

(2017) 06 GUJ CK 0046
In the Gujarat High Court
Case No : 2418 of 2008

DASHRATHSINH LAXMANSINH MAKWANA

APPELLANT

Vs

STATE OF GUJARAT & ANR.

RESPONDENT

Date of Decision : 15-06-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 482, Section 239, Section 156(3) - Saving of inherent powers of High Court - When accused shall be discharged - Police officers power to Investigate cognizable case
Indian Penal Code, 1860, Section 420, Section 415, Section 408 - Cheating and dishonestly inducing delivery of property - Cheating - Criminal breach of trust by clerk or servant
Negotiable Instruments Act, 1881, Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account

Citation : (2017) 06 GUJ CK 0046

Hon'ble Judges : B.N. Karia

Bench : Single Bench

Advocate : ASHISH M DAGLI, NV GANDHI, KP RAVAL

Judgement

1. The applicant-original accused has preferred this application under Section 482 of the Code of Criminal Procedure, 1973 {"CrPC" for brevity} for quashing and setting aside the order passed in Criminal Revision Application No. 25 of 2008 and Criminal Revision Application No. 26 of 2008 dated 16.09.2008 and an order passed by the learned JMFC, below discharge application dated 17.03.2016 arising out of the complaint, being Criminal Case No. 1025 of 2005 registered with the Judicial Magistrate, First Class, Prantij for the offence punishable under Section 420 of the Indian Penal Code.

2. Brief facts of the case are that complainant belongs to village Vaghpur, Ta: Prantij, District: Sabarkantha and doing agricultural work and rendering service as a Secretary to the Vaghpur Seva Sahakari Mandali [For short "Mandali"] and whereas, at the time of occurrence, the applicant/accused was serving as Loan

Inspector with Sabarkantha District Seva Cooperative Bank Limited, Prantij Branch. Being a Loan Inspector and resident of the same village, accused used to often come at the Mandali and thereby he developed relation with the complainant. At one point of time, the complainant requested to facilitate him for the amount of Rs. 20 lacs for establishing factory and thereby, the complainant and his Chairman made arrangement for loan amount in the name of members of Mandali and obtained necessary loan papers on 01.04.2003 entrusted to the accused person. That, being a Loan Inspector, the applicant got sanctioned loan for the said amount and misappropriated the whole amount. That, on loan being sanctioned, complainant and Chairman of the Mandali put their signatures over the cheques, which were entrusted to the accused, who in turn, encashed from the concerned bank, but did not remit the said amount of loan. That, the members of the Mandali as well as Chairman pressurized the respondent no.2, so in response thereof, the respondent no.2 issued a cheque of Rs. 20 lacs on 10.03.2005. 2.2 On presentation of the said cheque, it is informed from the concerned bank that the said cheque was dishonoured with an endorsement of "account closed", and thereby, the respondent no.2 committed cheating with the complainant and the members of the Mandali. 2.3 On account of his dishonest and malicious action, the complainant lodged criminal case against the respondent no.2 before the learned JMFC, Prantij and the same was registered as Criminal Inquiry Case No. 16 of 2005, and thereafter, learned Magistrate was pleased to pass an order under Section 156(3) Cr.PC, which has been investigated by PSI, Prantij and after collecting evidence, the Investigating Officer has filed charge sheet against the respondent no.2 on 07.07.2005 and thereby, learned Magistrate was pleased to issue summons against respondent no.2. Thereafter, he preferred discharge application under Section 239 CrPC, wherein learned Magistrate was pleased to allow the said discharge application. 2.4 Being aggrieved by and dissatisfied with order of the learned JMFC, Prantij, Ori. Complainant and State of Gujarat preferred Criminal Revision Application before the learned Additional Sessions Judge, Sabarkantha at Himmatnagar, being Criminal Revision Application No. 25 of 2008 and 26 of 2008 and while considering the facts and material available on record, the learned Judge was pleased to dismiss the said Revision Application of the complainant and the State on 16.09.2008.

