IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4083 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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SATISHKUMAR JAYANTILAL SHAH

Versus

STATE OF GUJARAT

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Appearance:

MR JA SHELAT for Petitioner

MR H.F.MEHTA,A.P.P. for Respondent No. 1

MR RS SANJANWALA for Respondent No. 2

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 30/10/96

ORAL JUDGEMENT

Rule.

Satishkumar Jayantilal Shah-original accused in Criminal Case No.2361 of 1992 on the file of the learned Metropolitan Magistrate, Court No.9, Ahmedabad has filed the present petition under Section 482 of the Code of Criminal Procedure.

2. The petitioner has been prosecuted by the respondent No.2 for the alleged offences punishable under Section 138 of the Negotiable Instruments Act by alleging that the present petitioner had taken goods worth Rs.1,43,248=40 from the respondent No.2-CompanyUniopole Plastics Pvt.Ltd in the period running between 10-1-1992 and 8-2-1992 and that towards the said dues 4 cheques bearing No.384226, 384246, 384243 and 384249 dated 15-2-92, 15-3-93, 16-3-92 and 25-3-92 for the respective amount of Rs.46,926=20, Rs.1,234=90, Rs.46,920=20 and 48,168=10 were given and that the said cheques were presented to the respondent No.2's banker and they were dishonoured by endorsement " refer to drawer" and the petitioner failed to pay the amount of those cheques though he was served with registered notice informing him about the dishonouring of his cheques.

3. The petitioner is seeking the quashing of the said criminal proceeding on 3 grounds :

i) That the cheques were presented second time after they were dishonoured on the first ocassion and the prosecution is lodged after the second dishonour by taking recourse to provisions of Section 138 of the Negotiable Instruments Act and the complainant had fail to take action against the petitioner when the cheques were dishonoured on the first ocassion, and he is not entitled to lodge the prosecution on the dishonour of the cheque on second presentation.

ii) That in all there are 4 cheques,therefore, in view of the provisions of Section 219 of the Code of Criminal Procedure, the court can take cognizance and frame a charge only as regards 3 cheques and consequently prosecution for all the 4 cheques is not legal.

iii) That the complaint in question is not lodged by the complainant as per the provisions of Section 142 of the Negotiable Instrument Act.

4. The contentions raised by the petitioner are contested by the the respondent and in addition it is contended on behalf of the respondent No.2 that this court should reject this peptition on account of delay and latches and on account of the petitioner not coming before the court with clean hands.

5. Before dealing with the 3 questions raised by the learned advocate for the petitioner, I would deal with the contentions raised on behalf of the respondent

No.2-original complainant. It is true that the Criminal Case No.2361 of 1992 was filed by the respondent No.2 in the year 1992. The present petition is filed in the year 1996, and, therefore, it is contended by Mr.Sanjanwala,the learned advocate for the respondent No.2 that the peptitioner has delayed in coming before this court and consequently his petition should be rejected. As against this, it is contended by the learned advocate for the petitioner that though the complaint is filed in the year 1992, the petitioner is in fact served in the year 1995 and he has further submitted that even he was not served with the clean copy of the complaint i.e. a readable copy of of the complaint and he had repeatedly ask for it and he got it in 1996 only. The learned advocate for the respondent No.2 disputed the said claim. In my opinion, it is not at all necessary to go into this controvercy as to when the present petitioner was served. It is settled law that if a contention raised before the court for exercising powers under Article 227 of the Constitution of India or under Section 482 of the Code of Criminal Procedure are based on pure question of law and if the same is going to the root of the matter and if the original criminal proceeding amounts to a clear abuse of process of law, then the court would not refrain from considering the contentions raised before the court for quashing the said proceeding. The learned advocate for the petitioner has cited before me in support of his contention the decision of High Court of Himachal Pradesh in 1979 Criminal Law Journal,446 Gopal Chauhan v. Smt.Satya and another. Even in that case though it is observed in one para that the petition of the petitioner deserves to be dismissed on the ground of latches, the petition was not dismissed on that ground but the contentions raised by the petitioner were considered by the Chief Justice of the said High Court and has given his decision on the contention raised before him. Therefore, I am unable to accept the contention raised by Mr. Sanjanwala that the present petition is liable tobe dismissed only because it is filed in the court about 4 years after the filing of the complaint in the trial court.

