

**2022 (0) ALJEL-HC 245897**

**GUJARAT HIGH COURT**

**Hon'ble Judges:Vaibhavi D.Nanavati, J.**

Girish Balkrishna Garg Versus State Of Gujarat

Criminal Miscellaneous Application No. 17863 of 2018 ; \*J.Date :- NOVEMBER 16, 2022

- NEGOTIABLE INSTRUMENTS ACT, 1881 Section - 138

**Cases Referred to :**

1. Alka Khandu Avhad Vs. Amar Syamprasad Mishra And Another, AIR 2021 SC 1616

**Equivalent Citation(s):**

2023 (1) DCR 686 : 2022 JX(Guj) 1459

**JUDGMENT :-**

**1** Heard Mr. Aftabhusen Ansari, learned advocate appearing for the applicants, Ms. Maithili D. Mehta, learned Additional Public Prosecutor appearing for the respondent No.1 - State and Ms. Roopal R. Patel, learned advocate appearing for the respondent No.2.

**2** By way of present application, the applicants have prayed for the following reliefs :-

"A) YOUR LORDSHIPS may kindly be pleased to admit and allow this application;

B) YOUR LORDSHIPS may kindly be pleased to quash and set aside the Criminal Case No.47918 of 2017 pending before the Chief Metropolitan Magistrate Court No.36, Ahmedabad, orders dated 18.7.2017 and 26.7.2017 passed therein and all proceedings arising out of the said complaint;

C) YOUR LORDSHIP may kindly be pleased to order that pending admission, hearing and / or final disposal of this application, further proceedings into the Criminal Case No. 47918 of 2017 pending before the Chief Metropolitan Magistrate Court No.36, Ahmedabad, orders dated 18.7.2017 and 26.7.2017 passed therein and all proceedings arising out of the said complaint be stayed in the interest of justice;

AND

D) YOUR LORDSHIPS may be pleased to grant such other and further relief(s) as may deed just and proper in the facts and circumstances of the case."

**3** By way of present application, the applicants herein have prayed for quashing of criminal case being Criminal Case No.47918 of 2017 pending before the Chief Metropolitan Magistrate Court No.36, Ahmedabad, wherein process has been issued pursuant to the complaint filed by the respondent No.2 on 26.07.2017, which is duly produced on record at page No.9 Annexure-A and the order issuing process dated 06.09.2017 passed below Exh.1 is duly produced on record at page No.14.

**4** Briefly stated that the complainant is the branch manager of Vijay Cooperative Bank Ltd., Odhav Branch, Ahmedabad, which sanctioned Hypo Cash Credit Facility in favour of the applicants. It is alleged that arrears of this loan was paid through cheque which bounced with an endorsement 'Insufficient Funds'. The cheque in question came to be issued by the applicant No.1 in favour of 'Balaji Textiles' on 22.05.2017 being cheque No.000023 through joint account held by the applicant No.1 and applicant No.2. The said cheque came to be returned with an endorsement of 'insufficient funds', which was deposited with the Bank of Baroda by Account Payee Cheque. Statutory Notice under Section 138 of the Negotiable Instruments Act, 1881 came to be issued to the applicants on 05.06.2017 by the respondent No.2 - original complainant. The respondent No.2 filed the impugned complaint being Criminal Case No.47918 of 2017 and process came to be issued on 16.07.2017.

5 Being aggrieved by the aforesaid the applicants No.1 and 2 have approached this Court seeking quashing of impugned complaint filed by the respondent No.2-original complainant.

#### SUBMISSIONS ON BEHALF OF THE APPLICANTS :-

6 Mr. Aftabhusen Ansari, learned advocate appearing for the applicants submitted that the impugned complaint filed at the instance of complainant - respondent No.2 Bank is not maintainable against the applicants. Mr. Aftabhusen Ansari, learned advocate appearing for the applicants submitted that the cheque in question which is duly produced on record at page No.20 dated 22.05.2017 being cheque No.000023 came to be issued by the applicant No.1. through joint account held by the applicant No.1 and applicant No.2 in favour of 'Balaji Textiles'. The said cheque came to be returned with an endorsement of 'insufficient funds', which was deposited with the Bank of Baroda by Account Payee Cheque. The said cheque was never issued in favour of the complainant and therefore, it is not open for the complainant to initiate proceedings under Section 138 qua the applicants herein. In view of above, criminal complaint filed before the concerned Court is not maintainable under the provisions of Section 138 of the Negotiable Instruments Act, 1881 qua applicants herein.

