(1997) 07 GUJ CK 0004

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No''s. 2267, 2268, 2269 and 2270 of 1997

Montari Industries Ltd. and Another — APPELLANT

Vs

State of Gujarat and Another — RESPONDENT

Date of Decision : 04-07-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (1998) 94 CompCas 356 : (1998) CriLJ 10 : (1998) 1 GLR 35 : (1998) 2 RCR(Criminal) 705

Hon'ble Judges : R.R. Jain, J

Bench : Single Bench

Judgement

R.R. Jain, J.—Heard Mr. B. S. Patel, learned advocate for the petitioners, Mr. S. A. Pandya, learned A.P.P. for respondent No. 1 State and Mr. Ashok L. Shah, learned advocate, for respondent No. 2.

2. Since all these matters involve identical questions of law and as they are between the same parties represented by the same advocates, they are disposed of by this common order.

3. Petitioner No. 1 is a corporate body of which petitioner No. 2 is a director. Respondent No. 2 is also a company. As alleged, the petitioners borrowed some amount from respondent No. 2 and in repayment thereof gave some cheques of different amounts and dates drawn on Standard Chartered Bank, Parliament Street, New Delhi. On deposit, the said cheques were returned dishonoured, therefore, respondent No. 2 filed four different criminal complaints u/s 138 of the Negotiable Instruments Act ("the Act" for short), in the court of the learned Metropolitan Magistrate (court No. 9), Ahmedabad. The learned Magistrate was pleased to take cognizance and issued process. Aggrieved by the institution and subsequently taking a cognizance by the learned Magistrate, the petitioners/ original accused have filed these petitions for quashing in exercise of inherent

powers u/s 482 of the Criminal Procedure Code 1973, ("the Code" for short).

4. A few relevant facts of all the case are stated hereunder :

Criminal Miscellaneous Application No. 2267 of 1997 :

Cheque No. 473530, dated May 10, 1996, drawn on Standard Chartered Bank, Parliament Street, New Delhi, for Rs. 30,00,000 (rupees thirty lakhs only) was issued by the petitioners to respondent No. 2 towards discharge of liability. The said cheque was deposited on June 10, 1996. As there were no sufficient funds the same was returned dishonoured on June 13, 1996, under intimation dated June 18, 1996, with an endorsement "exceeds arrangement". Consequently, respondent No. 2 filed Criminal Case No. 2543 of 1996.

Criminal Miscellaneous Application No. 2268 of 1997 :

Cheque No. 473521, dated May 10, 1996, drawn on Standard Chartered Bank, Parliament Street, New Delhi, for Rs. 1,59,049 (rupees one lakh fifty-nine thousand forty nine only) was issued by the petitioners to respondent No. 2 towards discharge of liability. The said cheque was deposited on June 10, 1996. As there were no sufficient funds the said cheque was returned dishonoured on June 13, 1996, under intimation dated June 18, 1996, with an endorsement "exceeds arrangement". Consequently, respondent No. 2 filed Criminal Case No. 2544 of 1996.

Criminal Miscellaneous Application No. 2269 of 1997 :

Cheque No. 473523, dated March 6, 1996, drawn on Standard Chartered Bank, Parliament Street, New Delhi, for Rs. 2,65,283 (rupees two lakhs sixty-five thousand two hundred eighty three only) was issued by the petitioners to respondent No. 2 towards discharge of liability. The said cheque was deposited on June 10, 1996. As the payment was stopped by the drawer on June 15, 1996, the same was returned on June 19, 1996, with an endorsement "payment stopped by drawer". Consequently, respondent No. 2 filed Criminal Case No. 2542 of 1996.

Criminal Miscellaneous Application No. 2270 of 1997 :

Cheque No. 473522, dated March 6, 1996, drawn on Standard Chartered Bank, Parliament Street, New Delhi, for Rs. 50,00,000 (rupees fifty lakhs only) was issued by the petitioners to respondent No. 2 towards discharge of liability. The said cheque was deposited on June 10, 1996. As the payment was stopped by the drawer on June 15, 1996, the same was returned on June 19, 1996, with an endorsement "payment stopped by drawer". Consequently, respondent No. 2 filed Criminal Case No. 2541 of 1996.

