(1998) 02 GUJ CK 0027

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No''s. 6519, 6520 and 6521 of 1997

Dadia and Sons and Others — APPELLANT

Vs

State of Gujarat and Another — RESPONDENT

Date of Decision : 02-02-1998

Acts Referred:

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

Citation : (1999) 98 CompCas 152

Hon'ble Judges : M.H. Kadri, J

Bench : Single Bench

Advocate : N.S. Desai, for the Appellant; P.B. Bhatt and H.C. Modi, for the Respondent

Judgement

M.H. Kadri J.

1. Rule. Learned Assistant Government Pleader, Mr. P. B. Bhatt, waives service of rule on behalf of opponent No. 1, whereas learned advocate,

Mr. H. C. Modi, waives service of rule on behalf of opponent No. 2-original complainant. By the consent of the learned advocates for the parties,

this group of criminal miscellaneous applications is taken up for final hearing.

2. Applicant No. 1 is a partnership-firm and applicants Nos. 2 to 6 are its partners, who have filed Criminal Misc. Applications Nos. 6519 of

1997 and 6520 of 1997; whereas applicant No. 1, a partnership-firm and applicants Nos. 2 to 7, partners of the said firm, filed Criminal Misc.

Application No. 6521 of 1997.

3. As common questions of law and facts are involved in this group of criminal miscellaneous applications, they are disposed of by the common

judgment.

4. The applicants, by way of filing these three applications, u/s 482 of the Code of Criminal Procedure (""the Code"" for short), have prayed to

quash the complaints filed by opponent No. 2, against the applicants, and the criminal proceedings, being Criminal Cases Nos. 3039 of 1996,

3040 of 1996 and 3041 of 1996, pending before the learned Metropolitan Magistrate, Court No. 15, Ahmedabad (hereinafter referred to as ""the

trial court"") for the offences punishable u/s 138 of the Negotiable Instruments Act, 1881 (""the Act"" for short) and section 420 of the Indian Penal

Code.

Criminal Misc. Application No. 6519 of 1997 :

The brief facts leading to filing of this application are that opponent No. 2 filed Criminal Case No. 3040 of 1996 in the trial court, alleging that

opponent No. 2 had paid loan amount to the applicants in the year 1993 and the applicant-firm had issued post-dated cheque towards the surety

thereof. As the complainant demanded repayment of the entire loan amount, the applicant-firm issued cheque, bearing No. 816142, dated April 1,

1996, for Rs. 73,303 in favour of opponent No. 2, drawn on Indian Bank, Ghatkopar Branch, Mumbai. When the said cheque was presented by

the complainant on August 29, 1996, for realisation, the same was dishonoured, with endorsement ""not arranged for"", by the bankers of the

applicants. Thereafter, on September 20, 1996, a statutory notice was served by the complainant to the applicants. However, the applicants have

not made the payment and, hence, Criminal Case No. 3040 of 1996 came to be filed, as stated above.

Criminal Misc. Application No. 6520 of 1997 :

The brief facts leading to the filing of this application are that opponent No. 2 filed Criminal Case No. 3041 of 1996 in the trial court, alleging that,

opponent No. 2 had paid loan amount to the applicants in the year 1993 and the applicant-firm had issued post-dated cheque towards the surety

thereof. As the complainant demanded repayment of the entire loan amount, the applicant-firm issued cheque, bearing No. 816145, dated April 1,

1996, for Rs. 1,09,953 in favour of opponent No. 2, drawn on Indian Bank, Ghatkopar Branch, Mumbai. When the said cheque was presented

by the complainant on August 29, 1996, for realisation, the same was dishonoured with endorsement ""not arranged for"" by the bankers of the applicants. Thereafter, on September 20, 1996, a statutory notice was served by the complainant to the applicants, However, the applicants have

not made the payment and, hence, Criminal Case No. 3041 of 1996 came to be filed, as stated above.

