

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Appeal No.452 of 2006

Between:

M/s. Sri Sai Karuna Finance & Enterprises

Rep. by its Managing Partner

G. Gangadhar.

.... Appellant/Complainant

AND

Smt. N. Sandhyarani

and another.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: **24.10.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgment?

Yes / No

2. Whether the copies of judgment may be
marked to Law Reporters / Journals?

Yes / No

3. Whether His Lordship wish to
see the fair copy of the Judgment?

Yes / No

U. DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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.... Respondents

! Counsel for Appellant : Sri Ch. Janardhan Reddy

^ Counsel for Respondent No.1 : Sri S. Ashok Anand Kumar

^ Counsel for Respondent No.2: Public Prosecutor for State (TG)

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> Head Note:

? Cases referred:

- 1) MANU/SC/0376/2010 = AIR 2010 SC 1898
- 2) (2008) 4 SCC 54
- 3) (2006) 6 Supreme Court Cases 39
- 4) AIR 2008 SC 278
- 5) 2000 CrI.L.J.2386
- 6) MANU/KE/1020/1999
- 7) 2017 (3) Crimes 42 (Bombay)
- 8) 2002 CrI.LJ 3682 = 2003 (1) ALD (CrI.) 121
- 9) AIR 1975 Kerala 144 = MANU/KE/0039/1975
- 10) MANU/KA/0541/2003
- 11) (2000) 2 SCC 737
- 12) MANU/DE/1868/2017

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**Criminal Appeal No.452 of 2006****JUDGMENT:**

The challenge in this Criminal Appeal at the instance of the complainant is the judgment dated 12.05.2005 in Criminal Appeal No.37/2004 passed by the learned Sessions Judge, Nizamabad, whereunder the appeal was allowed and conviction and sentence recorded in C.C.No.170 of 1999 by the Additional Judicial Magistrate of First Class, Nizamabad against the respondent for the offence under Section 138 of Negotiable Instruments Act, 1881 (for short "N.I. Act") was set aside.

2) The parties in this appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case in brief is thus:

a) M/s. Sri Sai Karuna Finance and Enterprises, who is the complainant is a partnership firm engaged in finance business at Nizamabad. It filed C.C.No.170 of 1999 before the Additional Judicial Magistrate of First Class, alleging that the accused, who is the Proprietrix of Jaya Sree Gas Agencies of Bharat Gas, Nizamabad for her business purpose borrowed Rs.1,20,000/- from complainant and issued a post-dated cheque No.006615 dated 22.01.1999 for the said amount drawn on Andhra Bank, Nizamabad Branch in favour of complainant and when complainant presented the said cheque with his banker i.e,

State Bank of India branch, Nizamabad on 22.01.1999 for collection, the said cheque was returned with a memo stating “exceeds arrangement” and thus the cheque was dishonoured. An intimation memo was issued to the complainant on 23.01.1999. Following the mandatory procedure laid under Section 138 of N.I. Act, the complainant issued statutory notice on 27.01.1999 to accused but the accused refused to receive the said notice and hence it was returned. Hence the complaint.

b) During trial, PWs.1 and 2 were examined and Exs.P.1 to P.8 were marked on behalf of complainant. DWs.1 to 3 were examined and Ex.D.1 was marked on behalf of defence.

c) The defence plea of accused in nutshell is that she is a war widow as her husband, who worked as Captain in the Indian Military (Indian Peace Keeping Force (IPKF)), died at Sri Lanka and the Government sanctioned her Gas Agency under Military quota in 1996 at Nizamabad and she started the Jaya Sree Gas Agency on 26.03.1996. She belongs to Srikakulam and she had no experience in the said business and so she entrusted the management of her Gas Agency to one Rama Krishna and Prasad, who worked as Manager and Assistant Manager, respectively. One week after inauguration, she left for Vizag due to health problem. At the request of both of them, she handed over the blank cheque books and letter pads with her signatures to them in the Nursing Home at Vizag. Both Rama Krishna and Prasad misused the blank cheques, borrowed amounts from different persons and issued cheques containing her signatures to make her liable. In March, 1999 on being informed by

her Sales Manager about the misdeeds of both Rama Krishna and Prasad, she went to Nizamabad and removed them from service. She came to know about the misuse of the blank cheques after the cases were filed against her on the strength of the cheques. Thus her case is that she did not borrow any amount and tender the disputed cheque to the complainant in discharge of the debt.

