
(2011) 05 GUJ CK 0001

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 2927 of 2005

Bholasingh Jaiprakash Construction Ltd. and Others

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 141

Citation : (2011) 05 GUJ CK 0001

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : B.S. Patel and Ranjan B. Patel, s 1 - 9, for the Appellant; K.P. Raval, Ld. APP for Respondent 1 and H.P. Motiramani and Y.H. Motiramani for Respondent 2, for the Respondent

Judgement

S.R. Brahmbhatt, J.—Learned advocate for the Petitioners has stated at the Bar that Petitioner No. 3, who happened to be the chairman of Petitioner Nos. 1 and 2 company has expired on 22/1/2008 and xerox copy of the death certificate is produced on record. Hence this petition would not survive qua Petitioner No. 3, who is named as accused No. 2 in the complaint. This petition is therefore now confined to the rest of the Petitioners, namely Petitioner company, who has been named twice, namely Petitioner No. 1 and Petitioner No. 2 and Petitioner Nos. 4 to 9.

2. The Petitioners who have been named as accused in criminal complaint No. 955 of 2002 filed by Respondent No. 2 alleging commission of offence u/s 138 of Negotiable Instrument Act, 1881 (herein after referred to as "N.I. Act" for brevity) have approached this Court u/s 482 of Code of Criminal Procedure seeking quashment of the said complaint for the reasons stated in the memo of the petition.

3. This Court (Coram: K.A. Puj, J {as he then was}) vide order dated 14/9/2005 issued rule in this matter which was made returnable on 5/10/2005, and granted

interim relief in terms of para 9(B) of the petition staying further proceedings of Criminal Complaint No. 955 of 2002 pending in the Court of Learned Chief Metropolitan Magistrate, Ahmedabad. This matter is listed in the final hearing board and is taken up for hearing.

4. The Respondent No. 2 has filed the complaint in question invoking Section 138 and 141 of N.I. Act, alleging that the complainant was supplying iron and steel material to accused No. 1 company. Accused No. 1 company issued cheque bearing No. 223307 dated 30/6/2002 for a sum of Rs. 70,00,000/- drawn on Janata Cooperative Bank Ltd., Nadiad branch, came to be issued on behalf of the company signed by Petitioner No. 4 for goods supplied at Modhera and Patan sites of the company. Another cheque bearing No. 647224 dated 30/6/2002 for Rs. 69,670/- was also issued drawn on Anand Mercantile Cooperative Bank, Anand, for the goods supplied at Kapadwanj site. On receiving telephonic instructions after receiving the same the complainant deposited two cheques in its account, after informing the accused that the cheques were to be deposited vide their communication dated 13/8/2002 and the cheques were deposited on 26/8/2002. The cheque in question being cheque No. 223307 dated 30/6/2002 for sum of Rs. 70.00 lakhs was returned back with remarks "refer to drawer". The complainant was therefore constrained to issue legal notice on 2/9/2002 sent by registered post acknowledgment due to accused No. 1 company and its registered office at Lucknow as well as its branches at Kapadwanj, Baroda, Bahuchraji district Mehsana. Notices were duly served and acknowledgment due slips have been produced on record. The company and directors failed in complying with the requirement of making payment of cheque amount after expiry of the statutory period, the complaint came to be filed which came to be registered as Criminal Complaint No. 955 of 2002 in the Court of Chief Metropolitan Magistrate, Ahmedabad, whereon the Court issued process. Petitioners appears to have filed one petition being Criminal Misc. Application No. 8717 of 2002 challenging issuance of process and complaint which came to be termed to be evidenced by this Court vide order dated 24/3/2002 passed in said Criminal Misc. Application No. 8717 of 2002. Said order read as under.

Heard Learned Counsel for the respective parties.

At the end of argument Learned Counsel for the Petitioners seek permission to withdraw this petition with a liberty to file application for discharge and also for exemption before the court below.

Permission is granted as prayed for. This petition stand disposed of as withdrawn. Notice is discharged. In the event of filing applications for discharge as also exemption same shall be disposed of on merits without being influenced by the order of withdrawal.

5. Said petition was sought to be withdrawn with a view to approach the Court concerned for seeking discharge. The discharge application was filed which came to be rejected by concerned Court vide order dated 19/2/2005 in light of the

decision in case of Adalat Prasad v. Roop Jindal and Anr. that once having taken cognizance of order process cannot be recalled and discharge cannot be granted.

6. Thereafter Petitioners, as per their say, who left with no choice but to approach this Court once again invoking Section 482 of Code of Criminal Procedure and as it is stated herein above, this Court on 14/9/2005 issued rule and granted interim relief staying further proceedings of the complaint in question.

