

(2012) 04 GUJ CK 0046
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1503 of 2011

Amit Birendrakumar Sinha

APPELLANT

Vs

Varsana Ispat Ltd.

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2013) ALLMR(Cri) 154

Hon'ble Judges : Anant S. Dave, J

Bench : Single Bench

Advocate : Anshin H. Desai, for the Appellant; Anand B. Gogia for the Respondent No. 1 and Mr. J.K. Shah, APP for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Anant S. Dave, J.—This application u/s 482 of the Code of Criminal Procedure, 1973 [for short, "the Code"] is filed by the applicant to quash Criminal Case No. 5140 of 2009 filed in the Court of the learned Additional Chief Judicial Magistrate, Gandhidham, Kutch, for the offences punishable u/s 138 of the Negotiable Instruments Act and the order dated 2.12.2009 passed by the trial court. At the stage of admission hearing, the Court (Coram: K.M. Thaker, J.) passed an order dated 7.2.2011, which reads as under:

1. Heard Mr. Anshin Desai, learned Advocate for the petitioner.
2. He has submitted that the present petition is left out from the group of three petitions. He has further submitted that in other two petitions, which are identical except in respect of the date of deposit of the cheque, the Court has passed order dated 28.1.2011. He has prayed for similar order on the ground that the other two petitions are identical in all respects as aforesaid.
3. Mr. Desai has further submitted that when the cheques were issued on behalf

of the company, the petitioner was holding the post of Vice President but when the cheques were deposited, he had already resigned.

4. Having regard to the submissions on behalf of the learned Advocate for the petitioner and the averments made in the petition, issue NOTICE returnable on 25th February, 2011. In the meanwhile, there shall be ad interim relief in terms of para 21[C] until the returnable date.

2. At the outset, it is submitted that the identical petition, being Criminal Misc. Application No. 1001 of 2011, is dismissed by the Court [Coram: M.R. Shah, J.] by C.A.V. Judgment dated 10.11.2011, which reads as under:

1.0. Present Criminal Miscellaneous Application u/s 482 of the Code of Criminal Procedure has been preferred by the applicant original accused No. 3 to quash and set aside the impugned complaint being Criminal Case No. 5140 of 2009 pending in the Court of learned Additional Chief Judicial Magistrate, Gandhidham, which has been filed for the offence u/s 138 of the Negotiable Instruments Act.

2.0. The impugned criminal complaint has been filed by respondent No. 2 original complainant in the Court of learned Additional Chief Judicial Magistrate, Gandhidham against the petitioner and others for the offence u/s 138 of the Negotiable Instruments Act with respect to dishonour of the cheques, which were admittedly signed by the original accused Nos. 2 and 3 (inclusive of the petitioner accused No. 3) authorized signatory of original accused No. 1 company. That the learned JMFC, Gandhidham by order dated 2.12.2009 has directed to issue summons against the petitioner and other accused persons for the offences u/s 138 of the Negotiable Instruments Act. Being aggrieved, the petitioner original accused No. 3 has preferred the present Criminal Miscellaneous Application u/s 482 of the Code of Criminal Procedure.

3.0. Shri Anshin Desai, learned advocate for the petitioner has submitted that cheques in question were dated 26.3.2009, 31.3.2009, 4.4.2009 and 8.4.2009, which were signed by the petitioner as one of the signatory of the cheques as Vice President of the original accused No. 1 company and the same came to be presented in the Bank at Gandhidham on 6.7.2009, which came to be dishonoured on 7.7.2009, however prior thereto the petitioner had already tendered his resignation as Vice President/Director of the Company on 27.6.2009 and the same was accepted on the same day and therefore, at the time when cheques dishonoured the petitioner had already resigned and therefore, it cannot be said that the petitioner has committed the offence as alleged u/s 138 of the Negotiable Instruments Act.

3.1. It is further submitted that even notice for dishonour was issued on 16.7.2009 regarding dishonour of the cheques and prior thereto the petitioner has already resigned and therefore, it cannot be said that ingredients of Section 138 of the Negotiable Instruments Act are satisfied, therefore, it is requested to quash and set aside the impugned complaint.

