(2017) 01 GUJ CK 0017

In the Gujarat High Court

Case No : 11627 of 2015

RITVI VIRAT SHAH — APPELLANT

Vs

STATE OF GUJARAT & ANR. — RESPONDENT

Date of Decision : 11-01-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 482 - Saving of inherent powers of High Court

Indian Penal Code, 1860, Section 420, Section 468, Section 471, Section 467, Section 406 - Cheating and dishonestly inducing delivery of property - Forgery for purpose of cheating - Using as genuine a forged document - Forgery of valuable security, will, etc - Punishment for Criminal breach of trust

Negotiable Instruments Act, 1881, Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account

Citation : (2017) 01 GUJ CK 0017

Hon'ble Judges : J.B.Pardiwala

Bench : Single Bench

Advocate : SAMIR AFZAL KHAN, NISHA THAKORE, LALIT M PATEL, DHARMESH V SHAH

Judgement

1. RULE returnable forthwith. Ms.Thakore, the learned APP waives service of notice of rule for and on behalf of the respondent no.1 - State of Gujarat. Mr.Dharmesh Shah, the learned counsel waives service of notice of rule for and on behalf of the respondent no.2 - original complainant. By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicant seeks to invoke the inherent powers of this Court, praying for quashing of the proceedings of the Criminal Case No.1746 of 2014 pending in the Court of the learned Metropolitan Magistrate, Negotiable Instruments Court No.36, Ahmedabad.

2. It appears from the materials on record that the husband of the applicant herein, viz. Viratkumar Babulal Shah, availed of the loan facility from the respondent no.2, a finance company. Indisputably, the loan agreement has been

signed jointly, i.e. by the husband as well as the applicant herself. In discharge of the loan liability, the husband issued a cheque drawn in favour of the respondent no.2 dated 5th February 2013 for the amount of Rs.88,673=00. The said cheque came to be dishonoured due to funds insufficient in the account maintained by the husband of the applicant herein. In such circumstances, the respondent no.2 lodged a complaint in the Court of the learned Metropolitan Magistrate which was numbered as Criminal Case No.1746 of 2014. The short point for my consideration is, whether the applicant herein could be held to be responsible for the offence punishable under Section 138 of the Negotiable Instruments Act. Indisputably, the applicant herein has not signed the cheque. She might have signed the loan agreement along with her husband but that by itself is not sufficient to fasten the liability if the cheque drawn by the husband is dishonoured. This issue is no longer res integra in view of the decision of the Supreme Court in the case of Mrs.Arpana A.Shah v. M/s.Sheth Developers Pvt. Ltd. and another, AIR 2013 SC 3210 . I may quote the relevant observations as under : "8. In order to constitute an offence under Section 138 of the N.I. Act, this Court, in Jugesh Sehgal v. Shamsher Singh Gogi (2009) 14 SCC 683 : (AIR 2009 SC (Supp) 2022), noted the following ingredients which are required to be fulfilled:

"(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act."

3. Considering the language used in Section 138 and taking note of background agreement pursuant to which a cheque is issued by more than one person, we are of the view that it is only the "drawer" of the cheque who can be made liable for the penal action under the provisions of the N.I. Act. It is settled law that strict interpretation is required to be given to penal statutes. 9. In Jugesh Sehgal (supra), after noting the ingredients for attracting Section 138 on the facts of the case, this Court concluded that there is no case to proceed under Section 138 of the Act. In that case, on 20.01.2001, the complainant filed an FIR against all the accused for the offence under Sections 420, 467, 468, 471 and 406 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and there was hardly any dispute that the cheque, subject-matter of the complaint under Section 138 of the N.I. Act, had not been drawn by the appellant on an account maintained by him in Indian Bank, Sonepat Branch. In the light of the ingredients required to be fulfilled to attract the provisions of Section 138, this Court, after finding that there is little doubt that the very first ingredient of Section 138 of the N.I. Act enumerated above is not satisfied and concluded that the case against the appellant for having committed an offence under Section 138 cannot be proved. 10. In S.K. Alagh v. State of Uttar Pradesh and others (2008) 5 SCC 662 : (AIR 2008 SC 1731 : 2008 AIR SCW 2389), this Court held:

"19. ..... If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya (2006) 10 SCC 581 : (AIR 2006 SC 3086 : 2006 AIR SCW 4582))"

11. In Sham Sunder and others v. State of Haryana (1989) 4 SCC 630 : (AIR 1989 SC 1982), this Court held as under:

"9. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

12. As rightly pointed out by learned senior counsel for the appellant, the interpretation sought to be advanced by the respondents would add words to Section 141 and extend the principle of vicarious liability to persons who are not named in it.

13. In the case on hand, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer, if it is a Company, then Drawer Company and is extended to the officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability. To put it clear, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. For example, Section 141 of the N.I. Act is

an instance of specific provision that in case an offence under Section 138 is committed by a company, the criminal liability for dishonour of a cheque will extend to the officers of the company. As a matter of fact, Section 141 contains conditions which have to be satisfied before the liability can be extended. Inasmuch as the provision creates a criminal liability, the conditions have to be strictly complied with. In other words, the persons who had nothing to do with the matter, need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, the officers of the company, who are responsible for the acts done in the name of the company, are sought to be made personally liable for the acts which result in criminal action being taken against the company. In other words, it makes every person who, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. It is true that the proviso to sub-section enables certain persons to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence. The liability under Section 141 of the N.I. Act is sought to be fastened vicariously on a person connected with the company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.

14. It is not in dispute that the first respondent has not filed any complaint under any other provisions of the Penal Code and, therefore, the argument pertaining to the intention of the parties is completely misconceived. We were taken through the notice issued under the provisions of Section 138, reply given thereto, copy of the complaint and the order issuing process. In this regard, Mr.Mukul Rohatgi, learned senior counsel for the respondent after narrating the involvement of the appellant herein and her husband contended that they cannot be permitted to raise any objection on the ground of concealing/suppressing material facts within her knowledge. For the said purpose, he relied on Oswal Fats and Oils Limited v. Additional Commissioner (Administration), Bareilly Division, Bareilly and others (2010) 4 SCC 728, Balwantrai Chimanlal Trivedi v. M.N. Nagrashna and Ors., AIR 1960 SC 1292, J.P. Builders and Anr. v. A. Ramadas Rao and Anr. (2011) 1 SCC 429 : (AIR 2011 SC (Civ) 230). Inasmuch as the appellant had annexed the relevant materials, namely, copy of notice, copy of reply, copy of the complaint and the order issuing process which alone is relevant for consideration in respect of complaint under Section 138 of the N.I. Act, the argument of learned senior counsel for Respondent No.1 that the stand of the appellant has to be rejected for suppressing of material facts or relevant facts, cannot stand. In such circumstances, we are of the view that the case law relied upon by the contesting respondent No.1 is inapplicable to the facts of the present case.

15. Mr. Mukul Rohtagi, learned senior counsel for respondent No.1, by drawing our attention to the definition of "person" in Section 3(42) of the General Clauses Act, 1897 submitted that in view of various circumstances mentioned, the

appellant herein being wife, is liable for criminal prosecution. He also submitted that in view of the explanation in Section 141(2) of the N.I. Act, the appellant wife is being prosecuted as an association of individual. In our view, all the above contentions are unacceptable since it was never the case of respondent No.1 in the complaint filed before learned Magistrate that the appellant wife is being prosecuted as an association of individuals and, therefore, on this ground alone, the above submission is liable to be rejected. Since, this expression has not been defined, the same has to be interpreted ejusdem generis having regard to the purpose of the principle of vicarious liability incorporated in Section 141. The terms "complaint", "persons" "association of persons" "company" and "directors" have been explained by this Court in Raghu Lakshminarayanan v. Fine Tubes (2007) 5 SCC 103 : (AIR 2007 SC 1634 : 2007 AIR SCW 2460).

