
(2003) 11 GUJ CK 0056

In the Gujarat High Court

Case No : Criminal Revision Application No. 433 of 2002

Prajapati Oil Industry

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-11-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 397, 401
General Clauses Act, 1897 — Section 27
Negotiable Instruments Act, 1881 (NI) — Section 118, 138
Post Office Act, 1898 — Section 6

Citation : (2003) 11 GUJ CK 0056

Hon'ble Judges : D.P. Buch, J

Bench : Single Bench

Advocate : M.B. Gandhi and Sunil M. Agrawal, for the Appellant; S.S. Patel, APP for Respondent No. 1 and F.B. Brahmbhatt, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Buch, J.—The petitioner above named has preferred this Criminal Revision Application u/s 397 read with Section 401 of the Code of Criminal Procedure, 1973 ("the Code" for short) challenging the judgment and conviction order September 30, 2002, recorded by the learned Addl. City Sessions Judge, Court No.16, Ahmedabad in Criminal appeal No.3 of 2002, under which the learned Addl. Sessions Judge dismissed the said appeal of the petitioner and confirmed the judgment and conviction order dated December 27, 2001, recorded by the learned Metropolitan Magistrate, Court No.10, Ahmedabad City in Criminal Case No.1689 of 1998 under which the learned Metropolitan Magistrate convicted the present petitioner for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short) and sentenced him to suffer SI for one year and directing him to pay fine of Rs.5,000/- and in default of payment of fine, the petitioner was directed to undergo further SI for three months.

2. The facts of the case of the complainant before the trial Court may be briefly stated as follows :

According to the case of the second respondent, the second respondent has been dealing with sale of chemicals at Ahmedabad. According to the case of the second respondent before the trial Court, the petitioner herein is a company registered under the Companies Act, 1956. That the petitioner used to purchase goods from the second respondent on credit and an account was also kept in the books of account of the second respondent. The second respondent used to issue bills for the goods purchased by and delivered to the present petitioner. That on completing the account, an amount of Rs.1,12,359/- was found to be due to the second respondent by the petitioner. Therefore, the second respondent demanded the said amount. That at that time, the petitioner issued four cheques as follows :

1. Cheque No.114816, dated 28-3-98 for Rs.36,938-00
2. Cheque No.114817, dated 7-4-98 for Rs.36,880/-
3. Cheque No.114820, dated 15-4-98 for Rs.37,421/-
4. Cheque No.114822, dated 27-4-98 for Rs.34,500/-

3. That the proprietor of the petitioner-company signed the cheques and they were handed over to the second respondent ; that the petitioner assured the second respondent that those cheques would be encashed and honoured by the bank concerned.

4. That thereafter, in accordance with the instruction of the petitioner, the second respondent presented the cheques on 27th June, 1998 before Navnirman Cooperative Bank at Rakhial Branch. That at that time, the cheques were dishonoured on the ground that the balance was insufficient. That thereafter, the second respondent approached the petitioner and informed the petitioner about dishonour of cheques. That at that time, the petitioner requested the second respondent that the financial condition was not good and therefore, the cheques may be again presented on 30th September, 1998 and at that time the cheques would be positively honoured. That, therefore, the contesting respondent again presented the said cheques before the concerned bank on 30th September, 1998. That at that time also the cheques were returned on 3rd October, 1998 with an endorsement that the balance was insufficient.

5. That, therefore, the second respondent issued a notice dated 13th October, 1998 by R.P.A.D. That the said notice was served upon the petitioner on 26th October, 1998 ; that despite the said position the petitioner neither paid the amount of the cheques nor replied the said notice. That, therefore, the petitioner has committed an offence punishable u/s 138 of the Act and therefore, the petitioner may be dealt with in accordance with the law.

6. On receipt of the said complaint on 21st November, 1998 the trial Court recorded verification of the petitioner on oath and thereafter directed that the summons be issued for an offence punishable u/s 138 of the Act against the petitioner.