d) The Trial Court having regard to the fact that Ex.P.1—cheque contained the signature of accused and she did not receive Ex.P.3—legal notice and give any reply, opined that the presumption under Section 139 of N.I Act would operate and thereby the burden would rest on her to rebut the presumption. In that process, the Trial Court on appreciation of the defence evidence, ultimately held that the accused failed to rebut the presumption and on the other hand, the complainant successfully established its case and accordingly, convicted her for the offence under Section 138 of N.I Act and sentenced her to undergo simple imprisonment for a period of six(6) months and to pay a fine of Rs.5000/- and in default to suffer SI for three(3) months.

4) Aggrieved, the accused filed CrI.A.No.37 of 2004 before the Sessions Judge, Nizamabad. The lower Appellate Court took a different view regarding the veracity of the loan transaction and alleged issuance of Ex.P.1—cheque by the accused to the complainant firm. Learned Appellate Judge observed that when the appellant was contending that she never borrowed any amount from the complainant and disputing about the contents of the cheque and the amounts mentioned therein, the

Trial Court was not justified in drawing the presumption under Sections 118 and 139 of N.I Act. Then on appreciation of the evidence he expressed doubt about the genuineness of the complainant's case, observing that the complainant being a partnership firm was expected to maintain the relevant ledgers and promissory notes for lending amounts to the parties but the complainant has not produced any such record to show that accused borrowed money and in discharge of such legally enforceable debt, she issued Ex.P.1—cheque. Learned Judge observed that for non-filing of the documents, adverse inference can be drawn against the complaint under Section 114 of Indian Evidence Act. He further observed that the complainant failed to examine one Aravind, who was said to be present at the time of complainant allegedly lending money to the accused. He observed, since loan was for huge amount of Rs.1,20,000/-, the complainant lending the amount without obtaining any document or promissory note was unbelievable, particularly, when accused was not known to any of the partners of the complainant firm and she was not a permanent resident of Nizamabad and a stranger to the complainant company. He observed, merely because PW.1 obtained gas connection from the agency of the accused, it cannot be believed that the complainant would lend money without obtaining promissory note and the signatures of accused on the concerned ledgers. The Appellate Court also observed that the firm of the complainant was not registered by the date of filing of the complaint i.e, 22.02.1999 but it was registered on 24.02.1999 with the Registrar of Firms. On all these observations, the lower Appellate Court held that the complainant failed

to make out the ingredients of offence under Section 138 of N.I. Act and accordingly, dismissed the complaint by allowing the appeal.

Hence the instant appeal by the complainant.

5) Heard arguments of Sri Ch. Janardhan Reddy, learned counsel for appellant and Sri S. Ashok Anand Kumar, learned counsel for 1st respondent.

6) Severely fulminating the judgment of the lower Appellate Court, learned counsel for appellant/complainant would argue that the appellate Court failed to notice that since the accused was not disputing her signature on Ex.P.1—cheque, the presumption under Section 139 of N.I Act would automatically apply whereby the burden will be heavy on her to establish that she did not borrow any amount and issue Ex.P.1 to complainant in discharge of legally enforceable debt. Instead, the Court placed burden on the complainant and even then, the complainant discharged his burden successfully by examining PWs.1 and 2 and producing Exs.P.1 to P.8. Merely because the complainant did not produce the promissory note and ledger accounts in proof of lending money, that cannot be treated as a ground to discard its case. PW.1 clearly stated that though generally they will obtain pronotes from the borrowers, sometimes they will lend money on cheques. Hence non-filing of the pronote or the ledger accounts is not a consequence for jettisoning complainant's case which was otherwise established firmly. He would further argue that the defence of the accused was a self-serving one rather than having any conviction, for, the accused took the

plea as if her staff members Prasad and Rama Krishna on whom she reposed confidence and handed over blank signed cheques and signed letter pads misused them and borrowed monies from different persons. However, she miserably failed to produce any reliable evidence to vindicate her defence. She claimed as if Prasad later showed repentance and issued Ex.D.1—affidavit narrating all the misdeeds allegedly committed by him. Except producing Ex.D.1—affidavit and examining DW.3—advocate who notarised the said affidavit, the accused has not examined the said Prasad or Ramakrishna to establish that they, for their needs, borrowed amounts from the complainant and tendered the blank cheque signed by accused to complainant as a security. Learned counsel strenuously argued that in the absence of such evidence, the defence plea would not gather any mass. He further argued that firm of the complainant was duly registered and doing money lending business with proper licence and hence the accused is liable to be convicted. He thus prayed to allow the appeal.