6. He has further submitted before me that the present petitioner had given an application in the trial court that he would pay the dues due from the petitioner and he has also sought time for making payment of the same and inspite of this he is coming in this court, and, therefore, he is not an honest person. But it must be remembered that the question is not about whether the petitioner is liable to pay the amount to the respondent No.2 or not. The question is as to whether the criminal

proceeding is justified or not. If the provisions of Section 138 of Negotiable Instruments Act are seen, then it would be quite clear that in order to take a cognizance under Section 138 of the Negotiable Instruments Act, there must be issuance of cheque towards the outstanding debt. Therefore, the liability of the drawer of the cheque has no bearing in considering the question which are raised before me.

7. From the papers which are produced in this Criminal Misc.application, it is quite clear that the cheque bearing No.384226 for the amount of Rs.49,926=20 dated 15-2-1992 was presented to the banker of the respondent No.2 on 17-2-1992 as well on 21-4-1992. Therefore, it is quite obvious that the said cheque was presented by the respondent No.2 to its banker on 2 ocassions. After it was dishonoured on the first ocassion, it was again presented in April 1992. Therefore, it is contended before me by the learned advocate for the petitioner that when the cheque was once dishonoured, the payee of the cheque ought to have taken recourse to the provisions of Section 138 of the Negotiable Instruments Act and he cannot wait for taking recourse to Section 138 of the Negotiable Instruments Act by making second presentation of the cheque. In support of his submission he has cited before me the case of Division Bench of Kerala High Court in Kumaresan v. Ameecrappa 1992 (2) Crimes,23 In the said case, His Lordship Thomas.J. who is at present eleveted as Judge of the Appex Court has held that more than one cause of action on the same cheque is not contemplated or envisaged under Chapter XVII of Negotiable Instruments Act,1881 and the prosecution in that case on account of the dishonouring of the cheque on the second presentation of the cheque has been quashed.

8. As against this, Mr.Sanjanwala,the learned advocate for the respondent No.2 has contended before me that Section 138 or any other provision of Chapter XVII of the Negotiable Insttruments Act,1881 does not lay down that the cheque is to be presented only once and that there could not be the prosecution of the person on the presentation of the cheque on the second ocassion. In support of that contention of him he has also cited before me the cases of M/s K.P.Textiles & another v. M/s.Malook Chand Naresh Chand, 1992 (3) Crimes, 594 , Richard Samson v. State of A.P.,1992 Cri.L.J.2566 , S.RAVIKUMAR V. RAJESHKUMAR JAIN, 1995 (2) Crimes,195, MANIVANNA PROP.SATYA HOSIERY GARMENTS VS.EVERKING GARMENTS , 1994 (3) Crimes 262 and Satishkumar s/o Premchand Jain v. Krishnagopal s/o Mohanlal Sarda 1994

9 Before considering the cases cited by both the sides it is necessary to consider the provisions of Section 138 of the Negotiable Instruments Act. If the provisions of Section 138 of the Negotiable Instruments Act are carefully read, then it would be quite clear that the said section is creating a criminal offence on account of the dishonouring of a cheque issued by a debtor to his creditor. The dispute or controvercy between the parties is initially and substantially a civil dispute and by the creation of the said provisions of Section 138 of the Negotiable Instruments Act, criminal liability is created. Therefore, when a civil right has been converted into a criminal liability, the provisions of the said Section would have to be costrued very liberally. In the case of Kumaresan v. Ameerappa, 1992 (1) Crimes, 23 His Lordship Thomas, J. has considered this aspect and has made the following observations in para No.7 of the said judgment.

It is contended that since the view adopted by learned single Judge in Mahadevan Sunil Kumar's case is also possible, the complainant cannot be denied the right to proceed against the petitioner for the offence under Section 138 of the Act. Even if such a view is possible, it is one of the settled principles of interpretation of statutes that when two interpretations are possible about a penal provision, only that which is less onerrous to the accused should be preferred ( vide Maxwell on the Interpretation of Statutes- 12the edition at page 239): " The principle applied in construing a penal Act is that if, in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it willbe reslved in favour of the person who would be liable to the penalty." The learned author quoted Lord Escher M.R., from the decision in Tuck & Sons v. Priester thus : " If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections." Supreme Court has adopted the same principle for interpretation of penal statutes (vide M.V.Joshi v. M.U.Shimpi. Departure from this principle is permitted if the object and scheme of the statute would be defeated otherwise ( vide Chief Inspector of Mines v. K.C.Thapur and Maharaja Book Depot v. State of Gujarat.