6.1 Mr. Aftabhusen Ansari, learned advocate appearing for the applicants vehemently submitted that the applicant No.2 viz. Sweta Girish Garg is not a signatory to the cheque in question though the cheque was issued from the joint account maintained by applicant Nos.1 and 2. The applicant No.2 has not signed the cheque even as per the notice and averments made in the complaint and considering the judgment of the Hon'ble Apex Court in the case of Alka Khandu Avhad Versus Amar Syamprasad Mishra and Another reported in AIR 2021 SC 1616, the non signatory cannot be made accused in the complaint under Section 138 of the Negotiable Instrument Act.

6.2 Mr. Aftabhusen Ansari, learned advocate appearing for the applicants further submitted that the cheque in question was issued in favour of 'Balaji Textiles' and not in favour of the complainant Bank namely 'Vijay Co-operative Bank Ltd' and therefore only 'Balaji Textiles' can maintain the prosecution under Section 138 of the Negotiable Instruments Act, 1881.

6.3 Mr. Aftabhusen Ansari, learned advocate appearing for the applicants has placed reliance on the definition of "payee" under Section 7 and Section 9 "holder in due course" of the Negotiable Instruments Act, 1881.

6.4 Mr. Aftabhusen Ansari, learned advocate appearing for the applicants submitted that the complaint by the complainant is not maintainable because the cheque in question was drawn in favour of payee viz. 'Balaji Textiles' and in no case the said cheque which is crossed cheque can be deposited in the account of the complainant. Further, a cheque is an order by the signatory to its bank to make the payment to the person named on it and when the cheque is crossed cheque it cannot be further negotiated and hence the complaint of the complainant is not maintainable.

#### SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 :-

7 Ms. Roopal R. Patel, learned advocate appearing for the respondent No.2 relied on the affidavit-in- reply filed by the complainant herein and placing reliance on the same, Ms. Roopal Patel, learned advocate appearing for the respondent No.2 submitted that the respondent No.2 is the Co-operative Bank. That, the applicant No.2 - Balaji Textile is the proprietorship concern whose proprietor is Shweta Girish Garg - wife of the applicant No.1 viz. Girish Balkrishna Garg. Applicant No.2 availed two loan facilities viz. (i) hypothecated cash credit of Rs.30,00,000/- having Account No.85 and (ii) Secured Loanworking capital of Rs.5,00,000/- having Account No.108. That the said loans were released on 28.06.2010 and 17.08.2012 vide Resolution No. 31.05.2010 and 29.06.2012 respectively passed by the respondent No.2.

7.1 Ms. Roopal Patel, learned advocate further submitted that various documents had been executed by the applicants herein and one Shri Sanjay Vedprakash Gupta. Applicant No.1 and the said Shri Sanjay stood as guarantors. They had executed an 'Ekrarnama', which is duly produced on record at Annexure-R collectively are the copies of the list of documents submitted with the respondent bank for procuring the said loan facilities. Annexure-S collectively are the copies of the documents which were executed with respect to the said loan facilities. As contracted between the parties, interest @ 14% was agreed upon over and above, penalty. Thus, total loan of Rs.35,00,000/- was availed.

7.2 Since, the accused had made defaults in payment of outstanding amounts, the same was increased to the tune of Rs.46,10,073/- as on 01.07.2017.

7.3 In view of such outstanding amount which is due and payable, at the instance of applicant No.2 the borrower and the applicants having express assurance to discharge the liability of accused No.2 for

payment and towards this assurance a cheque of Bank of Baroda bearing No.03200100017155 dated 22.05.2017 of the joint account of the accused of the said amount after duly signing it. In view of such assurance, the said cheque came to be dishonored on 23.07.2017 with an endorsement 'insufficient funds'. The respondent No.2 informed the accused about the return of the cheque, but the said amount was not paid by the applicants herein. Consequently, the respondents herein were constrained to issue notice under Section 138 of the Negotiable Instruments Act, 1881 on 05.06.2017. Resultantly, criminal case being Criminal Case No.47918 of 2017 came to be filed against the applicants herein.

