

(2012) 01 BOM CK 0027

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 15 of 2012

Damodhar Bajaj

APPELLANT

Vs

Ratan Shinde

RESPONDENT

Date of Decision: Jan. 12, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 256
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2012) BomCR(Cri) 384

Hon'ble Judges: Shrihari P. Davare, J

Bench: Single Bench

Advocate: M.P. Tripathi and Mr. R.R. Chandak, for the Appellant; N.B. Ghute, advocate h/f, Shri S.B. Ghute, for the Respondent

Judgement

Shrihari P. Davare, J.

Heard respective Learned Counsel for the parties.

2. With the consent of the Learned Counsel for the parties taken up for final hearing.

3. Parties hereinafter are referred to as, "complainant" and "accused".

4. It is the contention of the complainant that he was carrying on the business of Bajaj Industries at Majalgaon and the accused is carrying on the business of hotel and they had friendly relations with each other.

5. The accused was in need of the amount of Rs. Six Lacs, and therefore, he requested the complainant therefore. Since the relations between the complainant and the accused were friendly and since the accused undertook to give post dated cheque of two months, the complainant gave hand loan of Rs. Six Lacs to the accused on 20.9.2005 and the accused also issued cheque of Rs. Six Lacs, dated 21.11.2005 drawn on Rajashri Shahu Cooperative Bank, Beed, Branch Majalgaon, to the complainant towards repayment of the said amount. Accordingly, the

complainant presented the said cheque for encashment purpose on 16.3.2006. However, the said cheque was dishonored and returned unpaid with the cheque return memo. Hence, the complainant issued the demand notice to the accused and demanded the money/amount of the said cheque from the accused. However, the accused did not pay the said cheque amount to the complainant. Hence, the complainant filed the complaint against the accused u/s 138 of the Negotiable Instruments Act, which was numbered as Criminal Case No. 445 of 2006.

6. The accused appeared in the said case and the compromise took place between the parties therein. In pursuance of the said compromise, the accused issued cheque No. 051734, dated 1.10.2006 for Rs. Six Lacs to the complainant and the said cheque was recorded in the compromise in Criminal Case No. 445 of 2006 and the said case was disposed of in view of the said compromise.

7. Thereafter the accused requested the complainant to present the said cheque, which was tendered by him in the afore said compromise after 5th December, 2006. The complainant waited as per the request of the accused and presented the said cheque for encashment purpose after the said time limit. However, the said cheque was also dishonored and returned unpaid with the bank return memo on 6.12.2006. Hence, the complainant issued notice to the accused by R.P.A.D. on 3.1.2007 and demanded money/amount of the said cheque from him. However, the accused did not claim the said notice and the said notice was returned unclaimed to the complainant on 15.1.2007. The accused did not repay the amount/money of the said cheque as per the said notice, and therefore, the complainant again filed the complaint against the accused u/s 138 of the Negotiable Instruments Act on 26.2.2007, which was numbered as S.C.C. No. 265 of 2007 before the Additional Chief Judicial Magistrate, Majalgaon.

8. It appears that the accused appeared in the said case and the record discloses that his plea was recorded on 6.3.2008 and the accused pleaded not guilty and thereafter the said case was posted for recording of evidence.

9. However, it appears that on 30.9.2009, the complainant remained absent before the learned Trial Court, although the said case was fixed for recording of evidence, and hence, the said complaint came to be dismissed and the accused was acquitted by the learned Trial Court on the said date by order, dated 30.9.2009. Hence, being aggrieved and dissatisfied by the said order, dated 30.9.2009, dismissing the complaint of the complainant and acquitting the accused u/s 138 of the Negotiable Instruments Act, the complainant has preferred the present appeal challenging the same and prayed for quashment thereof.

10. Learned Counsel for the complainant submitted that the complainant was present before the court on the earlier day i.e. 7.9.2009, as well as the accused was also present on the said date and he preferred application for cancellation of warrant which was issued against him and thereafter the said case was adjourned to

13.9.2009 for compromise, if any. However, on 13.9.2009 both the complainant as well as the accused remained absent before the court and since no compromise had taken place between them, the said case was adjourned to 30.9.2009 for receipt of report of warrant. Thereafter on 30.9.2009, the complainant remained absent, and therefore, he tendered the application for exemption, but the said application (Exh.35) came to be rejected by the learned Trial Court observing that the complainant remained absent although the said case was fixed for recording of evidence, and therefore, dismissed the said application, and consequently, dismissed the said complaint filed by the complainant and acquitted the accused for the offence punishable u/s 138 of the Negotiable Instruments Act.

11. In the said context, Learned Counsel for the complainant submitted that as per Roznama, it is clear that the case was adjourned to 30.9.2009 for receipt of report of warrant and it was not fixed for recording of evidence on 30.9.2009, but still learned Trial Court observed on application (Exh.35) that the case was fixed for recording of evidence and since the complainant remained absent and since the complainant did not support his ground of illness by any record, the learned Trial Court dismissed the said application erroneously, and consequently, dismissed the complaint filed by the complainant on the said date and acquitted the accused by passing the order on the said complaint, which is under challenge in the present appeal.