3.2. It is further submitted by Shri Desai, learned advocate for the petitioner that as per Section 138 of the Negotiable Instruments Act, relevant date for the commission of offence is not at the time when the cheque is signed and/or issued, but is only at the time when on receipt of the statutory notice u/s 138 of the Negotiable Instruments Act, the notice sent by the drawee to the drawer, the amount is not paid within the statutory period of 15 days, that would be the starting point of offence and is completed after the said period is over if the payment is not made. Therefore, it is submitted that the offence u/s 138 of the Negotiable Instruments Act is said to have been committed and cause of action arises only after the receipt of the notice by the drawee to the drawer and non payment thereafter within statutory period of 15 days. Therefore, it is submitted that at the relevant time when the notice was issued u/s 138 of the Negotiable Instruments Act, the petitioner had already tendered his resignation much prior thereto and which was accepted by the company, it cannot be said the petitioner has committed the offence u/s 138 of the Negotiable Instruments Act. It is further submitted that the offence u/s 138 of the Negotiable Instruments Act would not be completed with the dishonour of cheque. It is submitted that it attains completion only with the failure of the cheque to pay the cheque amount within the expiry of 15 days as mentioned in clause (c) of the proviso to Section 138 of the Negotiable Instruments Act. It is submitted that offence u/s 138 of the Negotiable Instruments Act can be completed only with the concatenation of a number of acts as contemplated u/s 138 of the Negotiable Instruments Act. Therefore, it is submitted that issuance of cheques cannot ipso facto make a person liable for prosecution u/s 138 of the Negotiable Instruments Act.

3.4. Shri Desai, learned advocate for the petitioner has further submitted that all the disputes were subject to Hariyana jurisdiction and therefore, the learned JMFC, Gandhidham would not have any jurisdiction to hear and decide the present case.

3.5. Shri Desai, learned advocate for the petitioner has relied upon the following decisions of the Hon"ble Supreme Court in support of his above submission and has requested to quash and set aside the impugned complaint qua him.

- (1) Harshendra Kumar D. Vs. Rebatilata Koley Etc.,
- (2) K.K. Ahuja Vs. V.K. Vora and Another,
- (3) DCM Financial Services Ltd. Vs. J.N. Sareen and Another,
- (4) Sivakumar Vs. Natarajan,
- (5) Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd.,
- (6) K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another,
- (7) M/s. Uniplas India Ltd. and Others Vs. State (Govt. of NCT of Delhi) and Another,
- (8) Sadanandan Bhadran Vs. Madhavan Sunil Kumar,

(9) M/s. Sil Import, USA Vs. M/s. Exim Aides Silk Exporters, Bangalore,

(10) Subodh S. Salaskar Vs. Jayprakash M. Shah and Another,

3.6. By making above submissions and relying upon the above submissions, it is requested to allow the present petition.

4.0. Petition is opposed by Shri Gogia, learned advocate for the original complainant. It is submitted that it is specifically denied that the applicant had resigned as Vice President of the original accused No. 1 on 27.6.2009 as alleged. It is submitted that the aforesaid is the disputed question of fact and same can be said to be a defence of the petitioner, which is required to be considered at the time of trial. It is submitted that admittedly the petitioner is the signatory of the cheques and even all the invoices were signed by the petitioner, the petitioner can be said to be in day to day to affairs and management of the company and therefore, the petitioner is liable to be prosecuted for dishonour of the cheques, which were admittedly signed by the petitioner as authorized signatory of the original accused No. 1 company. Shri Gogia, learned advocate for the respondent No. 1 original complainant has relied upon the decision of the Hon'ble Supreme Court in the case of National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, as well as decision of the learned Single Judge in the case of K.C. Sethi Vs. State of Gujarat and Another, .

