that the real crux of the question is that the legislature, when it used the words ‘arising out of a contract’ in Section 69(2), it is referring to a contract entered into in course of business transaction by the unregistered plaintiff firm with its customers/defendants and the idea is to protect those in commerce, who deal

with such a partnership firm in business. Such said third parties, who deal with the partners ought to be enabled to know what the names of the partners of the firm before they deal with them in business". It is evident that Section 69(2) is not attracted to any and every contract.

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

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

52. The bar contemplated under Section 69(2) of the Act will come into picture only when the Suit is filed to enforce a right arising from a contract against a third party. In the present case, the Suit has been filed for recovery of possession of A and B schedule properties and to pay damages for use and occupation. If that being so, as

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

14. This Court had taken note of the above judgment only to reiterate the settled position of law that the bar of Suit insofar as an

unregistered firm is concerned will confine itself only to enforcement of a right arising from a contract. This cannot even be extended for enforcing a common law right. In the present case, this Court is dealing with a provision under the criminal law wherein, the learned counsel for the respondent is seeking to justify the fact that insofar as an unregistered firm is concerned, it is not necessary to make the firm as an accused since it does not qualify the status of a legal entity. It is trite law that when the provisions of criminal law are interpreted, the concept of strict construction will apply. Therefore, this Court cannot read the provisions of Section 69(2) of Indian Partnership Act into the provisions of Section 141 of the Negotiable Instruments Act.

15. It will be relevant to rely upon the judgments cited by the learned counsel for the petitioners.

16. The first judgment that was relied upon by the learned counsel for the petitioners is the case of *Abdul Gafoor Vs Abdurahiman* reported in **1999(4) Crimes 98**, referred supra. The relevant portions in the judgment is extracted hereunder.

"3.The counsel for the revision petitioner submitted that the 1st respondent being an unregistered partnership firm, the above prosecution is not sustainable under Section 69(2) of the Indian Partnership Act. The effect of non-registration of the partnership firm under Section 69 of the Partnership Act is applicable only to cases involving Civil rights and it has no application to Criminal cases. Therefore, the contention of revision petitioner that the prosecution in this case is not sustainable under Section 69(2) of the Indian Partnership Act is not acceptable.

4.The counsel for the revision petitioner submitted that the above complaint is filed by one Abdurahiman as the person who is authorised to sue on behalf of the firm under the Partnership Deed. Subsequently the Partnership Deed has been altered and another Abdul Rahiman who has been examined as PW1 in this case has been authorised to conduct the case on behalf of the partnership Firm. Therefore, PW1 is incompetent to give evidence in this case and there is no proper representation of the partnership firm. But under the Partnership Act all partners are agents of the partnership firm and therefore, every partner is competent to represent the firm and to give evidence on behalf of the firm. Hence this contention of the revision petitioner is also not sustainable."

17. The next judgment that was relied upon by the learned counsel for the petitioners is the case of ***Gurcharan Singh Vs. State of U.P. and another*** reported in ***2002(4) Crimes 165***, referred Supra. The relevant portions of the judgment is extracted hereunder:

"7. To appreciate the submission, the relevant part of [Section 69](#) of the Partnership Act necessary for the purpose is extracted hereunder :

"69. Effect of nonregistration.-

(1) xxxxxxxxxxxxxxxx

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

(3) xxxxxxxxxxxxxxxxxxxxxxxx (4) xxxxxxxxxxxxxxxxxxxxxxxx"

8. The aforesaid provision postulates that if a firm is not registered one, it or anybody on its behalf cannot maintain a 'suit' against a third party to enforce a right arising from a contract. So, what is barred is a 'suit' that has been filed to enforce a right arising from a contract. In other words, the liability of a third person to the firm arising out of a contract cannot be enforced by way of suit if the firm is unregistered. The word 'suit' has not been defined in the aforesaid Act. It is, therefore, desirable to refer to 'Law of Lexicon' and the judicial pronouncements to ascertain the true meaning of word 'suit' in the legal context. 'Suit' means 'a proceeding Instituted in civil court by presentation of a plaint. The word 'suit' ought to be confined to such proceedings as, under that description, are directly dealt with in [the Code](#) of Civil Procedure, or such as by the operation of the particular Act which regulates them are treated as suits (See Law of Lexicon,

1997 Edition). The word 'suit' in common parlance means a process Instituted in a Court for recovery or protection of a right, enforcement of a claim, or to redress civil injuries.

9. [Section 142](#) of the Act under caption "Cognizance of offences" provides that cognizance of the offence under [Section 138](#) can be taken upon a 'complaint' in writing made by the payee or the holder in due course of the cheque. The word 'complaint' defined in [Section 2\(d\)](#) of the Code of Criminal Procedure means any allegation made orally or in writing to a Magistrate, with a view to taking action under the said Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Since [Section 138](#) is a penal provision, that prescribes punishment for bouncing of cheque on any of the grounds mentioned therein, the Legislature in its wisdom has used word 'complaint' and not 'suit' in [Section 142](#) because a 'suit' can be maintained for recovery of money or for any other civil remedies. So the bar created for maintaining a suit in [Section 69](#) of the Partnership Act by an unregistered firm cannot be stretched and applied to maintain a criminal proceeding under [Section 138](#) of the Act. In *Amit Desai (supra)* a Division Bench of Andhra Pradesh High Court has taken the view that the firm being not registered under the [Partnership Act](#) cannot maintain a complaint under [Section 138](#) of the Act. No discussion on point of law involved was made by the learned Judges except referring to [Section 69](#) of the Partnership Act and some decisions of the Apex Court. While disagreeing with

