

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 891 of 2020

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Ayyubkhan Kalekhan Pathan
Versus
State of Gujarat

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Appearance:

MR. RAJAN J PATEL(6775) for the Applicant(s) No. 1
N J MEVADA(9058) for the Applicant(s) No. 1
MR ANKIT SHAH(6371) for the Respondent(s) No. 2
MS MAITHILI MEHTA, APP for the Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE NIRZAR S. DESAI

Date : 08/06/2022

ORAL ORDER

1 By way of this petition, the petitioner has prayed for quashing and setting aside Criminal Case No.788 of 2019 pending before the Chief Judicial Magistrate Court, Surendranagar.

2 It is the case of the petitioner that the petitioner is proprietor of M/s. A.K.Construction. The brother of the petitioner is the owner of another proprietary firm i.e. M/s. A.K.Road Contractor. It is the case of the petitioner that M/s. A.K.Road Contractor and M/s. A.K. Construction are two different firms and since the complaint under Section

138 of the Negotiable Instruments Act (for short, 'the Act') is registered by the complainant in respect of a cheque issued by the M/s. A.K.Road Contractor, he does not have any connection with the cheque issued by M/s. A.K.Road Contractor, and therefore, the entire proceedings under Section 138 of the Act against the petitioner are misconceived, and therefore the impugned proceedings are required to be quashed and set aside.

2.1 It is the case of the respondent No.2 – original complainant that the complainant is engaged in the business of transportation and the petitioner and his brother i.e. Ayyubkhan Kalekhan Pathan and Anishkhan Kalekhan Pathan both are civil contractors and engaged in the business of construction in the name and style of M/s. A.K.Road Contractor and M/s. A.K.Road Construction. The case of the complainant is that he used to supply concrete, grit, mettle and other material from different suppliers to the ongoing and under construction sites of the petitioner and was having business relationship with the petitioner since 2016. In October, 2016 the

petitioner had ordered concrete, grit, mettle and other construction material from Jay Somnath Minerals for their ongoing construction site at Dholi, which is located near Arnej and he had provided the transportation services of those material to the petitioner to the construction site. The material was supplied by the complainant from October, 2016 to May, 2018 and after construction was over, a number of bills were raised towards transportation charges amounting to Rs.37,24,631/- and towards part payment of the aforesaid amount, a cheque of Rs.20,00,000/- bearing cheque No.160541 dated 25.3.2019 in the name of M/s. A.K.Road Contractor was issued by the petitioner to the complainant with an assurance that the said cheque would be cleared. However, the said cheque was returned on 27.3.2019 with the endorsement of the bank, 'funds insufficient'. Thereafter, the complainant duly served a notice under Section 138 of the Act to the petitioner being the proprietor of the firm i.e. M/s. A.K.Road Contractor. However, though the notice was served upon the petitioner, the petitioner did not give reply to the notice issued by the complainant. Ultimately, the complainant was

constrained to file complaint under Section 138 of the Act before the competent court and in respect of the aforesaid complaint now the petitioner has preferred this petition for quashing on the ground that the firm i.e. M/s. A.K.Road Contractor does not belong to him and since he is not the drawer of the cheque the proceedings against him are misconceived and are required to be quashed and set aside.

3 Mr. Rajan Patel, learned advocate for the petitioner has submitted that the firm M/s. A.K.Road Contractor does not belong to the petitioner, and therefore, the entire proceedings initiated against the petitioner are misconceived as he is not the drawer of the cheque, and therefore, those proceedings are required to be quashed and set aside. He further submitted that since the cheque issued allegedly by the petitioner belongs to M/s. A.K.Road Contractor, any proceedings would lie against brother of the petitioner i.e. Anishkhan Kalekhan Pathan and not against the petitioner.

4 Learned advocate Mr. Brijesh Ramanuj for

Mr. Ankit Shah, learned advocate for the respondent No.2 submitted that Ayyubkhan Kalekhan Pathan and Anishkhan Kalekhan Pathan are real brothers and both are civil contractors and engaged in the business of construction in the names of M/s. A.K.Road Construction and M/s. A.K.Road Contractor, respectively and residing at the same place and details given on the online platform of M/s. A.K.Road Contractor and M/s. A.K.Road Construction, are one and the same. Even the contact number of the petitioner is mentioned in respect of both the aforesaid firms. Learned advocate Mr. Ramanuj further submitted that both the brothers are doing business jointly and though the cheque was issued by the petitioner with an assurance that the same will be cleared but just with a view to cheat the petitioner and to avoid the payment, the cheque of M/s.A.K.Road Contractor was issued in favour of the complainant. He further submitted that since an impression was created by the petitioner that both the brothers are carrying the business together and since both the brothers are having joint business the complainant had no reason to doubt the cheque issued by the

petitioner.

