

(1996) 03 GUJ CK 0027
In the Gujarat High Court

Case No : Criminal Revision Application No's. 190 and 191 of 1995

Satish Jayantilal Shah

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-03-1996

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1997) 1 CivCC 270 : (1999) 95 CompCas 303 : (1996) CriLJ 3099 :
(1996) 2 GLR 751 : (1996) 3 RCR(Criminal) 720

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

Bench : Single Bench

Advocate : B.M. Gupta and J.B. Dastoor, for the Appellant; Kiran Acharya and K.P. Raval, for the Respondent

Judgement

R.R. Jain, J.—These applications arise from Criminal Cases Nos. 1361 of 1092 and 1362 of 1992 on the file of the Metropolitan

Magistrate (Court No. 15), Ahmedabad. In each case the learned Magistrate was pleased to hold the applicant guilty for commission of the

offence punishable u/s 138 of the Negotiable Instruments Act and sentenced him to undergo simple imprisonment for one month and to pay a fine

of Rs. 25,000 in default, to undergo further simple imprisonment for one month. Aggrieved by the judgment and order of the learned Magistrate

dated October 14, 1994, the applicant also preferred Criminal Appeals Nos. 41 of 1994 and 42 of 1994. The same were decided by the learned

Additional City Sessions Judge (Court No. 12), Ahmedabad, on May 1, 1995, confirming the lower court's order. Aggrieved by the concurrent

finding of both the courts below, the applicant/original accused has preferred the above revision applications.

2. Since in both cases the parties are same and are also represented by same advocates and involve common questions of law and facts, they are

heard and disposed of by this common order at the notice stage on perusal of the record and proceedings received from the trial court.

3. The applicant/original accused is dealing in chemical business and is the sole proprietor of Padmavati Sales Corporation whereas opponent No.

1/original complainant is also doing chemical business as sole proprietor in the name of Asim Agencies.

4. According to the complainant/opponent No. 1, in response to an oral order placed on February 25, 1992, goods worth Rs. 1,01,500 were

sold and delivered to the applicant/accused, vide Invoice No. 104 of 1991-92, dated February 25, 1992, exhibit-4. The applicant/accused gave

cheque No. 384270, dated April 8, 1992, drawn on the Co-operative Bank of Ahmedabad, for Rs. 1,01,500 towards payment of said invoice.

Unfortunately, on being presented for realisation through opponent No. 1's banker, Nutan Nagrik Sahakari Bank Limited, it was returned

dishonoured and, therefore, following due procedure prescribed under law the complainant filed Criminal Case No. 1361 of 1992 u/s 138 of the

Negotiable Instruments Act. Similarly, for goods sold and delivered by opponent No. 1/original complainant to the applicant, vide Invoice No. 105

of 1991-92, dated March 6, 1992, exhibit-4, for Rs. 1,03,156 the applicant/accused gave cheque No. 384258, dated March 22, 1992, drawn

on the Co-operative Bank of Ahmedabad, for Rs. 1,03,156 towards payment of said invoice. But the same was also returned dishonoured when

presented through Nutan Nagrik Sahakari Bank Limited for realisation and, therefore, opponent No. 1/original complainant filed another Criminal

Case No. 1362 of 1992 u/s 138 of the Negotiable Instruments Act.

5. On appreciation of evidence adduced, the learned trial judge came to the conclusion that the offence punishable u/s 138 of the Negotiable

Instruments Act has been committed by the applicant and thereby convicted him as above in both cases.

6. Admittedly, the original complaints have been filed in personal names without impleading the name of the trading concern under which both the

parties are trading, that is, their proprietary concern. Mr. Gupta, the learned advocate for the applicants, has vehemently argued that since the

cheques are given by the applicant-proprietary concern in the name of the proprietary concern of opponent No. 1 and, therefore, if at all any

offence is committed, is committed by a proprietary concern against the complainant proprietor concern and as complaint is filed in personal name,

same is not maintainable. On this count his arguments are twofold

(i) the firm has to be indicted and then only the proprietor can be held guilty

(ii) in the absence of impleading proprietary concern as complainant as well as accused, the application would not be maintainable.