7) In oppugnation, learned counsel for 1st respondent/accused argued that it is the firm case of accused that she never approached complainant to borrow loan and she did not issue Ex.P.1—cheque for any legally enforceable debt. Hence merely because Ex.P.1 contains her signature it cannot be readily presumed that she issued the cheque to complainant. Hence the presumption under Section 139 of N.I Act cannot be drawn against her. The complainant failed to discharge his initial burden to show that indeed the complainant firm lent a huge amount of

Rs.1,20,000/- to the accused. As rightly observed by the lower Appellate Court, the complainant did not produce any iota of documentary evidence such as promissory note, ledger accounts, etc. Further, the complainant had also not examined one Aravind, who was said to be present at the time of alleged loan transaction. Hence the lower Appellate Court rightly held that the complainant failed to discharge its initial burden. Added to it, the complainant was an unregistered firm as on the date of filing of the complaint and therefore, the complaint was hit by Section 69 of Indian Partnership Act, 1932. He further argued the firm had no money lending licence as on the date of alleged loan. He placed reliance on several decisions, which will be discussed presently. He thus prayed to dismiss the appeal.

8) The points for determination in this appeal are:

(i) *Whether in the fact situation, the presumption under Section 139 of N.I Act is applicable against the accused?*

(ii) *If point No.1 is held affirmatively, whether accused could successfully thwart the presumption?*

(iii) *Whether the complaint is hit by Section 69 of Indian Partnership Act, 1932?*

9) **POINT No.1:** The admitted facts are that complainant is a partnership firm dealing in finance business by lending monies. Accused is the Proprietrix of Jaya Sree Gas Agencies. The accused is resident of Srikakulam and a war widow, whose husband worked as

Captain in Indian Military (IPKF) and died in Sri Lanka. The Gas Agency at Nizamabad was allotted to her by the Government in the war widow quota and she commenced the same in the year 1996, whereas the alleged loan transaction was on 10.11.1998. So by the date of alleged loan, she was a stranger to Nizamabad and was visiting that place now and then. In the backdrop of these admitted facts, the claim of the complainant is that the accused for her Gas Agency business borrowed Rs.1,20,000/- from the complainant on 10.11.1998 and in discharge of the loan, she issued Ex.P.1—cheque. The accused denies it and her claim is that she never borrowed any amount and the disputed cheque is one of the cheques that were misused by her staff members i.e., Prasad and Ramakrishna. In that view, the question is whether the presumption under Section 139 of N.I Act is applicable. Section 139 of N.I Act reads thus:

“Section 139 - Presumption in favour of holder: It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

In my considered view, since the accused was not disputing her signature on Ex.P.1—cheque, the presumption under Section 139 of N.I Act would squarely apply. My view gets fortified by following decision.

10) In **Rangappa v. Mohan**¹, the Apex Court happened to deal with the issue when and to what extent the presumption under section 139 of

¹ MANU/SC/0376/2010 = AIR 2010 SC 1898

N.I Act is applicable. In that case, in a complaint filed under Section 138 of N.I Act, the accused raised the defence that the cheque in question was a blank cheque bearing his signature, which had been lost and might have fallen into the hands of the complainant, which he misused to file the complaint and there was no legally enforceable debt or liability between the parties. The Apex Court referring various decisions, held that the presumption under Section 139 of N.I Act did apply even against the plea of accused that his lost cheque might have fallen into the hands of complainant.

a) Regarding the extent of applicability of the presumption, differing with its earlier decision in **Krishna Janardhan Bhatt v. Dattatraya G. Hegde**², wherein it was held that existence of legally enforceable debt is not a matter of presumption under Section 139 of N.I Act and that it merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability, the Apex Court in **Rangappa**'s case (1 supra), held thus:

***“Para 14:** In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat** (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a*

² (2008) 4 SCC 54

legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. x x x x x....”

