

IN THE HIGH COURT OF JUDICATURE AT MADRAS
CORAM:

Reserved on	29.11.2016
Judgment Pronounced on	07.12.2016

THE HONOURABLE MR.JUSTICE M.VENUGOPAL
Crl.A.No.6 of 2014

M/s New Kruba Jeweller ..Appellant / Complainant
Vs.

V.Kanchana ..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378(4) of Cr.P.C., to set aside the order of acquittal dated 21.09.2013 passed by the Fast Track Court, Magisterial Level - II, Coimbatore in STC No.278 of 2012 and allow the Appeal.

For Appellant : Mr.S.Haroon A.L.Rashad for
M/s T.S.Gopalan & Co.,

For Respondent : Mr.P.R.Thiruneelakandan

J U D G M E N T

Preamble:

The Appellant / Complainant has focused the instant Criminal Appeal as against the Judgment dated 21.09.2013 in STC No.278 of 2012 passed by the Learned Judicial Magistrate, FTC at Magisterial Level II, Coimbatore.

2. The Learned Judicial Magistrate (FTC at Magisterial Level II), Coimbatore while passing the Impugned Judgment of acquittal in STC No.278 of 2012 on 21.09.2013 at Paragraph No.11 had interalia observed that "...in this case, the complainant is not the payee. The payee was a firm by name M/s New Kruba Jewelers. It was discussed supra that the complainant has filed the complaint only in his personal capacity and not as a partner of the firm. The complainant has not satisfied the eligibility criteria prescribed by the statute. Though the signature and issuance of cheque were admitted by the accused, the complainant has to shift the initial burden cast on him. Only on shifting the initial burden, the presumption under Section 139 Negotiable Instruments Act could be drawn. The complainant had miserably failed to shift the initial burden. In fine, the accused is not guilty for offence under Section 138 Negotiable Instrument Act" and consequently acquitted him under Section 255(1) of Cr.P.C.,

Appellant's Contentions :

3. The Learned Counsel for the Appellant / Complainant contents that the trial court in STC No.278 of 2012 dated 21.09.2013, the Appellant / Complainant has filed the present Criminal Appeal before this Court contending that the trial court had mis-directed itself in arriving at a conclusion that the Appellant / Complainant was not 'the Payee of the cheque' and this had resulted in an 'Acquittal' of the Respondent / Accused.

4. The Learned Counsel for the Appellant projects an argument that under Section 25 of the Indian Partnership Act, 1932, if a partner files a complaint on behalf of the firm, the firm and other partners are bound by this Act, but this pivotal factor was not looked into by the trial court in a proper and correct perspective.

5. The Learned Counsel for the Appellant projects an argument that the trial court had failed to take into account of the suggestion made during cross-examination in regard to partial repayment, which amounts to 'acknowledgment of debt and liability' and that the Respondent was liable to be convicted on that basis in the absence of any material.

6. The Learned Counsel for the Appellant brings it to the notice of this Court that the complaint before the trial court was filed by the Appellant's firm and in fact, P.W.1 was representing the firm and in any event, the "Judgment of Acquittal" made by the trial court without considering the merits of the case is per se, not sustainable in the eye of Law.

7. The Learned Counsel for the Appellant takes a stand that 'an act of a partner' is binding on the firm and that filing of complaint by a partner even in his individual capacity is binding on the firm.

8. The Learned Counsel for the Appellant proceeds to take a plea that just because a partner of a firm had not affixed his seal in the complaint that would not absolve the liability of the Respondent inasmuch as the issuance of cheque to the Appellant's firm was not disputed by the Respondent / Accused and that the contra observation of the trial court that Appellant / Complainant had failed to discharge the 'onus' is an incorrect one, considering the facts and circumstances of the present case.

