2000 BLA 348 (GUJ)

GUJARAT HIGH COURT

Navinchandra Dharmashibhai Doshi Vs Natvarlal And Co.

Criminal Revision Application No. 530 of 1999

JUDGMENT DATE
05-01-2000

JUDGES
H.H. MEHTA J

PETITIONER
NAVINCHANDRA DHARMASHIBHAI DOSHI

RESPONDENT
NATVARLAL AND CO.

BENCH
SINGLE BENCH

COUNSEL
D.F. AMIN, FOR THE APPELLANT; P.R. ABICHANDANI, FOR RESPONDENT NO. 1, YATIN SONI AND B.Y. MANKAD, APP, FOR THE RESPONDENT

H.H. Mehta, The original accused No.2 of Criminal Case No.1106/97 which is still pending on the file of the learned Metropolitan Magistrate, Court No.16, Ahmedabad (for short `the learned Magistrate') has by filing this Criminal Revision Application under Sec. 397 of the Criminal Procedure Code, 1973, challenged correctness, legality and propriety of judgment Exh.14 dated 15th September, 1999, rendered by the learned Additional Sessions Judge, Court No.13, City Civil Court, Ahmedabad (for short `the learned Judge of the Revisional Court') in Criminal Revision Application No.148/99.

2. Here in this Criminal Revision Application, the Revision-Petitioner is an

original accused No.2 while revision opponents No.1 and 2 are complainant and accused No.1 respectively. For the sake of convenience, parties will be referred to hereinafter as `complainant' and `accused No.1 and 2' respectively at appropriate places.

3. The facts leading to this Criminal Revision Application in a nutshell are as follows:

3.1 On or about 5th April, 1997, the complainant lodged his private complaint against both the accused i.e. accused No.1 and 2 for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (for short `the Act') read with Sec. 114 of the Indian Penal Code.

3.2 As per that complaint lodged by complainant, the complainant is carrying on business of financing the needy persons on the basis of discounting of cheques. Both the accused are carrying on business at their business place situated in Kapadia Estate, Ratan Pole, Ahmedabad. Accused No.1 i.e. Smt.Manjulaben Navinchandra Doshi, is an owner of business named "M.N.Shroff". Accused No.2 is also carrying on and managing the affairs of the said business.

3.3 On or about 2nd August, 1996, both the accused had gone to complainant. The complainant gave a cheque of Rs. One Lakh which was got encashed by both the accused. Thereafter, on 7th August, 1996, the complainant gave another cheque of Rs.50,000/that was also got encashed by both the accused. Thereafter, on 2nd September, 1996, complainant gave a cheque of Rs. One lakh to both the accused. Similarly on 4th September, 1996, complainant gave a cheque of Rs.50,000/to both the accused and that all cheques were encashed by both the accused. Thus, it is the case of the complainant that accused has received in all an amount of Rs. Three lakhs for their business purpose. Both the accused had promised the complainant that they would repay the amount of Rs. Three lakhs.

3.3 Thereafter, on or about 30th December, 1996, both the accused gave a cheque for Rs. Three lakhs to complainant. As stated in the complaint, accused No.1 gave that cheque for Rs.Three lakhs by affixing a rubber stamp impression of "M.N.Shroff" and the accused No.2 signed the endorsement of authority, below that cheque. That cheque was presented for realisation in the bank on 5th March, 1997. That cheque was bounced with a reason of "funds

insufficient". Thereafter, complainant addressed a notice as required to be given under Sec. 138 of the Act to both the accused on 13th March, 1997, and both the accused were called upon to pay an amount of cheque together with interest within 15 days. Notice has been received by both the accused. Thereafter, on or about 25th March, 1997, accused No.2 gave an evasive reply to the complainant.

3.4 It is the case of complainant, as stated in Para 6 of his complaint, that accused No.1 got the cheque prepared from her son Sanjay Navinchandra Joshi in presence of Kundanbhai, friend of complainant. Except the signature all the particulars were filled in, by son of accused No.1 and thereafter accused No.2 put his signature below that cheque. Thereafter, on 5.4.97, the complainant lodged his private complaint in the court of learned Magistrate. The learned Magistrate took a cognizance of offence stated hereinabove against both the accused. That complaint came to be registered as Criminal Case No.1106/97. Copy of that complaint is there at Annexure `A'.