3. Heard learned learned advocate Mr. Ashish M. Dagli appearing on behalf of the applicant, learned advocate Mr. NV Gandhi appearing on behalf of the respondent no.2 and learned APP Mr. KP Raval appearing on behalf of the respondent no.1-State.

4. Learned advocate Mr. Ashish M. Dagli appearing on behalf of the applicant has submitted that the learned Judge ought to have considered the statement of witness, who is the member of the Mandali viz. Laxmanbhai Dipsinh, who has supported the case of the complainant in toto and also ought to have considered that an amount of Rs. 20 lacs was handed over to the accused persons for the purpose of establishing a factory in the village, in which numbers of peoples of

the village, were going to earn their bread and butter. The learned Judge has not considered the fact that the complainant has initiated proceedings under Section 138 of the Negotiable Instruments Act against the respondent no.2, because the cheque given to the petitioner was dishonoured on account of endorsement of "account closed" and has not considered the fact that the accused person before the Hon'ble Court to pay a montly installment of Rs. 25,000/- in between period of 1st to 7th of every month. That, learned Judge has not considered the fact that in criminal proceedings under Section 138, the learned Magistrate has taken cognizance of the offence and issued summons to the respondent no.2 because of prima facie case found against the respondent no.2. The learned Judge has committed an error of law in holding that two complaints cannot be made on the same set of facts and circumstances, which as per the provisions of the law, is totally incorrect. That, it is premature stage for discharging accused because at this stage no judicial evidence was available with the court for adjudicating on issue and on the basis of investigation papers, the learned Judge wrongly held that the accused was not guilty. The learned Judge failed to appreciate the conduct of the respondent no.2 who has taken a sum of Rs. 20 lacs of the bank which is public money and also failed to consider his criminal back ground. That, numbers of the criminal cases are lodged against the respondent no.2 and his son under the provisions of 138 of Negotiable Instruments Act in the Court of learned JMFC, Prantij and thus, it clearly shows the malafide conduct of the respondent and his son.

5. Learned advocate Mr. Ashish M. Dagli appearing on behalf of the petitioner has further argued that the learned Judge has failed to consider the fact that the respondent no.2 has given a cheque of Rs. 20 lacs to the complainant on 10.03.2005 for discharging his legal liability of taking loan amount from the bank and the same was returned to the bank, and because of intimation given to the bank to close down the account of the accused person and all such facts were also on record, which the learned Judge has not appreciated. The learned Judge has failed to appreciate the ingredients of Section 415 of the Indian Penal Code and held contrary to the provisions of law. That, it is a clear case of inducement made by accused persons to the bank to the effect that to take loan of Rs. 20 lacs from the Mandali and same was used for the purpose of benefit of village people, but at the end he has totally misappropriated the same amount and thereby deceived the members of Mandali and Chairperson who has sanctioned the said loan. The learned Judge ought to have considered the statement of witness which clearly shows involvement of the respondent no.2 in the present case. The witnesses have clearly stated before the Investigating Agency that the whole amount was misappropriated by the respondent no.2 for fulfillment of his personal benefits. That, the present petitioner has been very smartly inducted and cheated by the respondent no.2 by making false promise and further respondent no.2 has also deliberately issued a cheque in favour present petitioner despite knowing the fact that the same would be bounced and looking to the conduct and the modus operandi of the respondent no.2, the case of the

present petitioner requires consideration. Ultimately, it was requested by him to allow this application granting prayer sought for therein.