Appellant side order / Decisions:

9. The Learned Counsel for the Appellant cites the order dated 18.09.2015 in CrI.R.P.No.272 of 2007 between Shaji C.

Varki Proprietor, Kottayam V. M/s United Bankers, K.K.Road, Kottayam (Registered Partnership Firm rep. By its Partner Sri Joseph John, Kottayam) and another of the Kerala High Court wherein at Paragraph No.5 it is observed as under:-

"5. Going by the impugned judgment, it is seen that the accused had challenged the competency of the complainant to represent the firm. The complainant has produced Ext.P.1 deed of partnership to show that the partnership was re-constituted after the death of one of the partners. Therefore, the courts below rightly rejected the challenge against the competency of P.W.1 to represent the firm. It was also contended that the firm was not a registered one. Going by Section 141 of the N.I.Act, an unregistered firm also is full under Section 141 of the N.I.Act. Therefore, even though the firm was not a registered one, there is no legal infirmity or illegality in proceeding with the complaint under Section 138 of the N.I.Act by the firm. Thus, the learned Sessions Judge has rightly considered all the points raised in the appeal and dismissed the appeal. There is no illegality or impropriety in any of the findings in the impugned judgment under challenge."

10. The Learned Counsel for the Appellant relies on the decision of M/s. Beacon Industries, rep. By its Partner Bangalore V.Anupam Ghosh reported in ILR 2003 Karnataka at Page 4325 at Special Page 4328 and 4329 at Paragraph no. 6 it is observed as under:-

"6. In the case of Abdul Gafoor V. Abdur Rehman (1999 (4) Crimes 1998 the Kerala High Court held that an unregistered firm can prosecute a complaint under Section 138 of the Negotiable Instruments act and the effect of non-registration of a firm under Section 69 of the Partnership Act is applicable only to a case involving civil rights.

Further, the Supreme Court in the case BSI Ltd., and Another V. Gift Holdings Pvt., Ltd., and Another (2000 SCC (Cri) 538 has held that:

"... 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."

Again in the case of Gurcharan Singh V. State of U.P.

and Another (2002 (4) Crimes 165 the Allahabad High Court has followed the above said Judgment of the Supreme Court.

Therefore, in view of the above decisions of the Supreme Court as well as of the other High Courts, the contention of the respondent 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 no legal bearing on the criminal case. Hence the finding recorded by the Trial Court is totally incorrect and illegal and the same is liable to be set aside."

11. Besides the above, the Learned Counsel for the Appellant brings it to the notice of this Court the decision of Karthik & Co., rep. By its Manager S.P.Sekar, Thiruppur V. Vadivel and Sizing & Weaving Mills Private Limited rep. By its Managing Director, Saminathan, Thiruppur and another reported in 2012 (3) MWN (Cr) (DCC) 49 (Mad) wherein at Paragraph Nos.8 to 10, it is observed as under:-

"8. If the complainant prefers to recover money by filing a Civil Suit, he cannot do so in view of the bar contained in Section 69(2) of the Partnership Act. The learned counsel for the Respondents / Accused placed reliance upon a Division Bench decision of Andhra Pradesh High Court in Amit Desai and another V. Shine Enterprises and another, 2000 Cri. L.J.2386, wherein it is held 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 unregistered Firm, the bar equally applies to Criminal Case, as laid down in Explanation (2) of Section 138 of Negotiable Instruments Act.

9. Excepting the above said decision, most of the High Courts of this country have taken a constant view that the bar under Section 69(2) of the Act is not applicable to a Criminal Complaint filed by an unregistered firm. In so far as the decision in Amit Desai and another V. Shine Enterprises and another, 2000 Cri.L.J.2386 (supra) it is based on the explanation to Section 138 of the Negotiable Instruments Act. It goes as follows:

"For the purpose of this Section, "debt or other liability" means a legally enforceable debt or other

liability."

10. The above said decision has been referred by Assam High Court and it is opined that sub-section (2) of Section 69 of the Partnership Act debars a suit to enforce a right arising from a contract by or on behalf of a Firm against any third party if the Firm is not registered under the Act. The said provision relates to instituting a Criminal prosecution for launching Criminal action as prescribed by the special statute. With those observations, the Assam High Court has deferred with the view expressed in the case of Amit desai and agreed with the decision in Indrajit Gogai V. Auto Safes and Service Station, 2008(3) GLR 440; and in the case of Keara Arecanut Stores V. Ramkishore and Song, AIR 1975 Ker. 144(Supra). I follow the decision in BSI Ltd., and another by Supreme court and respectfully agree with the view taken by this Court in Jothi Sarees V. Pan.Muruganantham, 2006(1) MWN (Cr1.) (DCC) 45: 2006 (1) TNLR 534(Mad) and other High Courts in this regard.