7. It is true that in these matters, the original complainant is doing business in the name of the proprietary concern, Asim Agencies, and the accused

is also doing business in the name of the proprietary concern, Padmavati Sales Corporation. It is true that the names of the proprietary concerns

have not been impleaded in the original complaint. But, in my view, this omission does not invalidate maintainability and is not de hors the law. On

this point, a reference may be made to the definition of "person" defined u/s 11 of the Indian Penal Code, which says that the word "person

includes any company or association or body of persons, whether incorporated or not. The word "person" has also been defined in the General

Clauses Act, 1868, u/s 5(42) which is similar to that of section 11 of the Indian Penal Code. According to this definition, any company or

association or body of persons is recognised as legal entity or juristic person. This definition does not include proprietor. Hence, a proprietary

concern is not a legal entity or juristic person. A proprietary concern is a synonym of the proprietor. In fact, the proprietor is the person who does

business but for trading convenience business is done in the name of the proprietary concern. Thus the proprietary concern is not an independent,

legal and juristic entity having legal recognition in the eyes of law. Therefore, neither can it initiate any proceedings nor can proceedings be initiated

against it. In the case of a proprietary concern the proprietor is always an affected person who can either indict or be indicted. Keeping in mind this

legal position, the present proceedings have been rightly initiated by proprietor against the accused proprietor. Since a proprietary concern has no

legal entity the question of its being indicted first and then the proprietor does not arise. Interestingly, Mr. Gupta, who advances this contention, by

his own coil-duct has negated, as the present applications have been filed by

the proprietor against the proprietor without impleading the trading concerns. If this contention is accepted that alone is sufficient to dismiss both the revision applications.

8. Secondly, a juristic person always functions through a human administrator, may be director, manager or partner and the offence committed by such legal entity provides for imprisonment, then such administrator only has to be convicted to serve out sentence as the legal entity cannot be convicted to undergo imprisonment. Of course, where only fine is provided, the juristic person can be indicted. Taking this view also the contention has no force.

9. While admitting issuance of disputed cheques, Mr. Gupta, the learned advocate for the applicant/accused vehemently argues that the body of the cheques is not written by the drawer and that the cheques were not voluntarily given in discharge of a legal debt or liability and thus the provisions of section 138 of the Negotiable Instruments Act are not applicable. On this point, he relies upon the decision reported in *Taher N. Khambat v. Vinayak Enterprises* [1996] 86 Comp Cas 471 (AP) [1995] Cri. LJ 560. Mr. K. P. Raval, learned A.P.P., appearing for the State

has invited my attention to cross-examination on behalf of the applicant and statement of accused u/s 315 of the Criminal Procedure Code wherein

issuance of cheque has been clearly admitted. In my view, this question being purely a question of fact, cannot be raised and appreciated while

exercising revisional jurisdiction more particularly when no such contention was ever raised before the trial court. The only defence advanced

before the trial court is that the cheques were given to the complainant as advance payment towards the goods to be delivered in future. Thus, the

applicant clearly admitted execution, hence this contention needs no consideration and be rejected. Apart from this fact, no law provides that in the

case of any negotiable instrument the entire body has to be written by the maker or drawer only. What is material is signature of the drawer or

maker and not the body writing hence the question of body writing has no significance.

10. Opponent No. 1/complainant has proved by ample evidence on record that the goods were sold and delivered to the applicant in fulfilment of