6. Per contra, learned advocate Mr. NV Gandhi appearing on behalf of the respondent no.2 submitted that the present petition is arising out from an order passed by the learned Trial Court in Criminal Case No. 1025/2005, affirmed by the revisional court vide its common order passed in Criminal Revision Applications No. 25/2008 and 26/2008. However, one of the revisionists ie., the State Government has not preferred further proceedings challenging the orders of discharging qua the present respondent no.2 and it appears that the said revisionist-State Government accepted the decision of Courts below. But, being dissatisfied with the said orders, the original complainant ie., another revisionist has preferred this petition. That, the present petitioner has also preferred Criminal Case No. 586 of 2005 under Section 138 of Negotiable Instrument Act and after concluding trial, the Addl. Judicial Magistrate, First Class, Prantij has acquitted the respondent no.2 from the charges levelled against him. The present complainant-respondent no.2 was then a Secretary of Shri Vaghpur Group Seva Sahkari Mandli Limited, who is subjected to face criminal proceedings initiated pursuance to a complaint filed by the District Registrar, Cooperative Societies, Dist: Sabarkantha at Himmatnagar for the offence punishable under section 408 of IPC, whereby it is alleged that the present petitioner had misappropriated funds of the said Mandali amounting Rs. 10,75,942/- permanently and Rs. 10,000/- temporary. That, as per the findings recorded by the learned District Court, the petitioner had admitted his guilt before the learned District Registrar. That, just to save himself from the complaint lodged against him, complainantapplicant has filed false complaint against the respondent no.2. Ultimately, it was requested by him to dismiss the present petition.

7. Learned APP Mr. KP Raval appearing on behalf of the respondent no.2 has supported the arguments advanced by the learned advocate appearing on behalf of the applicants and urged that prima facie the respondent no.2 is involved in an offence punishable under Section 420 IPC, as a huge amount was misappropriated by him, while he was serving as a Loan Inspector in the Sabarkantha District Seva Cooperative Bank Limited. The statements recorded by the Investigating Officer of the witnesses supports the case of prosecution, however the same are not considered at this stage. Prima facie case is made out against the accused and therefore, the order passed by the learned trial Court as well as revisional Court in Criminal Revision Application No. 25/2008 and Criminal Revision Application No. 26/2008 confirming of discharging him from charges is bad and illegal, and it was requested by him to quash and set aside the impugned orders passed by the court below.

8. Heard learned advocates appearing on behalf of the respective parties at length.

9. Having considered the facts of the case, submissions made by learned

advocates appearing on behalf of the respective parties as well as learned APP for the prosecution, it appears that on the basis of averments made by the complainant before the court below ie., learned JMFC, Prantij, Criminal Inquiry No. 16/2005 was registered against the accused. It further appears that from the said cause of action, first Criminal Case under Section 138 of the Negotiable Instruments Act came to be filed by the complainant before the same court on 16th April, 2005. Learned Judge was pleased to issue process against the accused and criminal case was registered, being Criminal Case No. 586/2005. On the same cause of action, another Criminal Inquiry No. 16 of 2005 was registered against the said accused for the offence punishable under section 420 of the Indian Penal Code. During the course of the arguments, learned advocate appearing on behalf of the respondent no.2 has produced a copy of the judgment and order passed in Criminal Case No. 586 of 2005 on 28.03.2016 by the learned Additional Judicial Magistrate, First Class, Prantij made below exhibit 66 acquitting the accused from the offence punishable under Section 138 of the Negotiable Instruments Act. In the complaint also, a Page 14 of 21 HC-NIC Page 14 of 21 Created On Tue Aug 01 12:34:12 IST 2017 R/SCR.A/2418/2008 CAV JUDGMENT copy of the complaint in Criminal Case No. 586 of 2005 was produced on the record. It also appears that at the initial stage, no process was issued against the accused under Section 420 IPC in the complaint lodged by the complainant under Section 138 of the Negotiable Instruments Act. The said order was not challenged by the complainant before the appellate Court. It also appears that the complainant himself was serving as Secretary in the Mandali and during the tenure of his service as a Secretary, certain loan was sanctioned in favour of the members of the Mandali, which was misappropriated by the complainant. That, another complaint was lodged against the complainant by the Registrar of Cooperative Societies, District: Sabarkantha at Himmatnagar for the offence punishable under Section 408 IPC. The statements recorded by the Investigating Officer, of course, supports the case of the prosecution. It appears that they have no personal knowledge of the facts, and therefore, no offence can be said to have been committed under Section 420 IPC, as it culls out from the statements of witnesses. While deciding an application for discharge by the court prima facie case is required to be considered. Learned trial Judge has rightly decided and arrived at the conclusion that no prima facie case was made out against the present accused involving him under Section 420 IPC. Thus, the order passed in Criminal Revision Application No. 25/2008 and Criminal Revision Application No. 26/2008 by learned Additional Sessions Judge, Sabarkantha @ Himatnagar has never been challenged by the prosecution discharging the accused, which was confirmed by the order passed below ex. 30 in Criminal Case No. 1025 of 2005.

