

(2011) 07 GUJ CK 0003
In the Gujarat High Court

Case No : Special Criminal Application No's. 696 and 697 of 2011 and Criminal Miscellaneous Application No. 6906 of 2011 in Special Criminal Application No. 696 of 2011, Criminal Miscellaneous Application No. 6907 of 2011 in Special Criminal Application No. 697 of

Rajan Bholabhai Shah

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 354, 70, 82
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 07 GUJ CK 0003

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : Yogesh Lakhani and M.K. Vakharia, for the Appellant; K.P. Raval, Assistant Public Prosecutor for Respondent 1 and Smita Patel-Poa, for Party-in-Person for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—As common question of law and facts arise in Special Criminal Application Nos. 696/2011 and 697/2011 and are between the same parties and rest of the Criminal Miscellaneous Applications and Special Criminal Applications are interconnected and with respect to the criminal case pending between the parties before the learned trial Court, all these petitions and applications are heard together and disposed of by this common order.

2. Special Criminal Application No. 696/2011 has been preferred by the Petitioner - original accused Rajan Bholabhai Shah to quash and set aside the impugned judgment and order dated 10.03.2011 passed by the learned Principal Sessions Judge, City Civil Court, Ahmedabad in Criminal Revision Application No. 467/2010 as well as the proclamation dated 19.10.2010 issued by the learned Metropolitan Magistrate, Special Court No. 9 in Criminal Case No. 5870/2010

(New) (Old Criminal Case No. 982/2003).

2.1 Special Criminal Application No. 697/2011 has been preferred by the Petitioner - original accused Rajan Bholabhai Shah to quash and set aside the impugned judgment and order dated 10.03.2011 passed by the learned Principal Sessions Judge, City Civil Court, Ahmedabad in Criminal Revision Application No. 468/2010 as well as the proclamation dated 19.10.2010 issued by the learned Metropolitan Magistrate, Special Court No. 9 in Criminal Case No. 5869/2010 (New) (Old Criminal Case No. 983/2003).

2.2 Criminal Miscellaneous Application Nos. 6906/2011 and 6907/2011 have been preferred by the original complainant to vacate the ad-interim relief granted by this Court vide order dated 22.03.2011 in respective Special Criminal Application Nos. 696/2011 and 697/2011. Criminal Miscellaneous Application Nos. 5237/11 and 5238/2011 have been preferred by the original complainant - party in person for permitting his power of attorney Ms. Smita Patel to argue, appear, plead and conduct the aforesaid Special Criminal Application Nos. 696/2011 and 697/2011.

2.3 Special Criminal Application Nos. 1478/2011 and 1479/2011 have been preferred by the original complainant Rajiv A. Joshi to hear both these petitions along with main Special Criminal Applications and to call the record and proceedings of the criminal cases pending before the learned Metropolitan Magistrate to this Court and to pass appropriate orders in the aforesaid criminal complaints/cases.

3. Facts leading to filing of the present Special Criminal Application Nos. 696/2011 and 697/2011 in nut-shell are as under:

3.1 That Respondent No. 2 herein - original complainant Rajiv A. Joshi had instituted criminal case Nos. 982/2003 and 983/2003 before the learned Metropolitan Magistrate against the Petitioner - original accused for the offences u/s 138 of the Negotiable Instrument Act (hereinafter referred to as "Negotiable Instruments Act, 1881"). That the aforesaid criminal cases were re-numbered as Criminal Case Nos. 5870/2010 and 5869/2010. That the aforesaid criminal cases were pending in the Metropolitan Magistrate Court No. 25 which came to be transferred to the Court of Metropolitan Magistrate, N.I. Court No. 9, Ahmedabad on 25.08.2010. It appears that prior thereto, on 21.11.2009, Respondent No. 2 - original complainant submitted an application for issuing of arrest warrant against the Petitioner and on 22.01.2010, the learned Magistrate issued the arrest warrant against the Petitioner. That thereafter, the aforesaid cases came to be transferred to the Court of learned Metropolitan Magistrate Court No. 9, Ahmedabad which were given new numbers. It appears that arrest warrants issued by the earlier learned Magistrate were not served upon the Petitioner at the address mentioned in the warrants, therefore, on 25.08.2010, Respondent No. 2 - original complainant gave an application to serve warrants at the residence and business place of the Petitioner through RPAD and the same was

