

(2011) 11 GUJ CK 0062
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1102 of 2011

Junagadh Power Project Pvt. Ltd. and Another

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2012) 3 BC 147 : (2012) 2 GLR 1394

Hon'ble Judges : M. R. Shah, J

Bench : Single Bench

Advocate : Anand B. Gogia, Mr. R.B. Gogia and Mr. B.B. Gogia, for the Appellant; Dabhi, Assistant Public Prosecutor for the Respondent No. 1, Rule Served for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—Present Criminal Miscellaneous Application u/s 482 of the Code of Criminal Procedure has been preferred by the applicant-original accused Nos. 1 and 2 to quash and set aside the impugned complaint being Criminal Case NO. 2250 of 2010 pending in the Court of learned JMFC, Junagadh, filed by respondent NO. 2 herein for the offence punishable u/s 138 of the Negotiable Instruments Act. Respondent NO. 2 herein-original complainant has instituted aforesaid criminal complaint being Criminal Case NO. 2250 of 2010 in the Court of learned JMFC, Junagadh against the petitioners for the offence punishable u/s 138 of the N.I. Act for dishonour of the cheque NO. 433117 dated 6.4.2010 of RS. 10,000/- which has been admittedly issued by applicant NO. 1 company signed by applicant NO. 2. It is alleged in the said complaint that he was serving with the applicant NO. 1 company-original accused NO. 1 as Liaison Officer at village Khokharda, District Junagadh and was given cheque in question towards salary for the month of March, 2010 and when the said cheque was deposited the same has been dishonoured with an endorsement "Payment Stopped by Drawer". It is further alleged in the said complaint that despite the statutory

notice u/s 138 of the N.I. Act, the same has not been complied with and the false evasive reply has been given. Therefore, it is alleged that the petitioners have committed offence u/s 138 of the N.I. Act. That the learned Magistrate has directed to issue process against the applicants for the offence u/s 138 of the N.I. Act. Hence, being aggrieved and dissatisfied with the impugned complaint/criminal case, the applicants herein original accused have preferred the present Criminal Miscellaneous Application u/s 482 of the Code of Criminal Procedure.

2. Mr. Gogia, learned Advocate for the applicants has vehemently submitted that as such the applicants have not committed any offence as alleged for the offence punishable u/s 138 of the N.I. Act. It is submitted that as such the dispute in question has arisen out of contractual service relationship and with regard to non-payment of the salary. It is further submitted that the service of the complainant pursuant to the contract was terminated and, therefore, no amount was outstanding and, therefore, bank was instructed not to make the payment and therefore, it cannot be said that the petitioners have committed the offence u/s 138 of the N.I. Act as alleged. It is further submitted that even the complainant has claimed the salary for the notice period which would not fall within the jurisdiction of the Court taking up matter pertaining to the N.I. Act and the remedy lies elsewhere and, therefore, it is requested to quash and set aside the impugned complaint.

2.1. It is further submitted by Mr. Gogia, learned Advocate for the applicant that to attract the provision of Section 138 of the N.I. Act, firstly, it is necessary that there must exist legal debt or other liability in relation to which offence has taken place. It is submitted that at the relevant time there was no legal debt or legal liability and therefore, necessary ingredients of offence u/s 138 of the N.I. Act are missing.

2.2. It is further submitted by Mr. Gogia, learned Advocate for the applicant that even otherwise the complaint is not maintainable, as there being no business or commercial or mercantile relation between the parties. In support of his above submission, he has relied upon the decision of the Bombay High Court in the case of Goa Plast Pvt. Ltd. Vs. Shri Chico Ursula D'souza, . By making above submissions and relying upon the above decision, it is requested to allow the present application and to quash and set aside the impugned complaint. No other submissions have been made.

3. Petition is opposed by Mr. Dabhi, learned APP for the State. Though served, nobody appears on behalf of the original complainant. It is submitted by Mr. Dabhi, learned APP that admittedly the cheque in question has been issued by the company-original accused NO. 1 signed by original accused NO. 2, which has been dishonoured and, therefore, prima facie case is made out for the offence u/s 138 of the N.I. Act. It is submitted that whether at the relevant time when the cheque was given there was legal debt or liability or not is required to be considered while considering presumption u/s 139 of the N.I. Act, which is rebuttable and, therefore, it is requested not to quash and set aside the

impugned complaint in exercise of powers u/s 482 of the Code of Criminal Procedure.