3.5 It appears from record that thereafter accused No.2 submitted his application Exh.7 (Annexure `B') to the Court of learned Magistrate and took a dispute that he is not a drawer of a cheque and therefore he is not responsible for bouncing of that cheque which was given by accused No.1. He requested the learned Magistrate to discharge him from the case. The learned Magistrate, after hearing the arguments of learned advocates for both the parties, accepted the case of accused No.2 and by passing an order dated 28th March, 1999, below that application Exh.7 in Criminal Case No.1106/97, closed the proceeding of case qua accused No.2.

3.6 Being aggrieved against and dissatisfied with the said order dated 28th March, 1999, passed below application Exh.7 in aforesaid said case, the original complainant preferred a Criminal Revision Application No.148/99 to the Sessions Court, City Civil Court, Ahmedabad. The learned Judge of the Revisional Court after hearing the learned advocates for both the parties and after perusal of all the documents which were before him allowed that Criminal Revision Application, and by rendering his judgment Exh.14 dated 15th September, 1999, in Criminal Revision Application No.148/99 set aside the order passed by the learned Magistrate on 28th March, 1999.

3.7 Being aggrieved against and dissatisfied with the said judgment Exh.14 dated 15th September, 1999, rendered by the learned Judge of the Revisional Court, the original accused No.2 has preferred this Criminal Revision

Application.

4. I have heard Mr.D.F.Amin, learned advocate for the Revision-Petitioner, Mr.C.R.Abichandani, learned advocate for and on behalf of Mr.P.R.Abichandani for the Revision-opponent No.1. i.e. original complainant and Mr.B.Y.Mankad, learned APP for the Opponent No.3 - State. Mr.Yatin Soni, learned advocate appeared before this Court for Revision - Opponent No.2 but he has not argued in this matter.

5. Shri D.F.Amin, learned advocate for the petitioner has argued that looking to Sec. 138 of the Act, the person who can be held liable and responsible for an offence, is a person who has drawn a cheque. The main contention of Shri Amin is to the effect that accused No.2 is not a drawer of a cheque. He has, by reading complaint, argued that here in this case drawer of a cheque is "M.N. Shroff" which is a proprietory business of accused No.1. It is not the case of the complainant that "M.N.Shroff" is a partnership business. He has categorically argued that Sec. 141 of the Act will not be applicable to this case. He has further argued that accused No.2 merely signed the cheque under the authority of accused No.1 and, therefore, accused No.1 should be held responsible for bouncing of a cheque and therefore the order which was passed by the learned Magistrate to close the proceeding against accused No.2 is correct, legal and proper and hence the judgement rendered by the learned Judge of the Revisional Court is incorrect, illegal and not proper. He has further argued that while deciding the case prima facie for taking cognizance, the Court should see the documents only and if on mere look of cheque if it appears that cheque was given by "M.N.Shroff" who is a proprietory business of accused No.1, then in no case process should have been issued against accused No.2. He has further argued that the learned Judge of the Revisional Court ought to have upheld the order of the learned Magistrate, who by passing an order below application Exh.7, closed the proceeding of case against accused No.1. He has further argued that the learned Judge of the Revisional Court has not applied his mind to the correct facts and circumstances of the case. He has come to a conclusion by placing reliance on an irrelevant facts. He ought to have considered the provisions of Sec. 138 of the Act in its true and correct perspective.

5.1 In short, the arguments of Shri Amin are to the effect that accused No.2 is not a drawer of a cheque and hence he is not responsible for bouncing of the cheque and no cognizance can be taken against accused No.2. Simultaneously, he has argued that in this case real drawer of the cheque is accused No.1

because business was carried on, by her in name and style of "M.N. Shroff". It is of ownership of accused No.1 and, therefore, case can only be proceeded against accused No.1. In view of this, he has argued that this Criminal Revision Application be allowed and judgment which is challenged in this application be set aside by restoring earlier order of the learned Magistrate passed below Exh.7 in aforesaid case.

6. As against aforesaid arguments of Shri Amin, Shri C.R.Abichandani, learned advocate for the Revision Opponent No.1 i.e. original complainant has argued that the dispute with regard to "no liability to pay" can only be decided after evidence is led by both the parties and appreciated by the learned Magistrate of the trial court. He has further argued that looking to the facts and circumstances of the case, accused No.2 is a real drawer of the cheque and he cannot escape from his liability by saying that drawer of the cheque is accused No.1. He has also argued that accused No.2 had signed the cheque and, therefore, he is the drawer of the cheque and the learned Judge of the Revisional Court has rightly set aside the order of learned Magistrate who closed the proceeding of the case against accused No.2. Shri B.Y.Mankad, learned APP for the Opponent No.3- State has supported the case of original complainant.

