

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4171 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements? YES
2. To be referred to the Reporter or not? YES :
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement? NO
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? NO
5. Whether it is to be circulated to the Civil Judge? NO:

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SHANKU CONCRETES PVT LTD

Versus

STATE OF GUJARAT  
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Appearance:

MR NK MAJMUDAR for Petitioners  
MR. KP RAVAL for Respondent No. 1  
M/S.VYAS ASSOCIATES for Respondent No. 2  
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CORAM : MR.JUSTICE J.R.VORA

Date of decision: 30/11/1999

ORAL JUDGEMENT

1. Rule. Learned APP Mr. K.P. Raval waives  
service of rule on behalf of respondent No.1 and learned  
counsel Mr. D.D. Vyas waives service of rule on behalf  
of respondent No.2. With the consent of the learned

advocates appearing for the parties, the matter is finally heard and decided today.

2. This application is filed by the petitioners under Sec. 482 of the Criminal Procedure Code to quash a criminal complaint. The extent of criminal liability, which arises under Section 138 of the Negotiable Instruments Act, 1881, is the real controversy, which is the crux of the matter, requires to be adjudicated. The transactions which are other wise exclusively commercial and subject to civil jurisdiction, now by enacting Section 138 of the Negotiable Instruments Act, attaches criminal liability against the persons involved in such transaction. A careful judicial scrutiny and a deep probe is necessary to set at rest the battle arising from the commercial transaction.

3. Looking to the brief facts of the case it is revealed that one Shanku Concretes Pvt. Ltd., Halol, District Panchmahals, a company incorporated through its Managing Director Mr. Jaidev Kotak, residing at Bombay, obtained advance of Rs. 15 lacs from one Balbhadrasinh Indrasinh Zala, residing at Surendranagar. It appears that vide an agreement dated 5th June, 1995, the company Shanku Concretes Pvt. Ltd. through its Managing Director Mr. Jaidev Kotak entered into a contract with the above said Balbhadrasinh Indrasinh Zala and obtained advances by way of a debt of Rs.15 lacs to promote the production of the company. On that day, the amount of Rs. 15 lacs were paid to Mr. Jaidev Kotak, Managing Director. The agreement termed that the amount was to be returned after six months and during that period Managing Director Mr. Jaidev Kotak, as per the arrangement between the parties, issued seven cheques of due dates with a stipulation that if cheques are bounced, Balbhadrasinh Indrasinh Zala may take action against the company. Then, thereafter, a Criminal Case No. 132 of 1996 came to be filed by said Balbhadrasinh Indrasinh Zala in the court of Judicial Magistrate, First Class, at Lakhtar, against two accused - (i) Shanku Concretes Pvt. Ltd. and (2) Mr. Jaidev Kotak, under Section 138 of the Negotiable Instruments Act. It was alleged in the complaint by the complainant that the accused No.2 induced the complainant to believe that the post dated cheques referred to above, will be accepted by bank and that the complainant would get the amount of the cheque. Out of those cheques, the complainant deposited two cheques to the account of the Union Bank of India, which were bounced with an endorsement that the fund was insufficient in the account of the accused and, therefore, the complaint. The complainant gave notice to

the accused on 6th May, 1996, but within the statutory period of 15 days, the accused did not pay the amount. Learned Judicial Magistrate, First Class, Lakhtar, was pleased to issue process in the above said complaint against the accused. Summons was served on accused No.2, but he did not appear before the learned Magistrate and, therefore, the necessary procedure is being followed by the learned Judicial Magistrate.

4. During the pendency of the above said Criminal Case, the original complainant preferred one application before the Judicial Magistrate, First Class, Lakhtar, with a prayer to implead (1) Mr. Sandip Jaidev Kotak and (2) Mr. Kunal Jaidev Kotak as accused in the above said criminal case who are petitioners No. 2 and 3 in this petition. Learned Judicial Magistrate was pleased to issue notices to the above said Mr. Sandip Jaidev Kotak and Mr. Kunal Jaidev Kotak.

5. Now, this petition is filed by (i) Shanku Concretes Pvt. Ltd., (ii) Sandip Jaidev Kotak and (iii) Kunal Jaidev Kotak, against (i) State of Gujarat and (ii) Balbhadrasinh Indrasinh Zala - original complainant. It is urged that a Criminal Case No. 132 of 1996 be quashed because the cheques were issued as collateral security and would not form the base of the criminal liability as envisaged under Section 138 of the Negotiable Instruments Act. While it is also urged that at the relevant time accused No.2, who is absconding, was a person in-charge of the company and the Managing Director and, therefore, attempt to implead petitioners No. 2 and 3 as accused in the original criminal case, is against law and, therefore, the proceedings even at the initial stage of issuance of notices to petitioners No.2 and 3 be quashed, as against them.

