

Karnataka High Court Gowri Containers vs S.C. Shetty And Anr. on 3 October, 2007 Equivalent citations: 2008 CriLJ 498, ILR 2007 KAR 4586, 2008 (1) KarLJ 55 Author: A Kabbin Bench: A Kabbin ORDER A.C. Kabbin, J.

1. These two appeals have been preferred by the complainant challenging the acquittal of the respondent for offences punishable under Section 138 of the Negotiable Instruments Act. Since both these appeals relate to the same parties and the same transactions, this common judgment is being passed in respect of both the appeals.

2. The case of the complainant, in brief, is as under: The complainant deals in fabrication and manufacture of containers and other accessories and equipments. The accused No. 1 is the proprietor of the accused No. 2, a proprietary concern. The accused No. 2 deals in agro chemicals. The accused No. 2 by its proprietor S.C. Shetty placed an order for containers with the complainant and in response to the same, the complainant supplied to the accused materials as per invoices totalling for an amount of Rs. 82,384/-. Towards the payment of the said containers, the accused issued eight cheques. One cheque for Rs. 10,000/- was encashed and seven cheques were returned unencashed. The cheque bearing No. 062865 dated 26-06-1998 (concerned in C.C. No. 30387/1999 - Criminal Appeal No. 868/2002) for a sum of Rs. 10,000/- returned dishonoured with an endorsement 'insufficient funds'. Despite the legal notice dated 27.07.1998 the respondents having not paid the amount, they have committed an offence punishable under Section 138 of the Negotiable Instruments Act. In respect of other six cheques, namely cheque bearing No. 062866 dated 30-06-1998 for a sum of Rs. 10,000/-, cheque bearing No. 062871 dated 04-07-1998 for a sum of Rs. 10,000/-, cheque bearing No. 062872 dated 10-07-1998 for a sum of Rs. 10,000/-, cheque bearing No. 062873 dated 16-07-1998 for a sum of Rs. 10,000/-, cheque bearing No. 062874 dated 25-07-1998 for a sum of Rs. 10,000/- and cheque bearing No. 062875 dated 30-07-1998 for a sum of Rs. 12,350/- (concerned in C.C. No. 30240/1999 - Criminal Appeal No. 772/2002), since they were dishonoured as per the memo of dishonour dated 08-09-1998, the notice of dishonour was given on 14-09-1998. Though notices were served, the amount not having been paid, the accused has committed an offence punishable Under Section 138 of the Negotiable Instruments Act.

3. In each case, the complainant was examined as P W-1. The contention taken by the accused in each case was that blank cheques had been taken by the complainant as security which were later filled by the complainant; and that articles in question not having been supplied to the accused, there was no liability under the cheques. A legal point was raised by the respondent that the complainant - partnership firm being an unregistered partnership firm, in view of the provisions of Section 69(2) of the Indian Partnership Act, no suit could have been filed to recover the amount and consequently, the amounts under cheque were not legally enforceable debt or liability. The learned Trial Judge acquitted the accused/respondent on the grounds that: i) the date of service of notice had not been mentioned in the complaint, ii) D. W. 1 had denied the version of P. W. 1, iii) In the absence of documentary evidence, sole testimony of the complainant was not acceptable, iv) That the complainant firm not having been registered under the Partnership Act, the amount due was not enforceable debt or liability.