allowed. That on the basis of the aforesaid, warrant u/s 70 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code of Criminal Procedure") was issued on 25.08.2010 itself and the said warrants were sent through RPAD on 30.08.2010. It appears that on the very same day i.e. on 25.08.2010, Respondent No. 2 herein - original complainant submitted another application seeking declaration of proclaimed absconder against the Petitioner, which was kept for hearing on 30.09.2010 and the notice was issued upon the Petitioner, however, the same came to be served on the Petitioner only on 06.10.2010. As the notice for hearing on 30.09.2010 came to be served upon Petitioner on 06.10.2010 only, neither the Petitioner nor his advocate remained present on 30.09.2010. That the said application seeking declaration of proclaimed absconder came to be heard on 30.09.2010 and was kept for order on 16.10.2010. It appears that on 16.10.2010, the learned advocate appearing on behalf of the Petitioner appeared before the learned Magistrate and submitted the application for adjournment before the learned Court by submitting that the copy of the said application has not been served upon him and therefore, the Petitioner may be given a copy of the application and the matter may be adjourned for hearing on some other convenient date. That the learned Magistrate rejected the application of the Petitioner for adjournment and allowed the application of Respondent No. 2 for issuing of proclamation and ordered to issue proclamation u/s 82 of the Code of Criminal Procedure and in pursuance of the aforesaid order, the learned Magistrate has issued the proclamation on 19.10.2010. That being aggrieved and dissatisfied with the order passed by the learned Metropolitan Magistrate Court No. 9, Ahmedabad, the Petitioner preferred two Criminal Revision Applications being Criminal Revision Application Nos. 467/2010 and 468/2010 before the learned Principal Sessions Judge, City Sessions Court, Ahmedabad. That initially the learned Revisional Court granted the interim order on condition that the Petitioner shall deposit the entire cheque amount which came to be deposited by the Petitioner in each of the aforesaid criminal cases. Despite the above, the learned Principal Sessions Judge, City Sessions Court, Ahmedabad by impugned judgment and order dated 10.03.2011 has dismissed the aforesaid Criminal Revision Application Nos. 467/2010 and 468/2010 confirming the order passed by the learned Metropolitan Magistrate, Special Court No. 9, Ahmedabad issuing proclamation dated 19.10.2010 against the Petitioner. Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the learned Sessions Court in aforesaid Criminal Revision Application Nos. 467/2010 and 468/2010, confirming the order passed by the learned Metropolitan Magistrate issuing the proclamation against the Petitioner in aforesaid two criminal cases, the Petitioner - original accused has preferred the present Special Criminal Applications before this Court and has sought the aforesaid prayers. Having served with the notices of this Court in the present Special Criminal Applications, Respondent No. 2 - original complainant has appeared and has prayed to vacate the ad-interim relief granted earlier and had also submitted the aforesaid applications.

4. In the facts and circumstances of the case and with the consent of learned advocates appearing for respective parties as well as Respondent No. 2 - original complainant who has appeared and represented through his power of attorney Ms. Smita Patel, both these Special Criminal Applications are heard finally and other Criminal Miscellaneous Applications and Special Criminal Applications filed by the original complainant are also heard along with the present Special Criminal Applications.

5. Shri Y.S. Lakhani, learned Senior Advocate has appeared with Shri M.K. Vakharia, learned advocate appearing on behalf of the Petitioner - original accused and Respondent No. 2 has appeared in person through and along with his power of attorney Ms. Smita Patel, who has argued the matter on behalf of Respondent No. 2. Shri K.P. Raval, learned Additional Public Prosecutor has appeared on behalf of the State in each of the petitions.

6. Shri Y.S. Lakhani, learned Senior Advocate appearing on behalf of the Petitioner has vehemently submitted that the learned Sessions Court has materially erred in dismissing the revision applications and confirming the order passed by the learned Magistrate issuing proclamation against the Petitioner - original accused u/s 82 of the Code of Criminal Procedure. It is further submitted that as such when the Petitioner appeared before the learned Magistrate through his advocate on 16.10.2010 submitting that the Petitioner has been served with the notice to appear on 30.09.2010 only on 06.10.2010 and therefore, nobody could remain present on 30.09.2010 and even he was also not served with the copy of the application submitted by the complainant to issue proclamation, the learned Magistrate ought not to have issued the proclamation.

