

**IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT GULBARGA**

DATED THIS THE 05TH DAY OF JULY 2013

BEFORE

THE HON'BLE MR.JUSTICE V.SURI APPA RAO

CRIMINAL APPEAL NO.3608/2009

BETWEEN:

Padmavati Finance Registered
Kirana Bazar, Gulbarga
Through its partner
Sri. Udayakumar S/o G.Degoan
Age: 45 years, R/o Gulbarga

. . . Appellant

(By Sri B.D. Hnagarki, Adv.)

AND:

Md. Yosuf Ali S/o Haji Abdul Hameed Sab
Age: 56 years, Occ: Owner of Car
care motor Garage Shop No.1/1-2-3
Nehru Gunj, Gulbarga

. . . Respondent

(By Sri Ameet Kumar Deshpande, Adv.)

This Crl. Appeal is filed U/S.378(4) of Cr.P.C. praying to set aside the order of acquittal passed by the Court of III Addl. JMFC Gulbarga dated 06.06.2009 in C.C.No.1773/2006, acquitting the respondent/accused for the offences P/U/S.138 of N.I. Act.

This appeal coming on for final hearing this day, the Court delivered the following:

JUDGMENT

The appellant filed this appeal invoking provisions of Section 378 (4) of the Code of Criminal Procedure challenging the judgment dated 06.06.2009 passed in C.C.No.1773/2006 on the file of the III Additional J.M.F.C., Gulbarga, whereby the learned Magistrate dismissed the complaint filed by the appellant under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') on the sole ground that the complaint is not supported by any authorisation from the complainant firm. Therefore, the accused is entitled to be acquitted. Aggrieved by the finding and judgment of the Trial Court, the appellant who lodged the complaint under Sections 138 and 142 of the Act filed this appeal.

2. For the sake of convenience, the parties are referred to as they are arraigned in the Trial Court.

3. The relevant facts which leading to filing of this appeal are hereunder:

The complainant is a Registered Partnership Firm carrying on money lending business with a valid license. The

accused availed loan of Rs.1,00,000/- from the complainant under cheque discount scheme in CD A/c. No.13/03-02 on 26.09.2003 for a period of 30 days by promising to pay interest thereon at 21% per annum. The accused and two sureties executed promissory note and receipt in favour of the complainant on 26.09.2003. Subsequently the accused paid Rs.50,000/- towards principal loan amount and interest upto 17.12.2004. Admitting his liability to pay the balance amount with interest, he had issued a cheque bearing No.463151 dated 31.05.2006 for Rs.61,444.40 Ps. in favour of the complainant drawn on Karnataka Bank Limited, Super Market Branch, Gulbarga. On 31.05.2006, the complainant presented the cheque in Karnataka Bank Limited for its encashment and the same was dishonoured with an endorsement "Insufficient funds" in the account of the accused. After receiving information from the Bank, the complainant got issued statutory notice to the accused but the same was returned unserved on 07.07.2006 with a Shara that "party not found". After waiting for 15 days, the complainant filed a complaint before the JMFC, against the

accused for the offence punishable under Section 138 of the Act.

4. On behalf of the complainant, one Udaykumar, partner of the firm has been examined as PW.1 and got marked Exs.P1 to P6. The accused himself got examined as DW.1 and got marked Exs.D1 & D2.

5. The Trial Court framed the following points for consideration:

“1. *Whether the complainant has proved beyond reasonable doubt that the accused has committed an offence punishable U/s. 138 of N.I. Act as alleged in complaint?*

2. *What order or sentence?”*

6. After discussing the evidence on record and relying on the decision in the case of *M/s. Antifriction Bearing Co. Coimbatore V/s. M/s. Bharath Bearing Ltd., Coimbatore* reported in AIR 2009 (NOC) 725 (Madras) and also relying on the decision in the case of *Om Shakti SC/ST and Minority Credit Co-operative Society Ltd., V/s. M.Venkatesh* reported in ILR 2007 Karnataka 5126, the Trial Court acquitted the

accused for the offence punishable under Section 138 of the Act, observing that the complaint is not supported by any authorisation from the complainant firm, who filed the complaint under Section 138 of the Act.

7. Learned counsel for the complainant submitted that the complainant is partnership firm. The complainant is one of the partners of the firm has permitted to file complaint against the accused under Sections 138 and 142 of the Act. The Trial Court is therefore not justified in acquitting the accused on the sole ground that the complainant was not authorised by the firm, who filed complaint under Section 138 of the Act.

8. In support of his contention, learned counsel for the complainant placed reliance on the decision in the case of ***M/s. M.M.T.C. Ltd. and another v. M/s. Medchl Chemicals and Pharma (P) Ltd. and another*** reported in ***AIR 2002 SC 182***. Wherein, it is held that the only eligibility criterion prescribed by S. 142 is that the complaint under S. 138 must be by the payee or the holder in due

course of said cheque. This criterion is satisfied as the complaint is in the name and on behalf of the appellant Company who is the payee of the cheque. Merely because complaint is signed and presented by a person, who is neither as authorised agent nor a person empowered under the Articles of Association or by any resolution of the Board to do so is no ground to quash the complaint. It is open to the de jure complainant company to seek permission of the Court for sending any other person to represent the company in the Court. Thus, even presuming, that initially there was no authority, still the Company can, at any stage, rectify that defect. At a subsequent stage the Company can send a person who is competent to represent the company.