Criminal Misc. Application No. 6521 of 1997 :

The brief facts leading to the filing of this application are that opponent No. 2 filed Criminal Case No. 3039 of 1996 in the trial court, alleging that,

opponent No. 2 had paid loan amount to the applicants in the year 1993 and the applicant-firm had issued post-dated cheque towards the surety

thereof. As the complainant demanded repayment of the entire loan amount, the applicant-firm issued cheque bearing No. 824874, dated April 1,

1996, for Rs. 2,63,891 in favour of opponent No. 2, drawn on Indian Bank, Ghatkopar Branch, Mumbai. When the said cheque was presented

by the complainant on August 29, 1996, for realisation, the same was dis-honoured with endorsement ""not arranged for"" by the bankers of the

applicants. Thereafter, on September 20, 1996, a statutory notice was served by the complainant to the applicants. However, the applicants have

not made the payment and, hence, Criminal Case No. 3039 of 1996, came to be filed, as stated above.

5. All the above three criminal cases came to be filed on October 28, 1996, in the trial court. After verifying the contents of the complaints, the trial

court took cognizance of the offences and by order dated October 28, 1996, issued process against the applicants.

6. Accused Nos. 4 to 7 in Criminal Case No. 3039 of 1996 filed application for dropping the proceedings against them. The said application came

to be dismissed by the trial court on October 20, 1997. Similarly, accused Nos. 3 to 6, in Criminal Case No. 3040 of 1996 and Criminal Case

No. 3041 of 1996, filed applications for dropping the proceedings against them. The said applications were also dismissed by the trial court on

October 20, 1997.

7. Thereafter, the present criminal miscellaneous applications are filed before this court for quashing the complaints, as stated hereinabove. All the

three applications were placed for admission hearing before the court (Coram : M. S. Parikh J.) on December 10, 1997, and the following

common order was passed :

Leave to amend and produce necessary documents. Mr. N. S. Desai, learned advocate, seeks to withdraw this petition in so far as petitioners

Nos. 1 and 2 are concerned with a view to move an appropriate application before the learned Magistrate. In so far as petitioners Nos. 3 to 6 are

concerned, notice returnable on December 24, 1997. It will be open to the petitioners to pray for exemption before the learned Magistrate.

8. Mr. N. S. Desai, learned advocate appearing for the applicants, in all the three applications, has raised the following points.

(i) The complainant had presented cheques, despite intimation by the applicants not to deposit cheques before the first week of September 1996.

(ii) The dispute involved in the criminal cases is purely of a civil nature, and the complaints are filed by the complainant to bring pressure on the

applicants, which is a sheer abuse of the process of law.

(iii) On September 5, 1996, the applicants have instructed their bankers to stop payment of the cheques in question.

(iv) Applicants Nos. 3 to 6 in Criminal Misc. Applications Nos. 6519 of 1997 and 6520 of 1997 and applicants Nos. 3 to 7 in Criminal Misc.

Applications No. 6521 of 1997, were not in charge of the business of the firm and, therefore, the complaints against them are not maintainable and

are liable to be quashed.

9. Mr. H. C. Modi, learned advocate appearing for opponent No. 2 original complainant, has vehemently submitted that, in the applications filed

u/s 482 of the Code, the court is only required to see the contents of the complaints to find out whether the ingredients of section 138 of the Act

are satisfied or not. It is further submitted by the learned advocate for opponent No. 2 that, while exercising the inherent powers u/s 482 of the

Code, the court should not enter into the arena of disputed question of fact. It is further submitted by the learned advocate for opponent No. 2

that, unless the parties to the proceedings adduce oral evidence at the trial, the disputed question of fact raised by the applicants cannot be decided

in the present proceedings u/s 482 of the Code. It is further submitted by the learned advocate for opponent No. 2 that the applicants, in these

applications, which are filed u/s 482 of the Code, cannot produce new material or documents, which are not on the record of the case, pending in

the trial court. It is, lastly, submitted by the learned advocate for opponent No. 2

that the applicants have resorted to filing frivolous and vexatious

applications with the sole object of preventing trial on the merits and, therefore, these applications deserve to be dismissed.