12. Learned Counsel for the complainant further submitted that the dismissal of the complaint of the complainant on 30.9.2009 is a technical dismissal and no opportunity was given to the complainant to adduce/produce the evidence on record and the said complaint was not dismissed on its own merits, in accordance with law, and hence, submitted that opportunity is required to be given to the complainant to adduce/produce the evidence on record by quashing and setting aside the impugned order, dated 30.9.2009 and allowing the present appeal.

13. Learned Counsel for the complainant placed reliance on the judicial pronouncement of this Court in the case of Shri Pratap s/o Gopaldas Talreja vs. Shri Bhagwandas s/o Jehumal Matani, reported at 2011 ALL MR (Cri) 2912.

It is reflected from the roznama that the plea of the accused was recorded on 6.4.2010 and the matter was posted for filing affidavit in evidence in lieu of examination in chief, by the complainant, but thereafter the complainant remained absent and consequently the matter came to be dismissed for default, on 14.10.2010, as aforesaid, due to absence of the complainant and his advocate on the said date. However, simultaneously, it also cannot be overlooked and ignored that although the complaint was filed in 2004 and process was issued against the accused in 2006, his presence could be secured before the trial court initially by issuing bailable warrant and then after issuance of nonbailable warrant. Apart from that, the principles of natural justice require that opportunity be given to the complainant to prosecute the complaint on its own merits, as well as opportunity needs to be given to the accused also, to contest the said complaint on merits.

Hence, the cause put forth by the appellant for setting aside the impugned order that he was under bonafide belief that the matter would be settled out of the court, since assurance was given by the accused to the complainant to that effect, appears to be probable and sufficient. Moreover, the doctrine audi alter am partum contemplates that no one should be condemned unheard. If the impugned order is allowed to hold ground without any fault on the part of the complainant, he would feel prejudiced about his rights. In the circumstances, present appeal deserves to be allowed, by setting aside the impugned order dated 14.10.2010 regarding dismissal of the complaint for default u/s 256 of the Code of Criminal Procedure, and consequently, acquitting the accused and S.C.C. No. 579 of 2004 is required to be restored to its original stage and the matter is required to be remanded back to the trial court, with directions to the parties to remain present before the trial court on specific date and adduce evidence, and not to seek adjournments unless warranted emergently, and the learned trial court is required to be requested to decide the matter expeditiously, subject to reasonable cost to be paid by the appellant to the respondent, which can be quantified at Rs. 2,500/. = 2006 (6)ALL MR (Journal) 27 and 2009 ALL MR (Cri) JOURNAL 329 - Ref. to. (Paras 19,20)

14. Accordingly, Learned Counsel for the complainant urged that present appeal be allowed and the impugned order, dated 30.9.2009 be quashed and set aside.

15. Learned Counsel for the respondent/accused countered the said arguments and opposed the present appeal vehemently and submitted that the plea of the accused was recorded on 6.3.2008 and thereafter S.C.C. No. 265 of 2007 was posted for recording of evidence before the trial court on number of days, but still the complainant failed to adduce/produce the evidence in the said case for the substantial period. Moreover, it is canvassed by Learned Counsel for the accused that the complainant and the accused were present before the court on 7.9.2009 i.e. earlier to the dismissal of complaint filed by the complainant and accused presented the application for cancellation of warrant and also for bail on the said date and thereafter the said matter was posted on 13.9.2009 for compromise. However, the Roznama discloses that on the said date i.e. 13.9.2009 the complainant as well as the accused remained absent and it was observed in the Roznama that since the matter was not compromised, the matter was posted on 30.9.2009 for the receipt of report of warrant. Thereafter, on 30.9.2009, the complainant remained absent, but the accused was present before the court. Admittedly, the complainant tendered an application (Exh.35) for exemption. Learned trial Court obtained the say of the accused thereon and thereafter passed an order observing that the plea of the accused was recorded long back on 6.3.2008 and thereafter almost after 11/2 years the said case was posted for recording of evidence continuously, but still the complainant failed to adduce/produce the evidence and also observing that the complainant has not given any substantial reason for his absence, as well as he has not substantiated the ground of exemption i.e. his sickness by any documentary evidence, and therefore, consequently, rejected the said application and further

consequently, dismissed the said complaint on 30.9.2009 and acquitted the accused rightly, and hence, Learned Counsel for the accused submitted that no interference is called for in the present appeal.

16. According to the Learned Counsel for the accused, the complainant was not diligent in prosecuting the case before the learned Trial Court, and hence, learned Trial Court dismissed the said complaint for default committed by the complainant and acquitted the accused u/s 256 of the Code of Criminal Procedure rightly and further submitted that there is no substance in the present appeal and same is devoid of any merits, and therefore, same be dismissed.

