
(2012) 10 BOM CK 0228

In the Bombay High Court

Case No : Criminal Writ Petition No. 836 of 2012

Shankar Khandare

APPELLANT

Vs

The State of Maharashtra and APT Packaging Limited

RESPONDENT

Date of Decision : 23-10-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 2 BomCR(Cri) 145

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : S.A. Ambad, for the Appellant; B.J. Sonwane, Additional Public Prosecutor and Mr. S.P. Golegaonkar, Advocate, for the Respondent

Judgement

Shrihari P. Davare, J.—Heard learned respective Counsel for the parties. Rule. Rule made returnable forthwith. With the consent of learned Counsel for the parties, taken up for final hearing.

2. By the present petition filed by the petitioner (original accused) under Article 227 of the Constitution of India, the petitioner has prayed that the order dated 24th July 2012, passed by the learned Judicial Magistrate (F.C.), Court No. 1, Aurangabad, below Exhibit 47/D, in S.C.C. No. 5305/2009, be quashed and set aside.

3. Parties are hereinafter referred to as per their original status i.e. accused and complainant.

4. The factual matrix of the case is as under:

(a) The respondent no. 2 i.e. original complainant filed S.C.C. No. 5305/2009 against the petitioner herein i.e. original accused for the offence punishable u/s 138 of Negotiable Instruments Act, 1881, and accordingly, petitioner herein is the original accused, and respondent no. 2 is the original complainant therein.

According to respondent no. 2 i.e. original complainant, he has supplied the articles to the accused Company, and the said goods were delivered on 9-2-2009. The accused/petitioner issued a cheque bearing No. 252955 dated 16th March 2009, for Rs. 2,81,185/- against the outstanding amount of the said supplied goods, drawn on Axis Bank Limited, New Marine Lines, Mumbai. The respondent no. 2 presented the said cheque for encashment purpose. However, the said cheque was dishonoured and returned unpaid on 22nd July 2009 by the banker with the bank return memo bearing endorsement "funds insufficient". Hence, respondent no. 2 issued statutory notice to the petitioner, through Advocate, on 4-8-2009. The accused replied the said notice on 14-8-2009 and denied the liability of the payment of cheque amount to the complainant. Hence, the complainant filed complaint against the accused before learned Judicial Magistrate (F.C.), Court No. 1, Aurangabad, under S.C.C. No. 5305/2009, u/s 138 of Negotiable Instruments Act. Accordingly, learned Judicial Magistrate (F.C.) issued process against the accused. The accused appeared in the said case and his plea was recorded and he pleaded not guilty. Thereafter, the respondent no. 2 herein i.e. complainant filed his affidavit of examination in chief on 11-2-2010. Thereafter, on 27-2-2012, the said witness was cross examined by the Advocate for the accused partly, and the matter was adjourned for filing of documents and for further cross examination on 12th March 2012, 10th April 2012 and 4th May 2012.

(b) On 4th May 2012, according to the accused, the complainant was not present before the court, and therefore, cross examination could not take place in the morning session. According to the accused, in the afternoon session, Advocate for the accused was not feeling well due to sun stroke, and therefore, he preferred application for adjournment below Exhibit 43/D. The complainant filed his reply to the said application and opposed the said application. Accordingly, the said application was rejected by the learned trial court observing that the complainant was present since morning before the court and cross examination of the complainant was already conducted partly and there was no sufficient ground for adjourning the matter. In view of rejection of the said application Exhibit 43/D, learned trial court posted the matter for recording statement of the accused u/s 313 of the Code of Criminal Procedure. However, on 3rd July 2012, accused preferred another application Exhibit 47, and thereby requested to set aside the "no cross" order and sought permission for further cross examination. The complainant filed his say and opposed the said application, and requested for issuance of warrant against the accused since he was absent before the court for recording of statement u/s 313 of the Code of Criminal Procedure. Accordingly, considering contents of the said application and the reply, learned trial court passed an order on 24th July 2012, below application Exhibit 47, and thereby rejected the said application, and the said order is impugned in the present petition.