12. The Learned Counsel for the Appellant draws the attention of this Court to the decision Jothi Sarees, Erode rep. By its Partner, Subramania Gounder V. Pon.Muruganantham, Proprietor, Tanraj Textiles 2006(1) MWN (Cr.) (DCC) at Page 45 at Spl. Page 48 wherein at Paragraph Nos.9 and 10 it is observed as under:-

" 9. On a perusal of the entire materials available on record and also hearing the rival contentions put forward by the learned counsel for the parties, I am of the considered view that out of two reasons given by the learned Magistrate one reason is correct, but the other one viz., that the Complaint is not maintainable on the ground that though the Complaint was preferred by the partnership firm the complainant has not produced any document to substantiate the version of filing the complaint as a partnership firm. The reason assigned by the learned magistrate that non-maintainability of Complaint filed by the unregistered partnership firm is not sustainable in Law.

10. It is needless to say that such argument is available in respect of the Civil Case and not in respect of the case under Negotiable Instruments act with a penal provision under Section 138 of Negotiable Instruments act."

13. Apart from the above, the Learned Counsel for the Appellant cites the following decisions:-

(i) In the decision of Hon'ble Supreme Court BSI Limited and Another V. Gift Holdings Private Limited and Another reported in (2000) 2 Supreme Court Cases at Page 737 and at special page 738 and 739 wherein it is observed and laid down as follows:-

"The word "suit" envisaged in Section 22(1) of SICK Industrial Companies (Special Provisions) Act 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 by resorting to the maxim *contemporanea expositio est optima et fortissima in lege* (contemporaneous exposition is the best and strongest in law). A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI 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 sentence on proof of the guilt in duly conducted criminal proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability."

Also in the aforesaid decision at Special Page 743 at Paragraph Nos.16, 17 and 20 it is observed as under:-

"16. It was next contended that the ban against maintainability of a suit for the recovery of money would encompass prosecution proceedings also. To support the said contention reliance was sought to be made on the following meaning of the word "suit" as given in Bouvier's Law Dictionary:

"Suit is a generic term of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of any injury or the recovery of a right..... In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, information and a conviction by a Magistrate."

17. Learned counsel invited our attention to the maxim *contemporanea expositio est optima et fortissima in lege* (contemporaneous exposition is the best and strongest in law) for the purpose of stretching the scope of the word "suit" to envelop criminal

prosecution as well.

20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI 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. What was considered in Maharashtra Tubes Ltd., (2 (1993) 2 SCC 144) is whether the remedy provided in Section 29 or Section 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of SICA. Hence the legal principle adumbrated in said decision is of no avail to the appellants."

(ii) In the decision of Hon'ble Supreme Court Haryana State Co-operative Supply and Marketing Federation Limited V. Jayam Textiles and Another reported in (2014) 4 Supreme Court Cases at page 704 at Special page 706 and 707 wherein at Paragraph No.2, it is observed as follows:-

"2. The facts of the two appeals are : the appellant Federation supplied cotton bales to the respondents of the value of Rs.30,45,602 vide three invoices dated 19-12-1994, 21-12-1994 and 20-1-1995. The respondents, to discharge their liability, issued in total four cheques - two cheques for Rs.5 lakhs each dated 16.01.1995 and 20-1-1995 respectively. However, on presentation, all the said four cheques were returned unpaid by the bank with an endorsement "for want of sufficient funds". The appellant Federation sent legal notice(s) dated 19-4-1995 and 27.04.1995 under Section 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act"), which were duly received by the respondents. On failure of the respondents to pay the amount within the stipulated time of 15 days from the date of receipt of the notice, the appellant Federation filed complaints under Sections 138 and 140 of the NI Act read with Section 420 of the Penal Code, 1860 (for short "IPC") against the respondents. The said complaints were dismissed by the Judicial Magistrate vide order dated 07.02.2001 and the appeals filed against the said order were dismissed vide impugned judgment dated 18.06.2007 (1 (2007) 2 MWN (Cri) DCC 69)"

Respondent / Accused side Submissions:

14. Conversely, it is the submission of the Learned Counsel for the Respondent / Accused that an unregistered firm cannot

maintain a criminal case against a third party and 'Enforcement Legal Liability' has to be in respect of a civil suit and in the present case on hand before the trial court, on behalf of the Appellant / Complainant the un-registered partnership deed dated 03.04.1986 was not produced and marked as an Exhibit, (before the trial court) as a result of which, a categorical finding was rendered that the Appellant / Complainant had filed the complaint in his personal capacity and not as a partner of the firm and further that the eligibility criteria prescribed by the statute was not full-filled by the Appellant / Complainant. Moreover, it is represented on behalf of the Respondent that the payee firm was the Appellant / M/s New Kruba Jewellers and that complainant was not the payee. In reality, the trial court at Paragraph No.10 of its Impugned Judgment had opined that the complaint was signed by C.B.B.Sharavanan in his individual capacity and that the same was not found mentioned with the seal of the firm and was not signed by the complainant as a partner of the firm.

15. The Learned Counsel for the Respondent contends that finally the trial court came to the conclusion that 'only shifting initial burden the prosecution under Section 138 of the Negotiable Instruments Act can be drawn' and held that the Appellant / Complainant had miserably failed to shift an initial burden and found the Respondent / Accused not guilty under Section 138 of the Negotiable Instruments Act and resultantly acquitted him.

Respondent side citations :

16. The Learned Counsel for the Respondent / Accused cites the Hon'ble Division Bench decision of Andhrapradesh High Court in Amit Desai and Another V. Shine Enterprises and Another reported in CDJ Law Journal 2000 APHC 168 wherein at Paragraph Nos.15 and 16 observed as under:-

15. The learned counsel Mr.C.Padmanabha Reddy further relied upon a ruling reported in Kerala Arecanut Stores V. M/s Ramkishore and Sons, AIR 1975 Kerala 144. 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 V. Abdurathiman (1999) 2 Andh LT (Cri) 196. 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 differ 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 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."

17. The Learned Counsel for the Respondent relies on the decision of Kaushalya Devi Massand V. Roopkishore Khore reported in CDJ 2011 SC 296 wherein it is observed that 'an offence under Section 138 of Negotiable Instruments Act, is almost in the nature of civil wrong, which has been given criminal overtones'

18. The Learned Counsel for the Respondent refers to the decision of Sai Accumulator Industries Sangamner, through its Partner K.S.Chavan V. Sethi Brothers Aurangabad through its owner reported in CDJ 2016 BHC 446 and wherein at Paragraph No.9, it is 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 saie 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.

19. In the decision Krishna Texport Industries Limited V. Dem Limited reported in 2008 SCC Online (Delhi High Court) at page 659 at Paragraph No.32, it is observed as under:-

"32. The sancity of the proceedings Under Section 138 of the NI Act must, thus, be preserved and those proceedings must continue as they arise out of the failure of the company's Directors to honour the Negotiable Instrument duly signed by them like a

cheque. The proceedings under Section 138 of the NI Act are not for recovery of claim of money by a creditor for which the remedy would be by filing a civil suit"

20. He also cites the decision of Ranjan Sengupta V. The State of West Bengal and Another in the Judgment dated 11.02.2010 at C.R.R. No. 3166 of 2009 at Paragraph no.5, it is observed as under:-

"5. The next contention of the petitioner that the case has been abated because of the fact the person through whom the complaint was filed by the partnership firm, M/s Creative Construction has retired and left the firm is equally not tenable. In a case relating to an offence punishable under Section 138 of the Negotiable Instruments Act where the payee, who will be the complainant, is a juristic person, in this case a partnership firm, ought to be represented by any natural person, who may be anyone of its partner or any duly authorized person and such partnership firm can always be represented at the different stage of proceeding by different persons, viz., by any of its partners or by any authorized representative. There is no law the person who represented a partnership firm at the initial stage shall have to represent it till the end of trial, even when such person lost is authority due to his retirement or for any other reasons. It is highly preposterous to suggest that merely because the person who initially represented the partnership firm has retired as a partner then in that case the retiring partner cannot be substituted by the existing partners or by any authorized person of the partnership firm. In this connection reliance may very well be placed in the case of Associated Cements V. Kesvand, reported in 1998 SCC (CRI) 475".