17. On perusal of the impugned order, dated 30.9.2009 and Roznama annexed by the complainant along with the present appeal at Exh. "C" and other annexure filed by the complainant/appellant along with the present appeal and after hearing the rival submissions advanced by the Learned Counsel for the parties, at the out set, the dismissal of the complaint of the complaint by the learned trial Court on 30.9.2009 is, apparently, a technical dismissal due to the absence of the complainant on the said date and acquittal of the accused is also due to technical dismissal of the complaint obviously u/s 256 of the Code of Criminal Procedure and the said dismissal of the complaint is not on its own merits, in accordance with law. Moreover, the Roznama (Exh."C") reflects that the complainant as well as the accused were present on 7.9.2009 and it appears from the Roznama that warrant was issued against the accused on the earlier date due to absence of the accused, and therefore, the accused preferred an application for cancellation thereof and also preferred an application for bail on the said date and thereafter the said case was posted on 13.9.2009 for compromise. Moreover, on 13.9.2009 the complainant as well as the accused remained absent and it was observed in the said Roznama that compromise between the parties did not take place, and hence, the matter was posted on 30.9.2009 for receipt of report of the warrant. Hence, apparently, it is clear from the said Roznama dated 13.9.2009 that the said case was posted on 30.9.2009 for receipt of report of warrant and it was not apparently posted on 30.9.2009 for recording of evidence.

18. True it is that the complainant remained absent on the next date i.e. on 30.9.2009, but he preferred an application for exemption on the said date on account of his sickness and the health ground, and hence, it cannot be construed that the complainant was not diligent on the said date. Admittedly, the complainant did not annexe documentary proof/medical certificate along with application (Exh.35), but since the complainant had preferred the application for exemption on the ground of ill health, such certificate could have been accepted on the next date, without rejecting the said application on the said date. Apart from that, the order dated 30.9.2009 passed on the said application Exh. 35, recites that the said case was posted on the said date for recording of evidence, but the Roznama (Exh."C") categorically reveals that the said case was posted on 30.9.2009 for receipt of report

of warrant against the accused, and hence, the observations made by the learned Trial Court in the said order in that respect also, apparently, appear to be erroneous, and therefore, the consequent dismissal of the complaint of the complainant on the said date by the learned Trial Court due to absence of the complainant and further consequent acquittal of the accused for the offence punishable u/s 138 of the Negotiable Instruments Act, are also unsustainable.

19. Moreover, it also appears from the said Roznama that the possibility of compromise between the parties was being explored, since while adjourning the said case on 7.9.2009 to 13.9.2009 it was observed in the said Roznama that the said case was posted on 13.9.2009 for compromise and the said aspect also cannot be ignored and cannot be overlooked.

20. Hence, the grounds put forth by the complainant/appellant for his absence on 30.9.2009 appear to be sufficient ground and also the reasons/grounds put forth by the appellant for setting aside the impugned order, dated 30.9.2009 also appear to be reasonable and bona fide. Moreover, the doctrine of audi alter am partum contemplates that no one should be condemned unheard. If the impugned order is allowed to hold ground without any fault on the part of the complainant, he would feel prejudiced about his rights.

21. Moreover, the interest of justice requires that opportunity be given to the complainant to adduce/produce the evidence and matter be decided on its own merits. Hence, in the circumstances, present appeal deserves to be allowed by setting aside the order, dated 30.9.2009 regarding the dismissal of the complaint of the complainant and acquittal of the accused in S.C.C. No. 265 of 2007 and the said case is required to be restored to its original stage and the matter is required to be remanded back to the trial Court with direction to the parties to remain present before the learned Trial Court on a specified date with liberty to adduce/produce evidence, if any, and also with directions that not to seek any adjournments unless warranted emergently and the Trial Court is required to be requested to decide the matter expeditiously, subject to reasonable costs to be paid by the appellant to the respondent, which is quantified at Rs. 1,500/.

22. In the result, present appeal is allowed and the impugned order, dated 30.9.2009, passed by the Additional Chief Judicial Magistrate, Majalgaon, in S.C.C. No. 265 of 2007, dismissing the said complaint and acquitting the accused due to absence of the complainant for the offence punishable u/s 138 of the Negotiable Instruments Act, stands quashed and set aside and the S.C.C. No. 265 of 2007 stands restored to the file at its original stage and the matter is remitted back to the trial Court to decide the same afresh, on its own merits, in accordance with law, and the parties are directed to remain present before the learned Trial Court on 30.1.2012 at 11.00 a.m. and further directed not to seek adjournments unless warranted emergently and learned trial Court to decide the said Criminal Case expeditiously, subject to payment of costs of Rs. 1,500/by the appellant/complainant to the

respondent/accused on or before the said date and present appeal stands disposed of finally.