5. The respondent no. 2 has filed affidavit in reply and opposed the present petition vehemently and put forth the factual aspects stating that the respondent

no. 2/complainant filed affidavit of examination in chief on 11-2-2010, and the matter was posted for cross examination of the accused on 27th February 2012, and accused sought adjournment for filing documents. Thereafter, the matter was adjourned from time to time 26-2-2012, 12-3-2012, 10-4-2012, and thereafter fixed on 4-5-2012. On 4-5-2012, the complainant and his Advocate were present in the court hall in the morning session, but Counsel for the accused was absent, and therefore, learned trial court kept the matter in the afternoon, since usually Advocate for the accused attended the matter in the afternoon. Thereafter, complainant and his Advocate remained present in the afternoon session, but Advocate for the accused sent adjournment application through someone contending that he was all of sudden not feeling well. Hence, the complainant filed application before learned trial court, stating that he came from Pune for cross examination and it was not possible for him to attend the court, as he has joined another Company, and also stated that the matter was lingering from many days and accused was playing tactics of delay to protract the matter unnecessarily. Accordingly, learned trial court considering the reply filed by the complainant, rejected the application preferred by the accused. Thereafter, accused filed application on 3rd July 2012 for setting aside "no cross" order and sought opportunity for cross examination. Learned trial court set aside the said order subject to costs and permitted the accused to take cross examination of the complainant on 24th July 2012. However, on 24th July 2012 also, though time was granted for cross examination, Advocate for the accused failed to conduct cross examination and sought adjournment without giving any substantial reason. Hence, learned trial court rejected the said application for adjournment and kept the matter for recording statement of the accused. However, Advocate for the accused had given time to time assurance to the learned trial court that he would arrange for presence of the accused before the court, but the accused remained absent and prolonged the matter without any reason. Hence, on the request of Advocate for the complainant, learned trial court issued bailable warrant against the accused and notice to the surety, and thereafter matter was kept on 7-9-2012. However, learned trial court granted bail and cancelled the warrant and matter was kept on 21-9-2012. However, accused remained absent but his Advocate was present, and therefore, matter was posted on 3rd October 2012 for recording statement of the accused u/s 313 of the Code of Criminal Procedure. On 3-10-2012, Advocate for the accused tendered the order passed by this Court granting stay in the said matter. Thus, according to the complainant, the accused has been playing delaying tactics and protracting the matter with ulterior motive, and hence, it is contended that there is no substance in the present petition, and the same is devoid of any merits, and therefore, same be dismissed.

6. Learned Counsel for the petitioner canvassed that not allowing the accused to conduct further cross examination of the complainant amounts denial of fair trial to the accused. He further submitted that the accused is ready and willing to conduct further cross examination of the complainant on day-to-day basis. He

further submitted that the accused cannot be convicted without giving opportunity to cross examine the complainant further. He further canvassed that fair trial includes fair opportunity. Moreover, cross examination is a valuable right and denial of such right would mean denial of fair trial. According to him, rejection of the application results in violation of principles of natural justice. Hence, he urged that opportunity be given to the accused to conduct cross examination/further cross examination of the complainant by setting aside the impugned order.

7. Learned Counsel for respondent no. 2 countered the said arguments and submitted that sufficient opportunity was given to the accused to conduct cross examination/further cross examination of the complainant, but the accused has not availed the said opportunities and adopted the tactics to protract the matter with ulterior motive. He also submitted that "no cross" order was set aside by the learned trial court on payment of costs, but thereafter also the accused has not conducted further cross examination of the complainant. Thus, it is pointed out by the learned Counsel for respondent no. 2 that due and sufficient opportunity was given to the accused to conduct cross examination/further cross examination of the complainant, and principles of natural justice were duly observed by the learned trial court. However, it is submitted that the accused has taken disadvantage of the sufficient opportunity given to him and tried to protract the matter on some or other pretext, and therefore, learned trial court has rightly passed the order on 24th July 2012 below Exhibit 47, observing that though opportunities were given to the accused to further cross examine the complainant, the accused remained absent, and even complainant has come all the way from Pune, and there was no sufficient ground for not conducting cross examination of the complainant on that day, and accordingly, rejected the said application preferred by the accused rightly, and no interference is called for in the present petition. Thus, learned Counsel for respondent no. 2 urged that the present petition be dismissed. He relied upon judicial pronouncement of Delhi High Court, in the case of Bobby Kapoor Vs. Citi Finance Consumer Finance India Ltd. and others, reported at 2012 (2) BJ 376, wherein it is observed thus:

The Court can only give opportunity to cross-examine the witness, the Court cannot force an advocate to conduct cross-examination if he is not willing and the only option available with the Court under such circumstances is to close the cross-examination. The trial of a case cannot go as per the whim and fancies of either the accused or his Counsel. A summary trial has to be speedier and must end as quickly as possible. No date of hearing can be allowed to be wasted because of adamant attitude of the Counsel. The Trial Court therefore rightly closed the cross-examination of the witness.