Also in the aforesaid decision it is observed among other things that

".....The provisions of Section 143 has been inserted in the Negotiable Instruments Act by the Act 55 of 2002 with effect from 6th February, 2003 and by insertion of such provisions a Court has been empowered to try summarily an accused for an offence punishable under the said Act, and to impose a sentence exceeding three months which is not otherwise permissible under the Code of Criminal Procedure. Before such amendment all trials relating to any offence punishable under the Negotiable Instruments Act were held by following the procedure for trial of summons case. In the case at hand, trial was commenced long before such provisions for summary trial being introduced in the N.I. Act and the petitioner was althrough tried by the Court

following the procedure prescribed for summons trial and not in a summary way. The recording of evidence was commenced in the year 2000, thereafter also the rest of the witnesses of the complainant as well as the petitioner was examined as a defence witness following the procedure prescribed for a summons case. No part of the trial was held in a summary way and the accused person never took any objection to that even after amendment. It is true that the evidence was recorded at different stage by different Magistrates. Since, entire evidence was recorded during the trial not the substance of the evidence and the trial was not held in a summary way, thus, the accused person cannot be said to have suffered any prejudice. In view of the fact the trial was commenced as a regular summons case and not in a summary way and uptil now continued following the procedure prescribed for summons trial and not in a summary way, the bar contained in sub-section (3) of Section 326 of the code is not at all attracted."

Discussions :

21. At this juncture, this Court relevantly points out the decision of Hon'ble Supreme Court *KD Kamath & Co., V. CIT* (Commissioner of Income Tax) reported in 1971 (2SCC) at Page 873) wherein it is held that (a) There should be an agreement to share the profits as well as the losses of business (b) The business must be carried on by all or any of them acting for all, within the meaning the definition 'under Section 4 of Partnership Act, 1932'.

22. Also that whether a partnership exists or not is a question of fact, as opined by this Court. In fact, Order 30 of Civil Procedure Code enjoins that suits to be filed against 'Firms'. In reality, 'SUMMONS' can be issued against a firm or against persons, who are purported to be partners individually but it cannot be forgotten that the suit, proceeds only against the firm. An individual who is summoned before a Court of Law can establish that he is not a partner at any point of time. However an individual, who admit that they are partners can defend the firm, raise as many necessary pleas as they desire. In case, when a decree is passed, it is against the firm and the said decree can be executed against the property of the partnership and also against two classes of persons individually it is to be remembered that before a passing of a decree in a suit it is always open to a person to establish that he was not a partner.

23. It is a well settled preposition of Law that the status of the partner qua the firm is not that of a Master and a Servant or Employer and Employee but it is one of 'Equality'. It cannot be gainsaid that each partner shall be liable as if the debt of the firm was incurred on his personal liability. In

terms of ingredients of Section 43 of the Indian Contract Act, 1872 joint promise of every kind create a joint and several obligation in the absence an express agreement to the contrary. An every partner in a trading firm as an implied authority to borrow money for the purpose of the business or credit of the firm.

24. Besides the above, this Court significantly points out that a person / individual connected with the affairs of the company made be either its Manager, Partner, Managing Director can represent it during the course of legal proceedings before a Court of Law. The existence of legal recoverable debt is not a matter of presumption under Section 139 of the Negotiable Instruments act. Of course, Section 138 of Negotiable Instruments Act is a penal provision. The presumption under Section 118 of Negotiable Instruments Act is a rebuttable one. Section 139 of Negotiable Instruments Act applies only if 'cheque' was proved to be of a character mentioned in Section 138 of the Act.

25. No wonder, when a complainant is not a 'Holder in due Course', he cannot maintain the complaint, in the considered opinion of this Court. In this connection, it is not out of place for this Court to make a pertinent mention that 'payee' in Law alone whether corporeal or in incorporeal person can be the complainant. Moreover, a cheque issued by one Partner (on behalf of the firm) when it is bounced and a complaint is lodged against a partner issuing cheque and against others then, unless there is a recital in the complaint to the effect that other partners were incharge and against other responsible person (s) for conduct of business of a firm, the complaint against other partners is not maintainable. This is because of the fact that Section 141 of Negotiable Instruments Act Clause (a) of explanation states that the expression 'Company' includes a firm as per decision Amith V. Anilkumar Mehra 1996 (1) Crimes Page 412. That apart, for prosecution of a partner of a firm there ought to be pin pointed specific allegations / averments in regard to the part played by partner on such capacity.

