

(2011) 11 GUJ CK 0043
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 3796 of 2010

Machine Product Tradelink Pvt. Ltd. and Another	APPELLANT
Vs	
Utpal Bhupendra Raiji and Another	RESPONDENT

Date of Decision : 14-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 142

Citation : (2012) 1 GLH 218

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : B.J. Trivedi s 1 - 2, Mr. J.T. Trivedi s 1 - 2, Ms. Jignasa B. Trivedi s 1 - 2, for the Appellant; K.M. Parikh for Respondent 1, Mr. Dabhi, Assistant Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

Mr. M.R. Shah, J.—Present Criminal Miscellaneous Application has been preferred by the petitioners-original accused to quash and set aside the Criminal Case No. 2088 of 2002, pending in the Court of learned JMFC, Surat for the offence u/s 138 of the Negotiable Instruments Act, lodged by respondent No. 1 herein. That respondent No. 1 herein-original complainant has instituted/ filed complaint being Criminal Case No. 2088 of 2002 in the Court of learned JMFC, Surat against the petitioners and other for the offence u/s 138 of the N.I. Act alleging inter alia that he became the Director of original accused No. 1 company on 1.4.2001. That thereafter, he put by way of deposit/loan a sum of Rs. 3 lacs, which was accepted by the original accused No. 1 company through original accused No. 2. That thereafter, the complainant resigned as a Director on 11.9.2001 and at that time he asked for returned of Rs. 3 lacs and he was given cheque of Rs. 3 lacs dated 15.3.2002 drawn on Progressive Mercantile Cooperative Bank, Naranpura, Ahmedabad drawn from Bank Account of the original accused No. 1 Company, which was signed by the original accused No. 2. It is further alleged in the said complaint that time and again he was told not to

deposit the said cheque and thereafter he was told to deposit the said cheque on 5.9.2002 with an assurance that as and when said cheque was deposited, the same shall be honoured. It is further alleged in the said complaint that accordingly petitioners deposited the said cheque in his Bank Account and by communication dated 14.9.2002 the same has been returned with an endorsement "insufficient fund". It is further alleged that thereafter he served a statutory notice upon the accused persons to make the payment under the aforesaid cheque, which was dishonoured and despite the same, amount has not been paid and therefore, it is alleged that accused persons have committed an offence u/s 138 of the N.I. Act. That the learned Magistrate by order dated 12.11.2002 has been pleased to issue process against the petitioners and others for the offence u/s 138 and 142 of the N.I. Act. Hence, being aggrieved and dissatisfied with the same, the petitioners-original accused Nos. 1 and 2 have preferred Criminal Miscellaneous Application u/s 482 of the Code of Criminal Procedure to quash and set aside the impugned complaint/criminal case.

2. Shri Trivedi, learned Advocate for the petitioners -original accused Nos. 1 and 2 has vehemently submitted that as such the petitioners have not committed any offence as alleged u/s 138 of the Act. It is submitted that as such the cheque in question was given to the complainant by way of security and therefore, when the cheque in question was given by way of security and the same is dishonoured, it cannot be said that the petitioner has committed any offence u/s 138 of the N.I. Act. It is submitted that if the cheque is issued for ascertain amount of dues and/or debts and same is dishonoured then and then only it can be said that the offence u/s 138 of the N.I. Act is made out. Therefore, it is submitted that when the cheque in question was given under MOU and as a security and even as per the MOU, the cheque was to be exchanged and new cheque was to be obtained, no case is made out for the offence u/s 138 of the Act as the ingredients of Section 138 are not satisfied. In support of his above submission, he has relied upon the decisions of the Hon"ble Supreme Court in the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, and in the case of Sudhir Kumar Bhalla Vs. Jagdish Chand, etc. etc., .

2.1. Shri Trivedi, learned Advocate for the petitioners has further submitted that even the impugned complaint/ criminal case deserves to be quashed and set aside on the ground of suppression of not pointing out or stating anything with respect to MOU dated 11.10.2001. It is submitted that in the complaint the complainant has deliberately not referred to the MOU dated 11.10.2001 with a mala fide; intention as if the same would have to be referred in that case, it would have been made clear that the cheque in question was given by way of security and for dishonour of the same, the offence u/s 138 would not be attracted. Therefore, relying upon the decisions of the Hon"ble Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , it is requested to allow present application and quash and set aside the impugned complaint/criminal case on the ground of suppression of material facts in the complaint. By making above submissions and relying upon

the above decisions, it is requested to allow the present application.