7. In response to the service of summons, the petitioner appeared before the trial Court. The petitioner was supplied with the copy of the complaint. Plea was recorded. The petitioner pleaded not guilty. Therefore, the evidence produced by the second respondent was recorded. At the end of evidence, the trial Court recorded further statement of the petitioner u/s 313 of the Code. There also the petitioner did not plead guilty and contended that a false case was made out against the petitioner. The trial Court heard oral arguments advanced before it by the learned advocates for the parties. Thereafter, the trial Court pronounced the judgment and convicted and sentenced the present petitioner as aforesaid.

8. Feeling aggrieved by the said judgment and conviction order of the trial Court, the petitioner preferred Criminal Appeal No.3 of 2002 before the City Sessions Court at Ahmedabad. The said appeal came to be heard by the learned Addl. Sessions Judge, Court No.16 of the said Court. The learned Judge by judgment and order dated 30th September, 2002 dismissed the said appeal of the present petitioner. Hence, this revision application.

9. The petitioner has contended in this revision application that the judgments and orders of the two courts below are illegal and perverse and deserve to be set aside. That the learned Addl. Sessions Judge has not considered the contentions raised by the petitioner before the said Court. That though the second respondent has claimed that an amount of Rs.1,12,359/- was due to the second respondent by the petitioner, the second respondent did not produce any evidence or material or account to show that the said amount was due to the second respondent by the petitioner. That the two Courts below have committed an error in not accepting the defence of the petitioner that the amount said to be due to the second respondent was really not due. That in fact, the cheques were given in advance and the two Courts below have not considered that there was no material before the Courts below that the good was really supplied to the petitioner by the second respondent. That if the total amount due was Rs.1,12,359/-, then in that case, the trial Court ought to have considered that the cheques were issued worth Rs.1,45,739/- and therefore, two figures do not tally and without any explanation about the same, the two Courts below ought not to have accepted the version of the second respondent. That the second respondent has no where explained the difference in the said two figures, even in the notice issued to the petitioner demanding the amount of cheques. That the evidence of the second respondent that there was a settlement between the parties, has not been substantiated by any material on record. That the cheques were initially returned, as per the case of the second respondent, on 27-6-98 and yet the second respondent did not move at all for a period of three months and the said period has not been explained on record. That the alleged second presentment of the cheques is only with a view to come out of the clutches of limitation within which the complaint ought to have been filed. That as per the case of the second respondent, the demand notice was issued on 13-10-98 and as per the case of the second respondent, the notice was served on 26-10-98 ; That there was no reason for the delay of 13 days in service of notice ; that even

the complaint has been filed very late thereafter. That there is no material on record to show that the person filing the complaint had an authority to file the same. That on the whole, the judgments and conviction orders recorded by two Courts below are illegal and perverse and deserve to be set aside.

10. The petitioner has therefore, prayed that the present revision application be allowed, the judgments and conviction orders recorded by the two Courts below may be set aside and the petitioner may be acquitted.

11. On receiving the revision application, Rule was issued and in response to the service of notice of Rule learned A.P.P. Mr. S.S.Patel has appeared on behalf of the respondent No.1-State, learned advocate Mr. F.B.Brahmabhatt has appeared on behalf of respondent No.2. I have heard the learned advocates for the parties. They have taken me through the oral and documentary evidence on record.

12. In fact, the petitioner's case was argued initially by learned advocate Mr. M.B.Gandhi. Learned advocate Ms. Gandhi also argued on behalf of the petitioner. Now if we go through the case of the second respondent before the trial Court, it is very clear that as per the case of the second respondent, the petitioner used to purchase goods on credit from the second respondent and bills were issued by the second respondent for the said sale. That at the end of the transaction, an amount of Rs.1,12,359/- was due to the second respondent by the petitioner and as against that, four cheques as aforesaid were issued by the petitioner in the name of the second respondent. The cheques were dishonoured and therefore, the complaint was filed after issuance of notice of demand.