Thus the above observations of the Division Bench of the Kerala High Court supports my view that when the civil liability is converted into a criminal liability, the construction of provisions of section would have to be made very liberal and in favour of the person who has to face the prosecution. If the provisions of Chapter XVII of the Negotiable Instruments Act are considered, then it would be quite clear that by the provisions of Section 138 a creaditor has been given a right to have recourse to the crminal prosecution in case if the cheque given by his debtor is dishonoured on presentation to the bank. So when that right is confirred on the creditor, the creditor must promptly act for exercising the same. In the case of Satishkumar v. Krishna Gopal, 1994 Cri.L.J. 887 His Lordship P.S.Patankar,J.of Bombay High Court similarly Single Judge of A.P. in the case of RICHARD SAMSON SHERRAT VS. SUDHIR KUMAR SANGHI & ANOTHER,1992 ( 2) Crimes, 150 and Single Judge of Madras High Court in the case of MANIVANNA PROP. SATYA GARMENTS VS. EVER KING GARMENTS 1994 (3) CRIMES, 262, have observed in their judgments that it is a common practice amongst the merchantile community to present the cheque on number of ocassions. There could not be any dispute of the said observations of the said Lordships but the question is when a criminal liability is fastened to a person, whether the practice in the merchantile field could be made use to fix the liability on the person. If the provisions of Negotiable Instruments Act are taken into consideration, then it would be quite clear that after a cheque is dishonoured, no one can be a holder of same in due course for the said cheque and the cheque loses its negotiability. In RAM SARUP VS. HARDEO PRASAD, A.I.R. 1928 ALLAHABAD, 68 it has been held that after a cheque is dishonoured, no one can be a holder in due course. So under the civil liability when the cheque has been dishonoured, the payee of the cheque cannot negotiate it and there could not be a holder in due course of such dishonoured cheque, it is very difficult to accept the contentions raised on behalf of the respondent No.2 that he is entitled to present the said cheque again and to prosecute the drawer of the cheque. No doubt in the case of SATISHKUMAR V. KRISHNAGOPAL, 1994, Cri.L.J. 887 , RICHARD SAMSON SHERRAT V.SUDHIR KUMAR SANGHI & ANOTHER, 1992 (2) Crimes, 150 , RAVINDRANATHAN V. HUSSAIN 1992 (2) Crimes, 809 , S,RAVI KUMAR VS RAJESH KUMAR JAIN 1995 (2) Crimes, 195,SHEKHAR GUPTA AND OTHERS VS. SUBHAS CHANDRA MONDAL 1992 (Vol.73 ) COMPANY CASES, 590, the High Courts of Bombay, A.P., Kerala, Madras and Calcutta have accepted the prosecution under Section 138 of the Negotiable Instruments Act on account of the dishonouring of the cheque on the second ocassion. But in all these

cases, the facts clearly show that after the first dishonour of the cheque, the creditor had approached to the debtor either by giving the notice or by personal contact,and the debtor had made in some cases part payments and in all cases the debtor had requested to the creditor that he should present the cheque again and he would make arrangement to create sufficient funds to honour the cheque. Therefore, in those cases by making such representation, the debtor instead of issuing a second cheque for his outstanding dues had made alive the first cheque. Therefore, in view of those peculiar facts of those cases, namely that the debtor promised to see that the cheque is honoured on the second time and thereby induced and prevented the complainant not to take recourse under Section 138 of the Negotiable Instruments Act he has no jurisdiction been to say that the prosecution under Section 138 of the Negotiable Instruments Act on account of the dishonouring of the cheque on the second ocassion is not tenable in law. Therefore, in view of those peculiar facts, the decisions given in those cases will have tobe considered and accepted.

