

(2021) 09 GUJ CK 0067

In the Gujarat High Court

Case No : R/Special Criminal Application No. 2405, 2406, 2407 Of 2019

Kiran Udyog Private Limited

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 22-09-2021

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 139, 143, 147
Code Of Criminal Procedure, 1973 — Section 143, 258, 264, 357(3), 431
Indian Penal Code, 1860 — Section 64

Citation : (2021) 09 GUJ CK 0067

Hon'ble Judges : Gita Gopi, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Gita Gopi, J

1. The following prayer has been made in Special Criminal Application No. 2405 of 2019.

"17(A) Your Lordships may be pleased to issue appropriate writ, order or direction, directed the learned Additional Chief Metropolitan Magistrate Court No.27 to close the proceedings pending before him being Criminal Case No. 87813 of 2018 dated 18.09.20218 and passed an order of acquittal in the interest of justice.

(B) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay further proceedings of Criminal Case No. 87813 of 2018 pending in the Hon'ble Court of learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad.

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad, to exempt the presence of petitioners from personal appearance in the interest of justice.

(D) An ex-parte ad-interim relief in terms of prayer (B) and (C) above may kindly be granted.

(E) Such other and further relief/s as may be deemed just and necessary in the facts and circumstances of the present case may kindly be granted."

1.1 The following prayer has been made in Special Criminal Application No. 2406 of 2019.

"17(A) Your Lordships may be pleased to issue appropriate writ, order or direction, directing the learned Additional Chief Metropolitan Magistrate Court No.27 to close the proceedings pending before him being Criminal Case No. 87823 of 2018 dated 18.09.20218 and passed an order of acquittal in the interest of justice.

(B) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay further proceedings of Criminal Case No. 87823 of 2018 pending in the Hon'ble Court of learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad.

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad, to exempt the presence of petitioners from personal appearance in the interest of justice.

(D) An ex-parte ad-interim relief in terms of prayer (B) and (C) above may kindly be granted.

(E) Such other and further relief/s as may be deemed just and necessary in the facts and circumstances of the present case may kindly be granted."

1.2 The following prayer has been made in Special Criminal Application No. 2407 of 2019.

"17(A) Your Lordships may be pleased to issue appropriate writ, order or direction, directing the learned Additional Chief Metropolitan Magistrate Court No.27 to close the proceedings pending before him being Criminal Case No. 87810 of 2018 dated 18.09.20218 and passed an order of acquittal in the interest of justice.

(B) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay further proceedings of Criminal Case No. 87810 of 2018 pending in the Hon'ble Court of learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad.

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad, to exempt the presence of petitioners from personal appearance in the interest of justice.

(D) An ex-parte ad-interim relief in terms of prayer (B) and (C) above may kindly

be granted.

(E) Such other and further relief/s as may be deemed just and necessary in the facts and circumstances of the present case may kindly be granted."

1.3 As common questions of law and facts involved in the captioned applications, they are being heard and decided together by this common order.

2. On 28.02.2019 the matter was taken on board and the following order came to be passed.

"1. The petitioner is seeking closure of the proceedings pending before the learned Additional Chief Metropolitan Magistrate Court No. 27 in Criminal Case No. 87813 of 2018 dated 18.09.2018 on the ground that the entire outstanding amount of the cheque which has been dishonored, has been repaid prior to the returnable date. It is urged before this Court that the amount has been paid by way of RTGS.

2. He has urged that the case of Meters and Instruments Private Limited and Anr. vs. Kanchan Mehta reported in AIR 2017 SC 4594, also permits the closure of the case without waiting for the consent of the other side.

3. Issue Notice for final disposal, making it returnable on 14th March, 2019. Learned Additional Public Prosecutor waives service of notice on behalf of the respondent-State.

4. Interim relief in terms of Para - 17 (C) is granted.

Direct service tomorrow is permitted."

3. In view of the aforesaid order, the interim relief of exempting the presence of the petitioners for personal appearance before the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad, was allowed.

4. The matter was urged before the court for closure of the criminal proceedings before the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.27, Ahmedabad, on the ground of directions and observations made in M/s. Meters and Instruments Private Limited and another vs. Kanchan Mehta reported in AIR 2017 SC 4594.

5. Mr. Nandish Chudgar, learned advocate with Ms. Samata Patel, learned advocate for the petitioners stated that the petitioner No.1 is a Private Limited Company incorporated in the year 2000 and the company is governed under the Indian Companies Act, 1956. The registered office of the company is situated at New Delhi and the petitioners No.2 to 5 are the directors of the petitioner company. The transaction between the petitioner company and the respondent No.2 was with regard to purchase of aluminum manufacturers based in Ahmedabad having its manufacturing set-up at Chhatral. The petitioners had approached the respondent No.2 for purchase of Aluminum Alloy Ingot ADC-2 at own plant which is situated at Plot No.12, Sec-3 IMT, Manesar Gurgaon, Haryana.

The petitioner-company had issued eight different cheques of different amount in favour of the respondent No.2 for the payment against purchase of the goods. Three cases under Section 138 of the Negotiable Instruments Act (for short "N.I. Act") was filed as the cheques came to be dishonoured, after legal notice being issued on 18.08.2018.