6. The matter is argued two fold and can be divided in two parts - (i) quashing of the complaint i.e. criminal case pending before the learned Judicial Magistrate, First Class at Lakhtar and (ii) to quash the proceeding of issuing notices to petitioners No. 2 and 3 to implead them as accused in the criminal case referred above.

7. While dealing with the first part of the matter, learned Advocate Mr. N.K. Majmudar urged that a civil suit has been filed by the complainant for the money advanced and agreement between the parties was executed and as per the arrangement of the agreement, the cheques were offered as a collateral security and, therefore, the transaction was exclusively and entirely a civil

transaction and which would not attract criminal liability under Section 138 of the Act. Mr. Majmudar, for this, has relied upon a decision of the High Court of Madras in the matter of BALAJI SEAFOODS EXPORTS (INDIA) LTD vs. MAC INDUSTRIES LTD, reported in 1999 Current Criminal Reports, 424 wherein it was held that undated cheques given as security and bounced, would not attract the provision of Section 138 of the Negotiable Instruments Act. On the second part of the matter, learned Advocate Mr. Majmudar urged that as per section 141(1), the person in-charge of company only be made answerable under Section 138 of the Negotiable Instruments Act. The present petitioners No. 2 and 3, at the relevant time, were not in-charge of the company and, therefore, they cannot be made accused in the given criminal case under Section 138 of the Negotiable Instruments Act. It was urged that the provision of Section 141 of the Negotiable Instruments Act were ignored by the learned Magistrate while issuing notices against petitioners No. 2 and 3. There is nothing on the record, according to Mr. Majmudar, to denote that the cheques in question were given at the instance of present petitioners No.2 and 3, nor both of them or any of them as per the averment in the complaint were in-charge of affairs of company as envisaged under Sec. 141(1) of the Negotiable Instruments Act.

8. On the other hand, learned Senior Counsel Mr. D.D. Vyas while dealing with the first part of the matter, urged that original accused No.2 is absconding. This petition is not filed by the original accused No.2, but the petition is filed by the person, who are still not impleaded as accused in the criminal case. Such an application to quash a proceeding in which they are not the accused, is incompetent and it was further urged that the learned Magistrate has issued process and thereafter at the instance of complainant, a notice to petitioners No. 2 and 3 was issued. It was further urged that the proper course for the original accused No.1 and 2 would be to approach the learned Magistrate for dropping of the proceedings, for which Mr. Vyas has relied upon a decision of the Apex Court in the matter of K.M. MATHEW vs. STATE OF KERALA, reported in AIR 1992 SC 2206, wherein it is held that the order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process had already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused. Relying on this observation of the Apex Court, Mr. Vyas has urged that the equitable relief under Section 482 of the Criminal Procedure Code cannot

be asked for by the present petitioners No. 2 and 3, who are not the accused and that too for the benefit of the original accused No.2 Mr. Jaidev Kotak, who is absconding. Mr. Vyas further relied upon a unreported decision of this court in MISC. CRIMINAL APPLICATION NO. 6224 of 1996, wherein the accused was relegated to the Magistrate for making an application for dropping of the proceedings. So far as the present matter is concerned, Mr. Vyas has urged that Sec 141.(2) would be attracted and not Section 141 (1). Petitioners No. 2 and 3 are very well the Directors of the Company i.e. original accused No.1 and are liable to answer the complaint, which is filed under Section 138 of the Negotiable Instruments Act. Mr. Vyas urged that any person connected with the crime may be arraigned as an accused in a complaint because the court is not taking the cognizance of the accused but the court takes the cognizance of the offence. For this, Mr. Vyas has relied upon a decision of the Apex Court in the matter of RAGHUBANS DUBEY vs. STATE OF BIHAR, reported in AIR 1967 SC 1167. Mr. Vyas, to canvass his contention that the other Directors under Sec. 141(2) are liable, has relied upon a decision of this Court in the matter of BHAVESH BHARATBHAI MEHTA vs. STATE OF GUJARAT, reported in 1999 (2) GLR 1323.