the oral order and that the cheques were given towards payment for the goods

sold, therefore, the cheques are for valid consideration and in discharge of liability. Apart from this fact, when any negotiable instrument has been given or executed, a presumption can be raised u/s 118 of the Negotiable Instruments Act that the negotiable instrument was made or drawn for valid consideration. Of course, this is rebuttable presumption but nothing has been produced nor any evidence has been led to rebut this presumption. In this case, the other circumstances about valid consideration are so strong that even the court need not raise a presumption in that regard. Opponent No. 1/original complainant has proved sale and delivery of goods by cogent and concrete documentap evidence. The amount mentioned in the cheques exactly tallies with the figure of the invoices in question and, therefore, the cheques shall be deemed to have been given towards payment of bills, vide which goods are sold and delivered and thus have been in discharge of legal dues and liability. Assuming that the cheques are given as advance payment then the cheques would not have been for the exact amount tallying with the amount of invoices. Furthermore, advance payment is always made prior - to the transaction whereas in both these cases the cheques are given after a fortnight of the transaction and date of invoice. The date of placing oral order is not disputed by the applicant. If this be so, what prevented the applicant from making the complaint well in advance and inform opponent No. 1/original complainant for non-delivery as per order and a consequent request for not sending the cheques for realisation as goods have not been delivered. In the absence of any correspondence by the applicant with the opponent No. 1 in this behalf preceding the notice u/s 138 of the Negotiable Instruments Act, the defence is baseless and is raised in abuse of the process of law and deserves to be thrown out at the outset. Even assuming that cheques were given as advance payment for goods to be delivered then also nondelivery of goods can only amount to breach of agreement and nonetheless the transaction would be void as having been influenced by unlawful means as argued by Mr. Gupta. He further argued that the transaction would be covered by section 58 of the Negotiable Instruments Act. But, in my view, section 58 of the Act has no application in this case. The Act does not define unlawful means/consideration hence recourse will have to be taken to various provisions of the Indian Contract Act. Unlawful

consideration is defined in section 25 as being forbidden by law or is such which would defeat the provisions of any law or is fraudulent or is for

immoral or opposed to public policy. Mr. Gupta, the learned advocate for the applicant, has not been able to point out even an iota of evidence by

any stretch to bring the case within the purview of section 23 of the Indian Contract Act. Similarly, unlawful means would also include exercise of

force, coercion, etc., but nothing has been pointed out from the record which can bring the case within the purview of the various provisions of the

Indian Contract Act dealing with unlawful means. In this view of the facts, the judgment rendered in the case of Taher N. Khambat V. Vinayak

Enterprises [1996] 86 Camp Cas 471 (AP) [1995] Cri. LJ 560, as relied on by Mr. Gupta, has no application on facts.

11. A consideration can be past, present or future and, therefore. a pro-misc to deliver goods in future can be termed as future consideration and if

any cheque is given for future consideration it would be for valid consideration and in discharge of legal debts and liabilities and the consideration

cannot be said as unlawful.

12. A contention is also raised that the cheques were never sent for acceptance and, therefore, the question of dishonour does not arise. This is

again a question purely related to facts. The learned trial court has on the basis of the documents placed before it has come to the positive

conclusion that the cheques were sent for realisation and have been returned with the endorsement ""refer to drawer"" as is evident from exhibit-9 in

Criminal Case No. 1562 of 1992 and exhibit-8 in Criminal Case No. 1361 of 1992, the memo issued by the applicant's bank. Otherwise also this

question cannot be agitated in a revision application.

13. One more legal contention has been raised by Mr. Gupta, the learned advocate for the applicant, that no legal notice as contemplated under

clause (b) of the proviso to section 138 of the Negotiable Instruments Act was ever served upon the applicant and hence proceedings are vitiated.

From the record it clearly transpires that notice, exhibit-i 1, dated April 26, 1992, was sent by registered post at the registered address of the

applicant/accused in Criminal Case No. 1361 of 1992 whereas at exhibit-10 in Criminal Case No. 1562 of 1992. The notice was sent by

registered post and the acknowledgment receipt duly signed is produced on

record at exhibit-9 in Criminal Case No. 1361 of 1992 and at exhibit-9 in Criminal Case No. 1362 of 1992. Mr. Gupta disputes receipt of the notice saying that the acknowledgment does not bear the signature of the applicant. It is true that the signature on the acknowledgment receipt differs from the cheques in question. Here the question is not of the signature of the addressee but the question is whether it was received or reached at the address mentioned. The correctness of the address mentioned in the cause title of the notice as well as on the acknowledgment is not in dispute. Even the applicant has also written the same address in the cause title of the applications. Dispatch of notice by registered post is also not under challenge and, therefore, would be a relevant fact and the presumption that the notice/letter has reached and was delivered to the addressee can be raised u/s 16 of the Indian Evidence Act. Since the address is correct and a letter posted in ordinary course reaches the addressee I have no hesitation in raising the presumption that the notices in question did reach the addressee and have been delivered to the addressee or any authorised person on his behalf and, therefore, this contention also does not find favour of the court. As regards practice and procedure for service of notice through post and if addressee endeavours to manage to have the notice returned with postal remarks ""not available in the house"", ""house locked"", ""shop closed"", the apex court in a recent decision in State of Madhya Pradesh v. Hiyalal JT [1996] 1 SC 609 has held it to be a valid service on respondent-addressee. In the light of this decision, the contention does not hold good as on the facts also the prosecution case is on a much sound footing and the notice shall be deemed to have been served and much significance cannot be attributed to difference in signature. A person consciously or unconsciously may put different signatures. In this case the applicant being conscious about anticipated litigation might have scribed different signature with dishonest and deliberate intention of defeating the provisions.