26. It is to be pointed that a partner is an agent of the firm for the purpose of business of the firm as per Section 18 of the Indian Partnership Act, 1932. Section 19 enjoins an implied authority of partner as an agent of the firm. It provides that an act of partner who is performed to carry on, in the usual way, the business of the kind carried on by the firm, binds the firm. Section 20 of the Act refers to Extension and Restriction of partner's 'Implied Authority'. Section 22 specifies the Mode of Performing an Act to bind the firm. It provides that in order to bind a firm an act or instrument done or executed by a partner or other individual on behalf of the firm shall be done or executed in the firm name or in other

manner expressing or implying an intention to bind the firm. Besides this, Section 182 of the Indian Contract Act, 1872 mentions that an 'Agent' is the person employed to do any act for another or to represent another in dealing with third person.

27. In regard to a case pertaining to Section 138 of Negotiable Instruments Act, 1881, it is the prime responsibility of the complainant to specify necessary averments in the complaint with a view to make an accused 'vicariously liable'. For saddling with a criminal liability, there is no assumption or presumption that every partner knows about the transaction. The essential condition is that a partner, who was responsible for 'Carrying on the Business' and at the relevant point of time was 'incharge of business and in the absence of any concrete proof, ordinarily, a partner cannot be convicted.

28. An obligation on the part of a partner to prove that at the time of offence was committed he was not incharge and was not responsible to the firm for the conduct of its business would crop-up when the complainant makes relevant averments in the complaint and proves the said facts in the manner known to Law.

29. Section 25 of the Indian Partnership Act enjoins that every partner is liable, jointly with rest of the partners and also severally, for all acts of the firm performed, while he is a partner. There is no two opinion of a candid fact that a 'firm' is not a legal entity and it is only a compendious name for all the partners. To put it differently, a 'firm' does not have any independent existence leaving its partners.

31. Insofar as The Indian Partnership Act, 1932 is concerned, an unregistered firm is not an illegal one. Although there is no compulsion for a partnership firm ought to be registered, but it is to be kept in mind that the disabilities arising thereto because of 'non-registration' would be certainly an inconvenient one. As a matter of fact, no member can enforce his rights under partnership contract either against the firm or any past or present member, nor can the firm sue its customers for their contracts as per decision AIR 1975 ORI 84 (Afsar Hussain V. Trilokchand and Premchand).

32. The Prohibition specified in Section 69 of the Indian Partnership Act is in respect of initiating a proceeding to enforce a right arising out of a contract in any Court by an unregistered firm. Also that 'Non-registration of firm' has of no consequence in criminal proceedings as per decision Abdul Gaffoor V. Abdul Rehiman reported in (1999) 2 Kerala Law Times 634.

33. As far as the present case is concerned, on perusal of the complaint filed by the Appellant / Complainant (New Kruba Jewelers) under Sections 138 and 142 of Negotiable Instruments Act and Section 417 of IPC r/w Section 200 of Cr.P.C., this Court finds that the Appellant / Complainant had only mentioned that it is a partnership firm rep by its partner, C.B.B.Sharavanan. Furthermore, there is no indication in the complaint that the Appellant / Complainant is an unregistered firm. Also that the said partner had affixed the signature in the verification column as complainant only in his personal / individual capacity and not described himself as an partner, the Managing Partner of the firm. Even in the Ex.P.5, Lawyer's Notice dated 11.11.2008 issued on behalf of the Appellant / Jewellers, a partnership firm represented by its partner C.B.B.Sharavanan addressed to the Respondent / accused, there was no mention that the firm is a registered one.

34. In fact, the said Ex.P.5, Lawyer's notice is conspicuously silent as to whether the partner C.B.B.Sharavanan of the appellant is its managing partner.

