

HIGH COURT OF GUJARAT

UMIYA PIPE PRIVATE LIMITED

Versus

STATE OF GUJARAT

Date of Decision: 11 November 2011

Citation: 2011 LawSuit(Guj) 1309

Hon'ble Judges: [M R Shah](#)

Eq. Citations: 2014 11 RCR(Cri) 1823

Case Type: Criminal Miscellaneous Application

Case No: 5731 of 2008

Subject: Civil, Criminal

Acts Referred:

[Indian Penal Code, 1860 Sec 504, Sec 420, Sec 427, Sec 407](#)

[Code Of Criminal Procedure, 1973 Sec 482](#)

[Negotiable Instruments Act, 1881 Sec 138](#)

Final Decision: Application allowed

Advocates: [B B Naik](#), [L B Dabhi](#), [R C Jani](#), [R S Sanjanwala](#)

M. R. Shah, J.

[1] Present Criminal Miscellaneous Application under Section 482 of the Code of Criminal Procedure has been preferred by the petitioner-original accused to quash and set aside the impugned complaint being Criminal Case No.1731 of 2007 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 pending in the Court of learned JMFC, Mansa.

[2] Respondent no.2-herein original complainant through power of attorney had filed impugned criminal complaint in the Court of learned JMFC, Mansa being Criminal Case No.1731 of 2007 against the petitioner for the offence punishable under Section 138 of the N.I. Act alleging inter alia that huge amount was paid to the petitioner by way of loan and investment and even certain properties were also mortgaged by mortgage deed dated 28.2.2006 and under the said mortgage deed dated 28.2.2006 the

petitioner agreed to repay the amount and under the same and towards the part payment the accused given one cheque no.831209 dated 10.8.2007 drawn on Bank of Baroda, Dariyapur Branch, Ahmedabad of Rs.3 lacs and when the said cheque was deposited, the same has been returned with an endorsement today opening balance insufficient . It is further alleged in the complaint that thereafter the petitioner were served with the statutory notice dated 6.10.2007 under Section 138 of the N.I. Act and called upon the petitioner to make the payment within 15 days and the said notice was sent by R.P.A.D as well as UPC and despite the same the cheque amount has not been paid. Therefore, it is alleged that the petitioner has committed offence under Section 138 of the N.I. Act. That the learned JMFC, Mansa by order dated 19.11.2007 has directed to be issued summons against the petitioner for the offence under Section 138 of the N.I. Act. Hence, petitioner-original accused has preferred present Criminal Miscellaneous Application under Section 482 of the Code of Criminal Procedure.

[3] Shri Sanjanwala, learned Senior Advocate for the petitioner has vehemently submitted that as such under the MOU dated 9.2.2006 executed between the complainant and the petitioner, by which it was agreed by the petitioner to repay the amount of Rs.21,84,00,000/- by different post dated cheques between 4.12.2006 to 21.12.2009 and one of the post dated cheque was dated 10.8.2007 However, despite the above MOU dated 9.2.2006 the complainant lodged one FIR against the petitioner in local Crime Branch, Gandhinagar for the offences under Sections 407, 420, 427 and 504 of Indian Penal Code and Directors of the petitioner company were arrested and subsequently were released on bail. However, during the course of investigation Bank Account in question of the petitioner company was freezed by the Investigating Officer of local Crime Branch, Gandhinagar in the month of April/ May, 2006 and despite the fact that complainant was aware of freezing of the said bank account of the petitioner company being Current Account No.10497, the complainant deposited the cheque in question knowing fully well that the Bank account has not been operated and has been freezed. Therefore, it is submitted that when the Bank Account has been freezed by the investigating officer of the local Crime Branch, Gandhinagar pursuant to the FIR filed by the very complainant, the bank account is not operated by the petitioner since April/ May, 2006, it cannot be said that the petitioner has committed any offence as alleged under Section 138 of the N.I. Act. It is further submitted that at the time when the post dated cheques were given on 7.2.2006 the bank account of the petitioner company was in operation, however subsequently on the FIR filed by the complainant the said bank account has been freezed by the investigating officer, even today also the same has also continued to be freezed by the investigating officer. Therefore, it is submitted that the petitioner cannot be said to have been committed any offence under Section 138 of the N.I. Act. It is submitted that though the aforesaid was pointed out in the reply to the statutory notice, the complainant has deliberately not

stated anything with respect to the same in the impugned complaint. Therefore, it is submitted that impugned complaint filed by the complainant is nothing but an abuse of process of law and Court and with mala fide intention, therefore, it is requested to exercise the powers under Section 482 of the Code of Criminal Procedure and to quash and set aside the impugned complaint.