4.1. Now, so far as contention on behalf of the petitioner with respect to the jurisdiction of the learned JMFC, Gandhidham is concerned, it is submitted by Shri Gogia, learned advocate for the respondent No. 1 original complainant that as the cheques have been presented at Gandhidham and intimation of dishonour of cheques has been received at Gandhidham, the Gandhidham Court would have jurisdiction to try and entertain the complaint.

4.2. Shri Gogia, learned advocate for the respondent No. 1 original complainant has also relied upon the decision of the Hon'ble Supreme Court in the case Rallis India Ltd. Vs. Poduru Vidya Bhusan and Others, by submitting that if there are disputed questions of fact with respect to even alleged resignation of Director/partner the High Court would not be justified in quashing and setting aside the complaint in exercise of powers u/s 482 of the Code of Criminal Procedure. By making above submissions and relying upon the above decisions, it is requested to dismiss the present petition.

5.0. Shri Raval, learned APP has requested to pass appropriate order considering the facts and circumstance of the case.

6.0. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that the impugned complaint has been filed against the petitioner and others for the offence u/s 138 of the Negotiable Instruments Act for dishonour of the cheques issued by the original accused No. 1 company, which were admittedly signed by the petitioner as Vice President of the original accused No. 1 and another as signatory of the original accused No. 1

company. The petitioner has sought to quash and set aside the impugned complaint solely and mainly on the ground that prior to the deposit of the aforesaid cheques and issuance of statutory notice u/s 138 of the Act with respect to the dishonour of the cheques, the petitioner had already tendered his resignation on 27.6.2009, which was accepted on the same day. Alleged resignation of petitioner as Vice President of the company on 26.7.2009 has been disputed and denied by the original complainant. Therefore, as such aforesaid would be disputed question of fact, which is not required to be considered in an application u/s 482 of the Code of Criminal Procedure. At the most, same can be said to be defence of the petitioner accused, which is required to be considered on leading proper evidence at the time of trial. In the case of *Rallis India Ltd. Vs. Poduru Vidya Bhusan and Others*, the Hon"ble Supreme Court has specifically observed and held that at the threshold, the High Court should not interfere with the cognizance of the offence having been taken by the trial Court. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the respondent ceased to be the partners of the firm. In para 12 to 15 the Hon"ble Supreme Court has held and observed as under:

12. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, proviso to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable of punishment. Needless to say, final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquitted.

13. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the Respondents ceased to be the partners of the firm.

14. Before concluding the present discussion, we also take this opportunity to

strike a cautionary note with regard to the manner in which High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is *pari materia* with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties. In the present case, there are several disputed facts involved for instance, the date when the partnership came into being, who were the initial partners, if and when the Respondents had actually retired from the partnership firm etc.

15. Strictly speaking, the ratio of the SMS Pharmaceuticals (*supra*) can be followed only, after the factum that accused were the Directors or Partners of a Company or Firm respectively at the relevant point of time, stands fully established. However, in cases like the present, where there are allegations and counter allegations between the parties regarding the very composition of the firm, the above rule of "specific averment" must be broadly construed. Indeed, it would be nothing short of a travesty of justice if the Directors of a Company or Partners of a Firm, who, having duped a third party by producing false documents (like a fake partnership deed) or making false statements (that some others were in charge of the Company/Firm), at a subsequent stage, seek protection from prosecution on the ground that they were not directly indicted in the complaint such a proposition strikes against one of the very basic tenets of the law of natural justice, which is, that none shall be allowed to take advantage of his own default. Of course, the above observation is of a general nature, and has no bearing on the present case, but nonetheless, the power to quash a criminal proceeding with respect to an offence u/s 141 of the Act, must be exercised keeping this advisory note and caveat in mind.

7.0. Therefore, on the aforesaid ground and without giving an opportunity to party to lead evidence the impugned complaint is not required to be quashed and set aside in exercise of powers u/s 482 of the Code of Criminal Procedure.