the view taken by the Kerala High Court that [Section 69\(2\)](#) of the Partnership Act is applicable only where civil rights are invoked, the learned Judges referred to Explanation to [Section 138](#) of the Act and observed "enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in Explanation (2) of [Section 138](#) of the Negotiable Instruments Act". A Division Bench of the Kerala High Court in the case of [Kerala Arecanut Stores v. Ramkishore](#) and sons and Anr. AIR 1975 Ker 144, having made reference to various provisions of the Act regarding rights/obligations arising out of a negotiable instrument observed that the obligation of the drawer of the cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provision and there being no privity of contract between the maker of a cheque and the holder in due course, any right of action available to such holder is not under any contract. So he is entitled to sue on his cheque by reason of the right conferred upon him by the statute. That being so, action under [Section 138](#) is not a suit by the indorsee to enforce a right arising out of a contract and, therefore, the bar under [Section 69\(2\)](#) of the Partnership Act will not operate in such a case. To the same effect is view of a learned single Judge of the said High Court in the case of [Abdul Gafoor v. Abdurahiman](#), 1999 ISJ (Banking) 701. It is observed in the said case "the

effect of non-registration of the partnership firm under [Section 69](#) of the Partnership Act is applicable only to cases involving civil rights and it has no application to criminal cases."

10. In a recent judgment rendered by the Supreme Court in [B.S.I. Ltd. and another v. Gift Holdings Put. Ltd. and another](#). 2000 (1) ACrR 683 (SC) : 2000 SCC (Cri) 538, the word 'suit' came to be interpreted for deciding maintainability of a proceeding under [Section 138](#) of the Act in view of the ban imposed by the [Sick Industrial Companies \(Special Provisions\) Act](#). Under [Section 22\(1\)](#) of the aforesaid Act. it is provided that no suit for recovery of money or enforcement of any security against the industrial company or guarantee in respect of any loan or advance granted to the industrial company shall lie if in respect of an industrial company, an inquiry under [Section 16](#) is pending or any scheme referred to under [Section 17](#) is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under [Section 25](#) relating to an industrial company is pending adjudication. It was contended that the ban against maintainability of a suit for recovery of money would encompass prosecution proceedings also. Reliance was placed on the meaning of the word 'suit' as given in 'Bouvier's Law Dictionary'. Repelling such contention, the Court observed that the word 'suit' envisaged in [Section 22\(1\)](#) cannot be stretched to criminal prosecutions. A

criminal prosecution is neither for recovery of money nor for enforcement of any security etc. [Section 138](#) of the Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under [Section 138](#) is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability".

18. This Court is in complete agreement with the judgments of the Kerala High Court and the Allahabad High Court. The action under Section 138 of the Negotiable Instruments Act, is not a Suit to enforce a right arising out of a contract, and therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case. The word "Suit" envisaged under Section 69(2) of the Indian Partnership Act, cannot be stretched to criminal prosecutions. A criminal prosecution by its very nature is instituted not for recovery of money or for enforcement of any security. Section 138 of Negotiable Instruments Act is a penal provision, the commission of which offence entails a conviction and sentence on the proof of guilt. Chapter XVII of the Negotiable Instruments Act, 1881 is a code by itself which deals with penalties in case of dishonour of cheques.

19. Section 141 of the Negotiable Instruments Act deals with the concept of vicarious liability, wherein for the offence committed by the Company or a partnership firm, the directors or the partners, as the case may, are deemed to be guilty of the offence when it is shown that they are in charge of and responsible for the conduct of the day-to-day affairs of the business or the firm, as the case may be. While interpreting the provision, the Hon'ble Supreme Court has categorically held that the complaint cannot be maintained against the directors of the Company, without making the company as an accused person. This concept has been extended even for Partnership Firms. The registration or non-registration of the Partnership Firm will have no bearing insofar as 141 of the Negotiable Instruments Act is concerned.

20. In view of the above discussion, this Court is not in agreement with the submissions made by the learned counsel for the respondent. In this case admittedly, the cheque was given in the name of the Partnership Firm and after the cheque was dishonored, no statutory notice was issued to the Partnership Firm, and the Partnership Firm was not made as an accused in the complaint. Only the partners have been shown as accused persons in this complaint. Such a complaint is unsustainable and not in accordance

with Section 141 of the Negotiable Instruments Act and the law laid down by the Hon'ble Supreme Court. Therefore, the proceedings will have to be necessarily interfered with by this Court in exercise of its jurisdiction under Section 482 of Cr.P.C. In the result the proceedings in C.C.No.550 of 2012, pending on the file of the learned Judicial Magistrate No.I, Villupuram, is hereby quashed and the Criminal Original Petition is accordingly allowed. Consequently, the connected miscellaneous petitions are closed.

23.07.2019

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To

The Judicial Magistrate No.I,
Villupuram.

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N.ANAND VENKATESH.J.,

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