10. Further, it transpires from the allegations made in the complaint that there is no ingredients of cheating ie., there must be an inducement by the accused to the loanees from the initial stage. No specific allegations are made in the complaint that the accused has dishonest intention to cheat the members of

Mandali, in whose names, loan were sanctioned. In absence of ingredients of cheating made out in the complaint, no record is available with the prosecution.

11. As observed above, statement of the witnesses are not sufficient to constitute an offence of cheating. From the averments made in the complaint, it appears that allegation of cheating is based on the loan amount of Rs. 20 lacs between the period from 9th April 2003 to 20th October, 2004, but neither loan papers, nor amount of loan, nor the cheque for loan was seized from the concerned bank as well as no account books of Mandali were recovered by the Investigating Agency. It is also not disputed that the cheque of loan amount was admitted to bear signature of the complainant and Secretary and Chairman as MLA. But, there is no evidence to substantiate the said amount of loan entrusted by the complainant to the present accused. No writings to that effect was obtained by the complainant, nor recovered or seized from custody of the accused. It also appears from the findings arrived by the learned Sessions Judge in Criminal Revision Application No. 25 of 2008 and Criminal Revision Application No. 26 of 2008 that the sanctioned amount of loan was received by the complainant and the Chairman Deepsinh. None of the witnesses have pointed out figure of the loan amount and they have not stated story of cheating regarding erecting factory by the accused in their statements. It also appears from the finding that confessional statement of the complainant was recorded by the Auditor in respect of misappropriation of amount of Mandali. The Page 18 of 21 HC-NIC Page 18 of 21 Created On Tue Aug 01 12:34:12 IST 2017 R/ SCR.A/2418/2008 CAV JUDGMENT complainant has admitted in his confessional statement before the Auditor that Ledger (Rojmel) of the Mandali was written by him. The amount as per the rojmel was in his custody. He was dealing with money transactions of Mandali with the Bank. It is further stated by him that for the period from 01.04.2003 to 31.03.2004, audit work was carried out in the Mandali and he had committed misappropriation of the amount and has not credited the amount of some of the members in their account and same amount was used by him for his personal use. Prima facie, there is a reason to believe that the complainant himself has committed an offence of misappropriation, and therefore, he had filed a private complaint before the learned JMFC, Prantij without any documentary evidence against the respondent no.2. It transpires from the reasons arrived by the learned Additional Sessions Judge in Criminal Revision Application No. 25 of 2008 and Criminal Revision Application No. 26 of 2008, a Criminal Case No. 853/2005 came to be registered against the present complainant has given confessional statement before the Auditor on 12th August, 2004 as well as on 9th September, 2004, wherein he has admitted to have misappropriated an amount of Rs. 7,95,942/-. Considering both the confessional statements, the total amount comes to Rs. 10,75,942/-. In this complaint, the statements of the member-witnesses were recorded by the police; including that of the Vice-Chairman and they have specifically stated that the present complainant has committed criminal breach of trust during the period of audit. Therefore, learned JMFC, Prantij and learned Additional Sessions Judge,

Sabarkantha at Himatnagar in Criminal Case No. 1025 of 2005 below Exhibit 30 and in Criminal Revision Application No. 25 of 2008 and Criminal Revision Application No. 26 of 2008 have rightly passed an order of discharging the accused from the offence.

12. For the reasons aforestated, no illegality is committed by the Courts below in discharging the accused. Hence, the present application stands dismissed accordingly. The order passed by the learned Additional Sessions Judge, Sabarkantha @ Himatnagar in Criminal Revision Application No. 25 of 2008 and Criminal Revision Application No. 26 of 2008 confirming the order passed below Exhibit 30 in Criminal Case No. 1025/2005 by the learned JMFC, Prantij is hereby confirmed.

13. Rule is made absolute to the aforestated extent. No costs.