8. I have perused the present petition, its annexures, application Exhibit 43/D dated 4th May 2012, preferred by the accused, reply by the respondent no. 2 thereon, and the order passed by the learned trial court thereon. Moreover, I have also perused application Exhibit 47 dated 3rd July 2012, preferred by the

accused, and the reply filed by respondent no. 2 thereto dated 3rd July 2012, and the impugned order passed by the learned trial court on 24th July 2012, and heard rival submissions advanced by the learned Counsel for the parties anxiously, and also perused the judicial pronouncement cited by the learned Counsel for respondent no. 2 carefully.

9. It is the matter of record that sufficient opportunities were given to the accused to conduct cross examination and even further cross examination of the complainant, but still the accused has not availed the said opportunities. Moreover, it also appears that the learned trial court has set aside the "no cross" order on payment of costs and matter was posted for further cross examination of the complainant on 24th July 2012. However, it appears that on 24th July 2012 also, though time was granted for further cross examination of the complainant, Advocate for the accused failed to conduct the cross examination and again sought adjournment. It appears from the impugned order dated 24th July 2012, that the complainant was present before the court, who all the way had come from Pune. Hence, learned trial court rejected the application preferred by the accused for adjournment, observing that there was no sufficient ground for not conducting further cross examination of the complainant and posted the matter for recording statement of the accused u/s 313 of the Code of Criminal Procedure. Thus, it is amply clear that sufficient opportunities were given to the accused by the learned trial court to conduct further cross examination of the complainant.

10. Besides, admittedly, present case is a complaint filed u/s 138 of Negotiable Instruments Act, which is a summary trial and it cannot be overlooked that it shall be decided speedily. However, simultaneously, it also cannot be ignored that there should be a fair trial and right to cross examination should not be denied to the accused since the accused can avail opportunity of putting his defence through such cross examination. Hence, principles of natural justice require that due opportunity be given to the accused to conduct further cross examination of the complainant, but it shall be certainly on payment of reasonable costs by the accused to the complainant and parties are required to be directed to remain present before learned trial court on a specified date, by setting aside the impugned order and allowing the present petition, which would meet the ends of justice.

11. In so far as judicial pronouncement cited by the learned Counsel for respondent no. 2, in that case, it appears that copies of certain documents were not allegedly supplied to the Advocate, and therefore, he persisted that he would not cross examine the complainant's witness as loan agreement was not supplied to him, and therefore, learned Judge observed in the said case that the trial cannot go as per the whim and fancies of either the accused or his Counsel, and summary trial must be speedier and no date of hearing can be allowed to be wasted because of adamant attitude of the Counsel, and consequently, dismissed the said petition. However, so is not the position in the instant case, and hence,

facts and circumstances in the said case and facts and circumstances in the present case differ from each other. Ultimately, court has to see that no injustice is caused to either of the parties and due and fair opportunity be given to the complainant, as well as, to the accused, and therefore, present petition deserves to be allowed with the above referred directions.

12. In the result, present petition is allowed in terms of prayer clause "B" thereof, and the impugned order dated 24th July 2012, passed by the learned Judicial Magistrate (F.C.), Court No. 1, Aurangabad, below Exhibit 47/D in S.C.C. No. 5305/2009, stands quashed and set aside, and the complainant and original accused and their respective Advocates shall remain present before learned trial court at 11.00 a.m. on 1st December 2012, and the Advocate for the accused shall conduct further cross examination of the complainant on the said date, without any excuse and if the said cross examination is not completed on the said date, it shall be continued on 3rd December 2012, and thereafter on day-to-day basis, if required, subject to payment of costs by the accused to the complainant, which is quantified at Rs. 2,000/- [Rupees two thousand only], to be paid on or before next date. Rule is made absolute in the aforesaid terms, and the present petition is disposed of accordingly.