

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

CRIMINAL APPLICATION (APPA) NO. 748 OF 2018

Narendra s/o Amarnathji Kalda,
aged 46 years, Proprietor of M/s.
Mata Sherawali Transport, R/o
Shastrinagar, Chandrapur.

... APPLICANT
(Ori. Complainant)

Versus

Balbirsingh s/o Motisingh Chawhan,
aged 60 years, R/o Madhuban Complex,
Near Mount Convent, Chandrapur.

Bungalow No. 20, Magnum "C" Society,
Lokhandwala Complex, Andheri (W),
Mumbai – 400 053.

... RESPONDENT

Shri R.M. Bhangde, Advocate for the applicant.
Shri V.M. Gadkari, Advocate for the respondent.

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**CORAM : P. N. DESHMUKH &
PUSHPA V. GANEDIWALA, JJ.**

**DATE OF RESERVING THE JUDGMENT : 21/01/2020.
DATE OF PRONOUNCING THE JUDGMENT : 07/02/2020.**

JUDGMENT : (PER PUSHPA V. GANEDIWALA, J.)

This Bench has been constituted to answer the following question referred by the Single Bench of this Court vide order dated 24/10/2018 :-

“Whether prosecution of accused under Section 138 of the Negotiable Instruments Act, 1888, is hit by the bar created by sub-section (2) of Section 69 of the Indian Partnership Act, 1932 ?”

2. In *Sai Accumulator Industries, Sangamner Vs. Sethi Brothers, Aurangabad*¹, the Single Bench of this Court took a view that the complaint filed by an unregistered firm under Section 138 of the Negotiable Instrument Act, 1888 (in short “N.I. Act”) is not tenable in law in view of the bar under Section 69(2) of the Indian Partnership Act, 1932 (in short “the Act of 1932”).

3. The learned referral Judge expressed a diagonally opposite view and referred the question for consideration of the larger Bench.

4. Heard Shri R.M. Bhangde, learned counsel for the applicant (original complainant) and Shri V.M. Gadkari, learned counsel for the respondent/accused.

5. Shri Bhangde, learned counsel for the applicant took us through the relevant provisions of law and legal pronouncements of the Hon’ble Apex Court and different High

¹ 2016(5) Mh.LJ 936.

Courts and submitted that almost all the High Courts are of the view that the prosecution of the accused under Section 138 of the N.I. Act is maintainable and is not hit by the bar created by sub-section (2) of Section 69 of the Act of 1932.

6. Per contra, Shri Gadkari, learned counsel for the respondent supported the view expressed by the learned Single Judge in the case of *Sai Accumulator (supra)*.

7. It is pointed out that the judgment in *Sai Accumulator (supra)* was delivered by relying on the judgment of the Andhra Pradesh High Court in the case of *Mr. Amit Desai & Anr. vs. M/s. Shine Enterprises and Anr.*¹, while the judgment in the case of *Mr. Amit Desai (supra)* was already overruled by the larger Bench of the Andhra Pradesh High Court vide judgment given in the case of *A.V. Ramanaiah vs. M. Shekhara*² on 31.12.2007. However, this fact was not brought to the notice of the court hearing the case of *Sai Accumulator (supra)*.

1 2000 CRI. L.J. 2386.

2 ALD(CRI) 2009 2 801.

8. In the case of *Mr. Amit Desai (supra)*, the Division Bench of the Andhra Pradesh High Court took a view that 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 an unregistered firm, the bar equally applies to criminal case.

9. Disagreeing with the ratio in the case of *Mr. Amit Desai (supra)*, the coordinate Bench of the Andhra Pradesh High Court referred the question for consideration of the larger Bench. Accordingly, the larger Bench of the Andhra Pradesh High Court in the case of *A.V. Ramanaiah (supra)* held that the Division Bench in the case of *Mr. Amit Desai (supra)* has not laid down a correct law. The larger Bench after discussing various case laws on the point, came to the conclusion that the bar contained under Section 69 of the Act of 1932 would not get attracted for initiating action by or against an unregistered partnership firm for the offence committed under Section 138 of the N.I. Act.

10. Before advertng to answer the question referred, it would be fruitful to reproduce the relevant provisions and the object in bringing these provisions in the statute books. Section 69(2) of the Act of 1932 reads thus:-

“69. Effect of non-registration.- (1) XXXX

(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.”