9. Relying on the above decision, learned counsel for the complainant submitted that as per the provisions of Section 142 of the Act, the complainant is a payee and it can present the complaint under Section 138 of the Act. The complainant firm is being represented by its partner, who is a payee or the holder in due course of cheque.

10. The learned counsel for the complainant further placed reliance on another decision in the case of **M/s Sarathi Leasing Finance Limited vs Sri B. Narayana Shetty** reported in **ILR 2006 KAR 1929**.

11. In the above decision, this Court held, the Question of authorisation to such persons to file the complaint arises only if the accused takes up a specific plea that the company did not intend to prosecute him for the offence or that there is some material before the court to indicate that the complainant-company has no intention to prosecute the accused.

12. Finally he placed reliance on another decision in **Sri Lakshmi Kanchana Finance Corporation v. The State of A.P. & Anr.** reported in **AIR 2010 (NOC) 406 (A.P.)**. Wherein, the Hon'ble High Court held that the complaint under Sections 138 and 142 of the Act can be filed by a partner of firm even if he is not specifically authorised.

13. Relying on the aforesaid decision, the learned counsel for the complainant submitted that the complaint in this instant case is filed by the partner of firm, who got treated as payee or the holder in due course of cheque. The accused has not specifically taken a plea in the Trial Court alleging that the firm did not intend to prosecute him for the offence. Therefore, contended that no authorisation is required for any partner of the firm, who lodged complaint under Section 138 of the Act. Therefore, the judgment passed by the Trial Court is liable to be set aside.

14. Per contra, learned counsel for the accused submitted that the Trial Court after considering the facts of the complaint and the decisions of this Court in *ILR 2007 KAR 5126* and *AIR 2009 (NOC) 725 (Madras)*, acquitted the accused for the offence punishable under Section 138 of the Act on the ground that the complainant is not validly authorised by the firm to prosecute the accused under Section 138 of the Act.

15. The Trial Court relying on the above decisions, recorded the findings of acquittal observing that the complainant has no authorisation from the firm, who filed complaint under Section 138 of the Act.

16. Therefore, it is submitted that there are no grounds to interfere with the judgment of acquittal passed by the Trial Court.

17. Under the provisions of Section 142 of the Act, the complaint under Section 138 of the Act can be presented in writing, made by the payee or, as the case may be, the holder of due course of the cheque. Admittedly, in the instant case, the complainant is the payee, representing the appellant firm.

18. In ILR 2007 KAR 5126 relied upon by the learned counsel for the accused, the legal notice has been issued to the accused for and on behalf of the society by its Secretary. The complaint is filed by the Society through its President without authorisation. This Court therefore, held that the

presentation of the complaint by the Society through its President without authorisation is bad in law. In the above case, the complaint is lodged by the Society not by the Firm. Therefore, the decision relied upon by the learned counsel for the accused is not applicable to the facts of this case.

19. Section 2(a) of the Indian Partnership Act, 1932 defines as follows:

“(a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm.”

20. Section 19 of the Indian Partnership Act also reads as follows:

“19. Implied authority of partner as agent of the firm.-

(1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his “implied authority”.

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-

- (a) *submit a dispute relating to the business of the firm to arbitration,*
- (b) *open a banking account on behalf of the firm in his own name,*
- (c) *compromise or relinquish any claim or portion of a claim by the firm,*
- (d) *withdraw a suit or proceeding filed on behalf of the firm,*
- (e) *admit any liability in a suit or proceeding against the firm,*
- (f) *acquire immovable property on behalf of the firm*
- (g) *transfer immovable property belonging to the firm, or*
- (h) *enter into partnership on behalf of the firm.*

21. Section 22 of the Indian Partnership Act deals with mode of doing act to bind firm, which reads as follows:

“22. Mode of doing act to bind firm.- *In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm”.*

Thus, as per the provisions which are barred under Section 19(2)(a) to (h) of the Partnership Act, any partner of

the firm can file the complaint, as the definition under Section 2(a) of the Partnership Act, gives rise to a right enforceable by or against the firm.

22. In the instant case, one of the partners of the firm lodged complaint against the accused when the cheque issued by him was dishonoured. The partner of the firm therefore has enforceable right under law on behalf of the firm or against the firm unless barred under Section 19(2) of the Partnership Act or against the bylaws of the partnership deed.

23. In the instant case learned counsel for the complainant fairly submitted that there are no specific bylaws permitting any partner of the firm to file complaint with the firm for the benefit of the firm who is the payee defined under Section 142 of the Act.

24. Even during trial, the accused had not produced any kind of evidence to prove that the firm is not intending to prosecute him for the offence under Section 138 of the Act

and that the firm has no intention to prosecute him. In that view of the matter, the complainant representing the firm is competent to lodge the complaint on behalf of the firm for recovery of the amount due to the firm from the accused by invoking the provisions of Section 138 of the Act.

25. Having regard to the above facts and circumstances, the learned Magistrate was not justified in acquitting the accused on the sole ground that the complainant was not authorised to file complaint on behalf of the firm.

26. It is therefore held that the complainant being a partner of the firm is competent to file complaint under Section 138 of the Act. The appeal is therefore **allowed**. The judgment of acquittal passed by the Trial Court is hereby set aside. The matter is remanded back to the III Additional JMFC, Gulbarga, for fresh disposal according to law on the other points involved in the case.

**SD/-
JUDGE**

LG