10. The submission of the learned advocate for the applicants that the applicants had instructed the complainant not to present the cheques for

realisation before the first week of September 1996, is devoid of any merit. The cheques in question were issued on April 1, 1996. No evidence is

produced by the applicants indicating that they had instructed the complainant not to present the cheques for encashment before the first week of

September 1996. The complainant had presented the cheques in question on August 29, 1996, in her bank, namely, Bank of India, Ellis Bridge,

Ahmedabad. On presentation of the said cheques to the drawee bank, namely, Indian Bank, Ghatkopar Branch, Mumbai, the said cheques were

dishonoured and returned unpaid to the bankers of the complainant. The endorsement of the Indian Bank, Ghatkopar Branch, Mumbai, is dated

September 4, 1996, wherein, it is stated that the cheques were returned as ""not arranged for"". Even for the sake of argument if it is believed that

the applicants had instructed the complainant not to deposit the cheques before the first week of September 1996, then also the applicants had not

made arrangement for the funds as on September 4, 1996, so that the cheques may be cleared. Whether or not the applicants had instructed the

complainant not to present the cheques in question before the first week of September 1996, involves disputed question of fact, which cannot be

gone into, at this stage, while deciding the present applications u/s 482 of the Code.

11. The submission of the learned advocate for the applicants that the dispute involved in the criminal cases is purely of a civil nature and the

complaints are filed by the complainant to bring pressure on the applicants, which is a sheer abuse of the process of law, is also devoid of any

merit. The complainant has come out with a clear case, in her complaints, that she lent and advanced diverse amounts as and by way of loan

carrying interest at the rate of 18 per cent. per annum to applicant No. 1 firm. Applicant No. 1 firm had also paid TDS and deducted out of

interest paid or credited to the account of the complainant in the year 1995-96. It is alleged in the complaints that, in the first week of March, 1996, when the complainant demanded repayment of loan at the end of March, 1996, as she was badly in need of funds, applicant No. 2 agreed

to repay the outstanding amount of loan amount as on March 31, 1996. Thereafter, applicant No. 1-firm had issued cheques dated April 1, 1996,

for the out-standing amounts of loan amount and interest amount, in favour of the complainant. Looking to the allegations made in the complaints, it

cannot be, at this stage, said that the complainant had filed the abovestated complaints just to bring pressure on the applicants and the dispute

involved in the present case is purely of a civil nature. Looking to the allegations made in the complaints, it, prima facie, appears that the applicants

had, after settling their accounts with the complainant, issued cheques in question. The object of bringing section 138 of the Act on the statute is to

inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, section

138 is intended to prevent dishonesty on the part of the drawer of a negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induct the payee or holder in due course to act upon it. If the cheques in question are returned by the bank with

endorsement like (i) refer to drawer, (ii) exceeds arrangement, (iii) instruction for stoppage of payment and like other usual endorsements, it

amounts to dishonour within the meaning of section 138 of the Act and, therefore, even after issuance of notice, if the payee or holder does not

make the payment within the stipulated period, the statutory presumption would be of dishonest intention exposing to criminal liability. [see :

Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp

Cas 30

12. [1996] 2 SCC 7391. Thus, dishonour of cheques is an offence as per the provisions of section 138 of the Act and, therefore, the submission

of the learned advocate for the applicants that the dispute involved in the present case is purely of a civil nature and, on that count, the complaints

should be quashed, is also devoid of any merit.