6.1 It is further submitted by Shri Y.S. Lakhani, learned Senior Advocate appearing on behalf of the Petitioner - original accused that pursuant to the interim order passed by the learned Sessions Judge in the aforesaid revision applications, when the Petitioner had deposited the entire cheque amount and the Petitioner assured that he will remain present before the learned trial Court in the aforesaid criminal cases on each date of adjournment, the learned Sessions Judge has materially erred in dismissing the aforesaid criminal revision applications. It is submitted by Shri Lakhani, learned Senior Advocate that as such the purpose for issuing the proclamation was that the Petitioner - original accused shall remain present before the learned trial Court and therefore, as such when the Petitioner had remain present before the learned Magistrate subsequently, as such the purpose for which the proclamation was issued is fulfilled and achieved and therefore, the learned Sessions Court ought not to have rejected the said revision applications and ought to have disposed of the aforesaid criminal revision applications.

6.2 Shri Lakhani, learned Senior Advocate appearing on behalf of the Petitioner - original accused has stated at the Bar, under the instructions from his client who is personally present in the Court, that he undertakes to appear and remain present before the learned Metropolitan Magistrate in the aforesaid two criminal

cases on each date of adjournment and he and/or his Advocate shall cooperate the learned trial Court in early disposal of the aforesaid criminal cases and that to show his bonafides, he is also ready and willing to deposit sum/amount which may be directed by this Court with further undertaking that in case it is found by the learned Metropolitan Magistrate that the Petitioner and/or his Advocate is not cooperating, in that case, the said amount can be forfeited. He has submitted that necessary undertakings dated 01.07.2011 affirmed by the Petitioner to the aforesaid extent are already filed in the present proceedings, the same are directed to be taken on record and similar undertakings shall be filed before the learned Metropolitan Magistrate also. He has also further submitted that in the said undertaking, he has also stated that the Petitioner shall deposit a sum of Rs. 50,000/- before the learned Metropolitan Magistrate towards security for remaining present before the learned trial Court on each date of adjournment and to cooperate the learned trial Court in earlier disposal of the aforesaid proceedings. Therefore, accepting the aforesaid undertakings and considering the assurance given by the Petitioner recorded herein above, it is requested to allow the present Special Criminal Applications. Shri Lakhani, learned Senior Advocate has also submitted that even the cheques amount deposited by the Petitioner pursuant to the interim order passed by the learned Sessions Court in the aforesaid criminal revision applications has now been withdrawn by the original complainant. It is submitted that as such there were in all eight criminal cases filed by Respondent No. 2 and/or his company/partnership firm against the Petitioner out of which six criminal cases have been settled and the said six cases have been disposed of and only two criminal cases in question remain between the parties now.

6.3 Shri Lakhani, learned Senior Advocate appearing for the Petitioner has further submitted that as such No. relief can be granted to the complainant as prayed in Special Criminal Application Nos. 1478/2011 and 1479/2011 in exercise of the powers under Article 226 of the Constitution of India. It is submitted that as such criminal cases are required to be decided and disposed of by the learned trial Court/Metropolitan Magistrate and the same cannot be transferred to this Court as prayed for. Therefore, it is requested to dismiss the aforesaid Special Criminal Application Nos. 1478/2011 and 1479/2011.

7. Petitions are opposed by Respondent No. 2 - party in person who is now represented through his power of attorney Ms. Smita Patel. She has opposed present Special Criminal Applications by submitting that as there was total non-cooperation on the part of the accused and he was not remaining present and he was avoiding even service of summons/warrant issued by the learned Metropolitan Magistrate, the learned Metropolitan Magistrate was justified in issuing the proclamation u/s 82 of the Code of Criminal Procedure against the Petitioner and No. illegality has been committed by the learned Metropolitan Magistrate. It is submitted that the learned Sessions Court has rightly rejected the revision applications and has rightly confirmed the order passed by the learned Metropolitan Magistrate issuing the proclamation against the Petitioner. It

is further submitted that the criminal cases are for the offences u/s 138 of the Negotiable Instruments Act, 1881 and looking to the object and purpose of enactment of the Negotiable Instruments Act, 1881, more particularly, Section 138 of Negotiable Instruments Act, 1881, the same are required to be disposed of at the earliest. She has also requested that the proceedings of the aforesaid criminal cases be called for and transferred to this Court and this Court may finally decide and dispose of the aforesaid criminal cases exercising powers u/s 354 of the Code of Criminal Procedure. Therefore, it is requested to pass appropriate order and to protect the interest of the original complainant.