5.1 It has been stated that the learned Additional Chief Metropolitan Magistrate Court No.27, Ahmedabad, had issued the summons to the petitioners on 18.09.2018 making it returnable on 06.12.2018 in all the three matters. On that day the learned advocate for the petitioners remain present before the learned Additional Chief Metropolitan Magistrate Court No.27, Ahmedabad City, and informed that the petitioners have already paid the total amount of cheques to the respondent No.2-original complainant by RTGS. It has been stated that the said cheques came to be dishonoured on presentation on account of some temporary financial crunch faced by the petitioner No.1 company and the entire amount of the dishonoured cheques were directly paid to the original complainant through RTGS without even waiting for the next date of hearing of the impugned criminal proceedings under Section 138 of N.I.Act.

5.2 It has been stated by learned advocate Mr. Nandish Chudgar that the total amount in all the matters would come to Rs.1,03,58,012/- and the petitioner company has paid total amount Rs.1,03,59,000/- to the respondent - original complainant. The learned advocate for the petitioners has relied on the final observations made by the Hon'ble Apex Court in the case of M/s. Meters and Instruments (supra) particularly para 18, and submitted that, when the petitioner company has already made the payment of the cheques then the court by following the object of the provisions should exercise the discretion by closing the proceedings under the powers which has been granted under Section 143 read with Section 258 of Cr.P.C. and Section 357(3) of the Cr.P.C.

6. Mr. Shrijit Pillai, learned advocate for the respondent No.2-company submitted that the contract between the parties was to give 15% interest and the petitioner - company is bound to pay the same, and when the petitioner - company does not agree with the amount of cost or interest, as proposed by the accused, then that would be a sufficient to deny any consent; and thus, when there is no consensus towards the interest amount, then the court should be slow in exercising the discretion.

7. In para 18 of M/s. Meters and Instruments (supra) it has been observed as under:

"18. From the above discussion following aspects emerge:

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act.

Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances."

8. The Hon'ble Apex Court has thus laid down in the said judgment that the offence under Section 138 of N.I.Act is primarily a civil wrong, the burden of proof is on the accused in view of presumption under Section 139 but the standard of such proof is preponderance of probabilities and normally such matters should be tried summarily. The object of the provision is primarily to compensate and thus the punitive element is required to be considered with the only object for enforcing the compensatory element. Thus it has been laid down that compounding the matter at the initial stage should be encouraged subject to appropriate order of interest and cost as may be found acceptable to the parties

or the court.

9. It may happen that the complaining party may not give its consent for compounding the case. It has been further observed in the said judgment that, in such a situation, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated can on its own exercise the discretion close the proceedings and discharge the accused.

10. Here, in this case, it is stated that the common legal notice was issued on 18.08.2018 and was received by the petitioner-company on 23.08.2018. The learned advocate for the petitioner-company stated that from 17.09.2018 till 26.11.2018 the petitioner - company had started making the payment by RTGS mode and almost more than amount then prayed was paid which comes to Rs.1.03,59,000/- and thereafter the impugned complaint were filed on 18.09.2018. Learned advocate for the petitioner stated that within a period of one and half month the amount of the cheques has been paid to the complainant, and thus, after receiving the summons on 06.12.2018, the petitioner - company has informed the court of having made the total payment of cheques and requested the court to dispose of the matter.

11. It is required to be noted that the observations made by the Hon'ble Apex Court in M/s. Meters and Instruments (supra) was also considering the provisions of Section 143 of the Act and the provisions of Section 258 of Cr.P.C. It requires to mention here that in SUO MOTU Writ Petition (Cri.) No. 2 of 2020 for expeditious trial of cases under Section 138 of N.I.Act, 1881, it has been observed that Section 258 of the Cr.P.C. is not applicable to a summons case instituted on a complaint thus held that Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. Further noted that M/s. Meters and Instruments (supra) in so far as it conferred power on the trial court to discharge an accused is not good law. Thus it can be considered that while keeping in view the scheme under provisions of N.I.Act, judgment of M/s. Meters and Instruments (supra) is to encourage the parties to settle the issue amicably and primarily the consent of the parties would be sought for closure of the proceedings under Section 138 of N.I.Act, and while compounding the matter under Section 147 of N.I.Act, the Court is required to assess the amount to be paid to the complainant in accordance with the object as laid down by the Hon'ble Apex Court in M/s. Meters and Instruments (supra). It has been stated in para 20 as under:

"20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e- mail ID of the accused. If e- mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings

may be closed subject to any valid objection of the complainant . If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily."

12. The Hon'ble Apex Court by way of judgment has encouraged for the payment through the bank account of complainant. Here in this case the payment has been made by RTGS mode and such receipt of the money has not been denied by the complainant, but, the only issue which has been raised is about the payment of interest. The Hon'ble Apex Court has laid down in para 20 of the said judgment that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant. Here in this case the total cheque amount has been paid by the petitioner-company to the respondent No.2-original complainant but the only issue is with regard to payment of interests and cost. Thus, in the fitness of the matter and the facts and circumstances of the case, it would be more appropriate that both the parties are directed to approach the trial court through the learned advocates and assist the court in assessing the interests and cost amount to be paid. It is thus directed that the presence of the parties may not be insisted and the court may take all endeavors to make closure of the case at the earliest.

13. With the aforesaid observations and directions, the petitions are disposed of.