
(2011) 03 BOM CK 0082

In the Bombay High Court

Case No : Criminal Application No. 4723 of 2010

Rajendra Shaintilal Mistry

APPELLANT

Vs

Ajanta Printpack Industries, Mahendra Keshav Mahakal and
Ravindra Keshav Mahakal

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 3 Crimes 501

Hon'ble Judges : Hari P. Davare, J

Bench : Single Bench

Advocate : Joydeep Chatterji, for the Appellant; Pravin S. Patil, for the Respondent

Judgement

Hari P. Davare, J.—Heard Mr. Chatarjee learned Counsel for the applicant (Original Complainant) and Mr. Pravin S. Patil, learned Counsel for Respondent Nos. 1 to 3.

2. This is an application preferred by the applicant Appellant (Original complainant) seeking leave to file an appeal challenging the order dated 24th September, 2010 passed below Exh.1 in S.C.C.No. 9491 of 2007, by the learned Judicial Magistrate First Class-10, Aurangabad, thereby dismissing the complaint filed by the complainant, and acquitting the Respondents accused from the charge u/s 138 of the Negotiable Instruments Act.

FACTUAL MATRIX CAN BE SUMMARISED AS FOLLOWS:

3. Appellant (original complainant) has filed complaint bearing S.C.C.No. 9491 of 2007 on 17.12.2007, before learned Judicial Magistrate First Class, Aurangabad against Respondents (Original Accused) u/s 138 of the Negotiable Instruments Act. Respondent No. 1 is partnership Firm and Respondent Nos. 2 and 3 are partners thereof, who are managing affairs of Respondent NO. 1 Firm. Accordingly, Judicial Magistrate First Class, Aurangabad issued summons to

Respondent Nos. 1 to 3 and their presence was secured on 18.01.2010, after issuance of Non Bailable Warrants against them.

4. Thereafter, the matter was adjourned for several times. It is alleged that on 18.06.2010, learned Counsel for the accused and accused informed the learned Magistrate that the matter would be settled and therefore, the case was adjourned to 3rd July, 2010 and thereafter it was adjourned to 07.08.2010 and on 24.09.2010. However, on 24.09.2010 adjournment was sought by the advocate of accused because accused was out of station. Moreover, the complainant and his advocate were also absent, and therefore, learned trial Court passed order below Exh.1 and dismissed the complaint and acquitted the Respondents accused.

5. Being aggrieved and dissatisfied with said order dated 24.09.2010 complainant applicant Appellant preferred present application seeking leave to file appeal assailing the said order.

6. It is canvassed that on 24.09.2010 accused himself was absent. Application Exh.27 was filed seeking his personal exemption and same was granted. Therefore, it is submitted that although the case was posted for evidence on that day, no inconvenience would be caused to the accused since he was absent. It is also submitted that under such situation, action of dismissal of the complaint is a harsh action and the matter could have been postponed or deferred, since no prejudice or hardship was caused to the accused as he was absent. It was also argued on behalf of the applicant that advocate for complainant could not remain present on 24.09.2010, as he had gone to New Delhi by railway at 13.40 hours on 24.09.2010 to appear for examination on 26.09.2010 for the post of public Prosecutor in the CBI and although requested his junior to attend the case, due to oversight his Junior did not attend the said case.

7. learned Counsel for the Respondents opposed the present application vehemently, and submitted that no ground has been put forth for absence of complainant on 24.09.2009. It is also submitted that since the complainant remained absent for three times earlier, as well as he remained absent on 24.09.2010, learned trial Court rightly dismissed the complaint and acquitted the accused u/s 138 of the Negotiable Instruments Act and applicant is not entitled for leave to file appeal against the said order.

8. Considering the rival submissions, at the outset, it is apparent that dismissal of the complaint filed by the complainant, by order dated 24.09.2010, passed by the learned trial Court, is apparently technical dismissal due to absence of complainant and his advocate, and the said complaint, admittedly, has not been dismissed on merits. Principles of natural justice require that opportunity be given to the parties to prosecute, as well as to contest the matter, on its own merits. Therefore, leave is required to be granted to the applicant to file appeal challenging the impugned order dated 24.09.2010 in the interest of justice.

9. Accordingly, present application is allowed. Leave to file appeal is granted and

present application itself is treated as Appeal.

10. Admit the appeal, learned Counsel for Respondent waives the service of notice after admission.

11. Accordingly, with the consent of learned Counsel for respective parties, appeal is taken up for final hearing.

12. Heard learned Counsel for the parties.

13. Considering the facts and circumstances, and after considering rival submissions advanced by the learned Counsel for the parties, as mentioned herein above, it is apparent that dismissal of the complaint by order dated 24.09.2010, passed by the trial Court, in the instant case is apparently technical dismissal due to absence of the complainant and his advocate, but the said dismissal is not on merits, hence I am of the view that fair opportunity is required to be given to the applicant Appellant, therefore, the impugned order dated 24.09.2010 deserves to be quashed and set aside and matter is required to be remitted back to the trial Court to decide it on its own merits, in accordance with law, with directions to parties to remain present before trial Court on specified date, subject to saddling reasonable costs upon the applicant.

14. Accordingly, present appeal is allowed, subject to payment of costs of Rs. 5000/ (Rupees Five Thousand), by the applicant Appellant complainant to the Respondent Accused before lower Court, within a period of two weeks from today, and the impugned order dated 24.09.2010 passed by the Judicial Magistrate First Class 10, Aurangabad, in S.C.C.No. 9491 of 2007 stands quashed and set aside and the matter is remitted back to the trial Court, with direction to decide it on its own merits afresh, in accordance with law, after giving due opportunity to the parties to adduce/produce their respective evidences. The parties are directed to remain present before the trial Court on 6th April, 2011 at 11.00 a.m.

15. Appeal stands disposed of accordingly.