8. Shri K.P. Raval, learned Additional Public Prosecutor has requested to pass appropriate order looking to the facts and circumstances of the case.

9. Heard the learned advocates appearing for respective parties as well as Respondent No. 2 party in person who is also personally present and who is represented through his power of attorney Ms. Smita Patel. It is to be noted that earlier the aforesaid Criminal Case Nos. 982/2003 and 983/2003 were pending before the learned Metropolitan Magistrate Court No. 10, Ahmedabad which were transferred to the Court of learned Metropolitan Magistrate Court No. 25 which were renumbered. It appears that applications were submitted by Respondent No. 2 herein - original complainant before the learned Metropolitan Magistrate Court No. 25 requesting to issue arrest warrant against the Petitioner. It appears that even the right in favour of the Petitioner to cross-examine also came to be closed by the learned Metropolitan Magistrate. It appears that the arrest warrant issued against the Petitioner issued by the learned Metropolitan Magistrate Court No. 25, Ahmedabad were not served upon the Petitioner. That thereafter the aforesaid two criminal cases came to be transferred to the Court of learned Metropolitan Magistrate Court No. 9 (Negotiable Instruments Act, 1881), Ahmedabad which were again renumbered as Criminal Case No. 5870/2010 and 5869/2010 and the same came to be transferred on 24.08.2010. That on the next date i.e. 25.08.2010, Respondent No. 2 - original complainant submitted the application to serve the warrant at the residence and business place of the Petitioner through RPAD and the same was allowed. It appears that on the basis of the aforesaid a warrant u/s 70 of the Code of Criminal Procedure came to be issued on 25.08.2010 itself and the same were sent for service through RPAD on 30.08.2010. It appears that on the very date i.e. 25.08.2010, the complainant submitted another application seeking declaration of proclaimed absconder against the Petitioner which was kept for hearing on 30.09.2010 and the notice was issued on the Petitioner. It appears that the said notice came to be served upon the Petitioner only on 16.10.2010 i.e. after returnable date and therefore, neither the Petitioner nor his advocate remained present for hearing of the application seeking declaration of proclaimed absconder, which was fixed for hearing on 30.09.2010. That thereafter the said application seeking declaration of proclaimed absconder came to be heard ex-parte on 30.09.2010 and was kept for order on 16.10.2010 and on 16.10.2010 in the morning/first session, the learned advocate on behalf of Petitioner appeared before the learned

Metropolitan Magistrate and asked for the adjournment as well as copy of the application dated 25.08.2010 seeking proclamation by submitting that the copy of the application has not been served upon the complainant. That despite the above application for adjournment and request to serve the copy of the application, the learned Metropolitan Magistrate Court rejected the application for adjournment and directed to issue proclamation against the Petitioner u/s 82 of the Code of Criminal Procedure and thereafter pursuant to the aforesaid order, the Court had issued the proclamation on 19.10.2010 directing the Petitioner to remain present in the aforesaid proceedings on 10.12.2010. As stated herein above pursuant to the interim order passed by the learned Sessions Court in aforesaid criminal revision applications, the Petitioner - original accused had already deposited the entire cheques amount has been now secured and infect the same has been received by the original complainant. An undertaking has been given by the Petitioner submitting that on each and every date of adjournment, he will remain present before the learned Metropolitan Magistrate in the aforesaid proceedings and that he and/or his advocate shall fully cooperate the learned Metropolitan Magistrate in early disposal of the aforesaid criminal cases. He has also submitted that he is ready and willing to deposit reasonable amount with the trial Court which may be ordered by this Court (which is quantified at Rs. 50,000/- in each criminal case) to show his bonafides and as a security to remain present before the learned trial Court on each and every date of hearing and to cooperate the learned Metropolitan Magistrate in early disposal of the aforesaid criminal cases. He has also submitted in the undertaking that in case it is found by the learned Metropolitan Magistrate that the Petitioner is not remaining present in the aforesaid criminal proceedings and is not cooperating the learned Magistrate in early disposal of the aforesaid criminal cases, even the aforesaid amount of Rs. 50,000/- be forfeited. Considering the aforesaid facts and circumstances and the undertakings, with suitable directions the present Special Criminal Application Nos. 696/2010 and 697/2010 can be disposed of by quashing and setting aside the proclamation issued by learned Metropolitan Magistrate dated 19.10.2010 confirmed by the learned Sessions Court by judgment and order dated 10.03.2011 passed in Criminal Revision Application Nos. 467/2010 and 468/2010 and thus the purpose for issuing the proclamation directing the accused to remain present in the criminal proceedings will be achieved.

