RUTURAJ AYURVEDIC GRUH UDHYOG (THROUGH RES.NO.2) & ANR. Vs NAVNITLAL AND COMPANY THROUGH DEVANG MANOJBHAI GANDHI & ANR.

1246 of 2017; 1254 of 2017, 1256 of 2017

Court: GUJARAT HIGH COURT

Date of Decision: Feb. 28, 2017

Acts Referred:
Negotiable Instruments Act, 1881, Section 138, Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account - Dishonour of cheque for insufficiency, etc., of funds in the account#Partnership Act, 1932, Section 69(2), Section 69(2) - Effect of non-registration - Effect of non-registration

Hon'ble Judges: J B Pardiwala

Bench: Single Bench

Advocate: B M Mangukiya, Bela A Prajapati, Hardik P Mehta, Shruti Pathak

Final Decision: Disposed

Judgement

1. Since the issues involved in all the captioned applications are the same and the question of law raised is also common, those were heard

analogously and are being disposed of by this common judgment and order.

2. It appears from the materials on record that three criminal cases have been registered against the applicants herein for the dishonour of the

cheques, punishable under Section 138 of the Negotiable Instruments Act (for short, "the NI Act"). The three cases are going on before the

learned Additional Chief Metropolitan Magistrate and Special Negotiable Court No.30, Ahmedabad, and are at the final stage.

3. It also appears that the accused persons failed to remain present before the trial Court and their right of crossexamination of the complainant

was also closed.

4. The principal argument of Mr.Mangukiya, the learned counsel appearing for the applicants, is that the complaints under Section 138 of the NI

Act should be quashed because they are not maintainable in law. According to the learned counsel, the complaints have been filed by an

unregistered partnership firm through one of its partners.

5. It is submitted that an unregistered partnership firm cannot file a complaint for the dishonour of a cheque under Section 138 of the NI Act. The

submission is that the transaction for the purpose of Section 138 of the NI Act should be one relating to a legally enforceable debt or other liability.

Under Section 69(2) of the Partnership Act, the complainant, an unregistered partnership firm, could not have legally enforced the debt. In support

of his submissions, reliance has been placed on a decision rendered by the Bombay High Court in the case of Sai Accumulator Industries

Sangamner v. M/s.Sethi Brothers Aurangabad (Criminal Appeal No.426 of 2003, decided on 22nd April 2016). In the said case, the appeal was

filed by the original complainant against the acquittal of the accused under Section 138 of the NI Act. While dismissing the appeal and affirming the

acquittal, the learned Single Judge of the Bombay High Court observed as under :

9. Perusal of Section 138 of the Act shows that it has to be a transaction which relates to legally enforceable debt or other liability. It is quite clear

that under Section 69(2) of the Partnership Act, the complainant, unregistered partnership could not have legally enforced the debt. If being

unregistered partnership it cannot legally enforce the debt, it is not legally enforceable debt and would go out of the purview of Section 138 of the

N.I. Act. When complaint was filed complainant was not a registered partnership and thus could not have, at that time, filed the complaint. In this

view of the matter, the reasonings recorded by the Hon''ble High Court in the matter of Mr. Amit Desai, supra, appear to be apt for consideration

of the present matter. Adopting the said view in the matter of Mr. Amit Desai, supra, I find that the trial Court did not err while rejecting the

complaint and acquitting the accused. I do not find myself persuaded by the Judgments in the matter of Abdul Gafoor and Gurcharan Singh

(supra). There is no reason to interfere in the acquittal recorded by the trial Court, which is possible view of the matter.

6. Mr.Mangukiya also placed reliance on a Division Bench decision of the Andhra Pradesh High Court in the case of Amit Desai v. M/s.Shine

Enterprises, reported in 2000 Cri.L.J. 2386. He relied on the observations made by the Court in paragraphs 14 and 15, which read thus :

14. We have gone through the entire judgment and we are of the considered view that their Lordships did not express any opinion regarding to

the consequences of legal proceedings U/s.138 of the Negotiable Instruments Act filed by the unregistered partnership firm. Therefore, we hold

that the said ruling has no application in the present set of facts.

15. The learned counsel Mr. C. Padmanabha Reddy further relied upon a ruling reported in Kerala Arecanut Stores v. M/s. Ramkishore and Sons

& Another (3). Their Lordships of Kerala High Court were pleased to hold that a suit by a partner for recovery of money on dishonour of cheque endorsed in favour of the firm is not barred. The learned counsel further relied upon a ruling reported in Abdul Gafoor vs. Abdurahiman 5. The

learned Single Judge of Kerala High Court was pleased to hold that section 69 (2) of the Partnership Act is applicable only where the civil rights

are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. With due respect to the learned Single

Judge of Kerala High Court, we prefer to deffer with the views expressed by him. Explanation to Section 138 of the Negotiable Instruments Act

specifically laid down that the debt or other liability means a legally enforceable debt or other liability. 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.

Mr.Mangukiya also relied upon a ruling reported in Delhi Development Authority v. Kochhar Construction Work and Another, wherein their

Lordships were pleased to hold that if the partnership is not registered as required under Section 69(2) of Partnership Act, the suit instituted by

unregistered firm is void ab initio it means that the unregistered firm cannot legally enforce the right accrued to them during the process of law.