5. Mr. Patel, learned advocate for the petitioners, has argued that a legal express bar is engrafted in the provisions of law in continuing the proceedings on the following grounds, consequently, continuation would be abuse of process and unnecessary harassment :

(i) that at the relevant time proceedings were initiated under the Sick Industrial Companies (Special Provisions) Act, 1985, and section 22 thereof engrafts an express legal bar in continuing any legal proceeding;

(ii) before depositing the cheques in the bank by respondent No. 2, the petitioners had already intimated respondent No. 2 not to deposit the cheques and as per ratio laid down in the case of Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp Cas 30: [1996] 1 JT 643 (SC), there is an express bar in initiating criminal proceedings.

(iii) that no allegations are made against petitioner No. 2 who is a director.

6. To counter these arguments of Mr. Patel, the learned advocate for the petitioners, Mr. A. L. Shah, the learned advocate for respondent No. 2, has relied upon the judgment of this court in the case of Vijay Mills Co. Ltd. and Others Vs. State of Gujarat and Others, , as well as the latest judgment of the Supreme Court in K.K. Sidharthan Vs. T.P. Praveena Chandran and Another, .

7. In support of his first contention, Mr. Patel for the petitioners has placed heavy reliance upon section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, stating that an express legal bar is engrafted against institution and continuation. But, on mere perusal of the said section it is clear that the provisions of the section apply only to winding up, execution, distress or like steps against any of the properties of sick industrial unit. By no stretch of imagination, criminal prosecution against the company can be taken within its sweep and consequently, the institution and continuation of criminal proceedings is not vitiated or affected by any such alleged bar u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. My this view is fortified by a judgment of this court in Vijay Mills Co. Ltd. and Others Vs. State of Gujarat and Others, . Thus, the submission of Mr. Patel on this count has no force in law and does not require any recognition.

8. As regards the second contention, as held by the Supreme Court in Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp Cas 30: [1996] 1 JT 643 (SC), it is true that after issuance of cheque and before its presentation for encashment if the drawer issues notice to the drawee not to present the cheque for encashment and still the payee presents the cheque for encashment and it is returned dishonoured, the provisions of section 138 of the Act do not get attracted and no criminal prosecution can be initiated. But, with great respect, I say that the apex court has not clarified as to what shall be the nature and contents of such advance intimation. However, relying upon the judgment in Electronics Trade and Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) Pvt. Ltd. [1996] 86 Comp Cas 30 : [1996] 1 JT 643 (SC), the apex court has clarified in the subsequent judgment in K.K. Sidharthan Vs. T.P. Praveena Chandran and Another, , the nature of advance

intimation to the payee or holder of the cheque.

9. The object of bringing section 138 of the Act on the statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, section 138 of the Act intended to prevent dishonesty on the part of the drawer of a negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it. Therefore, as held by the Supreme Court, once a cheque is drawn by a person on an account maintained by him for payment of any amount or discharge of liability or debt and is returned by the bank with an endorsement like (i) refer to drawer, (ii) exceeds arrangement, (iii) instruction for stoppage of payment and like the other usual endorsements, it amounts to dishonour within the meaning of section 138 of the Act. Therefore even after issuance of notice if the drawer does not make the payment within the stipulated period, the statutory presumption would be of dishonest intention exposing to criminal liability. In the instant cases, two cheques have not been encashed because the amount of cheques exceeded the arrangements made, i.e., insufficient funds in the bank and other two cheques are returned because payment was stopped by the drawer. Prima facie, this amounts to dishonour, raising the statutory presumption of dishonest intention, bringing the cases within the sweep of section 138 of the Act.

10. Mr. Patel for the petitioners has argued that the petitioners had already informed the payee before the date of presentation of the cheques not to present yet the cheques were presented and dishonoured and hence the provisions of section 138 of the Act would not get attracted.