3. Application is opposed by Shri Parikh, learned Advocate for the respondent No. 1-original complainant. It is submitted that a sum of Rs. 3 lacs was given by the complainant by way " of loan/advance and thereafter the same was returned to the petitioners when the complainant retired as a Director and on settlement of the account and same was issued by the original accused No. 1 signed by accused No. 2 and the said cheque was issued under the MOU dated 11.10.2001. Therefore, it is submitted that the amount/dues were ascertained and merely because the post dated cheque was given and the same is dishonoured, it cannot be said that the offence u/s 138 of the N.I. Act is not made out. It is submitted that the post dated cheque was given for ascertained amount/dues/debt under the MOU dated 11.10.2001 and therefore, when the same is dishonoured and thereafter despite the statutory notice being served the said amount was not repaid, a case is made out for the offence u/s 138 of the N.I. Act. Shri Parikh, learned Advocate for the respondent No. 1-original complainant has also relied upon the decision of the Hon"ble Supreme Court in the case of M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, by submitting that as held by the Hon"ble Supreme Court in the said decision that the Court in exercise of inherent powers u/s 482 of the Code of Criminal Procedure cannot quash and set aside the complaint on the ground that cheque was not given for any debt or liability. It is further submitted that as held by the Hon"ble Supreme Court in the said decision presumption u/s 139 of the N.I. Act that cheque was received by holder for discharge of debt or liability arise though same is rebuttable. Therefore, it is requested not to exercise the powers u/s 482 of the Code of Criminal Procedure and not to quash and set aside the impugned complaint.

4. Shri Dabhi, learned APP has adopted the submissions made by Shri Parikh, learned Advocate for the respondent No. 1-original complainant and has requested to dismiss the present application.

5. Heard the learned Advocates for the respective parties at length. The short question which is posed for consideration of this Court is whether a post dated cheque which is given by way of security is dishonoured on the ground of "insufficient fund" whether the offence u/s 138 of the N.I. Act is made out or not?

6. In the present case, it is not in dispute that the cheque in question was given to the complainant under the MOU dated 11.10.2001 at the time when the complainant retired as a Director. It appears that at the relevant time when the cheque was issued number of other cheques were also issued in favour of other persons (as mentioned in the said MOU) and on settlement of the account. However, at the relevant time the company was not having any fund and therefore, the post dated cheque was issued and one of the cheque was in favour of the original complainant for a sum of Rs. 3 lacs dated 15.3.2002. Therefore, the cheque in question was issued/given to the complainant for ascertain amount of Rs. 3 lacs on settlement of the account. Therefore, it cannot be said that the

at the time when the post dated cheque was given there was no ascertain debt or dues. Therefore, even assuming that the said post dated cheque was given by way of security of ascertain dues, in that case, also when the said cheque is dishonoured on the ground that "fund insufficient" and thereafter even after service of the statutory notice u/s 138 of the N.I. Act, the same is not repaid, a case is made out u/s 138 of the N.I. Act for dishonour of the said cheque. It is to be noted that the said cheque in question for an amount of Rs. 3 lacs dated 15.3.2002 has been issued by the original accused No. 1 company signed by original accused No. 2-petitioners herein. Therefore on and after 15.3.2002 and within valid period of six months, the holder of the cheque entitled to deposit the said cheque and dishonour of the same and on compliance of other requirement of u/s 138 of the N.I. Act, it can be said that case u/s 138 of the Act is made out. Merely because, the said cheque was post dated cheque and/or given by way security it cannot be said that for dishonour of the same a case u/s 138 of the Act is not made out otherwise it will be given a premium to such a dishonest person who has given post dated cheque for ascertained amount with a promise that as and when in future the same is deposited, the same shall be honoured.