4.1 Learned advocate Mr. Ramanuj further submitted that since all throughout during the entire business transaction it was the petitioner who was dealing with the complainant and since the cheque also was issued by the petitioner, an impression was created by the petitioner that it was the petitioner who was carrying on business jointly with his brother and both the accounts belong to the petitioner only. Learned advocate Mr. Ramanuj further pointed out to the notice dated 1.4.2019 issued by the complainant which was specifically addressed to Ayyubkhan Kalekhan Pathan, who is the proprietor of M/s.A.K.Road Contractor. He further submitted that during the course of business, the complainant was never made aware about the fact that M/s. A.K.Road Contractor and M/s. A.K.Road Construction are two different firms owned by two different persons. He further submitted that considering the fact that there were very limited business relations with the petitioner, the complainant cannot be expected to know the internal arrangement in respect of two

different firms owned by two different brothers, and therefore, in good faith the complainant supplied the material to the petitioner. However, with an intention to dupe money of the complainant, the petitioner had deliberately issued the cheque of firm of the brother of the petitioner to avoid the payment. Learned advocate Mr. Ramanuj further submitted that though the application for quashing was preferred in 2020, no stay was granted by this Court and till date since there is no relief granted in favour of the petitioner, the trial has already commenced and even the stage of cross-examination of the complainant by the petitioner is also over. He further submitted that under Section 138 of the Act, the competent court has entered a crucial stage of evidence and hence considering the fact that the trial court has invested so much of time, the present petition may not be entertained as the intention of the petitioner was to give the cheque of firm belonging to his brother was a malafide intention only with a view to avoid payment of outstanding amount as the complainant was unaware of the fact M/s. A.K.Road Contractor is owned by brother of the

petitioner and not by the petitioner. Learned advocate Mr. Ramanuj further submitted that at no point of time, the notice dated 1.4.2019 issued by the complainant to the petitioner was neither replied nor was it brought to the notice of the complainant that both the firms are different, owners of both the firms are different and the petitioner is not the owner of the firm M/s. A.K.Road Contractor.

4.2 By making the aforesaid submissions, learned advocate Mr. Ramanuj prayed for dismissal of the petition.

5 Having heard learned advocates for the parties and on perusal of the record, it is clear that nothing on record was placed by the petitioner to indicate that the transportation services from the complainant were availed by his brother and not by him. Further, during the course of arguments a specific stand was taken by learned advocate for the petitioner that if at all any proceedings under Section 138 of the Act would lie against his brother and not against him. Learned advocate Mr. Rajan Patel

has not disputed the fact that the trial is going on and the petitioner has cross-examined the present complainant. These facts coupled with the fact that when the notice dated 1.4.2019 was served by the complainant upon the petitioner, the said notice was never replied by the petitioner. The submission of learned advocate Mr. Ramanuj that notice issued by the complainant was never replied by the petitioner was not controverted even today by learned advocate for the petitioner.

5.1 This Court has noticed that there are two brothers with the same initial i.e. Ayyubkhan Kalekhan Pathan and Anishkhan Kalekhan Pathan run the business in the names of two different firms i.e. M/s. A.K.Road Contractor and M/s. A.K.Road Construction and having the same address along with the contact number of one brother i.e. petitioner as contact number to contact both the firms, which is available on the online portal. In that case, a businessman who would be having a limited business relation with the person would not know about how the internal arrangement is made between two bothers

carrying out the business or which company or proprietary firm is owned by which brother. A businessman during normal business deal would go by only limited information about the person he is dealing with unless those facts are disclosed by him, the complainant is not expected to know that though there are two brothers having two different firms, both the firms are not related to each other and one brother is not authorized to issue cheque on behalf of a firm which is owned by another brother.

5.2 Though a notice dated 1.4.2019 was issued by the complainant even at that stage the petitioner could have clarified the aforesaid aspect that he is not the owner of the firm M/s. A.K.Road Contractor, and therefore, though the cheque was allegedly issued by him, he was not competent to issue the said cheque or the cheque does not bear his signature, and therefore, the proceedings under Section 138 of the Act against the petitioner are misconceived and are not maintainable. However, despite service of the notice to the petitioner, who is staying with his brother in the same premises having same address, the

petitioner did not bother to reply the notice, and therefore, that fact was never brought to the notice of the complainant that there are two different firms of two different brothers and he is not authorized to sign the cheque on behalf of M/s. A.K.Road Contractor. These facts would clearly indicate that the intention of the petitioner was to dupe the complainant.

5.3 Whether the cheque has been issued by the petitioner or his brother and whether he was competent to issue the cheque or not, are the matter of evidence at the stage of trial. However, prima facie, this Court is of the view that considering the huge amount involved, which is Rs.37,24,631/-, out of which Rs.20,00,000/- was sought to be paid by the petitioner by way of the cheque in question, which was returned by the bank with the endorsement 'funds insufficient', the intention of the petitioner was to avoid the payment or to dupe the complainant.

5.4 Further, when the trial has commenced and it has reached to the stage of completion of cross-

examination of the complainant, there is no point in staying the trial or to quash the complaint, more particularly, when the petitioner has not bothered even to reply to the notice dated 1.4.2019 and prima facie it seems that the petitioner's intention was to dupe the complainant.

5.5 Hence, the present petition is required to be dismissed and accordingly the same is dismissed. Notice discharged. No order as to costs.

P. SUBRAHMANYAM

(NIRZAR S. DESAI,J)