13. The submission of the learned advocate for the applicants that, by intimation dated September 5, 1996, the applicants had instructed their

bankers to ""stop payment"" of the cheques in question, is also devoid of any merit. The applicants, after dishonour of the cheques in question, were

served with statutory notices on September 20, 1996. After receipt of the said statutory notices, the applicants'' advocate has replied to the said

notices on September 30, 1996. In the reply to the notice, the applicants'' advocate has not stated that the banker of the applicants was, by

intimation dated September 5, 1996, instructed to ""stop payment"" of the cheques in question. No such written intimation to the banker was

produced with the reply to the statutory notices by the applicants. There was no reason to issue instruction to the banker to ""stop payment"" of the

cheques in question, because the applicants had come out with a clear case that they had instructed the complainant to deposit the cheques in

question in the first week of September 1996. In fact, the cheques were deposited on August 29, 1996, in the bank, at Ahmedabad, by the

complainant, which were sent for encashment to the applicants'' bank at Mumbai. The said cheques were returned unpaid on September 4, 1996,

as the applicants had not made arrangement in their account. It appears that the applicants have come out with false case that they had instructed

their banker to stop payment with a view to get out of the clutches of section 138 of the Act. The intimation letter of the applicants'' bank dated

September 4, 1996, does not indicate such endorsement that the payment of the cheques was stopped on the instruction of the drawer. As per the

decision of the Supreme Court in the case of Alil Mollah and Another Vs. State of West Bengal, , if the cheque is returned with endorsement

insufficient funds"", then the provisions of section 138 of the Act would be applicable. In fact, no such instruction or intimation was given to the

bank to stop the payment of the cheques in question. Therefore, the submission of the learned advocate for the applicants that they had instructed

the bank to stop payment, is liable to be rejected.

14. The learned advocate for the applicants has further submitted that applicants Nos. 3 to 6 in Criminal Misc. Applications Nos. 6519 of 1997

and 6520 of 1997 and applicants Nos. 3 to 7 in Criminal Misc. Application No. 6521 of 1997, were not in charge of the business of the firm and,

therefore, the complaints against them are not maintainable and liable to be quashed. The learned advocate for the applicants, after obtaining leave

to amend and to produce necessary documents, has produced xerox copy of the notice dated September 20, 1996, issued by learned advocate

Mr. H. C. Modi, and xerox copy of the general power of attorney by applicants Nos. 3 to 6 giving their powers as partner of the firm to applicant

No. 2, Mahendra Amrutlal Dadia.

15. Learned advocate Mr. Modi, appearing for opponent No. 2 has seriously objected to the amendment and production of additional documents

on the ground that, in exercise of powers u/s 482 of the Code, the allegation made in the complaints constituting offences shall be the sole criterion

to find out whether any offence is made out or not. He has further submitted that, at the stage of quashing complaint u/s 482 of the Act, no

additional material produced by the accused is permissible. In support of the above submission, the learned advocate for opponent No. 2 has

placed reliance on the decision of the Supreme Court in the case of Chand Dhawan v. Jawahar Lal [1992] Crl. Lj 1956. The Supreme Court, in

the facts of the said case, has held that, when the Magistrate was satisfied that an offence had been disclosed and, accordingly, the summons had

been issued, the High Court was not justified in reaching the conclusion that the proceedings were liable to be quashed on the basis of additional

materials produced by the accused as those were required to be proved, particularly when those materials were not accepted by the complainant.

16. In my opinion, the observation of the Supreme Court in Chand Dhawan v. Jawahar Lal [1992] Crl. LJ 1956, would apply in all fours to the

facts of the present case. At the stage of quashing complaint u/s 482 of the Code, the court is required to see the allegations made in the complaint.