[4] Application is opposed by Shri B.B. Naik, learned Senior Advocate with Shri R.C. Jani, learned advocate for the respondent no.2-original complainant. It is submitted that all the ingredients and the conditions for the offence under Section 138 of the N.I. Act have been satisfied and therefore, it is requested to dismiss the present application. It is submitted that admittedly, the cheque in question has been given by the petitioner signed by the authorized signatory / director of the petitioner no.1 company and same was deposited by the complainant with their banker, which has been returned / dishonoured with an endorsement fund insufficient and despite the statutory notice, accused persons have not made the payment within 15 days as required and only thereafter the complainant when filed the aforesaid complaint a prima facie case is made out for the offence under Section 138 of the N.I. Act and therefore, it is requested to dismiss the present petition. It is submitted that for whatever reason the cheque has been returned with an endorsement fund insufficient a case is made out for offence under Section 138 of the N.I. Act and therefore, it is requested not to exercise the powers under Section 482 of the Code of Criminal Procedure,

[5] Shri Dabhi, learned Additional Public Prosecutor has requested to pass appropriate order considering the facts and circumstances of the case.

[6] Heard the learned advocates for the respective parties at length. It is required to be noted that impugned complaint has been filed against the petitioner for the offence under section 138 of the N.I. Act for dishonour of cheque No. 831209 dated 10.8.2007 drawn on Bank of Baroda, Dariyapur Branch, Ahmedabad of the petitioner company. It appears that the said cheque was post dated cheque given to the original complainant on 7.2.2006 along with other eight post dated cheques, which were given while entering into the Memorandum of Agreement dated 9.2.2006. It appears that total 8 post dated cheques were given to the original complainant total amounting to Rs. 21,84,00,000/-. The particulars of the same are as under:

Sr. No.	Date of issue	Cheque No.	Amount	Name of Bank
1	1.12.2006	831216	100,00,000	Bank of Baroda
2	9.12.2006	831207	300,00,000	Bank of Baroda

3	31.3.2007	831208	300,00,000	Bank of Baroda
4	10.8.2007	831209	300,00,000	Bank of Baroda
5	01.4.2008	831210	300,00,000	Bank of Baroda
6	10.4.2008	831211	300,00,000	Bank of Baroda
7	31.12.2008	831212	300,00,000	Bank of Baroda
8	21.12.2009	831217	300,00,000	Bank of Baroda
Total			21,84,00,000/-	

[7] It appears that immediately after MOU dated 9.2.2006, the complainant lodged one FIR against the petitioner with local Crime Branch, Gandhinagar for the offences punishable under Sections 407, 420, 427 and 504 of Indian Penal Code and Directors of the petitioner company were arrested and subsequently were released on bail. It also appears that during the course of investigation, Bank Account in question being Current Bank Account No.10497 of the petitioner company was freezed by the Investigating Officer of local Crime Branch, Gandhinagar vide letter dated 26.4.2006 and since then and even as on today the same bank account is freezed. Thus, since April 2006, the Bank Account in question is not in operation due to freezing of the same by the investigating officer of local Crime Branch, Gandhinagar in FIR filed by the very complainant. Despite the above, the complainant deposited the cheque in question on 10.9.2007 which has been dishonoured with an endorsement today opening balance insufficient . It is to be noted that it is not the case on behalf of the complainant that the complainant was not aware of the freezing of the account in question by investigating officer of local Crime Branch, Gandhinagar. Even the same is not stated by the complainant in the present proceeding by way of filing affidavit in reply. Thus, despite having knowledge of freezing the bank account in question of the petitioner no.1 company by the investigating officer the complainant has deliberately deposited the cheque, which has been dishonoured / returned. It is required to be noted at this stage that the cheque in question was post dated cheque, which was given in the month of February 2006 and thereafter the Bank Account has been freezed by the investigating officer. It is required to be noted that along with the cheque in question other six post dated cheques were given to the complainant and prior to the cheque in question dated 12.8.2007 there were other three post dated cheques dated 1.12.2006, 9.12.2006 and 24.6.2007 being cheque nos. 831206, 831207 and 831208 and nothing is on record that what happened on the aforesaid three cheques. Thus, it appears that having full knowledge of freezing of the bank

account in question in the month of April/ May, 2006 the complainant did not deposit the aforesaid three post dated cheques and with a mala fide intention deposited the aforesaid post dated cheque dated 12.8.2007 which has been dishonoured / returned. Considering the aforesaid facts and circumstances when the Bank Account has been freezed since April 2006 and still the complainant deposited the same which has been dishonoured, it cannot be said that petitioner has committed an offence under Section 138 of the N.I. Act. It appears that deposit of cheque in question was with mala fide intention and thereafter filing of the complaint is nothing but an abuse of process of Court and law.

[8] It is also required to be noted at this stage that though the aforesaid was pointed out by the petitioner -accused in reply to the statutory notice under Section 138 of the N.I. Act, there is no reference to the reply to the statutory notice in the impugned complaint and suppressing the reply to the statutory notice, the impugned complaint has been filed which shows the conduct and mala fide intention on the part of the complainant. Under the circumstances, it appears to the Court that this is a fit case to exercise the power under Section 482 of the Code of Criminal Procedure as impugned complaint is nothing but abuse of process of law and Court.

[9] In view of the above and for the reasons stated above, application succeed. The the impugned complaint being Criminal Case No.1731 of 2007 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 pending in the Court of learned JMFC, Mansa is hereby quashed and set aside. Rule is made absolute to the aforesaid extent.