

Gurcharan Singh Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : May-23-2002

Reported in : 2003(1)ALD(Cri)121; 2002(3)AWC1783;
[2003]114CompCas434(All); 2002CriLJ3682

Judge : R.K. Dash, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2 and 482; [Partnership Act, 1932](#) - Sections 69

Appeal No. : Criminal Misc. Application No. 3875 of 2000

Appellant : Gurcharan Singh

Respondent : State of U.P. and anr.

Advocate for Def. : Satish Trivedi, ;K.B. Srivastava, ;Ashish Kumar Singh, Advs. and ;R.K. Jain, A.G.A.

Advocate for Pet/Ap. : R.R. Singh, Adv.

Disposition : Criminal misc. application dismissed

Judgement :

R.K. Dash, J.

1. M/s. Sterling Novelty Products, Moradabad (U.P.) is a partnership firm of which Mrs. Jagdish Kaur W/o Gurbaksh Singh, Mrs, Jasleen Kaur W/o Arvind Pal Singh and Master Uvraj Singh are the partners. The aforesaid firm is engaged in export business in handicrafts, brass wares, textiles and aluminum items at Moradabad since 1992. International Gifts Ltd. Is a company at Ontario, Canada and Gurcharan Singh, petitioner herein is the President of the said company. M/s. Sterling Novelty Products through its partner Uvraj Singh represented by his natural guardian Arvinder Pal Singh filed a complaint before the Court of Chief Judicial Magistrate, Moradabad bearing Case No. 852/9 of 1999 under Section 138 of Negotiable Instruments Act (hereinafter referred to as 'the Act') and Sections 406 and 420, I.P.C. arraying International Gifts Ltd. and its President Gurcharan Singh as accused.

2. The case of the complainant, in short, is that the firm (M/s. Sterling Novelty Products) supplied brass wares and textiles to the accused persons which were duly received by them. Towards payment thereof, they issued post dated cheque No. 001530 dated 15.2.1999 of worth \$ 85,959.20 and No. 001531 dated 15.3.1999 of worth \$ 84,208.80 Canadian Dollar. Both the aforesaid cheques were issued by Gurcharan Singh, the petitioner as President of M/s. International Gifts Ltd. The complainant presented the cheque No. 001530 dated 15.2.1999 with its banker Indian Overseas Bank, Moradabad and the same was sent to Bank of Montreal, Canada. The cheque was dishonoured and returned unpaid since the accused intimated his banker to stop payment. Similarly the other cheque No. 001531 dated 15.3.1999 which complainant deposited with in banker, Indian Overseas Bank, Moradabad was dishonoured on the very same ground. The complainant then served notice upon the accused as provided in the Act asking for payment of the amount covered under both the cheques within fifteenth days of the date of receipt of the notice. As the accused failed to make payment, the present complaint was filed. However, after filing of the complaint, the amount covered under cheque No. 001530 was paid. The learned Magistrate after recording the statement of the complainant and having gone through, the relevant materials and documents was satisfied that prima facie offence under Section 138 of the Act and Section 420, I.P.C. was made out against the accused persons and accordingly, took cognizance of the said offence and issued process to the

accused Gurcharan Singh, President of the International Gifts Ltd for appearance. Challenging the order of the Magistrate taking cognizance of the offence, the accused has filed the present case seeking quashing of the criminal proceeding, inter alia, on the ground that the notice issued after bouncing of cheques is bad in law and that the complaint is barred by limitation as provided in Section 142 of the Act. Admitting that the cheques were dishonoured by his banker on his intimation ; the accused has urged that he was compelled to take such steps since the goods supplied by complainant's firm were sub-standard and, therefore, in view of the nature of the dispute, he cannot be imputed with any criminal liability.

3. The complainant on being noticed filed return refuting the allegation that the goods supplied by it were sub-standard. It is urged that when the cheques were returned unpaid by the Bank of Montreal, correspondence was made with the accused to explain the reason of the return of the cheques. He responded to complainant's letter, but did not take such plea that payment was stopped as the goods supplied were sub-standard. As regards the validity of the notice and period of limitation for filing complaint, his case is that on being informed by its banker, Indian Overseas Bank on 23.4.1999 regarding dishonour of the cheques, he sent notice on 6.5.1999 to the accused calling upon him to pay the amount of the cheques and the same was acknowledged on 10.5.999. As provided under law, the accused was required to discharge his liability within 15 days from the date of receipt of the said notice that is, on or before 25th May, 1999. Since the accused did not discharge his liability and failed to make payment, the complainant filed the case on 18.6.1999 which is well within time as envisaged in Section 142 of the Act. The accused by way of filing supplementary affidavit has taken two new more grounds challenging the criminal proceeding that the firm of the complainant, namely, M/s. Sterling Novelty Products being not a registered firm cannot maintain criminal case and that the complaint was not a properly constituted one since the vakalatnama so filed does not bear the signature of the complainant. To this, complainant replied by way of affidavit denying the allegation and urged that the firm is a registered firm and that complaint was filed by one of the partners, a minor through his natural guardian.

