IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.426 OF 2003

Sai Accumulator Industries Sangamner,
Through its Partner,
Shri Kacheshvar Savaleram Chavan,
Age-51 years, Occu:Trader,
R/o-Sangamner, Dist-Ahmednagar.

...APPELLANT
(Orig. Complainant)

VERSUS

M/s. Sethi Brothers Aurangabad,
Through its Owner,
Smt. Sunanda Sethi @ Sunita Kapoor,
Age-51 years, R/o-Shop No.45,
Sindhi Colony, Jalna Road,
Aurangabad, Dist-Aurangabad.

...RESPONDENT
(Orig. Respondent)

...
Shri. S.T. Shelke Advocate for Appellant.
Shri. S.N. Pagare Advocate for Respondent.
...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT :30TH MARCH,2016

DATE OF PRONOUNCING JUDGMENT: 22ND APRIL, 2016

JUDGMENT :

1. This is an Appeal against acquittal of Respondent - original accused under Section 138 of the Negotiable Instruments Act, 1881 ("Act" in brief).

2. Facts in brief may be stated as follows:

(A). The Appellant - original complainant (hereafter referred as "complainant") filed private complaint in the trial Court claiming that the complainant is a registered partnership firm and had business dealings with Respondent - accused. Respondent had purchased battery plates from the complainant and against such transaction, on 18th May 1994 issued two cheques (Exhibit 46, 47), each of Rupees Twelve Thousand. The cheques were presented to Nagar Urban Central Co-operative Bank of the complainant on 16th November 1994. The Bank sent the cheques for collection to Indira

Co-operative Bank of the accused. The cheques returned back to the complainant unpaid with memorandum (Exhibit 56) dated 22nd November 1994 reporting insufficient funds. Complainant issued notice (Exhibit 48) on 25th November 1994 through Advocate which was refused (according to the complainant around 30th November 1994). The complainant filed complaint on 5th January 1995.

(B). On behalf of the complainant, PW-1 Kacheshwar Chavan was examined. He claimed to be one of the partners and claimed that he had the power of attorney to file complaint and to give evidence. Complainant examined PW-2 Pramod Joshi from Nagar Urban Co-operative Bank to prove documents at Exhibit 54, 55 - which were registers regarding sending the cheques for collection and their return. The witness proved memo Exhibit 56 relating to dishonour of cheques. Complainant examined PW-3 Dole Asaraji from Indira Co-operative Bank, who proved that the cheques were returned unpaid for want of necessary funds.

(C). The Respondent-accused entered the witness box and deposed that she did purchase the battery plates and had issued the concerned two cheques. She stated that when she received the battery plates, they were defective and her customers started making complaints and she deposed that one of the customer made written complaint to her and even claimed compensation from her. She claims that she sent the defective battery plates to the complainant and raised dispute regarding the quality. Her evidence is that the complainant did not respondent for 2-3 months and so she issued letter to her Bank which is Exhibit 85, regarding stopping of payment.

(D). The evidence from the record of the trial Court shows that PW-1 claimed the complainant to be registered partnership firm but this was disputed by the accused. In the cross-examination of PW-1 Kacheshwar Chavan also it was suggested to him that the complainant was not a registered partnership firm and that PW-1 was not partner of that firm.

(E). The trial Court discussed the evidence and has recorded findings that the complainant had proved that the accused had issued the two cheques and the same were for discharge of debt or liability. Trial Court held that it was proved that the cheques were dishonoured due to insufficient funds in the account of the accused. It also concluded that the notice dated 25th November 1994 (Exhibit 48) was sent to the Respondent-accused on correct address. However, the trial Court found that the complainant had not proved as to on what date the notice was refused, as the envelope had postal seals only dated 25th November 1994 when the Notice was booked. The trial Court held that the complainant produced copies of the registration of the firm which showed that it was registered only on 14th October 1999, which is during pendency of the complaint. It found that the power of attorney tendered was also not proved. The trial Court held that the complainant failed to prove that prior to 14th October 1999 the complainant was registered partnership firm and that PW-1 Kacheshwar Chavan had right to file complaint as a partner of the firm or that he was power of attorney holder. The trial Court referred to Judgment in the matter of **Mr. Amit Desai and another vs. M/s. Shine Enterprises and another, reported in 2000 Cri. L.J. 2386, from Andhra Pradesh High Court** and found that complainant was unregistered partnership firm when the complaint was filed. It found that PW-1 had no right to file the complaint.