Challenging that judgment of acquittal, these appeals have been preferred by the complainant. 4. Smt. M.D. Anuradha, learned Counsel for the appellant submits that this is not a claim arising out of a contract, but the cheques having been issued for payment of price of goods supplied, Section 69(2) of the Indian Partnership Act has no application to the present case. As regards the observation of the learned Trial Judge that in the absence of documentary evidence, the sole testimony of P.W.I regarding delivery of goods cannot be accepted, she submits that non delivery of goods to the respondents had to be proved by the accused and not by the complainant, but there is positive material on record to prove delivery of goods. As regards absence of the date of service of notice in the complaint, she invites the attention of the Court to the averment in the complaint regarding the issuance of notice and service of notice and submits that from the acknowledgment cards, the dates of service of notice is evident. On these grounds, she submits that the acquittal was not justified and she prays for allowing the appeals and setting aside the acquittal. 5. Replying to that argument, Sri. H. Jayakar Shetty, learned Counsel for the respondents submits that as per the complaint, delivery of goods was in furtherance of a contract between the complainant and the accused and therefore any claim in respect of the alleged supply of containers was towards the enforcement of contract and consequently the amount claimed under the cheques being the amount in furtherance of the contract, Section 69(2) of the Indian Partnership Act is applicable. He further submits that the suggestions made by the accused clearly show that the goods had been delivered to one Raja Screen Printers and not to the accused and therefore there was no liability on the accused to pay the amounts under the cheques. He submits that the writing in the cheques in question is not that of the accused and it is for the complainant to prove that the cheques had been issued as the price of the goods delivered. On these grounds, he submits that the learned Trial Judge was right in acquitting the accused/ respondents. 6. To consider in the first instance the claim of the complainant that these cheques had been issued for payment of the goods supplied, in addition to his deposition, the complainant places reliance on certain documents to show that such delivery of goods had been made, and for payment of the said dues, these cheques had been issued. The original invoices have been produced in C.C. No. 30420/1999 and they are as follows: Ex.P-19 Invoice No. 86 dated 16-08-1997 Rs. 17,472-00 Ex.P-20 Invoice No. 87 dated 19-08-1997 Rs. 24,128-00 Ex.P-21 Invoice No. 88 dated 26-08-1997 Rs. 29,673-80 Ex.P-22 Invoice No. 92 dated 23-09-1997 Rs. 2,789-80 Ex.P-23 Invoice No. 91 dated 23-09-2007 Rs. 8,320-00 The contention of the learned Counsel for the respondents is that no such articles had been delivered to the accused/respondents. In this regard, he has placed reliance on the endorsement in those invoices that the delivery was to Raja Screen Printers of Bangalore. He also places reliance on the admission of the complainant in the cross-examination that these invoices do not bear the signatures of the accused. 7. The learned Counsel for the appellant has pointed out that on Exs.P-19, P-20 and P-21 there are seals of the accused No. 2 M/s. Southern Agro Chemicals, to show that the orders placed were by the accused but the delivery was to be to Raja Screen Printers. This shows that delivery to

Raja Screen Printers was as per the instruction of the accused. It is contended by the learned Counsel for the respondents (accused) that the address in the seal is different from the address of the respondent No. 2 written at the top of Exs.P-19, P-20 and P-21. These invoices were raised as per the orders placed by the accused whose address was given as 69th Cross, V Block, Rajajinagar, Bangalore, when invoices were raised. However the seal shows the address as I Floor, 68th Cross, Bashyam Circle, Rajajinagar, Bangalore. It is not for the complainant to explain why a different address is given in the accused's seal, but for the accused to explain as to how in the seal he has changed the address. Infact when notices of the appeals were sent to the respondents at No. 643, 1st Floor, 62nd Cross, Rajajinagar, Bangalore, the notices were returned with the endorsement of the ASI of the Kamakshipalya police station stating that the addressee had vacated the premises and he was later traced to be operating near the Bashyam Circle. Therefore the seals on Exs.P-19 to P-21 have to be accepted as those of the accused. Infact this indicates an attempt on the part of the respondents to evade the service and liability and none else. 8. As per invoice No. 86 dated 16-08-1997 at Ex.P-19, 2100 numbers of containers were delivered at Raja Screen Printers. The corresponding delivery challan is at Ex.P-24 for having delivered 2100 containers with the endorsement of Raja Screen Printers for having received 2100 number of containers. Similar delivery challans are found at Ex.P-26 corresponding to invoice at Ex.P-22 for having delivered 300 and 410 numbers of containers to M/s. Southern Agro Chemicals (the accused No. 2), at Ex.P-27 in respect of the invoice No. 91 (Ex.P-23) and at Ex.P-25 corresponding to invoice No. 82 (relating to Ex.P-20). Delivery challan Ex.P-26 bears the seal of the accused No. 2 and that delivery was as per invoice No. 86 dated 16.08.1997 (Ex.P-19) to Raja Screen Printers. These materials shift the burden to the accused to rebut the proof. The respondents not having chosen to adduce rebuttal evidence, it has to be held that the contention of the respondents that articles had not been supplied is patently false. 9. Now coming to the contention of the respondents that in view of the provisions of Section 69(2) of the Indian Partnership Act, the amount under the transaction was not legally enforceable debt, reliance has been placed by the respondents learned advocate on a Division Bench decision of Andhra Pradesh High Court in *Amit Desai and Anr. v. Shine Enterprises and Anr.* 2000 Criminal Law Journal 2386 wherein in respect of an unregistered partnership firm, on the ground that the suit cannot be instituted by an unregistered firm, it was held that the debt against the accused was not a legally enforceable debt. That was the case in which, the second consignment received by the complainant could not be sold and it had been returned to the accused by dispatching through a lawyer and the accused had sent a credit note to the amount and promised to return the value of the stock returned to them. In that circumstances, the accused had issued a cheque and the complaint arose out of the dishonour of that cheque. The amount under the cheque arose out of that promise of the accused to return the value of the stock. That was a case of enforcement of a right arising out of such contract. That principle is not applicable to the fact of the present case. 10. The Supreme Court in the case of *Kamal Pushpa Enterprises v. D.R.*