9.1 So far as Special Criminal Application Nos. 1478/2011 and 1479/2011 preferred by Respondent No. 2 party in person - original complainant are concerned, looking to the reliefs sought in the said Special Criminal Applications, it appears to the Court that No. relief can be granted to the original complainant as prayed for in the aforesaid Special Criminal Applications. This Court cannot finally decide and dispose of the aforesaid criminal cases. The aforesaid criminal cases are to be tried and disposed of by the learned Metropolitan Magistrate and the prayer of the original complainant to transfer the aforesaid criminal cases to this Court and finally decide and dispose of, cannot be accepted and/or granted.

Under the circumstances, aforesaid Special Criminal Application Nos. 1478/2011 and 1479/2011 deserve to be dismissed.

10. In view of the above and for the reasons stated above, Special Criminal Application Nos. 696/2011 and 697/2011 are hereby allowed and the impugned order dated 19.10.2010 passed by the learned Metropolitan Magistrate issuing proclamation u/s 82 of the Code of Criminal Procedure against the Petitioner in the aforesaid Criminal Case Nos. 5870/2010 and 5869/2010 as well as the impugned judgment and order dated 10.03.2011 passed by the learned Sessions Judge, City Sessions Court, Ahmedabad in Criminal Revision Application Nos. 467/2010 and 468/2010 are hereby quashed and set aside on condition that the Petitioner shall abide by the undertakings dated 01.07.2011 filed by him and on condition that as agreed, the Petitioner shall remain present before the learned trial Court on each and every date of adjournment and shall cooperate the learned Metropolitan Magistrate in early disposal of the aforesaid criminal cases and on further condition that Petitioner shall deposit a sum of Rs. 50,000/- in the Court of learned Metropolitan Magistrate within a period of 15 days from today which may be treated as security towards assurance given by the Petitioner as mentioned in the aforesaid undertakings, which shall be invested by the learned Metropolitan Magistrate in fixed deposit in any Nationalized Bank in the name of Nazir and the same may be returned to the Petitioner - original accused at the conclusion of the trial and in case it is found that the Petitioner has acted as per the undertakings dated 01.07.2011. The learned Metropolitan Magistrate to finally decide and dispose of the aforesaid criminal cases at the earliest and preferably within a period of six months from the date of receipt of the present order. As so stated in the undertakings, in case it is found by the learned Metropolitan Magistrate that Petitioner and/or his advocate are not cooperating in early disposal of the aforesaid criminal cases and that has not remain present in the aforesaid criminal cases, in that case, it will be open for the learned Metropolitan Magistrate to forfeit the amount of Rs. 50,000/- which is to be deposited by the Petitioner as stated herein above. Rule is made absolute to the aforesaid extent in aforesaid Special Criminal Application Nos. 696/2011 and 697/2011.

10.1 In view of the disposal of the Special Criminal Application Nos. 696/2011 and 697/2011, No. orders in Criminal Miscellaneous Application Nos. 6906/2011, 6907/2011, 5237/2011 and 5238/2011.

10.2 For the reasons stated above, there is No. substance in Special Criminal Application Nos. 1478/2011 and 1479/2011 and the same deserve to be dismissed and are, accordingly, dismissed.