4. Sri R.R. Singh, learned counsel for the petitioner at the commencement of the argument raised three contentions that the complaint so filed was not a properly constituted one inasmuch as, vakalatnama filed in the Court is an unsigned one, that the petitioner was not liable to pay the amount covered under the cheque in question, for the goods supplied were sub-standard and that M/s. Sterling Novelty Product being not registered firm under the Partnership Act cannot maintain the criminal proceeding. He, however, confined his argument as to the maintainability of the criminal proceedings, in support whereof he relied upon a decision of the Andhra Pradesh High Court in case of Mr. Amit Desai and Anr. v. Shine Enterprises and Anr., 2000 Cri LJ 2386.

5. Sri Satish Trivedi, Senior Advocate assisted by Sri K.B. Srivastava appearing for the complainant-respondent No. 2 on the other hand urged that it is untrue that the vakalatnama was not executed by the father of the minor, one of the partners of the aforesaid firm. The Xerox copy of the vakalatnama which has been filed by the petitioner is not legible and properly Xeroxed one. In fact, it was executed by the complainant's father. Even conceding that the vakalatnama was not executed by the minor's father, yet the same cannot be a ground to dismiss the complaint at the threshold. With regard to the defence plea that the goods supplied were sub-standard, it is submitted that it is false and afterthought. Besides, such a plea cannot be entertained and complaint cannot be quashed on the premise that the dispute related to commercial transaction. In answer to the maintainability of the criminal proceeding as raised by the learned counsel for the petitioner, he contended that M/s. Sterling Novelty Products is a registered partnership firm and that is the reason why such a plea was not taken in the petition filed under Section 482, Cr. P.C. Moreover, assuming that it is an unregistered firm, what is barred under Section 69 of the Partnership Act is the 'suit' and this being a criminal case arising out of a 'complaint' under Section 138 of the Act, the said provision cannot be borrowed and applied to it.

6. The factual aspect of the case that emerges from the pleadings of the parties and the submissions made by the learned counsel appearing for them is that two cheques in question issued by the petitioner as President of M/s. International Gifts Limited to M/s. Sterling Novelty Products, Moradabad, were deposited with

its banker namely, Indian Overseas Bank, Moradabad, who in turn sent the same for encashment to the banker of the petitioner, but it returned the cheques unpaid in view of the intimation by the petitioner to stop payment. Accordingly, Indian Overseas Bank informed the respondent regarding bouncing of cheques on 23.4.1999. The respondent firm thereupon gave notice in writing to the petitioner on 6.5.1999 making demand for payment of the amount covered under the cheques as provided under Section 138(b) of the Act. The notice was served on 10.5.1999 i.e., within stipulated period. When the petitioner failed to make payment within the permissible period of fifteen days of the receipt of the notice, respondent-firm through one of its partner filed complaint on 18.6.1999 which is within the period of limitation as prescribed under Section 142 of the Act. In that view of the matter, the sole question posed is whether, assuming the contention of the petitioner that the respondent-firm is not a registered one, the criminal proceeding would be maintainable in view of the bar created by Section 69(2) of the Partnership Act. Before proceeding to answer the said question, it may be noted that the petitioner's assertion that the respondent-firm is unregistered one has been stoutly denied and disputed. It is affirmatively pleaded that the firm is a registered firm.