11. But, as held by tile Supreme Court in K.K. Sidharthan Vs. T.P. Praveena Chandran and Another, , simple advance intimation not to present the cheque without making arrangement for sufficient funds in the account would not exonerate the drawer from the criminal liability contemplated u/s 138 of the Act. The advance intimation not to present the cheque should contain detailed sufficient and legally tenable reasons. Otherwise, anybody by giving a cheque would induce somebody to act on it and without making arrangements of funds would simply inform the payee not to deposit and would get rid of the liability. To say so, is to encourage dishonesty and frustrate the object of section 138 of the Act. If the drawer after issuance of cheque informs the drawee for not presenting the cheque for encashment without sufficient detailed and legally tenable reasons/grounds and without making arrangement for sufficient funds in his account, in my view, one has to raise statutory presumption that the cheque was given with dishonest intention to induce the payee to act on it and, thus, shall be deemed to have committed the offence.

12. In the instant case, admittedly the advance intimation refers to protection u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and pendency of BIFR proceedings. As discussed above, this is not a legally tenable ground. This does not come in the way of the petitioners to fulfil the promises

upon which have made other one (payee) to believe and act. It is also an admitted fact that despite giving cheques funds were not arranged. The act of not making arrangements for funds ipso facto reflects that the drawer did not have intention of honouring the same and thus raising a presumption about dishonest intention. The reasons contained in the advance intimation should be such that despite making arrangements for the funds the drawer is reasonably prevented from honouring the cheque, therefore, has expressed the inability in advance with a request not to present the cheque.

13. In Criminal Miscellaneous Application No. 2267 of 1997, the petitioners have relied upon advance intimation dated February 26, 1996. But the same does not pertain to cheque No. 473530 which is the subject matter of the complaint and hence of no avail. Even treating this as an advance intimation, it clearly shows that the petitioners were not able to make arrangement for sufficient funds. This statement itself reflects upon the dishonest intention. Similarly, in Criminal Miscellaneous Application No. 2268 of 1997, the criminal proceedings are initiated for dishonour of cheque No. 473521 and the so-called advance intimation dated February 26, 1996, is in connection with some other cheque. Therefore, in the eyes of law, this is no more an advance intimation. Yet for the sake of arguments, even if it is taken as an advance intimation, the intimation does not contain sufficient and tenable reasons and only says that the petitioners have not been able to make arrangement for sufficient funds. In Criminal Miscellaneous Application No. 2269 of 1997, though advance intimation pertains to the cheque in question and the payment was stopped by drawer yet prima facie it constitutes offence because in the advance intimation the petitioners expressed inability to make arrangement for sufficient funds in the account maintained in the bank. In Criminal Miscellaneous Application No. 2270 of 1997, also the payment was stopped by the drawer on account of inability to make sufficient funds in the account. As discussed above, an advance notice not to present cheque without making arrangements for sufficient funds does not take out the case from the ambit of section 138 of the Act. Therefore, prima facie, the act amounts to an offence.

14. The third contention has no force in law by virtue of section 141 of the Act. In the case of companies and firms, a director and partner is always primarily liable, of course, subject to effective participation, knowledge, etc. Ordinarily, also a company as a legal entity has no soul, mind or limb to work physically and has to discharge functions through some human agency. Such human agency recognised under law to work, would always be liable for and on behalf of company. A company cannot be sentenced and, therefore, wherever the criminal liability refers to awarding sentence, such human agency only has to be convicted and sentenced. In the result, no such express allegations are required to be made against such human agency.

15. For the reasons stated above, any interference by this court in exercise of inherent powers at the initial stage would amount to scuttling the prosecution in

its embryo without affording opportunity to the parties to lead their evidence and the court to appreciate it. As a cardinal rule, the court should be slow in exercising inherent powers in quashing proceedings at the initial stage as the same are required to be used sparingly and in rare cases to prevent abuse of the process of the court. In the instant cases, prima facie, the ingredients of section 138 of the Act are satisfied. Consequently, the petitioners shall be deemed to have committed an offence exposing them to criminal liability, of course, subject to appreciation of evidence by the court below. Therefore, in my view, initiation of criminal proceedings is completely in accordance with law and cannot be termed as an abuse of the process of the court. Under these circumstances, the applications being devoid of merit do not require any further consideration. Hence, the applications are rejected. Notice is discharged. Interim relief stands vacated.

16. At this stage, Mr. Patel for the petitioners, requests the court to stay operation of the order for a period of eight weeks. Mr. Shah for respondent No. 2 has no objection, if reasonable time is given so as to approach the apex court. Accordingly, the operation of the order is stayed till August 19, 1997.