So from the above jurisprudence, an analogy can be drawn to apply the presumption under Section 139 of N.I Act to the instant case.

11) **POINT No.2:** Since point No.1 is held affirmatively, it has now to be seen whether the accused could dispel the presumption. In ***Rangappa***’s case (1 supra), while observing that Section 139 of N.I Act casts a reverse onus on the accused, the Apex Court has narrated as to how the said reverse burden can be discharged. It was observed thus:

*Para 14: x x x x While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. **In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of ‘preponderance of probabilities’. Therefore, if the accused is able to raise a probable defence which creates doubts***

about the existence of a legally enforceable debt or liability, the prosecution can fail. (Emphasis supplied). As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

Similarly, in *M.S. Narayana Menon alias Mani v. State of Kerala and another*³, the Apex Court observed that the presumption under Section 139 of N.I Act can be discharged by raising preponderance of probabilities and the burden of proof on accused is not heavy and he need not disprove the prosecution case on its entirety, rather, he can discharge his burden through direct or circumstantial evidence, for which, he can also rely upon the evidence adduced by the complainant.

12a) Hence, it has now to be seen whether accused has discharged her burden to stifle the presumption. The accused examined DWs.1 to 3. DW.1, who was the Booking Clerk in the Gas Agency of accused, deposed that in the absence of accused, Prasad and Ramakrishna managed the Gas Agency and they were removed from the posts as they mismanaged the Gas Agency. After the accused took the charge, she never alone went to any place but either himself or one Devendra Reddy accompanied her to all places. He further stated that the complainant used to come to Prasad to collect amounts daily. However, he never came to the Gas Agency whenever accused was present. He affirmatively³ stated that the accused never went to the finance company of the complainant. This witness used to go to the finance company of

³ (2006) 6 Supreme Court Cases 39

the complainant along with Ramakrishna. He stated that at present he is working as Manager in the said Gas Agency and he took charge after Ramakrishna and Prasad were removed. He further stated that accused never took loan from the complainant as per his knowledge. After he took charge of the post of Manager, the accused never obtained loan from the complainant for her business purpose. In the cross-examination, he admitted that he does not know as to how much amount was taken by the accused from different banks but Ramakrishna and Prasad knew that fact. He further admitted that he does not know the loan accounts of the accused. He denied the suggestion that accused obtained loan of Rs.1,20,000/- from the complainant—finance company.

b) On scrutiny, the evidence of DW.1 is not much helpful to accused as he admitted that he was not aware of the loan accounts of the accused. He was previously working as Booking Clerk and after removal of Ramakrishna and Prasad, he was appointed as Manager. Therefore, he cannot be expected to know whether or not the accused has obtained the loan from the complainant. However, his evidence will help to the extent that previously Ramakrishna and Prasad worked in the Gas Agency of accused and due to some misdeeds committed by them, they were removed and he was appointed as Manager.

c) Then DW.2 is the accused herself. She deposed in tune with her defence plea stating that Ramakrishna and Prasad misused the blank signed cheques issued by her. Her evidence, in my view is helpful to a limited extent that Ramakrishna and Prasad committed misdeeds and

they were removed by the accused. However, her evidence cannot vouchsafe that either Ramakrishna or Prasad borrowed monies from the complainant and issued the blank signed cheque of her to the complainant as a security. That fact has to come from the horse mouth of either Prasad or Ramakrishna. Though accused claimed that Prasad after repenting for his misdeeds, gave Ex.D.1—affidavit, but did not examine him and on the other hand examined only DW.3, who claims to have notarised Ex.D.1. However, the evidence of DW.3 is not a substitute for the evidence of Prasad.

d) Thus, the evidence of DWs.1 to 3 could establish to the extent that Ramakrishna and Prasad have cheated the accused but their testimony will not establish the defence plea of accused that she never approached the complainant and borrowed amount and issued Ex.P.1—cheque to the complainant. Ofcourse, though not from her own evidence, in my considered view, she could probablise her defence from the vital defects in the prosecution evidence and other facts and circumstances as held in *M.S. Narayana Menon*'s case (3 supra). I will discuss the same with reference to complainant's evidence.

