

(2010) 03 GUJ CK 0051
In the Gujarat High Court
Case No : Criminal Appeal No. 1009 of 1999

Dinesh Amrutbhai Patel

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256, 378
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 03 GUJ CK 0051

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

Bench : Single Bench

Advocate : A.D. Shah and Ekanth Ahuja, for the Appellant; C.M. Shah, APP and J.M. Panchal and K.J. Panchal for Opponent 2, for the Respondent

Judgement

S.R. Brahmbhatt, J.—The appellant original complainant has preferred this appeal u/s 378 of Criminal Procedure Code challenging the order dated 15/6/1998 passed by learned Metropolitan Magistrate Court No. 9 in Criminal Case No. 1276 of 1993 where under the court on account of absence of complainant and his advocate, without any report dismissed the complaint and discharged the accused of the charge of committing offence u/s 138 of the Negotiable Instruments Act.

2. The facts need not be elaborated as the entire challenge rests on the short order that has been passed by learned Metropolitan Magistrate which has resulted into discharging the accused/respondent No. 2 herein of the charge of committing offence u/s 138 of Negotiable Instruments Act. However without advertng to the facts elaborately, the short facts are set out hereunder in deciding this appeal.

3. The appellant original complainant is a consulting Radiologist having his consulting room at K.B. Commercial Center, Opposite Dinabai Tower, Laldarwaja, Ahmedabad. Respondent No. 2, original accused is a general merchant doing business in chillies, who is partner of Shri Haribansh situated at 7 Lines Street,

Patna Bazar, Guntur, Andhra Pradesh. Said firm is having its account with Mahila Utkarsh Nagrik Sahakari Bank Limited at Ahmedabad and current account number is 171. The appellant complainant advanced different amounts as deposit to the firm Shri Haribansh as they required funds for their business, at the rate of 18 % interest p.a. Respondent firm issued post-dated cheque duly signed by respondent No. 2 herein.

4. The appellant/complainant on deposit of the cheque on 19/3/1993 it returned, and subsequently appellant deposited said cheque on other agreed dates and ultimately it returned with an endorsement "Refer to Drawer". The appellant therefore served notice through advocate which was served to the respondent No. 2/accused on 21/4/1993 but the respondent accused did not return the amount by complying the notice.

5. The appellant/complainant filed complaint for offence u/s 138 of Negotiable Instruments Act on 21/5/1993. After recording verification said complaint was registered as Criminal Case No. 1276 of 1993. As the firm could not be served with summons, complainant deleted name of the firm as per Court's order. Accused filed revision petition which came to be dismissed. The accused submitted application on 25/7/1997 which was fixed for hearing on 8/10/1997 and thereafter it was adjourned to 21/3/1998. The court was on leave on 21/3/1998 and therefore the case which was listed on that day was adjourned to 4/6/1998. Advocate of the appellant tried to find out the real thing which have revealed that the date of 4/6/1998 was cancelled and it was changed to 16/4/1998 which was without his consent or within his knowledge. Subsequently without the knowledge of the advocate for the complainant it was adjourned to 15/6/1998 and on that day the complaint came to be dismissed, which is impugned in this appeal.

6. Shri Ekanth Ahuja for Shri AD Shah for the appellant relying upon the decision of this Court in Criminal Appeal No. 1135 of 2007 decided on 3/3/2010 (Coram: S.R. Brahmbhatt, J), wherein this Court relied upon the decision of the Apex Court decided in case of Mohd. Azeem Vs. A. Venkatesh and Another, and contended that the appeal is required to be allowed. Learned Counsel for the appellant placing reliance upon copy of the Rojkam submitted that it cannot be disputed that original case board of the concerned court at sr. No. 198 to 212 stood adjourned to 4/6/1998 but subsequently the date in this particular case which is figuring at 206, i.e. all the three cases were adjourned to 16/4/1008 and later on 26/4/1998 and then again on 16/4/1998. This aspect have not been disputed by learned advocate for the respondent accused. However learned Counsel Shri Panchal for the respondent vehemently argued that the court was absolutely justified in dismissing the complaint and discharging the accused as under the provision of Section 256 the Court is empowered to pass such an order and when the court has utilised its discretion further noticing past many defaults causing consternation to the accused the said order needs no interference under acquittal jurisdiction by exercising power u/s 378 of Cr.P.C.

7. Shri Panchal, learned advocate appearing for the respondent further submitted that the order impugned would otherwise also not a bar in filing second complaint. In support of this proposition he relied on the decision of the Apex Court in case of Jatinder Singh Vs. Ranjit Kaur, He further submitted that rojkam which is available on record go to show that the complainant on earlier occasion atleast 9 to 10 times remained absent and when the court has taken all the defaults and absence on the part of the complainant and passed the order of discharge, same may not be interfered with u/s 378 of Cr.P.C.

8. This Court is unable to accept the submission of Shri. Panchal, learned advocate for the respondent for the following reasons:

(a) The fact remains to be noted that the complaint was in respect of offence punishable u/s 138 of Negotiable Instruments Act and therefore the entire complexion of the complaint will have to be borne-in-mind while appreciating submissions canvassed on behalf of the respondent in respect of availability of second complaint or opportunity of filing second complaint etc. The past defaults and absence have been thought fit to be condoned by the court at the relevant time and therefore, in my view, those past defaults and absence once again having been condoned at the relevant time by the concerned court, same could not have been pressed into service for resisting the appeal as the same would be of no avail. The complaint has been not decided on merits and the discharge is the result thereof.

b) This Court ordinarily would not accept copy of the board/rojkam which is pressed into service for indicating the dates as neither the same is certified nor is endorsed as true copy. However as the said copy has not been controverted the same may be looked into, which also go to show that originally the date given was 4/6 and subsequently it came to be altered to 26/4 and then after 16/4.

c) It is required to be noted that while admitting this matter, this Court (Coram: J.R. Vora, J. [as he then was]) had called for report of the concerned court with regard to the board and thereafter the Court passed the order on 30/11/1999. Learned Magistrate's report confirm that the dates were changed in respect of this case. This being on record this would lend support to the version of the appellant and the same would therefore make his case more stronger so as to justify acceptance of appeal by this Court u/s 378 Cr.P.C.

9. In view of this, and in view of the fact that no serious prejudice is likely to be caused to the respondent, and sustaining the order would otherwise cause tremendous prejudice to the appellant, the appeal is partly allowed. The matter is required to be remanded back to the Court below for deciding it on merits and in accordance with law. Order accordingly.