

(2011) 05 BOM CK 0031

In the Bombay High Court

Case No : Criminal Appeal No. 256 of 2011 and Criminal Application No. 4540 of 2010

Shri Pratap Talreja

APPELLANT

Vs

Shri Bhagwandas Matani

RESPONDENT

Date of Decision : 02-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256, 256(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 4 BC 108

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : R.J. Kataria, for the Appellant; S.B. Yawalkar, for the Respondent

Judgement

Shrihari P. Davare, J.—Learned Advocate for Respondent has filed affidavit-in-reply and the same is taken on record.

2. Heard learned Counsel for the parties.

3. This is an application preferred by the applicant (original complainant) seeking leave to file appeal, challenging order dated 14.10.2010, passed by the learned Judicial Magistrate, First Class, Jalgaon, in Summary Criminal Case No. 579 of 2004, thereby dismissing the said complaint in default u/s 256 of the Code of Criminal Procedure and consequently, acquitting the Respondent herein (original accused) for the offence punishable u/s 138 of the Negotiable Instruments Act.

4. Since it appears from the impugned order itself that the complaint filed by the applicant herein (original complainant) came to be dismissed in default due to absence of the complainant and his Advocate u/s 256 of the Code of Criminal Procedure resulting into acquittal of the Respondent-accused for the offence punishable u/s 138 of the Negotiable Instruments Act, it is apparent that the said dismissal is technical, and therefore, leave to file appeal is granted and present application is treated as appeal. Appeal be registered and numbered, accordingly.

5. Admit. Mr. Yawalkar, Advocate for Respondent waives the service of notice after admission.

6. With the consent of learned Counsel for the parties, present appeal is taken up for final hearing.

7. Briefly stated, the facts of the case are that the complainant and the accused claim to be friends of each other and they had cordial relations. It is alleged that in December 2003, the accused was in financial difficulties, and therefore, he requested the complainant to give him Rs. 5.00 lakhs as hand loan, with the assurance that he would repay the same, shortly.

8. Pursuant to the said request of the accused, the complainant arranged for the amount of loan of Rs. 5.00 lakhs from his relatives, friends, as well as from his own funds and gave the same to the accused. It is also alleged that the relations between the complainant and accused being of belief, complainant did not obtain any receipt from the accused. Thereafter, as decided between them, the complainant demanded back the amount of Rs. 5.00 lakhs from the accused, and in pursuance thereof, the accused issued cheque bearing No. 0029045 dated 22.1.2004 for Rs. 1.00 lakh drawn on Union Bank of India, in favour of the complainant. Accordingly, the complainant presented the said cheque for encashment through Jalgaon People's Cooperative Bank on 22.1.2004 itself. However, the said cheque was dishonoured and was returned unpaid with endorsement "insufficient funds", on 24.1.2004 along with bank return memo, and hence, the complainant issued demand notice to the accused on 27.1.2004 and demanded the cheque amount from him. The said notice was received by the accused on 29.1.2004, but the accused neither repaid the amount of cheque to the complainant nor replied to the said notice, and hence, on 16.2.2004, complainant filed complaint bearing S.T.C. No. 579 of 2004, in the Court of J.M.F.C. Jalgaon, against the accused for having committed offence u/s 138 of the Negotiable Instruments Act.

9. Accordingly, process was issued against the accused on 6.10.2006. It appears that the accused did not appear on issuance of summons and, therefore, bailable warrant was required to be issued against him on but still he did not appear and hence, non bailable warrant was issued against him on 21.1.2010 and thereafter the accused was arrested and was brought before the court, on 25.1.2010. Thereafter, it appears, that the complainant and his Advocate remained absent on various dates, viz. 14.5.2010, 25.6.2010, 21.7.2010, 20.8.2010, and therefore, the said complaint was posted on 20.9.2010, for dismissal. However, the complainant and his Advocate remained absent on the said date also, and the matter was adjourned to 14.10.2010. On the complainant and his Advocate remained absent and consequently, learned Magistrate dismissed the complaint u/s 256 of the Code of Criminal Procedure, on 14.10.2010 and acquitted the accused for the offence punishable u/s 138 of the Negotiable Instruments Act.

10. Being aggrieved and dissatisfied by the impugned order dated 14.10.2010,

passed by the learned J.M.F.C., Jalgaon, the original complainant has preferred present appeal, challenging the same and prayed for quashment thereof.

11. Learned Counsel for the Appellant canvassed that although the complaint was filed by the complainant in the year 2004 and process came to be issued against the accused in the year 2006, presence of the accused could be secured after lapse of about four years, after his arrest on 25.1.2010 which itself reflects that the accused avoided to appear in the matter. Learned Counsel for the Appellant-complainant also submitted that the accused approached the complainant and told him that he wanted to compromise the matter and orally assured that he would repay the entire amount and requested the complainant that he should not take further steps in the matter before the court, and therefore, the Appellant-complainant was under bonafide belief that the matter is likely to be settled out of the court.