7. Learned advocate appearing for the Petitioners invited this Court's attention to the documents annexed to the petition to support his contention that the complaint is required to be quashed as the offence cannot be said to have been committed on account of the fact as they emerge from reading of documents annexed to this petition. The documents pressed into service for seeking support to the contention for quashment are listed as under, namely:

The reply to the notice issued by original complainant dated 16/9/2002.

8. Relying upon this document a contention was canvassed on behalf of the Petitioners that the Petitioners have paid up the amount of liability and therefore complaint is nothing but sheer abuse of process of law and hence required to be quashed in exercise of power conferred upon this Court u/s 482 Code of Criminal Procedure. Leaned advocate for the Petitioners invited this Court's attention to para-3, 4, and 7 to support his contention that the adding of figures mentioned there under coupled with narration in respect of dispatching demand drafts and act of Respondent No. 2 in encashing those demand drafts without disclosing the contents of the notice either in the memo of the complaint or producing the same before the Court amount to mala fide exercise of misuse of provisions of law for harassing the Petitioners. Therefore the complaint is required to be quashed.

9. Learned advocate appearing for the Petitioners relied upon the documents produced on page-23, 24, 25, 26, 27 and 28 to indicate that these are the books of accounts extracts maintained by complainant forming of relevant entries made there under, which would conclusively show that the liability existed on the date of issuance of cheque namely cheque No. 8341843 came to be fulfilled and discharged on or before 10/10/2002 and the complaint thereafter came to be filed on next day i.e. on 11/10/2002, after having deposited the demand drafts as narrated in the reply to the notice and as it is reflected in the extract of books of accounts of the complainant which have been produced by complainant himself. Therefore the Court can accept that the Petitioners accused have aptly rebutted the presumption available against them by virtue of provision of Section 139 N.I. Act. The Petitioners have thus successfully rebutted the presumption by traversing those documents and therefore in light of this entries produced by the complainant himself the Court may come to the conclusion that the Petitioners are not liable to be proceeded against and hence the complaint be quashed.

10. Shri Patel, learned advocate appearing for the Petitioners relying upon the aforesaid documents and statements produced by Respondent No. 2 contended

that the liability existed on the date of issuance of the cheque dated 30/6/2002 had been discharged in its totality and hence filing of the complaint on 11/10/2002 was sheer abuse of process of law.

11. Shri Patel has further submitted that learned advocate for the Respondent No. 2 would not be justified in arguing that the amount was not sent in time as the amount was remitted by demand drafts and the demand drafts delivered should amount to discharging liability in its totality as the demand drafts are acceptable mode of payment in the commercial transaction.

12. Shri Patel, learned advocate for the Petitioners relying upon a decision of his Court in case of Bhratbhai K. Patel v. C.L. Verma (since decd) through P.O.A. Surjit Singh Macker and Anr. reported in 2002 (2) GLR pg. 1713, contended that, the Court while exercising discretion u/s 482 Code of Criminal Procedure has to appreciate the attempt to rebut legal presumptions and if rebuttal is found to be acceptable, then, the accused Petitioners may not be unnecessarily subjected to rigors of criminal trial. The petition therefore may be allowed qua all the surviving Petitioners and the complaint in question be quashed.

13. Shri Patel, learned advocate for the Petitioner relying upon a decision in case of S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., reported in 2005 (3) G.L.H. pg. 513 contended that in case if the Court is not inclined to quash the complaint qua all, atleast the complaint in question is required to be quashed qua Petitioner Nos. 5 to 9 as the complainant has made no averments indicating attributes which would render them vicariously liable u/s 141 of N.I. Act.

14. Learned advocate Shri Motiramani appearing for Respondent No. 2 submitted that the proposition of law laid down in case of S.M.S. Pharmaceuticals Ltd. (supra) by the Apex Court cannot be disputed and the Court, if inclined to quash the complaint qua the Petitioner Nos. 5 to 9, may pass appropriate order, but for the rest of the Petitioners, namely the company as well as the signatory namely accused No. 1 and accused No. 3 the complaint may not be quashed.

15. Relying upon the decision of the Apex Court in case of M/s M.M.T.C. Ltd. and Anr. v. M/S Medchl Chemicals and Pharma (P) Ltd. and Anr., reported in 2001 AIR SCW 4793, Shri Motiramani submitted that the the complainant is not required to indicate in terms that their subsists liability on the date of filing of the complaint. Learned advocate for the Respondent No. 2 while answering the contention with regard to discharge or not existing of liability on the part of the Petitioners, relying upon aforesaid Supreme Court decision contended that the Court while exercising power u/s 482 may not undertake appreciation of evidence and therefore, on established principle of law petition is required to be dismissed qua atleast those accused who are signatory and responsible for issuance of cheques.