7. Looking to rival contentions of both the parties, it would be necessary to place on record the scope and ambit of powers to be exercised under Sec. 397 of Cr.P.C. read with Sec. 401 of Cr.P.C. This Criminal Revision Application has been preferred with a request to exercise the revisional powers to set aside the order of the learned Judge of the Revisional Court.

In case of Sushilaben Mohanlal v. Mali Chunilal Hargovind reported in 1991(1) GLH 342, it has been held that the jurisdictional sweep of revisional Court in a case like the one on hand is very much circumscribed and, therefore, the revisional Court will be at loath to interfere with the finding of the trial court unless and until the misreading of evidence or perversity or manifest error of law or miscarriage of justice is successfully pointed out.

In case of Arefabanu Majidkhan Pathan Vs. Mohammad Hanif Hussainmiya and Another, . It has been held by this Court that the interference of the Court would be justified where the decision rendered by the court below is patently or grossly errorneous or there was no compliance with the provisions of law and that there was a violation of the statutory requirements. The interference could also be caused if it is found that the finding of fact, which was germane to the

main issue to be decided by the revisional Court, was not in consonance with the evidence which were brought before the trial Court. The revisional jurisdiction would have also afforded an opportunity of interference to the revisional court if some evidence which was required to be considered for deciding the issues between the parties either was not at all considered or was considered in such a fashion that it could not have been done so by a Judicial Tribunal reasonably conversant with the principles which govern the field."

8. Keeping in mind the above legal position with regard to very limited powers of this Court while exercising the revisional jurisdiction, the contentions of rival parties are dealt with. It is true that as per Sec. 138 of the Act, a drawer of the cheque can be prosecuted for offence punishable under Sec. 138 of the Act. Sec. 138 of the Act reads as follows:

"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, in 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:"

8.1 On reading Sec. 138 of the Act, not the only drawer of the cheque can be held responsible for bouncing of the cheque but that person who has drawn a cheque must have issued that cheque on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part for any debt or other liability. Under the circumstances, the Court has not to ascertain only who is a drawer of cheque. The court is further required to see as to whether that person who draws a cheque, had issued a cheque on an account maintained by him with the banker. Thus, looking to Sec. 138 of the Act, it is necessary to know as to what is meant by drawer. Sec. 7 of the Act defines that the maker of a bill of exchange or cheque is called the `drawer' and the person thereby directed to pay is called the `drawee'. In view of this definition of Sec. 7 of the Act. It is therefore required to know as to what is meant by maker of cheque. Shri Mankad, learned APP has placed reliance on a definition of a maker given in

Book titled "Iyer's Judicial Dictionary 11th Edition, 1995." As per definition of "maker" on Page 726 of said book "maker" means the person who signs promissory note; by making it he engages that he will pay it according to its tenor, and is precluded from denying to a holder in due course, the existence of the payee and his then capacity to endorse'. Shri Mankad has also placed reliance on definitions of "draw" and "drawer" given in Book titled "Black's Law Dictionary 7th Edition of 1990". As per definition of "to draw" means to create and sign (a draft). As per definition of "drawer" given on Page 510 drawer means "one who directs a person or entity usu. a bank to pay a sum of money stated in an instrument - for example a person who writes check, the maker of a note or draft." The drawer of a cheque (check) is a person who signs it. The person who creates or executes a draft. Thus maker of a cheque is a person who signed the cheque.

9. Shri DF Amin, learned advocate for the revision petitioner has argued that in this case "M.N.Shroff" is a drawer because it is the case of the complainant that accused No.1 who is admittedly wife of accused No.2 is a proprietor or owner of the said business which she carries in name of "M.N.Shroff". If arguments of Shri Amin are accepted then as per his arguments if rubber stamp impression of `M.N. Shroff' with endorsement authority is affixed on cheque, then the said cheque can be said to have been made by accused No.1 even if signature is not there in between endorsement of " For M.N.Shroff" and Authority. Looking to definition of maker of the document, the document can be said to have been completed or made as soon as the person signs that document and therefore here in this case as soon as accused No.2 put his signature just above endorsement "Authority" and just below endorsement " For M.N. Shroff" cheque was made and, therefore, to my mind accused No.2 made a cheque in question and therefore he is a drawer of a cheque in a question within the meaning of Sec. 7 of the Act and therefore the arguments advanced by Shri Amin cannot be accepted.