11. The Special Committee, which was appointed to examine the provisions of the Bill to amend the law relating to partnership, recommended such bar and in para 17 of its report narrated the reasons for bringing such bar. For ready reference, para 17 of the report of the Special Committee (see Mulla : Partnership Act, 1st Edn., 1934, p.167, at pp.176-77) is reproduced herein below :-

“17. The outlines of the scheme are briefly as follows. The English precedent in so far as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with

small and ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the direction of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claims against third parties in the civil courts; and any partner who is not registered will be unable to enforce his claims either against third parties or against his fellow partners. One exception to this disability is made – any unregistered partner in any firm, registered or unregistered, may sue for dissolution of the firm. This exception is made on the principle that registration is designed primarily to protect third parties, and the absence of registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left intact.”

12. Section 138 of the N.I. Act reads thus:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other

liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.”

13. The object of introducing Sections 138 to 142 of the N.I. Act vide Amendment Act 66 of 1998 was specifically to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangement made by the drawer. Section 138 of the N.I. Act is applicable only in case the cheque is presented for payment within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. The other conditions to constitute the offence are :-

I) the payee should have made a demand for payment by registered notice after the cheque is returned unpaid; and

II) the drawer should have failed to pay the amount demanded within 15 days of the receipt of notice.

14. Section 138 of the N.I. Act is a penal provision, the commission of which entails prosecution and conviction on proving of guilt. Once the offence under Section 138 of the N.I. Act is completed, the prosecution can be initiated for bringing the offender to penal liability.

15. In *Sai Accumulator's* case (*supra*), the learned Single Judge took a view that for the commission of the offence punishable under Section 138 of the N.I. Act, the amount must be the legally enforceable debt, while an unregistered firm could not enforce a debt against the third party due to the bar created by Section 69(2) of the Act of 1932 and in this way, the debt is not the legally enforceable debt.

16. There is no disagreement with the proposition that the '*debt or other liability*' as has been referred in Section 138 of the N.I. Act, is a '*legally enforceable debt or other liability*'. However, by creating a bar to enforce a right arising out of contract by an unregistered firm, with the object to promote registration of the firms and to exempt the small firms from compulsory registration, the inherent character of enforceability of the 'right' does not get changed and it would still remain as a right enforceable by law. Once the bar is removed, the remedy would be revived. Moreover, even the plaintiff/unregistered firm can withdraw the suit with liberty to file a fresh one after getting the firm registered and section 14 of the Limitation Act,

1963 (in short “the Act of 1963”) would be applicable to such proceedings. On the other hand, for filing a complaint under Section 138 of the N. I. Act, it has to be filed within a period of one month from the date on which cause of action arises. And there is no provision in the Code of Criminal Procedure unlike Rule 1(3) of Order 23 of the Code of Civil Procedure, to withdraw the complaint with liberty to file it fresh after removal of formal defect, so also, Section 14 of the Act of 1963 would not be applicable to the complaints before the Criminal Courts as it is applicable only to the suits or the proceedings before the Civil Courts.

17. In this background, there is no point in stretching the bar which is in the nature of temporary bar to the suit to the complaints under section 138 of the N. I. Act, which is in the nature of penal provision with the object to inculcate faith in banking transactions. The term ‘suit’ under Section 69(2) of the Act of 1932 must receive its plain and simple meaning. It cannot be stretched for securing immunity from criminal prosecutions. The bar under Section 69(2) of the Act of 1932 is

liable to be confined only to enforcement of contractual obligations.

18. In addition to the above, when a plaint is rejected being barred by Section 69(2) of the Act of 1932, the same shall not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, in view of Order 7 Rule 13 of the Code of Civil Procedure. Similar kind of provision is neither available in N. I. Act nor in the Code of Criminal Procedure.

19. Furthermore, by way of simple endorsement, the cheque can be negotiated in the name of any person or registered firm and in this way, the effect of bar can be neutralised by an unregistered firm and in such an eventuality, there won't be a privity of contract between the drawer of the cheque and its holder.

20. The larger Bench in the case of *A.V. Ramanaiah* (*supra*) fortified its view by observing that the bar contained

under Section 69 of the Act of 1932 is intended to prevent an unregistered partnership firm to enforce a right arising out of a contract against a third party, and that it is not intended to create any such bar for the purposes of enforcing rights arising out of statutes or for invoking the protection available under any other statute.

21. For the foregoing reasons, we are in agreement with the view expressed by the referral Judge.

22. In such conspectus, our answer to the question referred is as under :-

“The prosecution of an accused under Section 138 of the Negotiable Instruments Act, 1888, is not hit by the bar created by sub-section (2) of Section 69 of the Indian Partnership Act, 1932.”

23. In view of the above, the matter be placed before the appropriate Bench.

24. Before parting with the judgment, we place on record our appreciation for Shri R.M. Bhangde, learned counsel

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for the applicant and Shri V.M. Gadkari, learned counsel for the respondent, who have ably assisted the Bench in answering this reference.

Sumit.

JUDGE

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