Construction Co. AIR 2000 Supreme Court 2576 has observed that the bar to enforce rights arising from contract under Section 69(2) of the Partnership Act applies only in respect of suits and not applicable to the proceedings before the Arbitrator. In a direct decision of this Court *Beacon Industries, Rep. by Its Partner, Bangalore v. Anupam Ghosh* the observation of this Court is that an unregistered firm is barred from filing a civil suit, but that there is no bar to initiate a private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act. 11. The words, 'legally enforceable debt or other liability' used in the explanations to Section 138 of the Negotiable Instruments Act refer to the enforceability in law of the debt or the liability in question and have no reference to the right of the person enforcing it. If there is no legal impediment for enforceability of a debt or other liability in general, disability of a particular individual or entity to enforce such right to recover such debt or liability does not render such debt or liability not legally enforceable debt or liability. The intention of the legislature is to make non payment of amounts of cheques despite service of notice as per the provisions of the Act an offence only when the cheque has been issued for payment of a legitimate debt or liability. Amount required to be paid as price of articles or goods is a legitimate debt or liability and therefore it is a legally enforceable debt or liability. The disability of an unregistered firm under Section 69(2) of the Indian Partnership Act to file a suit to enforce a right arising out of a contract does not make such debt or liability not a legally enforceable debt or liability. 12. In the present case, the claim is regarding the goods supplied. The complainant had proved that the goods had been supplied and the cheques had been issued for the amounts due as price of such goods. Besides in addition to the presumption available in favour of the complainant under Section 139 of the Negotiable Instruments Act regarding issuance of cheques for discharge of the debt or liability, the complainant had placed positive material to substantiate his contention. On the contrary, no rebuttal evidence had been adduced by the accused to disprove the claim of the complaint. Sections 138 and 139 of the Negotiable Instruments Act have been enacted to preserve the sanctity of commercial transactions and to discourage debtors to unjustifiably avoid payment of dues under cheques. Denying legitimate claims by magnifying unmerited technicalities would result into injustice and may erode the faith of the people in the rule of law. Therefore, the learned Trial Judge erred in observing on the basis of Section 69(2) of the Partnership Act that the liability was not legally enforceable. 13. As regards the other contention that the date of service of notices had not been mentioned in the complaint, the complaint clearly mentions that the notice of dishonour of cheques had been issued in one case on 27-07-1998 and in another case on 14.09.1998 both by registered post acknowledgment due and under certificate of posting. The notices sent by registered post acknowledgment due to the accused No. 1 were returned as refused. Notices sent to the accused No. 2 of which the accused No. 1 is the proprietor were served on 28-07-1998. Service of notices had not been denied by the accused. Admittedly the amounts of cheques had not been paid. The complaint having been filed within the time from the date of service of notices, this ground on which the learned Trial Judge

held against the complainant has to be held as perverse. 14. For the above said reasons, both the appeals are allowed and setting aside the acquittal of the respondents in each case, the respondents are convicted in each case for the offence punishable under Section 138 of the Negotiable Instruments Act. At the request of the learned Counsel for the respondent, adjourned to 09-10-2007 to hear regarding sentence. ORDER REGARDING SENTENCE The respondent is present. Learned Counsel for the appellant and the respondents have filed a joint application in each case praying for permission to compound the offence. Since the respondents have been convicted in both the appeals, the question of permitting the parties to compound the offence does not arise. In view of the same, the prayer to compound the offence in each case is rejected. Then a joint memo signed by the learned Counsel for the appellant and the learned Counsel for the respondent is filed in the following terms: 1. It is submitted that after hearing the above case, this Hon'ble Court was pleased to convict the respondent for the offence committed under Section 138. It is submitted that now at the intervention of the friends and well wishers, the appellant and respondents have settled disputes between the appellant and respondents out of Court and in consideration of the settlement, the respondents have paid Rs. 90,000/- towards full and final settlement of the 7 cheques involved in the above two appeals filed by the appellant and also the appellant has agreed said settlement and thereby received Rs. 90,000/- in full and final settlement of the claim in respect of 7 cheques involved in the above two appeals and hence the appellant does not want to press the above appeals and prays for dismissal of the same as withdrawn and the respondents may kindly be acquitted, in the interest of justice. In view of the payment of the amount by the respondents in full and final settlement of both the appeals, a lenient view is taken and the accused No. 2 represented by the accused No. 1 is sentenced to pay a fine of Rs. 1,000/- (Rupees one thousand only) in default the accused No. 1 shall undergo simple imprisonment for one month in each case. One month's time is granted to the respondents to pay the fine in the Trial Court. No separate sentence is imposed on the accused No. 1 in view of the settlement between parties and imposition of fine on the accused No. 2.