13a) PW1 is the Managing Partner of complainant—Firm and PW2 is the Branch Manager, Andhra Bank. PW1 deposed that the accused approached the finance agency on 10.11.1998 and on her request loan of Rs.1,20,000/- was given and accused gave a cheque with a post date of 22.01.1999 drawn on Andhra Branch, Main Branch, Nizamabad where she had account. He deposed that one Aravind was present when he paid

amount to accused. His further narration is that the cheque was bounded and after issuing legal notice the complainant filed the complaint. In the cross-examination he stated that as PW1 used to go to gas agency of accused, he knew her and hence amount was given to her. He further stated that as his house was nearer to the house of accused, he used to take gas from the shop of accused. He admitted he has not produced any record that he obtained gas connection from the shop of accused. He stated that accused has given the cheque duly signed but he does not know who filled the matter in Ex.P1. He opined that her staff members accompanied her to the finance company and one of her staff members might have filled the cheque. He stated that they will obtain promissory note from the borrower whenever they advance amount. He stated that they would also advance loan if a person deposits cheque and they enter the amount given to the borrowers in the ledger, but they would not obtain the signatures of the borrower. He admitted that he has not filed ledger pertaining to the company into the Court. He denied the suggestion that he did not mention the date of advancement of loan as 10.11.1998 in the complaint. He denied the further suggestion that accused never borrowed loan from their company.

b) PW2's evidence is not much relevant except for the fact that accused was having account in their branch and she was given a cheque book and Ex.P1—cheque was received from SBI and the same was not honoured because the cheque amount exceeds arrangement.

c) So, when the above evidence is thoroughly scrutinized, admittedly the accused is not a native or resident of Nizamabad and there was no much acquaintance between her and complainant. The complaint claims to have obtained gas connection from accused but did not produce any record. In such circumstances, it is highly unbelievable that the complainant could lend a huge amount of Rs.1,20,000/- only on the basis of Ex.P.1 without obtaining collateral documents like pronote or some other loan agreement. The complainant is a finance firm and generally it is expected to maintain accounts relating to its finance business. Therefore, there shall be entries in the account books for the loan allegedly taken by the accused. However, the complainant has not produced any iota of documentary evidence in support of Ex.P.1 that the accused tendered Ex.P.1—cheque in discharge of a legally enforceable debt. Further, complainant has not examined the Aravind who was present at the time of alleged loan transaction. Further, curiously the complainant has not charged any interest for the alleged loan amount. The complainant claims to have lent huge amount of Rs.1,20,000/- on 10.11.1998 and Ex.P1 was issued with a post date of 22.01.1999. So, there is a gap of two months 12 days. The complainant being a finance company there was no reason for not charging any interest. Thus, non-production of any supporting documents to Ex.P1, besides non-charging interest creates a grave suspicion of complainant's case. These facts, coupled with Rama Krishna and Prasad cheating the accused as revealed in the defence evidence would probablise the defence theory.

14) In *John K.John vs. Tom Varghese and others*⁴ under similar circumstances, the Apex Court observed thus:

“Para-10: x x x x... It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay installments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits.”

So, this point is concerned, I hold that defence had successfully dispelled presumption and established her defence.

15) **POINT No.3:** It is to be noted, accused contended that complainant—Firm had no money lending licence issued under Andhra Pradesh (Telangana Area) Money Lenders Act, 1349-Fasli as on the date of alleged loan and also that the firm was not registered with the Registrar of Firms by the date of complaint and hence the complaint was hit by Section 69 of Indian Partnership Act, 1932.

a) The first contention is concerned, Ex.P7—licence dated 12.01.1998 issued by Mandal Revenue Officer, Nizamabad would show that the Government have issued money lending licence to the complainant’s firm for a period of one year from 21.01.1998 to

⁴ AIR 2008 SC 278

20.01.1999. Ex.P7 contains an entry that the said licence was renewed for a period of one year w.e.f. 21.01.1999 to 20.01.2000. On the reverse of Ex.P7, two more entries are available showing the licence was renewed from 21.01.2000 to 20.01.2001 and from 21.01.2001 to 20.02.2002. The alleged loan is 10.11.1998 and complaint was filed on 22.02.1999. Thus, Ex.P7 depicts that firm had had money lending licence by the dates of alleged loan and complaint and hence there is no force in the contention.