The learned Metropolitan Magistrate was also satisfied with the allegations made in the complaints and took cognizance of the offences u/s 138 of

the Act. From a bare perusal of the complaints, it is specifically stated that all the accused were partners of the accuses No. 1-firm and they jointly

manage the affairs of the firm. The allegations and averments made in the complaints, prima facie, show that all the accused-partners were

managing the affairs of the accused No. 1-firm and, therefore, at this stage, it cannot be said that accused Nos. 3 to 6, or accused Nos. 3 to 7, as

the case may be, were merely sleeping partners and they cannot be held liable for the acts of the firm. Whether or not applicants Nos. 3 to 6 in

Criminal Misc. Applications Nos. 6519 of 1997 and 6520 of 1997 and applicants

Nos. 3 to 7 in Criminal Misc. Application No. 6521 of 1997

were responsible for the acts of the firm, cannot be decided at this stage. It requires leading of evidence at the trial, and, therefore, at this stage, it

can-not be said that applicants Nos. 3 to 6 in Criminal Misc. Applications Nos. 6519 of 1997 and 6520 of 1997 and applicants Nos. 3 to 7 in

Criminal Misc. Application No. 6521 of 1997, were not responsible for the acts of the firm.

17. The learned advocate for the applicants has placed reliance on the decision of the Punjab and Haryana High Court, in the case of Anita v. Anil

K. Mehra [1996] 1 Crimes 412; [1998] 94 Comp Cas 584, wherein, it is held that a cheque issued by one partner on behalf of a firm had

bounced and, since there was no assertion in the complaint that respondents Nos. 2 and 3 were in charge of and responsible to the firm for

conduct of business of the said firm, the complaint cannot proceed against these two partners. In my opinion, looking to the facts of the present

case, the judgment of the Punjab and Haryana High Court in the case of Anita v. Anil K. Mehra [1996] 1 Crimes 412; [1998] 94 Comp Cas 584

is not applicable to the facts of the present case. In the complaints, the complainant has come out with specific allegation that all the accused-

partners of the firm were managing the affairs of applicant No. 1-firm.

18. The learned advocate for opponent No. 2 - original complainant - has placed reliance on the decision of the Madras High Court in the case of

Saj Flight Services (P.) Ltd. v. P. T. Gopala Raja [1997] 88 Comp Cas 544, wherein it is held that, for the purpose of proving offence u/s 138 of

the Act, necessary and proper party must be added, and, when the debt was incurred for and on behalf of the firm, all the persons concerned,

inclusive of the other directors or the partners must be jointly and severally liable, for which every one has to be added as party. The allegations

made in the complaints, prima facie, show that all the partners of applicant No. 1-firm were taking part in the management of the firm and,

therefore, also at this stage, it cannot be said that applicants Nos. 3 to 6 in Criminal Misc. Applications Nos. 6519 of 1997 and 6520 of 1997 and

applicants Nos. 3 to 7 in Criminal Misc. Application No. 6521 of 1997, were not responsible for the acts of the firm.

19. The learned advocate for opponent No. 2 has further submitted that the

applications were not sworn by applicant No. 2 and this court may

compare the signature of applicant No. 2 in the vakalatnama and the signature in the applications. I am afraid, this court cannot compare, at this

stage, the signatures of applicant No. 2 as appearing in the vakalatnama and in the affidavit in support of the applications. In my opinion, it would

be hazardous to compare signature of applicant No. 2 at the stage of deciding applications u/s 482 of the Code. It is also submitted by the learned

advocate for opponent No. 2 that the applicants have tried to interfere with the administration of justice which amounts to contempt of the court as

per the decision of the Supreme Court in the case of Dhananjay Sharma Vs. State of Haryana and Others, , and, therefore, notice for contempt,

under the Contempt of Courts Act, may be issued against the applicants. In my opinion, this submission of the learned advocate for opponent No.

2 cannot be entertained in the present proceedings. However, it would be open to opponent No. 2 to initiate appropriate proceedings under the

Contempt of Courts Act. It is, lastly, submitted by the learned advocate for opponent No. 2 that opponent No. 2 should be awarded

compensatory costs of these three applications. In my opinion, awarding of cost is discretionary and, in view of the facts and circumstances of the

case, I do not find it necessary to award costs in favour of opponent No. 2.

20. As a result of foregoing discussion, I do not find any substance in these three applications, and they are dismissed. Rule is discharged.