10. Thus, in my opinion, when a cheque is given by a debtor to his creditor, the dishonouring of the cheque by the banker of the creditor gives the cause of action to lodge the criminal case. The proviso of Section 138 of Negotiable Instruments Act is merely laying down procedure for prosecution. The proviso of Section 138 is not creating any cause of action. It lays down the procedure for lodging the prosecution just as under the Criminal Procedure Code. The provisions of Section 195 of Cr.P.C. is a condition for lodging certain prosecutions and the court taking cognizance of certain prosecution.Taking cognizance by the court or condition for lodging prosecution on account of certain provision could not be said to be the cause of action for the criminal offence. No doubt, in certain cases, those conditions for the prosecution might save the period of limitation and might also save the second prosecution of the person if the earlier prosecution has been rejected on account of non-fulfilment of those conditions. But in no case, it can be said that the proviso to Section 138 is creating the cause of action for prosecution in question or it is the cause of action for lodging of complaint. In my opinion,it is only a condition for lodging the complaint.

11. Therefore, in the above circumstances in the instant case when the complainant has not alleged in his complaint that after the dishonouring of the first cheque

bearing No.384226 dtd. 15-2-92 of Rs.46,926=20 he had approached the debtor-present petitioner and that the petitioner had requested him to present it on second time, his lodging of a complaint after presenting the cheque on second ocassion for the said cheque could not be accepted. It is submitted before me by the learned advocate for the petitioner that other cheques were also presented second time and they were dishonoured on the second ocassion. But from the material on record I am unable to accept the said submission of him. But if that be the case, the petitioner can urge the said contention before the learned Magistrate.

12. The next contention raised on behalf of the petitioner is that there are 4 cheques and consequently the court was not competent to frame a charge against the petitioner for 4 cheques in view of Section 219 of the Code of Criminal Procedure. It is contended that in view of the Section 219, the court could have taken cognizance for only 3 cheques and the charge could be only as regards 3 cheques. Now in view of my finding, this contention regarding the provision of Section 219 has remained acadamic as I have found that the cognizance of the first cheque dtd. 15-2-92 bearing No.384226 could not be taken, but even then, it would be proper to decide this question of law, and, therefore, I proceed to decide the same.

13. It must be remembered that as per the allegations made by the complainant in his complaint, the present petitioner had taken goods on credit from the complainant during the period running between 10-1-92 and 8-1-93. It is further claim of the complainant that towards his dues of the goods taken on credit, these 4 cheques were given by him. Now if these averments made in the complaint are taken into consideration alongwith the provisions of Section 220 of Code of Criminal Procedure, then it would be quite clear that the issuance of these 4 cheques could be said to be the part of the same transaction. If issuance of these 4 cheques are said to be part and parcel of the one and the same transaction, then taking cognizance of the 4 cheques and framing a charge for those 4 cheques could not be said to be any illegality as the said action would be covered by the provisions of Section 220 of the Code of Criminal Procedure.

14. The next contention raised on behalf of the petitioner is as regards the provisions of Section 142 of the Negotiable Instruments Act,1881. It is contended before me by the learned advocate for the petitioner that in the title of the complaint the name of the complainant

is given as under.

Arunbhai Motilal Parikh
Age about-adult
Occupation-service
Residence- Unipole Plastic Pvt.Ltd.
Ist Floor, H.K.House, Ashram Road,
AHMEDABAD-380009

Thus, as per the title of the complaint, the complaint is lodged by Arunbhai Motilal Parikh and not by Unipole Plastic Pvt.Ltd. Admittedly the cheques in question were issued to Unipole Plastic Pvt.Ltd, and, therefore, the complaint in question is not lodged by the payee of the cheque and consequently in view of the provisions of Section 142 of the Negotiable Instruments Act, the court cannot take cognizance of the complaint in question. In support of that submission of him, he has put reliance on the judgment of this court in the case of Dipendra G.Choksi & Anr. v. Kailashchandra C. Dhoot & Anr., XXXVI (1) G.L.R., 424.