8.0. It is also required to be noted at this stage that so far as the petitioner is concerned, admittedly he is the signatory to the cheques in question as Vice President and authorized signatory of the original accused No. 1 company. As held and observed by the Hon"ble Supreme Court in the case of National Small Industries Corporation Ltd. (*supra*) so far as the signatory to the cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141 of the Negotiable Instruments Act. It is also required to be noted and so stated in the affidavit in reply that applicant has signed the invoices as Vice President of the Company. Even otherwise, from the necessary averment and allegation against the petitioner the petitioner is required to be tried.

9.0. In the case of K.C. Shethi (supra) when such a plea was raised and the complaint u/s 138 of the Negotiable Instruments Act was sought to be quashed on the plea that when the statutory notice was served, he had already retired prior thereto, this Court has refused to quash and set aside the complaint in exercise of powers u/s 482 of the Code of Criminal Procedure by holding that persons responsible for commission and omission of offence are liable irrespective of resignation more so when directors have signed the cheques. In any case, in the present case it is disputed that applicant has resigned as Vice President on 27.6.2009 as alleged.

10.0. Now, so far as contention on behalf of the petitioner that Gandhidham Court had no jurisdiction is concerned, same has no substance. It is to be noted that original complainant is having its business at Gandhidham and the cheques were presented in the Bank at Gandhidham and the intimation with respect to the dishonour of cheques were received by the complainant at Gandhidham. Therefore, considering the decision of the Hon''ble Supreme Court in the case of K. Bhaskaran (supra) impugned complaint is not required to be quashed and set aside on the aforesaid ground.

11.0. Now, so far as reliance placed upon the other decisions of the Hon''ble Supreme Court referred to herein above, considering the same it appears that none of the decisions would be of any assistance to the petitioner. In the case of Harshad Kumar D. (supra), it was specifically found by the Hon''ble Supreme Court that Director resigned much prior to cause of action for the offence u/s 138 of the N.I. Act and resignation was accepted by the company and the same was also notified to the Registrar of the Companies in prescribed form No. 32. Therefore, on facts the aforesaid decision would not be of any assistance to the petitioner.

12.0. Now, so far as contention on behalf of the petitioner that the relevant date for cause of action to file complaint u/s 138 of the N.I. Act would be serving of the statutory notice u/s 138 of the N.I. Act and within 15 days from the receipt of such notice the amount under the cheque is not repaid is concerned, the aforesaid seems to be attractive but has no substance. For constituting the offence u/s 138 of the N.I. Act what is required is issuance of cheque by a person from the Bank account maintained by him; same is dishonoured on presentation within stipulated period of its validity and issuance of notice within the period stipulated and non payment of amount under the cheques in question within 15 days from the receipt of the statutory notice. Therefore, for constituting offence u/s 138 of the Act the bundle of facts are required to be considered and not one of the fact. If the contention on behalf of the petitioner is accepted, in that case, in a given case it may happen that a person who issued the cheque for example on 15.10.2011 and signs the cheque and he resigns on 17.10.2011 and when a person deposits the said cheque on 20.11.2011 same is dishonoured on the ground of "fund insufficient" and statutory notice is given within stipulated time, in that case no person can be prosecuted u/s 138 of the N.I. Act and it will give a

premium to such dishonest person and purpose and object for enacting Section 138 of the Act would be frustrated. Therefore, the aforesaid contention on behalf of the petitioner cannot be accepted.

13.0. Even otherwise, as stated above, whether the petitioner has tendered is resignation on 27.6.2009, which was accepted on the same day is disputed as stated above it can be said to be his defence, which is required to be considered at the time of trial by permitting the parties to lead evidence.

14.0. In view of the above and for the reasons stated above, petition fails and same deserves to be dismissed and is accordingly dismissed. Rule discharged. Ad-interim relief granted earlier, if any, stands vacated forthwith.

3. This Court is in complete agreement with the reasons assigned by the Coordinate Bench of this Court for dismissing the said application, which is identical to the present application. In view of the above, there is no substance in any of the contentions raised by the learned counsel for the applicant and the present application deserves to be dismissed by adopting the reasons given by the Coordinate Bench of this Court for dismissing the said identical matter. In the result, this application is dismissed. The ad interim relief stands vacated. Notice is discharged.