16. The above discussion with reference to Section 138 and the materials culled out from the statutory notice, reply, copy of the complaint, order, issuance of process etc., clearly show that only the drawer of the cheque being responsible for the same.

17. In addition to our conclusion, it is useful to refer some of the decisions rendered by various High Courts on this issue.

18. Learned single Judge of the Madras High Court in Devendra Pundir v. Rajendra Prasad Maurya, Proprietor, Satyamev Exports S/o. Sri Rama Shankar Maurya, 2008 Criminal Law Journal 777, following decisions of this Court, has concluded thus:

"7. This Court is of the considered view that the above proposition of law laid down by the Hon''ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case. Even in this case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern namely, "Kamakshi Enterprises" and as such, the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise." After saying so, learned single Judge, quashed the proceedings initiated against the petitioner therein and permitted the Judicial Magistrate to proceed and expedite the trial in respect of others.

19. In Gita Berry v. Genesis Educational Foundation, 151 (2009) DLT 155, the petitioner therein was wife and she filed a petition under Section 482 of the Code seeking quashing of the complaint filed under Section 138 of the N.I. Act. The case of the petitioner therein was that the offence under Section 138 of the Act cannot be said to have been made out against her only on the ground that she was a joint account holder along with her husband. It was pointed out that she has neither drawn nor issued the cheque in question and, therefore, according to her, the complaint against her was not maintainable. Learned single Judge of the High Court of Delhi, after noting that the complaint was only under Section 138 of the Act and not under Section 420, IPC and pointing out that nothing was

elicited from the complainant to the effect that the petitioner was responsible for the cheque in question, quashed the proceedings insofar as the petitioner therein.

20. In Smt. Bandeep Kaur v. S. Avneet Singh (2008) 2 PLR 796 : (AIR 2008 (NOC) 1301), in a similar situation, learned single Judge of the Punjab and Haryana High Court held that in case the drawer of a cheque fails to make the payment on receipt of a notice, then the provisions of Section 138 of the Act could be attracted against him only. Learned single Judge further held that though the cheque was drawn to a joint bank account which is to be operated by anyone, i.e., the petitioner or by her husband, but the controversial document is the cheque, the liability regarding dishonouring of which can be fastened on the drawer of it. After saying so, learned single Judge accepted the plea of the petitioner and quashed the proceedings insofar as it relates to her and permitted the complainant to proceed further insofar as against others.

21. In the light of the principles as discussed in the earlier paras, we fully endorse the view expressed by the learned Judges of the Madras, Delhi and Punjab and Haryana High Courts.

22. In the light of the above discussion, we hold that under Section 138 of the Act, it is only the drawer of the cheque who can be prosecuted. In the case on hand, admittedly, the appellant is not a drawer of the cheque and she has not signed the same. A copy of the cheque was brought to our notice, though it contains name of the appellant and her husband, the fact remains that her husband alone put his signature. In addition to the same, a bare reading of the complaint as also the affidavit of examination-in-chief of the complainant and a bare look at the cheque would show that the appellant has not signed the cheque.

23. We also hold that under Section 138 of the N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the N.I. Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case "except in case of Section 141 of the N.I. Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry

out the process of admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage."

4. In view of the settled position of law, there is no other option but to quash the proceedings so far as the applicant herein is concerned. This application is, accordingly, allowed. The proceedings of the Criminal Case No.1746 of 2014 pending in the Court of the learned Metropolitan Magistrate, Negotiable Instruments Court No.36, Ahmedabad, are hereby quashed so far as the applicant herein is concerned. The Court shall now proceed further with the Criminal Case so far as the coaccused is concerned, i.e. the husband of the applicant. Rule made absolute to the aforesaid extent. Direct service is permitted.