35. Moreover, there was also no mention in the complaint of the Appellant that there were other partners in the Appellant's firm. The entire complaint of the Appellant proceeds to the effect that they are running a Jewellery shop under the name and style of M/s New Kruba Jewellers and further that the Respondent / Accused had purchased six gold bangles and two gold chains for a sum of Rs.2,50,000/- under Invoice No.85 dated 10.07.2008 from it. At this stage, this Court points out that Section 21 of Indian Penal Code defines a term 'person' which includes any company or association or persons whether incorrect or not. One cannot loose sight of an essential fact that Section 3(42) of the General Clauses Act is akin to Section 21 of the Indian Penal Code, 1860. The words 'another person' in Section 138 of Negotiable Instruments Act are not explained. The term 'Drawer' in Section 138(b) of the Negotiable Instruments Act could not be restricted in sense to the 'Drawer' of a cheque alone but to those who were presumed to be guilty of an offence. The maker of Bill of Exchange is called 'Drawer'. The 'Drawer' is a person, who signs the 'Bill of Exchange' giving an order to another individual, the 'Drawee' to pay the amount mentioned therein.

36. It is an axiomatic principle in Law that a criminal proceeding can be set in motion by any affected person viz., 'holder of cheque in due course'. The principle 'locus-standi' is alien to criminal jurisprudence. In this connection, this Court necessarily points out the decision of Hon'ble Supreme Court in Manohar Lal V. Vinesh Anand and Others (AIR 2001 Supreme Court 1820) wherein it is laid down as follows:-

"To pursue an offender in the event of commission of an offence is to sub-serve a social need - Society cannot afford to have a criminal escape his liability. Since that would bring about a state of social pollution, which is neither desired nor warranted and this is irrespective of the concept of locus- the doctrine of locus-standi is totally foreign to criminal jurisprudence."

37. It is not out of place for this Court to point out that a direct evidence with one of the several partners had an authority to acknowledge liability is not necessary. The said authority can be inferred from the surrounding circumstances. Further more, the act of the partner which is performed in a routine manner in relation to the business of the firm, may include the power to acknowledge the liability in a usual manner.

38. A mere running of the eye over the contents of the complaint dated 16.09.2008 of the Appellant / Complainant (before the trial court) latently and patently point out that the complaint is significantly absent in regard to persons who are the partners, responsible for conduct of business of the firm. Except in the sworn statement of C.B.B.Sharavanan he had mentioned that he is a partner of the 'Kruba Jeweller' (A partnership firm) and further he had mentioned that he is the complainant, in fact in the complaint also he had not mentioned that he is the Managing Partner of the firm and further authorised to file the complaint on behalf of the Firm. Even in the recorded sworn statement before the trial court at the time of taking cognizance of the complaint, the said C.B.B.Sharavanan, partner of the Appellant's firm had not stated that as a 'Managing Partner' he was authorised by the Appellant firm to file the complaint. Further, he had not spoken about the Appellant firm whether it being a registered or unregistered one. Only for the first time before this Court on behalf of the Appellant in the typed set of papers dated 21.11.2016, the copy of the partnership deed dated 03.04.1996 was filed.

39. Upon a query being raised by this Court as to whether the said partnership dated 03.04.1996 was a registered one, the Learned Counsel for the Appellant informs the Court that the Partnership deed dated 03.04.1996 is an unregistered one. By placing reliance on the said unregistered partnership deed dated 03.04.1996, the Learned Counsel for the Appellant takes a plea that as per Clause 9 of the said partnership deed dated 03.04.1996, one Mr.B.B.Balaji (3rd Party and another B.B.Saravanan S/o Balavenkatraman are authorised to sign in agreement, tender individually / jointly on behalf of the firm. Further, they are advised to file and conduct suits in Courts of

Law on behalf of the firm and similarly be sued by other or other party. In fact, the clause 10 of the said partnership unregistered deed dated 03.04.1996 envisages, that all the parties shall be the working partners of the firm and would be responsible for day today administration of the business of the firm, the working partners would be entitled to remuneration for the service rendered by them.

40. At this stage, this Court worth recalls and recollects the decision of Abdul Gafoor V. Abdur Rehman (1999 (2) Kerala Law times at page 634 wherein it is held that 'The effect of non-registration of partnership firm under Section 69 of the Partnership Act is applicable only to case involving civil rights and it has no application to criminal case'.