10. It is interesting to note that during the course of arguments Shri Amin was asked to produce documents available from the Bank to show as how the account in name of "M.N. Shroff" was opened and who is authorised person to operate that bank account. There is no dispute with regard to bank account which has been opened by "M.N. Shroff" with the Pragati Co-operative Bank Ltd. It is quite possible that both the accused might have opened an account in the name of "M.N.Shroff" with the said bank and both would have given their specific signatures for operating, that account. In spite of sufficient time was given to Shri Amin, that type of documents are not produced by Shri Amin to

satisfy the query made to him by this Court. It is also interesting to note that Shri Amin has produced original Power of Attorney executed by accused No.1 in favour of accused No.2 on 30th October, 1991. As per that deed of Power of Attorney, accused No.1 Manjulaben Navinchandra Doshi, is Proprietor of M/s. M.N. Shroff and she authorised accused No.2 in her own name and on her own behalf to do and execute all the acts and things as narrated in the deed of Power of Attorney. One of that three acts is to open and operate any kind of bank account on behalf of her and on behalf of any of her pro-concerns and on behalf of the proprietorship firm wherein she is an owner. The second act is to do all such things in respect of her bank accounts in effect as she agreed to ratify and confirm whatever accused No.2 shall do. Thus, from this power of attorney it appears that accused No.2 who is a husband of accused No.1 has been fully empowered by accused No.1 to transact all types of businesses relating to her bank account. If we peruse a cheque in question, we find that accused No.2 signed the cheque as follows:

"FOR M.N. SHROFF
Sd/- illegible
Authority"

11. Thus, on perusal of cheque by conjoint reading of power of attorney, it is crystal clear that accused No.2 was empowered to sign the cheque by accused No.1 and, therefore, when he was empowered to sign the cheque, it can be said that accused No.2 made a cheque for and on behalf of accused No.1. Now he cannot escape from his liability by saying that he signed the cheque only under authority and not in his individual capacity. Shri Amin has also placed reliance on Sec. 26 of the Act. Section 26 of the Act reads as follows:

"Capacity to make, etc., promissory notes etc: Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque."

11.1 In view of Sec. 26 every person capable of contracting according to law, may bind himself and therefore when accused No.2 has made/drawn a cheque he is responsible for bouncing of that cheque. Shri Amin has also placed reliance on Sec. 29 of the Act. Sec. 29 of the Act reads as follows:

"Sec. 29 Liability of legal representative signing:- A legal representative of a

deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such."

11.2 This Sec. 29 will not be applicable to this case as it pertains to legal representatives of deceased persons. Here in this case, accused No.2 signed that authority given by accused No.1. As per Sec. 30 of the Act, the drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided."

11.3 In view of above legal position, prima facie it appears that accused No.2 signed to make a cheque in question and therefore he is a drawer of the cheque and therefore contention of Shri Amin cannot be sustained. Hence it is rejected.

12. Shri Abichandani, learned advocate has cited certain authorities on the point of evidence which is required to be led to decide as to whether there is a liability of accused No.2 for signing the cheque or not.

(1) Smt. Davinder Kaur and another v. Small Scale Industries Development Bank of India reported in 1998(3) Crimes 548.(A.P.) This case is with regard to cheque given by Director of Company. It is also observed in this case that it is a well settled that under Sec. 482 of Cr.P.C. High Court has to confine to the facts as alleged in the complaint by the prosecution and no investigation into the facts should normally be done by the High Court.

(2) M.Sreeramulu Reddy v. N.C.Ramasamy reported in 1(1993) BC 8. In this case plea with regard to existence of liability was taken. It was held that this plea involves evidence to be placed before the Magistrate for appreciation of facts.

(3) Rajan Kinnerkar v. Eric Cordeiro and another reported in 1994(2) Crimes 259. In this case the petitioner was a director of the company when he signed the cheque. However subsequent to his signature he ceased to be as such an incharge of the company, at the time when the cheques were presented to the party and dishonoured by the Bankers. It was held that although prima facie it appears that petitioner is not liable for alleged offence yet such contention that petitioner no more remained in-charge of company needs to be evidenced and

such evidence has to be led at the trial.