He also relied upon a ruling n M/s. Shreeram Finance Corporation v. Yasin Khan and Others, AIR 1989 SC 1769, wherein their Lordships held

in Para (6) of the judgment as under:

6. In the present case the suit filed by the appellants is clearly hit by the provisions of sub-section (2) of S.69 of the said Partnership Act as on the

date when the suit was filed, two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact, partners,

one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was given to the

Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of

Firms. The result is that the suit was not maintainable in view of the provisions of sub-sec.(2) of Sec.69 of the said Partnership Act and the view

taken by the trial court and confirmed by the High Court in this connection is correct. Although the plaint was amended on a later date that cannot

save the suit. Reference has been made to some decisions in the judgment of the trial court: however, we 2do not find it necessary to refer to any

of them as the position in law, in our opinion, is clear on a plain reading of sub-sec.(2) of S.69 of the said Partnership Act.

7. On the other hand, all the three applications have been vehemently opposed by Mr.Hardik P.Mehta, the learned counsel appearing for the

complainant. Mr.Mehta pointed out that the partnership firm is a registered partnership firm. He places on record a document issued by the

Registrar of Firms, Ahmedabad city, Ahmedabad, evidencing the registration of the firm. According to him, the principal argument canvassed on behalf of the applicants should fail. Mr.Mehta submitted that assuming for the moment that the partnership firm is not a registered firm, a complaint

under Section 138 of the NI Act is always maintainable at the instance of such an unregistered partnership firm. Thus, it appears from the

document produced on record that the partnership firm is a registered firm under the provisions of the Indian Partnership Act. In such

circumstances, as such, it would not be necessary for me to go into the question, whether a complaint under Section 138 of the NI Act is

maintainable at the instance of an unregistered partnership firm. However, since the question is of some importance and being a neat question of

law, I would like to look into the same. In the case of Gurcharan Singh v. State of U.P. and another, 2002 Cri.L.J. 3682, a learned Single Judge of

the Allahabad High Court observed as under :

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 non-registration.- (1) xxxxx xxxxx xxxxx

(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) and (4) xxxxx xxxxx xxxxx

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.

11. In view of discussions made above, I would hold that even accepting the contention of the learned counsel for the petitioner that M/3. Sterling

Novelty Products is not a registered firm under the Partnership Act, yet the bar created by Section 69 of the said Act has no application for

maintaining a criminal proceeding under Section 138 of the Act. In that view of the matter, no interference is called for in the criminal proceeding

(Case No. 852/9 of 1999) pending against the petitioner in exercise of inherent power."" In the case of Abdul Gafoor v. Abdurahiman, (1999)2

KERLT 634, a learned Single Judge of the Kerala High Court considered the very same issue and held as under : ""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.

12. Even by plain reading of Section 69(2) of the Partnership Act leaves no scope for doubt that what is barred by the said section is the institution

of a suit to enforce a right arising from a contract or conferred by the Partnership Act 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 in suit is or has been

shown as a partner in the register of firms.

13. A careful reading of Section 69(2) of the Partnership Act clearly shows that an unregistered partnership firm is barred from filing a civil suit and

there is no bar as such to file a private complaint and it is purely criminal liability on the part of the person who has issued the cheque. Even if the

cheque issued by a partner of an unregistered firm for legally recoverable debt or otherwise and if such cheque dishonoured when it was presented

for encashment, it amounts to a criminal liability. Therefore, the dismissal of a complaint by the Trial Court by relying on the decision of the Andhra

Pradesh High Court referred to above is incorrect. Whenever a complaint is presented under Section 138 of the Negotiable Instruments Act, it is

the duty of the learned Magistrate to take note of the cognizance and record the sworn statement of the complainant and his witnesses and after

hearing if there is any prima facie case then it is the duty of the Court to issue summons to the accused.

14. In the case of BSI Limited and another v. Gift Holdings Private Limited, reported in (2000)2 SCC 737, the Supreme Court held thus : ""... A

criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the Negotiable Instruments 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.

15. Again in the case of Gurcharan Singh v. State of Uttar Pradesh and Another, 2002(4) Crimes 165 (All), the Allahabad High Court has

followed the above said judgment of the Supreme Court.

16. Therefore, in view of the above decision of the Supreme Court as well as of the other High Courts, the contention of the applicants that filing of

a criminal complaint by a partner of an unregistered firm is hit by Section 69(2) of the Partnership Act cannot be accepted. The said section has no

application to the criminal cases. Under these circumstances it could be said that Section 69(2) of the Partnership Act is applicable only where the

civil rights are invoked and not in criminal cases. Nonregistration of the firm has no legal bearing on the criminal case.

17. Mr.Mangukiya, the learned counsel submits that his client may be given one opportunity to cross-examine the complainant.

12. It is for the applicants to file an appropriate application before the trial Court in this regard. If any such application is filed, the trial Court may

consider the same in accordance with law.

13. With the above, all the three applications are disposed of. Notice in each of the application stands discharged. Ad-interim order earlier granted

stands vacated in all the three applications.