7. Even otherwise, there is a presumption u/s 139 of the Act and when the cheque was received by the holder for discharge of debt or liability. Therefore, when the original accused No. 1 company has issued the cheque which was signed by the original accused No. 2 and was given to the complainant there is always presumption u/s 139 of the Act that said cheque was issued by him for discharge of debt or liability. It is to be noted that in the present case the cheque in question was given under the MOU dated 11.10.2001 and on settlement of account. In the case of *MI s. M.M.T.C Ltd. & Anr (Supra)* in para 13 to 16 the Hon"ble Supreme Court has observed and held as under :-

13. The learned Judge has next gone into facts and arrived at a conclusion that the cheques were issued as security and not for any debt or liability existing on the date they were issued. In so doing the learned Judge has ignored well settled law that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.

It is next held as follows :-

This is a special provision incorporated in the Negotiable Instrument Act. It is necessary to allege specifically in the complaint that there was a subsisting liability and an enforceable debt and to discharge the same, the cheques were issued. But, we do not find any such allegation at all. The absence of such vital allegation, considerably impairs the maintainability.

14. In the case of Maruti Udyog Ltd. Vs. Narender and Others, , this Court has held that, by virtue of Section 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. This Court has held that at the initial stage of the proceedings the High Court was not justified in entertaining and accepting a plea that there was no debt or liability and thereby quashing the complaint.

15. A similar view has been taken by this Court in the case of K.N. Beena v. Muniyappan reported in 2001 (7) Scale 331, wherein again it has been held that u/s 139 of the Negotiable Instruments Act the Court has to presume, in a complaint u/s 138, that the cheque had been issued for a debt or liability. 16. There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

7.1. Under the circumstances, the impugned complaint is not required to be quashed by this Court in exercise of powers u/s 482 of the Code of Criminal Procedure.

8. Now, so far as reliance placed upon the decision of the Hon''ble Supreme Court in the case of M.S. Narayana Menon @ Mani (supra) is concerned, it is required to be noted that case before the Hon''ble Supreme Court was after the accused persons were tried and on facts and on leading the evidence the accused persons rebutted the presumption which was u/s 139 of the N.I. Act. In the said decision, there is no absolute proposition of law laid down by the Hon''ble Supreme Court that even in case where the post dated cheque is given by way of security for ascertained amount and on settlement of the account and the said cheque is dishonoured, the case u/s 138 of the N.I. Act is not made out.

9. Even the decision of the Hon''ble Supreme Court in the case of Sudhir-Kumar Bhalla (supra) relied upon by the learned Advocate for the petitioners shall not applicable to the facts of the present case. It is also required to be noted that even the case before the Hon''ble Supreme Court was after the trial and in the said decision also there is no absolute proposition of law laid down by the Hon''ble Supreme Court that even in case where the post dated cheque is given by way of security for ascertained amount and on settlement of the account and the said cheque is dishonoured, as sought to be contended on behalf of the petitioners.

10. Now, so far as the contention on behalf of the petitioner that in the complaint the complainant has not stated nothing with respect to the MOU and therefore, there is a suppression of material facts and therefore, the impugned complaint required to be quashed and set aside is concerned, the same has no substance at

all. Non mentioning of MOU in the complaint is not so fatal for which the impugned complaint required to be quashed and set aside. It is to be noted that the impugned complaint is filed for offence u/s 138 of the N.I. Act and therefore, complainant was required to mention only this facts which are necessary for the purpose of making out the offence u/s 138 of the Act i.e. issuance of cheque; deposit of the same; dishonour of said cheque; service of statutory notice u/s 138 of the Act and non payment of the cheque amount despite the service of the statutory notice u/s 138 of the Act. Under the circumstances, on the aforesaid ground the complaint is not required to be quashed and set aside. Under the circumstances, the decision relied upon in the case of S.P. Chegalvaraya Naidu (dead) (supra) would not be any assistance to the petitioners in the facts and circumstances of the case.

11. In view of the above and for the reasons stated above, no case is made out to quash and set aside the impugned complaint in exercise of powers u/s 482 of the Code of Criminal Procedure. Hence, present application deserves to be dismissed and is accordingly dismissed. Rule discharged. Ad-interim relief granted earlier stands vacated forthwith. At this stage, Shri J.T. Trivedi, learned Advocate for the petitioners has requested to extend the ad-interim relief granted earlier. In the facts and circumstances of the case and for the reasons stated above when no case is made out to quash and set aside the impugned complaint, the prayer of the petitioners is rejected.