#### POSITION OF LAW :-

**8** At this stage, it is apposite to refer to the position of law laid down by the Hon'ble Supreme Court in case of Alka Khandu Avhad Versus Amar Syamprasad Mishra and Another reported in AIR 2021 SCC 1616, wherein it is held thus :-

"7. On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:

i) that the cheque is drawn by a person and on an account maintained by him with a banker;

ii) for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability; and

iii) the said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.

8. Now, so far as the case on behalf of the original complainant that the appellant herein original accused No. 2 can be convicted with the aid of Section 141 of the NI Act is concerned, the aforesaid has no substance.

8.1 Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. Learned counsel appearing on behalf of the original complainant has submitted that Company means any body corporate and includes, a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within other association of individuals and therefore with the aid of Section 141 of the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be other association of individuals . Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the appellant cannot be convicted with the aid of Section 141 of the NI Act. Therefore, the High Court has committed a grave error in not quashing the complaint against the appellant for the offence punishable under Section 138 r/w Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 r/w Section 141 of the NI Act, therefore, can be said to be abuse of process of law and therefore the same is required to be quashed and set aside."

#### ANALYSIS :-

**9** In facts of the present case, undisputedly, cheque in question came to be issued by the applicant No.1 i.e. Girish Balkrishna Garg in favour of Balaji Textiles being cheque No.000023 dated 22.05.2017, duly produced on record at page No.20, which came to be returned with an endorsement 'insufficient funds' on 23.05.2017, which is duly produced on record at page No.21.

**10** At this it is apposite to refer Section 7 of the Negotiable Instruments Act, 1881 definition of payee which reads thus :-

"Section 7. The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

**11** Moreover, the contention of the complainant that, the complainant is holder in due course cannot be accepted as the definition of the "holder in due course" which is given in Section 9 of the Negotiable Instruments Act, 1881 specifically the debars the crossed cheque from its purview. Section 9 of the Negotiable Instruments Act, 1881 reads thus :-

9. "Holder in due course". - "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

**12** Undisputedly, the cheque in question came to be issued by the applicant No.1 in favour of 'Balaji Textiles'. For maintaining the complaint against the applicants herein under Section 138 of the Negotiable Instruments Act, 1881, the following conditions are required to be satisfied :-

- i) that the cheque is drawn by a person and on account maintained by him with a banker;
- ii) for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability; and
- iii) the said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account. Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the Negotiable Instruments Act, 1881 does not speak about the joint liability to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is maintained and that he was a signatory to the cheque.

**13** The following emerge for the consideration of this Court :-

- (i) The applicant No.2 i.e. Shweta Girish Garg is not signatory to the cheque in question though the same was issued from the joint account maintained by the applicant Nos.1 and 2. Considering the ratio as laid down and referred above in AIR 2021 SC 1616; The applicant No.2 not being signatory cheque the impugned complaint being Criminal Case No.47918 of 2017 is not maintainable against the applicant No.2 under the provisions of Section 138 of the Negotiable Instruments Act, 1881.
- ii) The impugned complaint is held to be not maintainable in view of the fact that the cheque in question was issued by the applicant No.1 in favour of payee namely 'Balaji Textiles' and not in favour of the complainant Bank i.e. 'Vijay Co-operative Bank Limited' and that in no case the cheque in question being a crossed cheque could have been deposited in the account of complainant.

**14** Further, a cheque is an order by the signatory to its bank to make the payment to the person named on it and when the cheque is crossed cheque it cannot be further negotiated and hence the complaint of the complainant is not maintainable.

**15** Considering the aforesaid facts as stated above, Section 7 and Section 9 of the Negotiable Instruments Act, 1881 and settled position of law as referred above, the submissions advanced by Mr. Aftabhusen Ansari, the learned advocate appearing for the applicant requires consideration.

**16** This Court in exercise of discretion under Section 482 of the Code of Criminal Procedure, deems it fit to quash the criminal case Being Criminal Case No.47918 of 2017 pending before the Chief Metropolitan Magistrate Court No.36, Ahmedabad, order dated 18.07.2017 and 26.07.2017 passed therein and all proceedings arising out of the said complaint and the same are hereby quashed and set aside.

**17** It is however clarified that quashing of criminal complaint is qua the provisions of Section 138 of the Negotiable Instruments Act, 1881. It is open for the complainant to take any other steps in accordance with law. The application is accordingly allowed.

**18** Rule made absolute to the aforesaid extent. Direct service is permitted.