15. It is true that Section 142 of Negotiable Instruments Act clearly lays down that the court can take cognizance only if the complaint is filed in writing by the payee or holder in due course of the cheque. When the provisions of Section 142 of the Negotiable Instruments Act are to be considered for the purpose of consideration regarding taking of cognizance of a complaint, in my opinion, mere the title of the complaint cannot be taken into consideration. The title of the complaint alongwith the averments made in the complaint are to be taken into consideration. I have already quoted the title of the complaint in question and it is proper to consider the averments made in the complaint. In para No.1 of the complaint, the complainant has stated as under :

I- the complainant- reside in Ahmedabad City. I am manager of Unipole Plastic Pvt. Ltd. situated on 1st floor of H.K.House, Ashram Road, Ahmedabad. I do all the general and banking work of the company. The company is making production of chemicals named " Nitro Benzine" and does the business regarding supply of the said produce, as per the orders of the different parties.

Then, in para 2 it is further averred as under :

I- the complainant- know the accused very

well since long because he is having business relation with the company. The company of the complainant has been supplying Nitro Benzine to the accused from time to time. The accused used to give the price of the said goods. During the period from 10-1-92 to 8-2-92 the Company by different invoices sent Nitro Benzine for the value of Rs.1,47,246=40 to the accused and the same has been received by the accused. Detailed delivery slips of the goods are with the Company. The accused had issued seperate cheques towards the outstanding amount of company.

Then in para 3 after describing various cheques issued by the present petitioner it is further averred as under :

As per the instruction of the accused the company credited the abovesaid four cheques issued in respect of the legal outstanding amount, in the account of the Company standing in Central Bank of India, Lal Darwaja.But the said cheques were returned unrealised as there was no sufficient balance in the account of the accused. In this regard the bank informed the company, vide its letter dtd. 22-4-92. The original cheques bearing nos.384226 ; 384246 ; 384243 ; 384249 ; and return memo dtd. 21-4-92, of Co-Operative Bank of Ahmedabad, Station Road Branch were sent to the company by the Central Bank of India. On receipt of the aforesaid documents by the company, I- the complainant-came to know that aforesaid cheques have been returned because of insufficient money in the account of the accused.

Then in para 4 it is further stated as under :

Inspite of the above promise the accused did not pay the amount of aforesaid returned cheques, to the company. Therefore on 29-4-92 within time limit my company under section 138of Negotiable Instrument Act sent notice to the accused through the advocate, by Regd.A.D. and by that notice he was requested to pay the amount of the abovesaid returned cheques.

Now if the above pleadings or averments in the complaint are taken into consideration, then it would be quite clear that the complaint in question is lodged by the company through its manager who has been named as the complainant in the case. No doubt, in the title of the

complaint there is no specific name of the company, but merely because of not mentioning of the company in the title of the complaint, it could not be said that the complaint is not lodged by the company. In the case of Dipendra G. Choksi & Anr. v. Kailalshchandra C.Dhoot & Anr.XXXVI (1) G.L.R.,424 from the averments made in the complaint itself the learned advocate for the company was not in a position to point out to His Lordship B.C.Patel,J. as to who was the payee of the cheque. It seems that in that complaint, there was no reference of the company in the body of the complaint as well as in the title of the complaint.That would be quite clear from the following observations in para No.8.

> If there is nothing to show that the complainant is a payee or a holder in due course, the Court could not have taken cognizance, and on this short ground alone, petition required to be allowed. Mr. Nanavati, learned Advocate appearing for original-complainant read out the complaint but could not point out from the complaint as to who is the payee or holder in due course of the cheque. In absence of this positive averment in the complaint the Court ought not to have taken cognizance of the offence and therefore, the process issued against the petitioners requires to be quashed on this limited ground only.

Therefore, in view of the peculiar facts of that case His Lordship has quashed the criminal prosecution in that case, but in my opinion, in view of the above quoted averments made in the complaint, the complaint in this case will have to be treated as lodged by the company. In addition to it, the complainant has produced before the trial court the resolution of the company that he has been authorised to lodge the complaint in question. No doubt, the said resolution of the company was produced at the time of recording his evidence, but in view of the averments in the complaint, I am unable to hold that the complaint in question was not lodged by the payee of the cheques.

16. Thus, I hold that the learned Metropolitan Magistrate of Court No.9, Ahmedabad cannot take cognizance of the cheque No.384226 dated 15-2-92 for the amount of Rs.46,926-20 and his action in taking cognizance for the offence as regards that cheque alone is quashed and set aside. Thus, the petition is partly allowed and substantially rejected with above observation. However, the petitioner would be at liberty to move the trial court for discharge on other legal grounds.Rule is discharged accordingly.

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