7. To appreciate the submission, the relevant part of Section 69 of the Partnership Act necessary for the purpose is extracted hereunder :

'69. Effect of nonregistration.-

(1) xxxxxxxxxxxxxxx

(2) No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) xxxxxxxxxxxxxxxxxxxxxxx

(4) xxxxxxxxxxxxxxxxxxxxxxx'

8. The aforesaid provision postulates that if a firm is not registered one, it or anybody on its behalf cannot maintain a 'suit' against a third party to enforce a right arising from a contract. So, what is barred is a 'suit' that has been filed to enforce a right arising from a contract. In other words, the liability of a third person to the firm arising out of a contract cannot be enforced by way of suit if the firm is unregistered. The word 'suit' has not been defined in the aforesaid Act. It is, therefore, desirable to refer to 'Law of Lexicon' and the judicial pronouncements to ascertain the true meaning of word 'suit' in the legal context. 'Suit' means 'a proceeding Instituted in civil court by presentation of a plaint. The word 'suit' ought to be confined to such proceedings as, under that description, are directly dealt with in the Code of Civil Procedure, or such as by the operation of the particular Act which regulates them are treated as suits (See Law of Lexicon, 1997 Edition). The word 'suit' in common parlance means a process Instituted in a Court for recovery or protection of a right, enforcement of a claim, or to redress civil injuries.

9. Section 142 of the Act under caption 'Cognizance of offences' provides that cognizance of the offence under Section 138 can be taken upon a 'complaint' in writing made by the payee or the holder in due course of the cheque. The word 'complaint' defined in Section 2(d) of the Code of Criminal Procedure means any allegation made orally or in writing to a Magistrate, with a view to taking action under the said Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Since Section 138 is a penal provision, that prescribes punishment for bouncing of cheque on any of the grounds mentioned therein, the Legislature in its wisdom has used word 'complaint' and not 'suit' in Section 142 because a 'suit' can be maintained for recovery of money or for any other civil remedies. So the bar created for maintaining a suit in Section 69 of the Partnership Act by an unregistered firm cannot be stretched and applied to maintain a criminal proceeding under Section 138 of the Act. In Amit Desai (supra) a Division Bench of Andhra Pradesh High Court has taken the view that the firm being not registered under the Partnership Act cannot maintain a complaint under Section 138 of the Act. No discussion on point of law involved was made by the learned Judges except referring to Section 69 of the Partnership Act and some decisions of the Apex Court. While disagreeing with the view taken by the Kerala High Court that Section 69(2) of the

Partnership Act is applicable only where civil rights are invoked, the learned Judges referred to Explanation to Section 138 of the Act and observed 'enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in Explanation (2) of Section 138 of the Negotiable Instruments Act'. A Division Bench of the Kerala High Court in the case of Kerala Arecanut Stores v. Ramkishore and sons and Anr. AIR 1975 Ker 144, having made reference to various provisions of the Act regarding rights/obligations arising out of a negotiable instrument observed that the obligation of the drawer of the cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provision and there being no privity of contract between the maker of a cheque and the holder in due course, any right of action available to such holder is not under any contract. So he is entitled to sue on his cheque by reason of the right conferred upon him by the statute. That being so, action under Section 138 is not a suit by the indorsee to enforce a right arising out of a contract and, therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case. To the same effect is view of a learned single Judge of the said High Court in the case of Abdul Gafoor v. Abdurahiman, 1999 ISJ (Banking) 701. It is observed in the said case 'the effect of non-registration of the partnership firm under Section 69 of the Partnership Act is applicable only to cases involving civil rights and it has no application to criminal cases.' 10. In a recent judgment rendered by the Supreme Court in B.S.I. Ltd. and another v. Gift Holdings Put. Ltd. and another. 2000 (1) ACrR 683 (SC) : 2000 SCC (Cri) 538, the word 'suit' came to be interpreted for deciding maintainability of a proceeding under Section 138 of the Act in view of the ban imposed by the Sick Industrial Companies (Special Provisions) Act. Under Section 22(1) of the aforesaid Act. it is provided that no suit for recovery of money or enforcement of any security against the industrial company or guarantee in respect of any loan or advance granted to the industrial company shall lie if in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending adjudication. It was

contended that the ban against maintainability of a suit for recovery of money would encompass prosecution proceedings also. Reliance was placed on the meaning of the word 'suit' as given in 'Bouvier's Law Dictionary'. Repelling such contention, the Court observed that the word 'suit' envisaged in Section 22(1) cannot be stretched to criminal prosecutions. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability.

11. In view of discussions made above, I would hold that even accepting the contention of the learned counsel for the petitioner that M/3. Sterling Novelty Products is not a registered firm under the Partnership Act, yet the bar created by Section 69 of the said Act has no application for maintaining a criminal proceeding under Section 138 of the Act. In that view of the matter, no interference is called for in the criminal proceeding (Case No. 852/9 of 1999) pending against the petitioner in exercise of inherent power.

12. In the result. Criminal Misc. Application fails and the same is dismissed.

13. The court below is directed to take up expeditious hearing and dispose of the case within reasonable time preferably within a period of six months from date of receipt of this judgment.

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