13. In order to substantiate the said case, the second respondent has examined before the trial Court one Babubhai Shankarbai at Exh.3. He is the first witness for the second respondent. According to his evidence, he has been dealing with chemical business in the names of Western Chemicals, Vaishali Chemicals and Vikas Chemicals. That the petitioner herein had entered into a transaction with the said two concerns ; that an amount of Rs.1,12,359/- was due to the second respondent by the petitioner and therefore, the petitioner issued four cheques as aforesaid in favour of the second respondent ; that all the cheques were presented to the bank and they were dishonoured on the ground that the balance was insufficient.

14. The witness has further deposed before the trial Court that the cheques were shown to him and they were the same cheques which were issued to the second respondent by the petitioner. He produced the cheques and proved the same before the Court concerned. The witness has further deposed that since the cheques were dishonoured, appropriate memos were received from the concerned bank showing that the balance was insufficient. Those memos have also been produced by the second respondent before the trial Court.

15. The witness has further stated that an amount of Rs.1,12,359/- was due to the second respondent by the petitioner and against the said dues, the petitioner had issued 4 cheques, total of which would come to Rs.1,45,000/-. It is further

deposed by him that the remaining balance has been credited in the account of Vikas Chemicals. He has further stated that demand notice was issued and it bears the signatures of his advocate. He produced the same at Exh.16. The postal acknowledgments have also been produced on record. It is further deposed by him that a separate notice was issued to the petitioner under certificate of posting which certificate was produced at Exh.19 before the trial Court. He has further deposed before the trial Court that the petitioner neither replied nor complied with the notice and therefore, complaint has been filed.

16. In cross-examination, he has deposed that he has been dealing in the chemical business in the name of Western Chemicals since last 26 years and he has also been paying income tax. He has also stated that he is prepared to produce the income tax returns for the year 1997/98. He has further stated that he has been maintaining books of accounts of Western Chemicals and he has shown his readiness to produce copies thereof on the record of the case. He has further stated that he is prepared to produce the bills of goods supplied to the petitioner. He has also deposed that at the time of recording the orders, the signatures are obtained on order slips and he has shown his readiness to produce those slips also.

17. Then he has stated that as per the system of the market, cheques are issued at the time of the placement of orders. However, he has clarified that the cheques are issued in accordance with the terms and conditions of the contract after the receipt of the goods. He has further stated that he has not rendered explanation with respect to the additional amount of Vikas Chemical, in his complaint. He has denied that there was a dispute about the price of goods. He has also denied that the goods in question was not supplied by the second respondent to the petitioner.

18. Then there is the evidence of witness Vithhalbhai Karshanbhai Prajapati at Exh.20. He has been serving as a Branch Manager in Vijay Co-operative Bank, Nehru Bridge Branch at Ahmedabad. He has deposed before the trial Court that the cheques in question were shown to him and they were issued by the present petitioner ; that the maximum balance in the account of the petitioner was Rs.531/- only. An attempt was made to show that the witness was not acquainted with the signature of signatory of the cheques.

19. Thereafter, in further statement u/s 313 of the Code, the petitioner has stated before the trial Court that the cheques were issued as deposit and not against the delivery of the goods. He has also stated that he has never received the notice in question.

20. On the strength of the above evidence, the trial Court came to the conclusion that the cheques were issued against the dues by the petitioner and therefore, the petitioner was liable to see that the cheques were honoured. It is further observed by the trial Court that despite the service of notice, the petitioner did not make the arrangement for the payment of cheques. That, therefore, there is

a clear case of an offence punishable u/s 138 of the Act.

21. Even the Sessions Court has also accepted the said finding and has found that the cheques were, in fact, issued by the petitioner and the same have been dishonoured. It is further observed by the Sessions Court that the petitioner was required to pay the amount of cheques as the said amount was due to the second respondent by the petitioner. That the notice was duly served. That, therefore, since the petitioner's cheques were dishonoured and since the payment was not made within the stipulated period after receipt of notice, the offence was made out and therefore, the trial Court, according to the opinion of the Sessions Court, was justified in convicting the petitioner.