3. I have heard the counsel for both sides. The dispute has narrowed down to the question as to what is the effect of the complainant not being

a registered partnership firm at the relevant time when complaint was filed. The learned counsel for the Appellant submitted that PW-1 Kacheshwar Chavan produced photo copy of partnership deed and power of attorney. The transaction was not in question and the sending of notice was not disputed although date when it was refused was in dispute. The accused has not denied that the cheques were bounced but she has raised dispute that the battery plates were defective and the cheques could not have been presented for clearance when dispute on that count had been raised. The learned counsel for Appellant relied on the case of **Abdul Gafoor vs. Abdurahiman, reported in 2000(3) ALL M.R. (JOURNAL) 17,** and the case of **Gurcharan Singh vs. State of U.P. and another, reported in 2002 CRI. L.J. 3682 of Allahabad High Court.** It is stated that in the case of **Gurcharan Singh,** the Allahabad High Court has relied on the Judgment in the case of **BSI Ltd. and another vs. Gift Holdings Pvt. Ltd. and**

another, reported in 2000 Supreme Court Cases (Cri.) 538. The counsel submitted that the Hon'ble Apex Court has, while referring to Section 69(2) of the Indian Partnership Act, 1932 repelled the contention that suit for recovery of money would encompass prosecution proceedings also. Thus, it is argued that there was no bar to the filing of the complaint by unregistered partnership.

4. Against this, the counsel for Respondent-accused submitted that the Respondent had issued the concerned two cheques for battery plates which had been supplied. The battery plates were defective and her customers were making complaints and most of the customers returned back the defective battery plates. The accused sent the defective battery plates to the complainant for testing. The complainant did not replace the defective battery plates inspite of various requests. The complainant did not respond for 3 to 4 months and the accused was left with no

choice but to request her Bank by letter dated 8th June 1994 (Exhibit 85) to stop the payment of cheques. It is argued, relying on the Judgment in the matter of **Mr. Amit Desai** (supra) that the complaint could not have been filed by unregistered partnership and the trial Court has rightly acquitted the accused.

5. Section 69 of the Indian Partnership Act, 1932 ("Partnership Act" for short) deals with effect of non-registration of partnership firm. Sub-Section (2) of Section 69 provides that 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.

. There is no dispute regarding the fact that this Sub-Section relates to Suits, which need to be understood as Civil Suits. The complainant has relied on the Judgment in the matter of **Abdul Gafoor**, (referred supra). In Para 3 and 4 of that Judgment, there is reference to the submissions which were made before the said Court. Going through the paragraphs, I find it difficult to decipher which portion is relating to argument and which is relating to finding or the whole of the paragraphs relate to arguments. I do not intend to get diverted by the Head Notes of the Citation.

6. Coming to the Judgment in the case of **Gurcharan Singh** (supra), which is the Judgment of Hon'ble Single Judge of the Allahabad High Court, it related to Section 138 matter between M/s Sterling Novelty Products, Moradabad, a partnership firm and International Gifts Ltd., a company from Canada of which President was one Gurcharan Singh, who was made accused. Gurcharan Singh was the applicant before the High Court and dispute was raised that the Respondent firm was

unregistered. The learned Single Judge discussed Section 69 of the Partnership Act. It also considered the Judgment in the matter of **Mr. Amit Desai** (supra) to observe that the Judgment in the matter of Amit Desai had not discussed the law involved except referring to Section 69. The learned Single Judge then referred to the Judgment of the Hon'ble Supreme Court in the matter of **BSI Ltd. vs. Gift Holding Pvt. Ltd.** (supra) and observations of the Supreme Court and on that basis concluded that even if M/s. Sterling Novelty Products was not a registered firm, bar created under Section 69 of the Partnership Act had no application and proceedings under Section 138 of the Act was maintainable.