9. Having considered the rival contentions and on scrutinising the record, it appears that the first part of the matter is required to be dealt with first. If the petitioners succeed in the first part, the second part of the matter need not be dealt with by this Court. Therefore, it has to be carefully scrutinised whether the complaint is being filed by the complainant is required to be quashed and set aside on the ground urged by the petitioners. As stated above, Section 138 of the Act is enacted by the Legislatures as a punitive measure for the due discharge of civil liability and a penal action is prescribed for inculcating the faith of the people in the Banking system. A transaction, which would otherwise be an exclusively civil transaction attracts criminal liability by virtue of Section 138 of Negotiable Instruments Act. Therefore, while Courts of Law are called upon to decide and fasten criminal liability in such circumstances, then a close judicial scrutiny of the facts and circumstances of the case is absolutely necessary. Now, if we examine Section 138 of the Negotiable Instruments Act, which runs as under :

138. DISHONOUR OF CHEQUE FOR INSUFFICIENCY, ETC.

OF FUNDS IN THE ACCOUNT - Where any cheque drawn

by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, the whole or in part, of any debt or other liability, 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 by an agreement made with that bank, such person shall be deemed to have committed an offence, and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both;

Provided that nothing contained in this section shall apply unless --

- (a) the 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,
- (b) the payee or the holder in due course of the cheque, as the case may be, 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 fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

10. Pursuing Section 138 of the Negotiable Instruments Act, the part of the section, which is relevant for this matter is " for the discharge, in whole or in part, of any debt or other liability" the preexisting condition is, there must be the existence of any debt or any other liability, for which the cheque might have been issued and bounced. Reverting back to the facts of the case, it is an admitted case that the company i.e. the original accused No.2 wanted to promote its production and, therefore, borrowed Rs. 15 lacs from the original complainant i.e. the present respondent No.2. The Managing Director, at present absconding,

original accused No.2 on behalf of the company original accused No.1, entered into an agreement, clearly binding himself and the company, to repay the amount within six months from the date of the execution of the agreement. It clearly appears that to ensure the due performance of the terms further accused No.2 issued seven cheques of due dates to the complainant and necessary averments were also made in the agreement that for the due performance of the agreement i.e. repayment of the advances after the six months from the date of the agreement cheques are delivered. Some of the such cheques were bounced, for which the complaint is filed.

11. The crux of the matter, therefore, would be whether there was any existing liability on the part of the present petitioners, which required due discharge within the meaning of Section 138 of the Negotiable Instruments Act, and that whether the cheques which were bounced were issued to discharge such existing liability?

12. Considering the facts and circumstances of this case, the answer to the above question must be in the negative because as per the agreement executed between the parties, liability which was to be discharged within the meaning of Section 138 of the Negotiable Instruments Act, was still to be arisen only on 5.12.1995 i.e. after the six months of the execution of the contract. This clearly denotes that when the cheques were delivered, there was no liability on the part of the accused to discharge any debt.

13. The above view further strengthen from the agreement executed between the parties. It is amply clear in the agreement that accused shall repay the amount after six months of the execution of agreement and it is also made clear that for due performance (in Gujarati is mentioned in the agreement) of the contract. The intention of the parties is clear from this averments that the cheques were issued as the collateral security for the due performance of the contract, by which the Company and the Director i.e. accused No.2 bound themselves to repay the said amount. It is, therefore, clear that cheques were not issued to discharge any existing debt.

14. This court relies on the decision cited by Mr. Majmudar of the High Court of Madras (supra), wherein a principle is laid down that to attract Sec.138 of the Negotiable Instruments Act, it must be pointed out that there was subsisting liability or debt on the date when the contract was entered into. In that given case before

the High Court of Madras, the contract expressly made it clear that the cheques were handed over as security. In this case, it is clear from the agreement entered into between the parties that after borrowing the money, making a statement to repay the same at some future date, the cheques were issued for due performance. Therefore, the transaction from its very nature or from the intention of the parties, as reflected in the agreement executed between the parties, is purely of a civil nature, for which a civil suit has already been filed. The very fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques, will take the case out of the purview of the Section 138 of the Negotiable Instruments Act.

15. So far as the arguments of Mr. Vyas that this application at the instance of petitioners No.2 and 3 is not maintainable to the benefit of the accused No.2 i.e. Mr. Jaidev Kotak is concerned, the same cannot be upheld for the simple reason that the powers of the High Court under Section 482 are so wide as even to entertain a suo moto petition or anything which is brought to the notice of the High Court by any person and, therefore, mere fact that this petition is filed by petitioners No. 2 and 3 who were not the accused in the complaint, could not be a ground to reject the petition.