14. Highlighting the fact of difference in signatures on the acknowledgment receipt as well as the cheques, Mr. Gupta has argued that the court cannot be an expert to compare signatures as contemplated u/s 75 of the Indian Evidence Act. It is true that the court cannot be an expert and base its conclusions merely on comparison of signatures by itself. But it can

definitely compare the signatures in light of other admitted evidence on record. In this case, I have gone through the judgment and nothing can be found that the court by becoming expert and comparing signatures has arrived at any particular conclusion. The court has not made any observation like an expert's opinion. The court has not at all based its finding on such evidence and, therefore, this contention has also no force in the eyes of law. Under law the court has power to compare the signature/handwriting strengthening its finding based on other cogent material and evidence on record. Therefore, there is nothing wrong if handwritings are compared to strengthen the finding.

15. Basically, dishonour of cheques is a civil wrong arising out of breach of contract and, therefore, becomes the subject matter of civil remedy.

However, as held by the Supreme Court in *M/s. Electronics Trade and Technology Development Corpn. Ltd., Secunderabad Vs. M/s. Indian*

Technologists and Engineers (Electronics) Pvt. Ltd. and another, , the object of bringing section 138 on the statute book appears to inculcate faith

in the efficacy of banking operations and credibility in transacting business on negotiable instruments so that the faith of the commercial community

in banking operations may not be shaken. Therefore, despite the civil remedy, section 138 is introduced to prevent dishonesty on the part of the

drawer of the negotiable instrument and abuse thereof. The very scheme of banking operations requires the payee or holder in due course to act

upon negotiable instrument presuming that it is in lieu of cash amount. It is in this background that despite the civil remedy criminal liability is

introduced so as to restore the faith of the commercial community in banking operations. In case of dishonour the court can raise presumption of

dishonest intention and hold criminally liable, a deterrent remedy. That the offence under this section shall be deemed to have been committed, the

moment cheque is dishonoured on being presented for realisation. But, since basically the dispute is of civil nature, the Legislature thought it wise to

provide for a safety valve enabling the drawer or maker of instrument to resolve the grievance and get rid of criminal liability by making payment

within the stipulated period of 15 days from the date of receipt of notice as provided under sections 138(b) and 138(c) of the Negotiable

Instruments Act. Therefore, issuance of notice is nothing else but a procedure

enabling the drawer of the instrument to resolve the grievance and get rid of criminal liability. If at all there is any irregularity in service of notice it would be a procedural irregularity and not illegality and shall not vitiate the proceedings. Issuance of notice is nothing else but an intimation to the drawer that by dishonour of cheque one becomes subject to criminal liability which can be avoided by making payment.

16. Thus, on an overall consideration of material placed before the court and oral submissions advanced, I am of the view that the applicant has committed offence punishable u/s 138 of the Negotiable Instruments Act and both the courts below have rightly convicted. I do not find any illegality or error in appreciation of evidence or exercise of jurisdiction de hors the law. Thus, the present revision applications being devoid of merit deserve to be rejected and are hereby rejected maintaining the concurrent finding of both the courts below. Notice in both the applications is discharged.

17. At this stage, Mr. Gupta, learned advocate for the applicant, orally requests the court to grant suitable time to the applicant for surrendering before the trial court to serve out sentence. Since the other side has no objection, the applicant is granted time upto to March 25, 1996, to surrender before the trial court failing which the trial court shall be at liberty to take appropriate steps in accordance with law.