b) The next contention of course, relates to want of registration of firm. Ex.P6 is the partnership deed dated 12.05.1997 of complainant's firm which shows that the said firm started its money lending business at Nizamabad under the name and style M/s.Sri Karuna Finance and Enterprises w.e.f. 17.04.1997. The partnership deed contains 'at will' clause. Be that it may, Ex.P8 is the certificate dated 24.02.1999 issued by the Registrar of Firms acknowledging the receipt of statement prescribed by Section 58(1) of Indian Partnership Act from the complainant—firm and entering of said statement in the register of firms. Thus, it is clear complainant's firm was not registered as on the date of alleged loan i.e. 10.11.1998 and also the date of complaint i.e. 22.02.1999.

c) The effect of non-registration is dealt with in Section 69 of Partnership Act which reads thus:

“Section—69: Effect of non-registration.—

(1) x x x

(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.*

(3) x x x

(4) x x x x

16) Since the word ‘*suit*’ is employed in sub-section (2) imposing an embargo to institute the suit by an unregistered firm, there was a dichotomy of opinion among different High Courts as to whether the bar engrafted in sub-section (2) also applies to criminal proceedings particularly private complaints lodged by an unregistered firm.

17) In *Amit Desai and another vs. Shine Enterprises and State*⁵ a Division Bench of this Court dealt with the issue whether a private complaint filed under Section 138 of NI Act can be quashed under Section 482 Cr.P.C. at the instance of accused on the ground that complainant—Firm was not registered under Section 69 of Partnership Act. Repelling the contention of respondent/complainant that the bar engrafted in Section 69 would be applicable against civil suits but not criminal cases the DB observed thus:

⁵ 2000 Cr.L.J.2386

“Para-13: x x xx... 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.”

In that process, the Division Bench differed with the ruling of a learned single Judge of a High Court of Kerala **Abdul Gafoor vs. Abdurahiman**⁶ wherein it was held that the bar under Section 69 of Partnership Act is applicable only to civil rights but not criminal cases.

The DB accordingly quashed the criminal case.

18) Later, the High Court of Bombay (Aurangabad Bench) in **Sai Accumulator Industries Sangamner vs. Sethi Brothers Aurangabad**⁷ following the decision of the A.P. High Court held thus:

“Para—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,

⁶ MANU/KE/1020/1999

⁷ 2017 (3) Crimes 42 (Bombay)

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.”

In that process, the High Court of Bombay was not persuaded by the judgment of High Court of Kerala in **Abdul Gafoor**’s case (6 *supra*) and High Court of Allahabad in **Gurucharan Singh vs. State of UP and another**⁸.

19) The High Courts of AP and Bombay have laid stress on the explanation to Section 138 of NI Act which says that for the purpose of said section “*debt or other liability*” means “*legally enforceable debt or other liability*” which cannot be enforced in criminal case and in case civil suit is to be filed bar under Section 69 of Partnership Act would attract and therefore, the said bar equally applies to criminal case under Section 138 of NI Act.

We will now peruse the decisions expressing contra opinion.

20) In **Abdul Gafoor**’s case (6 *supra*) the revision petition who was convicted for the offence under Section 138 of NI Act took the plea that the prosecution was not sustainable under Section 69(2) of Partnership Act as the 1st respondent was an unregistered partnership firm. Reiterating the contention, learned single Judge held that the fact of non-registration of partnership firm under Section 69 of Partnership Act was

⁸ 2002 CrLJ 3682 = 2003 (1) ALD (CrL.) 121

applicable only to cases involving civil rights and which has no application to criminal cases. As already noted, the High Courts of AP and Bombay not agreed with the same.

21) In *Kerala Arecanut Stores vs. Ramkishore and Sons and another*⁹ a Division Bench of High Court of Kerala was engaged with the question whether an unregistered firm in whose favour a cheque was endorsed can maintain a suit for recovery of money. The Division Bench opined that there was no privity of contract between the maker of the cheque and the unregistered firm who is the holder in due course. Any right of action available to such holder was not under any contract, for he was a third party to the contract. It must be said the above decision has no direct bearing on the issue.