16. Learned advocate for Respondent No. 2 invited this Court's attention to page 100 of the compilation and submitted that as per item No. 10 dated 10/11/2002 outstanding liability is indicated and amount is Rs. 13,61,069/-. Learned advocate for Respondent No. 2 submitted that the affidavit in reply is filed and in

that affidavit in reply Respondent No. 2 has not accepted the say of the Petitioners that there existed any liability when the complaint came to be filed. The denial on the part of Respondent No. 2 therefore act as sufficient ground for non-suiting the Petitioners so far as this petition is concerned, as u/s 482 Code of Criminal Procedure, the Court would not undertake appreciation of evidence and adjudicate upon rival contentions of the complainant as well as accused Petitioners.

17. This Court has heard learned advocates for the parties and perused the documents. The Court needs to be mindful of the fact that the Petitioners have approached this Court invoking provision of Section 482 Code of Criminal Procedure. Exercise of discretion for quashment of complaint is to be based upon impeccable plea of sheer abuse of process of law and therefore, submission of learned advocate for the parties are required to be examined from the point as to whether there is an abuse of process of law at the end of the complainant/ Respondent No. 2 herein above in filing this complaint.

18. The decision relied upon by learned advocate for Respondent No. 2 in case of MMTC Ltd. (supra) is containing the answer so far as the submission with regard to non mentioning of payment mentioned in the reply to the notice is concerned. The Court is of the view that Petitioners were not entitled to agitate on non disclosure of the contents of the reply to the notice unless and until it is impeccably capable of indicating that filing of the complaint was sheer abuse of process of law. The reply to the notice therefore is required to be examined. The Court at this stage needs to be mindful of the fact that the Court is not to undertake any appreciation of evidence. Therefore, the probative value of that document would not be pronounced upon at this stage. The document and reading of the document as it is along with document in the form of entries therein has collectively persuaded this Court to observe that the liability had not been discharged as argued by learned advocate for the Petitioners and in case if the said is discharged, then, it would be for the trial Court to appreciate the evidentiary value after recording the evidence at length of both the sides, namely complainant as well as accused. The defense of there exist no liability would not be available while examining the plea for quashment of the complaint based upon such a defense. The degree of impeccability required for accepting such a plea being conspicuously absent, in the peculiar facts of the present case same would not persuade this Court for quashing of the complaint. The Court rather is persuaded to observe that there exist or appears to be an attempt on the part of the Petitioners to avoid or evade their contractual liability arising out of the terms of the contract for making payment in time and on failure of their part to pay the late payment penalty. Be that as it may; the Court hasten to add here that the Court is not here to bind on either way as the Court is not examining the matter for appreciating the evidence. The appreciation of evidence being in the realm of trial Court, this Court u/s 482 Code of Criminal Procedure would restrain appreciating the evidence. Learned advocate for the Petitioners was not justified in relying upon decision of this Court in case of Bharatbhai K. Patel (supra) as the

Court has in unequivocal terms observed that this rebuttal be otherwise was capable in light of impeccable defense put forward in the facts of this case, namely non existence of contract, lack of privity etc. were the facts which weighed with the Court in accepting submission on behalf of Petitioner therein for quashment. This Court, therefore, is of the view that the facts on that case law is different than the facts in the present case and therefore the judgment relied upon by learned advocate for the Petitioners would be of no available to the Petitioners. The petition, in my view, therefore is required to be quashed qua the Petitioner No. 1 and Petitioner No. 4, i.e. the accused No. 1 and accused No. 3 respectively.

19. This bring this Court to decide the matter qua other Petitioners/accused. As averred in the memo of complaint their liability for issuance of cheques exist. But those averments in my view are not sufficient to render them liable to be subjected to rigors of criminal trial and therefore in light of the decision cited at the Bar in case of S.M.S. Pharmaceuticals Ltd. (supra) the other Petitioners/directors who have not been named with their role in the complaint are required to be protected and accordingly the complaint qua them would stand quashed. The petition is therefore disposed of as partly allowed. The complaint qua Petitioner No. 1 and 4, i.e. original accused No. 1 and accused No. 3 would survive and complaint against rest of the Petitioners/accused are quashed. Complaint against Petitioner No. 3/accused No. 2 is abated. Rule made absolute to the said extent.

20. Shri Patel, learned advocate for the Petitioners at this stage requests for continuance of stay granted earlier qua Petitioner Nos. 1 and 4/accused No. 1 and 3 as the petition is not granted qua them. This request is strongly objected by learned advocate for the Respondent No. 2. The objection is overruled. The stay granted earlier is therefore extended qua the Petitioner Nos. 1 and 4/accused No. 1 and 3, for a further period up to 8/7/2011.