22. The learned advocate for the petitioner has argued at length that there is no material on record to show that the goods in question were really supplied by the second respondent to the petitioner. That in fact, the second respondent was obliged to prove before the trial Court that the goods was supplied by the second respondent to the petitioner ; that unless it is proved that the goods was supplied by the second respondent to the petitioner, there would not be any question of dues of the second respondent and therefore, the cheques would be treated to be without consideration.

23. Here it is required to be considered that so far the issue of cheques is concerned, it has been proved beyond reasonable doubt that the cheques in question were really issued and signed by the petitioner in favour of the second respondent. The petitioner has also not challenged the said fact during the cross-examination of the second respondent. The petitioner's further statement was recorded u/s 313 of the Code and there also he has not disputed his signatures in the said cheques. On the contrary, he has given a reply to the second question that the cheques were issued as deposit and not against the delivery of goods which would clearly mean that even according to the statement of the petitioner, the petitioner had issued the cheques in favour of the second respondent.

24. Here the provisions of Section 118 of the Act are required to be considered. The said Section may be reproduced for ready reference as follows :

118. Presumption as to negotiable instruments.-Until the contrary is proved, the following presumptions shall be made-

(a) of consideration, that every negotiable instrument, was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed negotiated or transferred, was accepted, endorsed negotiated or transferred for consideration ;

(b) as to date, that every negotiable instrument bearing a date was made or drawn on such date ;

(c) as to time of acceptance, that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity ;

(d) as to time of transfer, that every transfer of a negotiable instrument was made before its maturity ;

(e) as to order of endorsements, that the endorsements appearing upon negotiable instrument were made in the order in which they appear thereupon;

(f) as to stamps, that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course, provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

25. On a bare reading of Section 118 of the Act it is clear that as soon as a cheque is produced on record, a presumption will arise about the consideration that the negotiable instrument concerned was made or drawn for consideration.

26. In the present case also when the cheques are proved to have been drawn by the petitioner, a presumption has arisen in favour of the second respondent that the cheques were issued by the petitioner in favour of the second respondent against the consideration.

27. Now it would be for the petitioner to rebut the presumption. The petitioner has not produced any material on record to disprove or rebut the said position.

28. An attempt was made to argue that the amount stated in the cheques was more than the amount due to the second respondent by the petitioner. This position has been explained by the second respondent in evidence. The second respondent has clearly explained that the difference was credited in the account of Vikas Chemicals.

29. Learned advocate for the petitioner has argued at length that this fact has not been clarified either in the notice or in the complaint.

30. Now simply because the position has not been clarified earlier, it cannot be said that the clarification rendered by the second respondent is false.

31. Again the petitioner had an opportunity to explain the position during the course of his further statement u/s 313 of the Code. The petitioner never explained the said position. Moreover, even with respect to the said explanation rendered by the second respondent during the course of his evidence, no further cross-examination has been undertaken with a view to bring further material from the cross-examination of the second respondent. So on one hand, the difference of the two amounts has been explained by the second respondent during the course of his evidence before the trial Court, on the other hand even during the cross-examination, the said fact was not seriously challenged, thirdly the petitioner has not explained the said position during the course of his further

statement u/s 313 of the Code. In that view of the matter, it has to be accepted that the difference in two amounts has been satisfactorily explained by the second respondent during the course of the evidence. On the other hand, we find that the petitioner has not made any effort to rebut the presumption. When a statutory presumption arises in favour of the second respondent, it becomes the responsibility and liability of the petitioner to rebut the same. The petitioner has not made any effort to rebut the same and therefore, when the presumption stood un-rebutted, it would mean that the consideration of those cheques has to be accepted to be in existence in favour of the second respondent and against the petitioner, meaning thereby it cannot be said that the cheques were without consideration.

32. It is also required to be considered that the two Courts below have recorded concurrent findings of the fact that the petitioner had issued the cheques against the consideration. This is a finding of fact based on evidence and also based on statutory presumption u/s 118 of the Act. The said presumption has not been rebutted and the difference of amount has been explained by the second respondent. Therefore, the said concurrent findings of the two Courts below are required to be accepted.