16. The other arguments advanced by Mr. D.D. Vyas is regarding to relegate the accused before the learned Magistrate where the accused will have a right to apply for the stoppage or dropping of the proceedings, for which Mr. Vyas has relied upon a decision of the Apex Court in the matter of K.M. Mathew (supra). In K.M. Mathew's case, it has nowhere been laid down that the accused in a given and appropriate case cannot approach the High Court under Section 482 and in such circumstances appropriate remedy would be to relegate the accused before the learned Magistrate for filing an application before the Magistrate for dropping of the proceedings. On the contrary, the trend of the Apex Court in the recent decisions is otherwise. In PEPSI FOODS LTD vs. SPECIAL JUDICIAL MAGISTRATE, reported in (1998) 5 SCC 749, in para 29 of the decision, the Apex Court observed that no doubt the Magistrate can discharge the accused at any stage of the trial if he found the charge to be groundless but that does not mean that the accused cannot approach the High Court under Section 482 of the Criminal Procedure Code or under Article 227 of the Constitution of India to have the proceeding quashed against him when the complaint does not make out any case



against him and still must undergo the agony of a criminal trial. In ASHOK CHATURVEDI vs. SHITUL H. CHANCHANI, reported in (1998) 7 SCC 698, the Apex Court observed in para 5 as under and said that accused can approach the High Court by an application under Section 482 if the complaint does not disclose any offence even if he has right to argue the grounds before Magistrate for discharge.

" But the question that yet remains for consideration whether the allegations made in the petition of complaint together with statements made by the complainant and the witnesses before the Magistrate taken on their face value, do make the offence for which the Magistrate has taken cognizance of? The learned counsel for the respondent in this connection had urged that the accused had a right to put this argument at the time of framing of charges, and therefore, this Court should not interfere with the order of the Magistrate taking cognizance, at this stage. This, argument, however, does not appeal to us inasmuch as merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power under Section 482 of the Code can be exercised. Bearing in mind the parameters laid down by this Court in several decisions for exercise of power under Section 482 of the Code, we have examined the allegations made in the complaint petition and the statement of the complainant and the two other witnesses made on oath before the Magistrate. We are clearly of

the opinion that the necessary ingredients of any of the offences have not been made out so far as the appellants are concerned. The petition of complaint is a vague one and excepting the bald allegation that the shares of the complainant have been transferred on forged signatures, nothing further has been stated and there is not an iota of material to indicate how all or any of these appellants are involved in the so called allegation of forgery. The statement of the complainant on oath as well as his witnesses do not improve the position in any manner, and therefore, in our considered opinion, even if the allegations made in the complaint petition and the statement of the complainant and his witnesses are taken on their face value, the offence under Sections 406, 420, 467, 468 and 120-B of the Indian Penal Code cannot be said to have been made out. This being the position, the impugned order of the Magistrate taking cognizance of the offence dated 5.2.1996 so far as it relates to the appellants cannot be sustained and the High Court also committed error in not invoking its power under Section 482 of the Code. In the aforesaid premises, the impugned order of the High Court as well as the order of the Magistrate dated 5.2.1996 taking cognizance of the offence as against the appellants stand quashed."

17. Therefore, the accused has right to approach the High Court at any stage for quashing with the allegations that complaint prima facie does not disclose any offence. In such circumstances, when it appears to the High Court under Section 482 of the Code that complaint does not disclose any offence, it has ample powers to quash the proceedings and the complaint and accused need not in all cases be relegated to the learned Magistrate directing the accused to file proper application for discharge or dropping of the proceedings. As discussed above, the complaint filed under Section 138 of the Negotiable Instruments Act in this case discloses no criminal liability as envisaged under Section 138 of the Act and, therefore, the complaint is required to be quashed.

18. When petitioners succeed in the first part of the matter, this court need not to deal with the second part of the matter.

19. For the foregoing discussion, this Misc. Criminal Application is allowed. The complaint filed on

20th June, 1996 before the learned Judicial Magistrate, First Class at Lakhtar, which culminated into Criminal Case No. 132 of 1996, is quashed and all the proceedings taken in pursuance of this complaint are also quashed.

20. In the result, the petition succeeds. Rule is made absolute accordingly.

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