3.1. Now, so far as contention on behalf of the petitioners that as there was no business or commercial or mercantile relation between the parties and therefore, complaint for the offence u/s 138 of the N.I. Act is not maintainable is concerned, it is submitted by Mr. Dabhi, learned APP that there is nothing in the Section 138 of the N.I. Act that only in a case where cheque is issued there exists between the parties business or commercial or mercantile relation and the said cheque has been dishonoured then and then only the offence u/s 138 of the N.I. Act can be said to have been made out. It is submitted that, that is not requirement u/s 138 of the N.I. Act. Therefore, it is requested to dismiss the present application.

4. Heard the learned Advocates for the respective parties at length. At the outset, it is required to be noted that impugned complaint has been filed by respondent NO. 2 herein-original complainant for the offence u/s 138 of the N.I. Act for dishonour of cheque, which is admittedly issued by the petitioner No. 1 herein-original accused No. 1 company and signed by petitioner No. 2-original accused No. 2. It is the case of the petitioners that there was no legal debt or liability at the time when the cheque is issued and, therefore, it is requested to quash and set aside the impugned FIR. On the aforesaid ground, the impugned complaint cannot be quashed and set aside. Mere issuance of cheque in favour of the respondent No. 2 is sufficient to show that the accused owes liability. While considering the provision of Section 139 of the N.I. Act besides cheques, the cheque issued by the accused has been dishonoured nothing further is required to be proved by the complainant and it is for the accused to rebut the presumption u/s 139 of the N.I. Act. There is statutory presumption of debt or liability in favour of person in whose favour cheque has been issued, however the same is rebuttable which can be rebutted only at the time of trial and on leading the appropriate evidence. Unless and until, the presumption is rebutted by leading evidence, the presumption cannot be said to be rebutted. Under the circumstances, on the aforesaid ground the impugned complaint is not required to be quashed and set aside at this stage.

5. Now, so far as contention on behalf of the petitioners that the dispute in question had arisen out of contractual relationship with regard to alleged non payment of salary and that there being no business or commercial or mercantile relation between the parties and, therefore, complaint is not maintainable is concerned, same has no substance. Considering Section 138 of the N.I. Act, it does not say that only in a case where there were business or commercial or mercantile relation between the parties and the cheque has been issued from such business or commercial or mercantile relation between the parties and same is dishonoured then and then the offence u/s 138 of the N.I. Act can be said to be made out. Such is not provided in Section 138 of the N.I. Act. On plain reading of Section 138 of the N.I. Act, it provides that any cheque drawn by a

person on account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of, any debt or other liability, is returned by the bank, it can be said that the offence u/s 138 of the N.I. Act is said to have been committed. It does not provide that such debt or liability must be arising out of the business or commercial or mercantile relation between the parties. To say so would be adding something to section which is not there. Any cheque which is returned unpaid, which has been issued on account for the discharge of any whole or any part of any debt or other liability, it can be said that the offence u/s 138 of the N.I. Act is made out subject to fulfilling of other conditions as mentioned u/s 138 of the N.I. Act. Therefore, contention on behalf of the petitioners that the complaint is not maintainable as there being no business or commercial or mercantile relation between the parties, has no substance and cannot be accepted. With respect, this Court is not in agreement with the view taken by the Bombay High Court in the case of Goa Plast Pvt. Ltd. (supra). It is to be noted that as such in the case before the Bombay High Court it was case against the acquittal by the learned trial Court and entire evidence was before the Court and on appreciation of evidence the learned trial Court acquitted the accused, which came to be confirmed by the High Court. Even otherwise, for the reasons stated above, this Court is not in agreement with view expressed by the Bombay High Court.

6. In view of the above and for the reasons stated above, when the cheque has been issued by the petitioner No. 1-original accused No. 1 signed by petitioner No. 2-original accused No. 2 which has been returned unpaid, a prima facie case is made out for the offence u/s 138 of the N.I. Act and there is a presumption u/s 139 of the N.I. Act with respect to legal debt or liability which is rebutted on leading the evidence, no case is made out quash and set aside the impugned complaint by this Court in exercise of powers u/s 482 of the Code of Criminal Procedure. In view of the above and for the reasons stated above, application fails and same deserves to be dismissed and is accordingly dismissed. Rule is discharged. Ad interim relief granted earlier shall stand vacated forthwith.