22) In *Beacon Industries rep. by its Partner vs. Anupam Ghosh*¹⁰ the High Court Karnataka referred several decisions including AP and Supreme Court and held that Section 69 (2) of Partnership Act has no application to criminal cases. It must be noted that the judgment of Apex Court in *BSI Limited and others vs. Gift Holdings Private Limited and others*¹¹ was in a different context. In the said case, the Apex Court was dealing with Companies and their Directors struggling themselves to get extricated from the catch of prosecution filed against them under Section 138 of NI Act, moved the Company Board for Industrial Finance and Reconstruction (for short 'BIFR') to declare it as sick

⁹ AIR 1975 Kerala 144 = MANU/KE/0039/1975

¹⁰ MANU/KA/0541/2003

¹¹ (2000) 2 SCC 737

industrial company. When the proceedings were pending before the BIFR under Section 16 of Sick Industrial Companies (Special Provisions) Act, 1985 (for short “SICA”) a declaration was made by the order passed by BIFR in terms of Section 22(3) of SICA. Basing on the said order, the appellant/BSI contended before the Supreme Court that it was not liable to be prosecuted in view of embargo contained in Section 22(1) of SICA. The Apex Court observed Section 138 of NI Act was introduced in 1988 when SICA was already in vogue and Parliament did not think it necessary to exclude companies falling under Section 22 of SICA from the operation of NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words "*and no suit for the recovery of money or for enforcement of any security against industrial company or of any guarantee in respect of any loans or advance granted to industrial company*", Parliament did not specifically include prosecution proceedings within the ambit of the said ban. The Apex Court ultimately concluded that if the commission of offence under Section 138 of the NI Act was completed before the commencement of proceedings under Section 22(1) of SICA there was 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.

23) Thus, a close scrutiny of above decision would show that the Honourable Supreme Court was dealing with the rights of third parties to launch criminal prosecution against the company who was under the

proceedings of SICA but it was not a case of right of the company to proceed against the third parties.

24) In *Sai Accumulator Industries Sangamner*'s case (7 supra), the High Court of Bombay discussed this aspect and observed that the judgment of Honourable Apex Court was in different context and there is a sea difference between right to prosecute and right not to be prosecuted unless provisions are complied. Therefore, the decision of High Court of Karnataka in *Beacon Industries* (9 supra) which was based on the judgment in *BSI Limited* (11 supra) cannot be followed as the latter judgment was rendered on a different footing.

25) The High Court of Allahabad in *Gurucharan Singh* (8 supra) and High Court of Delhi in *Rani Kapoor vs. Silvermount*¹² have expressed the view that the bar created for maintaining the suit in Section 69 of Partnership Act by an unregistered firm cannot be stretched and applied to maintain the criminal proceedings under Section 138 of NI Act.

26) So, on a conspectus of the above jurimetrics, the High Court of AP and High Court of Bombay held that a private complaint under Section 138 of NI Act is not maintainable at the instance of an unregistered firm in view of explanation to Section 138 of NI Act where it is mentioned that “*debt or other liability*” means “*legally enforceable debt or other liability*”. Whereas the judgments of other High Courts mostly went on the premise that since in Section 69(2) of Partnership

¹² MANU/DE/1868/2017

Act the word 'suit' is only mentioned, criminal prosecution is not barred thereby. Some of the decisions were rendered basing on the Apex Court judgment in **BSI Limited** (11 supra). If Section 69 of Partnership Act alone is taken into consideration, it would appear as if suits alone are barred and not criminal prosecution. However, the explanation to Section 138 of NI Act cannot be ignored because the matter under consideration is in respect of a private complaint filed under Section 138 of NI Act. Sofaras the judgment of Apex Court is concerned, as already stated supra, it was rendered in a different context.

27) So, in my view, the judgments of High Courts of Bombay and Andhra Pradesh alone can be considered and followed. Even otherwise, the judgment of Division Bench of this Court is a binding precedent for me. The net result is the complaint in the instant case is hit by Section 69 of Indian Partnership Act.

This point is answered accordingly.

28) In the result, in view of my findings in points 1 to 3, there are no merits in the Criminal Appeal and accordingly, the same is dismissed by confirming the judgment in Criminal Appeal No.37 of 2004 on the file of Sessions Judge, Nizamabad.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 24.10.2018

Scs/Murthy