Ghuge

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.367 OF 2023

Kola Venkatarama Naidu … Petitioner
V/s.
Shyantanu Sudarshan Chokhani and Ors … Respondents

Mr. Rahul A. Kamerkar with Mr. Brazilla Vaz for the petitioner.

Mr. P.D. Desai for the respondent No.1.

Mr. A.R. Patil, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 27, 2023

P.C.:

1. The challenge in this petition is the order of process issuance in a proceeding under Section 138 of the Negotiable Instruments Act 1881. The grounds to challenge the order of issuance of the process are (i) the person who filed the complaint was not connected with the partnership firm. (ii) Complaint filed by the partnership firm is not maintainable as the partnership is not registered.

2. In so far as the authority of the person filing the complaint on behalf of the partnership firm, the law is well settled that such ground needs to be raised at the time of trial. However, *prima facie,* in the facts of the present case, the complaint has been filed by a partnership firm describing itself as a partnership. The person who has signed the complaint is the authorized signatory.

3. In so far as the non-registration of partnership firm is concerned, Section 69 of the Partnership Act, 1932 bars the rights of a person enforcing rights conferred under the Partnership Act or Partnership Deed. In the facts of the case, the right sought to be enforced arises out of the issuance of the cheque and arises out of proceeding under Section 138 of the Negotiable Instruments Act 1881. Therefore, non-registration of partnership deed at the stage of issuance of process is of no relevance.

4. The apex Court in the case of **Firm Ashok Traders & Anr Vs. Gurumukh Das Saluja & Ors.** reported in (2004) 3 SCC 155 has interpreted under Section 69 of Partnership Act, 1932, holding that such bar under Section 69 applies to suit not any other proceedings. The complaint under Section 138 of the Negotiable Instruments Act 1881 would fall into other proceedings.

5. The next submission on behalf of the petitioner is that the cheque has been signed in favour of the company having the name IHSL. Paragraph No.4 of the complaint states that the loan amount has been disbursed to the account of IHSL on the instructions of the accused. Whether the accused had instructed the complainant to disburse such an amount in favour of the complainant is a question that needs to be adjudicated at the appropriate stage of the proceeding.

6. He further submitted that the Directors of IHSL are the same as the partners of the complaint, and therefore there is no disbursement of the amount in favour of the accused. Thus, at the stage of issuance of process, such inquiry is not contemplated as such point does not fall within the parameters of judicial review arising out of the order of issuance of process.

7. The Learned advocate for the petitioner relied on the judgment in the case of **AC Narayan Vs. State of Maharashtra and Anr,** reported in (2014) 11 SCC 790where in paragraph 31 it is held as under:-

> **31.** In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed :
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> *(i)* by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee";
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> *(ii)* the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and
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> *(iii)* the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.

8. Reading paragraph 31, it is clear that the Apex Court was considering the case of a complaint filed by the proprietary concern. The law regulating proprietary firm is distinct from the law regulating the partnership firm's rights. Under Section 141 of the Negotiable Instruments Act, 1881 partnership firm is equated with the Company. Therefore, the partnership is a legal person who can sue or be sued in its own name, unlike a proprietary firm. It is well settled that the proprietary firm is not a legal person save and except deeming fiction created under Order 30 of the Code of Civil Procedure, 1908. Therefore, the judgment of **AC Narayan,** (supra) has no application in the facts of the present case.

9. The next contention raised on behalf of the petitioner is about the difference in the names of the complainant and dates and the amount of cheque mentioned in the complaint and the loan agreement. Such a question being a question of fact, needs to be adjudicated by the Trial Court at the appropriate stage.

10. Therefore, there is no merit in the writ petition, the Writ Petition stands dismissed. No costs.

(AMIT BORKAR, J.)