33. This being a revisional jurisdiction, it would not be possible for this Court to lightly interfere with the findings of fact recorded concurrently by two Courts below. Here we find that the two Courts below have recorded concurrent findings of fact about the dues outstanding against the petitioner. It is more so when there is a statutory provision in favour of the second respondent. Considering the evidence on record and considering statutory presumption in favour of the second respondent, again it is required to be presumed that the amount was really due to the second respondent by the petitioner. It cannot be said that the cheques were issued without consideration.

34. It has also been contended by the learned advocate for the petitioner that the petitioner had not received statutory notice demanding the amount of cheques and therefore, in absence of any proof about due service of a statutory notice, the complaint was liable to be dismissed by the trial Court.

35. The second respondent has deposed before the trial Court that the notice was issued to and served upon the petitioner and a copy of the said notice has been produced on record. The postal acknowledgments have also been produced on record. One more copy was sent under certificate of posting and the postal certificate has also been produced on record. They are at Exh.16 to 19. The trial Court as well as the lower appellate Court, both have found that the petitioner was duly served with notices as required by proviso (b) to Section 138 of the Act. This is again a finding of fact which cannot be interfered with unless it is found to be illegal and perverse.

36. u/s 27 of The General Clauses Act as well as u/s 6 of the Post Office Act, a presumption would certainly arise in favour of service of notice when a prepaid

registered post has been dispatched and postal acknowledgment has been produced on record.

37. We can find from the cross-examination of the second respondent that so far the service of notice is concerned, the petitioner did not cross-examine the second respondent. On the other hand, the second respondent has produced copy of notice, postal acknowledgment and certificate of posting at Exh.16 to 19 before the trial Court.

38. The petitioner has stated in his further statement that he did not receive the notice and the postal acknowledgment on record did not contain his signature. Again when the notice was dispatched at the correct address and when postal acknowledgment has been produced on record, then again it has to be presumed that the notice was served upon the petitioner. Mere denial about his signature on the postal acknowledgment by the petitioner is quite insufficient.

39. Moreover, this is a question of fact and both the Courts below have recorded a finding of fact that the petitioner was duly served with the demand notice under proviso (b) to Section 138 of the Act. It cannot be said that the two Courts below have committed any illegality in holding that the petitioner was duly served with demand notice. The said findings are supported by the aforesaid statutory presumption under the Post Office Act and under the General Clauses Act. Therefore, those findings cannot be treated to be illegal and against the weight of evidence on record.

40. So far as first presentment of cheques is concerned, the second respondent has clearly deposed that he had approached the petitioner after the dishonour of the cheques and the petitioner had assured him that the cheques would be honoured at the second presentment. That thereafter, the cheques were presented again and dishonoured and thereafter, the notice was issued.

41. Learned advocate for the petitioner has argued that the second respondent ought not to have waited for the presentment of the cheques again. It would be a matter of choice on the part of the complainant to present the cheques on any number of occasions within the stipulated period. However, if once the notice is issued, then the position would be different. In the present case we find that before issuance of notice, the second respondent presented the cheques before the bank twice and they were dishonoured at both the occasions. In that view of the matter, it cannot be said that there was some technical error or illegality on the part of the second respondent in presenting the cheques twice before the bank concerned.

42. The cheques were presented at both the occasions within the stipulated period. Notices were issued within the stipulated period and even the complaint has been filed within the stipulated period of limitation. Therefore, there is no illegality even from procedural aspect also.

43. In this connection we can refer to a decision of Hiten P. Dalal Vs.

Bratindranath Banerjee, , wherein it has been laid down by the Hon''ble Supreme Court that the presumption u/s 138 of the Act regarding consideration and presumption as to debt or liability is a presumption which is statutory one and the Court is under obligation to raise this presumption. That at the same time, the other side is always at liberty to rebut the said presumption. It has further been observed that mandatory presumption has to be rebutted by proof and not by mere explanation. In the present case, we find that there is absolutely no proof about the rebuttal of presumption and in absence of any proof, the presumption stood un-rebutted and therefore, the consideration is required to be held to have been proved by the second respondent.