41. Also this Court aptly points out the decision of Hon'ble Supreme Court Haldiram V. Bhujwala V. Anand Kumar Deepak Kumar reported in 2000 2 MLJ (SC) at Page 159 wherein it is held as follows:-

"A suit is not barred by Section 69(2) of the Partnership Act if a statutory right or a common law right is being enforced. It is well settled that a passing off action is a common law action based on tort. Therefore, a suit for perpetual injunction to restrain the defendant not to pass off the defendant's goods as those of plaintiffs by using the plaintiff's trademark and for damages is an action at common law and is not barred by Section 69(2). If the reliefs of permanent injunction or damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is not barred by Section 69(2). If the reliefs of permanent injunction or damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act and is not barred by Section 69(2). In both these situations, the unregistered partnership in the case before the court cannot be said to be enforcing any right arising from a contract."

42. Furthermore, an HOMO-SAPIEN is to keep in mind that 'filing of complaint is only for the purpose of cognizance and only during the trial of the main case the prosecution ought to adduce evidence', in the considered opinion of this Court.

Conclusion:

43. In the upshot of detailed qualitative and quantitative discussions as mentioned supra and also this Court taking note

of the surrounding facts and circumstances of the instant case in an integral manner comes to an inevitable conclusion that the Appellant / Complainant / Jewellers before the trial court had not produced the unregistered Partnership Deed dated 03.04.1996 and further in the complaint filed by the Appellant he had filed the same by signing only as a complainant in his individual status / capacity without affixing seal / Rubber stamp of the firm (although in the cause title of the complaint Appellant / Firm was shown as one represented by its partner C.B.B.Sharavanan) and furthermore this Court bearing in mind that before the trial court the plea of 'maintainability of complaint' was not taken on behalf of the Respondent / Accused (not withstanding the fact that it is the legal plea), yet this Court without delving deep any further is of the considered view that an opportunity is to be provided to the Appellant / Complainant to file the unregistered Partnership Deed dated 03.04.1996 and to mark the same (Of course, subject to Proof, Relevancy and Admissibility). Viewed in that perspective this Court opines that the remand of the matter is just and necessary otherwise there would be a failure of justice. Also that based on the available materials on records, it is not possible for this Court to effectively and efficaciously pronounce the Judgment in Appeal. Moreover, if the subject matter in issue is not remanded to the trial court for fresh consideration in accordance with Law, then, this Court opines that there would be 'Failure and traverse of Justice'. Accordingly, this Court by exercising its sound judicial discretion interferes and sets aside the Judgment of the Learned Judicial Magistrate (FTC Magisterial Level II, Coimbatore) in STC No.278 of 2012 dated 21.09.2013 and remits back the entire subject matter in issue (without expressing any opinion on the merits of the matter one way or the other) for its fresh consideration with an unbiased, free, fair, open mind and in a dispassionate manner, in accordance with law. Consequently, the Criminal Appeal succeeds.

सत्यमेव जयते

44. In fine, the present Criminal Appeal is allowed. The Judgment of the trial court dated 21.09.2013 in STC No.278 of 2012 is set aside by this Court for the reasons assigned in this appeal. It is lucidly made clear that the trial court is directed to provide necessary opportunities to respective parties, to adduce further oral and documentary evidence by examining witnesses (if they so desire / pleases) and to mark the documents in STC No.278 of 2012 (of course after adhering to the Principles of Natural Justice in the manner known to Law and in accordance with Law). Liberty is granted to both sides to raise all factual and legal pleas before the trial court. Further, the trial court is directed to dispose of the main case

in S.T.C.No.278 of 2012 on its file afresh, in any event, within a period of three months from the date of receipt of copy of this Judgment and to report to this Court without fail.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssd

To

1. Fast Track Court, Magisterial Level - II, Coimbatore
2. The Public Prosecutor, High Court, Madras.
3. The Registrar Judicial, High Court, Madras
(For favour of Information and necessary follow-up action)

4.The Judicial Magistrate No.5 Coimbatore

5.Thro The Chief Judicial Magistrate Coimbatore

copy to

The Section Officer
Crl.Section
High Court Madras

+1 cc to Mr.P.R.Thiruneelakandan Advocate sr 72272

+1 cc to M/s.T.S.Gopalan Advocate sr 71952

Crl.A.No.6 of 2014

rj(co)
aa05/01/2017

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