13. When accused No.2 has advanced his plea that he is not responsible for bouncing of cheque because he is not a drawer of a cheque, it is he who knows better as to under what capacity he signed the cheque. As per Sec. 106 of the Indian Evidence Act when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Here in this case, accused No.2 has advanced his case that he is not a drawer of a cheque and as per his case drawer of a cheque is Manjulaben Navinchandra Doshi, then that fact is required to be proved by leading evidence by him because he has signed cheque with authority. There is nothing on record to suggest as to under what authority he has signed the cheque and that facts are within the knowledge of accused No.2. He must prove the facts with regard to his own plea and, therefore, from mere look of a cheque, at present it cannot be decided that accused No.2 is not a "drawer" of a cheque.

13.1 I have gone through the impugned judgment challenged in this application. The learned Judge of the Revisional Court has assigned cogent and convincing reasons for arriving at a particular conclusion that evidence is required to led and appreciated to arrive at a just and correct decision as to whether accused No.2 is not responsible for bouncing of the cheque. This conclusion can not be said to be incorrect or illegal or improper. Under these circumstances, this Court is of the view that both the parties are required to lead evidence for fixing the liability of accused No.2 and after leading that evidence, the learned Magistrate will appreciate that evidence and will come to a judicial conclusion as to whether accused No.2 is responsible for bouncing of the cheque or not. It is interesting to note that accused No.1 who is admittedly wife of accused No.2 had also given an application to the learned Magistrate on 11th August, 1997, wherein she had taken a contention that she is not a signatory to the cheque. That application came to be rejected by the learned Magistrate on 1.1.1997. Then accused No.1 preferred a Criminal Revision Application No.324/98 to the Sessions Court, City Civil and Sessions Court, Ahmedabad, and the learned Additional Sessions Judge, Court No.18, City Civil & Sessions Court, Ahmedabad, rejected that revision application on 17th February, 1999. Thus, an attempt has been made by accused No.1 that she is not signatory to the cheque and on the other hand accused No.2 has made an attempt that he is not a drawer of the cheque and thus both the accused want to escape from the liability for cheque in question. If this would be the position then accused No.2 is in real sense a drawer of the cheque because accused No.1 has disclosed in her application that she is not a signatory to the cheque.

14. Shri D.F.Amin, learned advocate for the petitioner has put much stress on the words "cheque drawn by person" used in Sec. 138 of the Act and on the basis of this words he has argued that accused No.2 is not a "drawer" of a cheque. On reading Sec. 138 of the Act, it is not sufficient that a person who disowns the liability must prove that he is not a drawer of the cheque but in view of Sec. 138 of the Act he has further to prove that cheque in question was drawn by him as person not on an account maintained by him with the banker. Here in this case, looking to deed of Power of Attorney, the accused No.1 has, in her deed of power of attorney fully authorised accused No.2 to open and operate the bank account on her behalf and therefore looking to this deed of power of attorney, the accused No.2 had given a cheque on an account maintained by him because he was authorised by accused No.1 to open and operate the bank account. At the cost of repetition, it is again stated that Mr.Amin was directed to produce the documents available from the bank to show that account was not opened by the accused No.2 or if at all it was opened by accused No.1 then what was his status while getting opened account with the bank. In view of this, it is not necessary for accused No.2 only to show that he is not a drawer of the cheque but he has further to show that cheque drawn by him was not on account maintained by him with the banker.

15. In view of what is stated hereinabove, the learned Additional Sessions Judge has rightly set aside the order of the trial court and he has rightly come to a conclusion that for defence of accused No.2 evidence is required to be led by both the parties and that can only be done if accused No.2 is put to trial before the learned Magistrate. In no case it can be said that the judgment of the Revisional Court is illegal, incorrect or improper.

15.1 In view of this, this Criminal Revision Application is devoid of merits and same is required to be rejected. Accordingly, this Criminal Revision Application is rejected. As the Criminal Case is of 1997 from which this Criminal Revision Application has arisen, the learned Magistrate is directed to expedite the trial of the case and dispose of it as early as possible preferably within six months from the date of receipt of writ of this Court. Rule is discharged. Ad-interim relief granted earlier shall stand vacated forthwith.