44. In K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , the Hon''ble Supreme Court has observed that if a notice required under a statute has been sent and if it has been returned as unclaimed, then giving of notice is complied with. It has also been laid down that where the sender has despatched the notice by post with the correct address written on it, then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Such non-service on the person addressed on the notice has not been challenged. The postal acknowledgment has been produced on record. A second copy of the notice has been served under certificate of posting. The certificate of posting is also on record. The above evidence conclusively leads us to believe that the notice has been duly served upon the petitioner. Therefore, mere denial by the petitioner is insufficient to disprove the service of notice.

45. In Jain Associates and Ors. v Deepak Chaudhary and Co., reported in 2000 (2) Cri 374, again it has been laid down that the notice sent under certificate of posting would be presumed to have been duly served in due course. The said judgment was rendered by the Hon''ble High Court of Delhi.

46. In Aparna Agencies, Hyderabad Vs. P. Sudhakar Rao and another, , the Hon''ble High Court of Andhra Pradesh has referred to the provisions made in Section 27 of the General Clauses Act, 1897 for the purpose of raising presumption about the service of notice which has been referred to hereinabove.

47. In Bhanwar Lal v. State of Rajasthan reported in 1999 (1) Cri 695 a notice was sent by registered post A.D. and was returned unserved with the endorsement that addressee's garage was closed. It was held that though the complaint may be treated to be premature, the examination of the complainant was on a subsequent date and therefore, the complaint was not liable to be quashed on the ground that it was filed before the due date.

48. In I.C.D.S. Ltd. v Beemna Shabeer and another, reported in AIR 2002 SCW 3358, it has been observed that even if a cheque is issued by a guarantor, it cannot be said that it has not been issued for the purpose of discharging any debt or liability.

49. One more aspect can not be lost sight of. If the petitioner really did not get

the goods/materials despite issue of cheques in advance, as per the case of petitioner, then the petitioner would not have observed silence. He would not have been idle. He would have promptly reacted, would have issued notice to the second respondent requiring him to immediately supply the goods. He would have had issued appropriate instruction to the bank. He would have produced evidence and materials including his own books of accounts, to prove non-delivery or non-supply of goods by the second respondent to the petitioner. Moreover, when the second respondent had shown his readiness, in his evidence, to produce further documents and materials, then he could have been asked to produce the same. This was not done by the petitioner. Then there was nothing wrong with the second respondent in relying upon the statutory presumption u/s 118 of the said Act referred to hereinabove in order to prove consideration of cheques, service of notice etc.

50. The above aspects clearly go to show that the petitioner had issued the cheques against the consideration as per the presumption in favour of the second respondent. That the second respondent has issued statutory notice of demand to the petitioner ; that it was duly served upon the petitioner. That the petitioner did not reply or comply with the same. That the cheques were dishonoured and though dishonoured they were again presented within the period of limitation. So all the requirements of Section 138 of the Act are complied with and there is no flaw either statutory or procedural or otherwise. Therefore, when the petitioner failed to see that the cheques are honoured and when the cheques have been dishonoured, the offence is made out. The trial Court as well as the Sessions Court, both have appreciated the factual as well as legal aspects properly. There is no error committed in procedure. It cannot be said that the petitioner was not given a reasonable opportunity to defend the case. Any way, the case has been proved beyond any reasonable doubt before the trial Court and therefore, the trial Court as well as the Sessions Court were justified in holding the petitioner guilty for the offence punishable u/s 138 of the Act. Suffice it to say that there is no merit in the present revision application and it deserves to be dismissed since the judgment and orders of the two Courts below are not found illegal.

51. For the foregoing reasons, this revision application is dismissed. The judgments and orders of the two Courts below are confirmed. The petitioner is on bail and therefore, his bail bonds are cancelled. The Court below will naturally issue appropriate warrant against the petitioner and notice to the surety with a view to see that the petitioner surrenders at the earliest. The petitioner shall also forthwith surrender to the custody of the trial Court to serve out the remaining sentence. Rule discharged.