7 (A). As the learned Single Judge of Allahabad High Court has relied on the Judgment of the Hon'ble Supreme Court, I have also gone through the said Judgment. The Judgment in the matter of **B.S.I. Ltd. (supra)** shows that the

Hon'ble Supreme Court was dealing with companies and their directors struggling to get themselves extricated from the catch of prosecutions filed against them, consequent to non-payment of amounts covered by cheques issued by such companies. It appears that against those directors process had been issued by the Magistrate under Section 138 of the Act. The company moved the Board for Industrial Finance and Reconstruction (BIFR) to declare it a sick industrial company. When the proceedings were pending before BIFR under Section 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA" for short), a declaration was made by the order passed by BIFR as per Section 22(3) of SICA. On such basis the appellant BSI Ltd. contended before the Supreme Court that it was not liable to be prosecuted in view of embargo contained in Section 22(1) of SICA. Sub-Section (1) of Section 22 of SICA reads as under:

> "**22. Suspension of legal proceedings, contracts, etc.**-(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation for consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof <u>and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."</u>
>
> (Emphasis supplied)

(B). Relying on such provision, it was claimed before the Hon'ble Apex Court that all legal proceedings including prosecution would stand suspended by the operation of embargo.

(C). In Para 15 of the Judgment in the case of **B.S.I. Ltd. (supra),** the Hon'ble Supreme Court observed as under:

> "15. The fallacy of the above contention is twofold. First is, that maintainability of prosecution proceedings is not to be tested on the touchstone of any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is, there is no insurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company because the ban contained in Section 22(1) is only conditional as could be discerned from the last limb thereof which reads thus: "Except with the consent of the Board or, as the case may be, the appellate authority." It means that with such consent the court would be in a position to resort to proceedings for distress against the properties of the sick industrial company. Hence the aforesaid contention has no merit at all."

(D). In Para 19 the Apex Court further observed that:

> "19. The said contention is also devoid

> of merits. The word "suit" envisaged in Section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company". As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process."

(E). The Hon'ble Supreme Court then concluded that, if commission of the offence under Section 138 of the Act was completed before the commencement of proceedings under Section 22(1) of SICA, there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal complaint duly instituted under Section 142 of the NI Act.

8. It is quite clear that Judgment of the Hon'ble Supreme Court in the case of **B.S.I. Ltd. (supra)**, was in different context and the Hon'ble Supreme Court was clearly considering Section 22(1) of SICA. There is a sea difference between

the right to prosecute and the right not to be prosecuted unless provisions are complied. The consideration in the matter of **B.S.I. Ltd. (supra)**, was based on the claim that the prosecution cannot proceed because Section 22(1) of SICA had got attracted. In the present matter, it is a question of right of the complainant, if it has any, to prosecute. In this context, I find that the Judgment of the Hon'ble Andhra Pradesh High Court is much closer to the point involved in this matter. In the matter of **Mr. Amit Desai (supra)**, the Division Bench of Andhra Pradesh High Court dealt with Section 69 of the Partnership Act. It considered also the matter of **Abdul Gafoor**, referred above. In Para 15 of the Judgment, the Division Bench of Andhra Pradesh High Court observed as under:

> "15......... Explanation to Section 138 of the Negotiable Instruments Act specifically laid down that the debt or other liability means a legally enforceable debit 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."

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.

10. In the result, the Appeal is dismissed. The bail bonds of the Respondent-accused are cancelled.

[A.I.S. CHEEMA, J.]

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