12. As regards absence of the Appellant on 20.8.2010, learned Counsel for the Appellant submitted that due to illness, the Appellant could not remain present before the court on that date and thereafter the matter was posted to 20.9.2010 and thereafter to 14.10.2010 and came to be dismissed in default. In the said context, learned Counsel for the Appellant submitted that since the Appellant was under bonafide impression that the matter would be settled out of the court as assured by the accused, he and his advocate remained absent before the trial court on 14.10.2010 which resulted into dismissal of the complaint u/s 256 of Code of Criminal Court and acquittal of accused, which deserves to be quashed and set aside in the interest of justice.

13. Shri Kataria, learned Counsel for the Appellant placed reliance upon the judgment of Punjab and Haryana High Court in the case of Manjit Kaur v. State of Punjab and Anr. reported in 2006 (6) ALL MR (Journal) 27, and more particular on paragraph 6 thereof which reads:

The above provisions clearly provide that the real test in such like cases is of good faith. The Court has to consider the facts of each case and to see as to whether the complainant was absent for any good reason or not. The Apex Court in Mohd. Azeem's case 2007 (7) SCC 726 (supra), in similar circumstances, set aside the order of the learned Magistrate and restored the complaint observing that one singular default in appearance on the part of the complainant was not sufficient to dismiss the complaint in default when the cause shown by the complainant for the absence had not been disbelieved and was a valid ground for restoration of the complaint. In the present case, even the process had not been issued to the accused and Petitioner had placed on record the medical certificate of the doctor advising her rest for 10 days with effect from 30-6-1997. The proviso to Sub-section (1) of Section 256 of the Code of Criminal Procedure clearly provides that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate thinks that the personal attendance of the complainant is not necessary, the same may be dispensed with. The Court need not adopt a shortcut method to put an end to the

litigation. The learned Magistrate, before dismissing the complaint in default should have recorded the reasons as to why he does not deem it proper to adjourn the hearing. However, no such reasons were forthcoming and, therefore, the impugned order cannot be sustained.

Moreover, learned Counsel for the Appellant also relied upon the judgment in the case of Narender Parashar v. Jagbir Sing 2009 ALL MR (Cri.) Journal 329, and more particularly on para 5 thereof which reads:

5. The cause shown by the Appellant for his non-appearance before the learned Trial Court is noting down the next date of hearing as 24.11.2007 instead of 5.11.2007 due to communication gap between Reader of the Court as well as his counsel. As is well known, a party should not be allowed to suffer because of a negligence of his counsel's part. In re: Purushotam Mantri v. Vinod Tandon alias Hari Nath Tandon 2008 (4) CCC 64 (P&H) : 2008 (3) PLR 595 (P&H) it has been observed that it would be too harsh on the Petitioner to non-suit him merely for his non-appearance on one date. In the instant case too, the facts are similar. To my mind, the cause put-forth by the Appellant for setting aside the impugned order is sufficient. The doctrine of "audialteram partem" too contemplates that no one should be condemned unheard. If the impugned order is allowed to hold ground without any fault of the Appellant, he will feel prejudiced in his right. In the orders of F. Bucan "Nothing rankles more in the human heart than brooding sense of injustice.". If the Appellant is not afforded the opportunity to substantiate the allegations contained in complaint by leading evidence, it will go on ranking in his mind that injustice has been done to him. The Courts are here to administer justice. Therefore, without sojourning any longer on this short point, the impugned order dated 5.11.2007 passed by the Court of learned Additional Chief Judicial Magistrate, Faridabad, is set aside with a direction to restore Complaint Case No. 378/(sic) 19.10.2006 bearing caption "Narender Parashar v. Jagbir Sing" to its original number and proceed further according to law. The Appellant through his counsel has been directed to put in his appearance before the aforementioned Court on 16.4.2009 at 20.00 A.M. The Registry is directed to transmit a certified copy of this judgment to the said Court at the earliest possible.

14. Accordingly, learned Counsel for the Appellant urged that the impugned order dated 14.10.2010 dismissing the complaint of the Appellant in default u/s 256 of the Code of Criminal Procedure and acquitting the accused for the offence punishable u/s 138 of the Negotiable Instruments Act, be quashed and set aside and the Appellant-complainant be given an opportunity to prosecute the said complaint on its own merits.

15. Learned Counsel for the Respondent-accused countered the said arguments and opposed the present appeal, vehemently. Learned Counsel for the Respondent controverted the plea put-forth by the Appellant-complainant that there were any talks of compromise between the Appellant and the Respondent and categorically denied that the accused-Respondent herein gave any assurance

to the complainant that the matter would be settled out of the court or requested the complainant not to take further steps in respect of the said complaint, and therefore, learned Counsel for the Respondent submitted that there is no question of any bonafide belief of the complainant that the matter was to be settled out of the court, as contended by learned Counsel for the Appellant.

16. As regards absence of the complainant and his advocate on 20.8.2010, although it is submitted by learned Counsel for the Appellant that due to illness the complainant could not remain present before the trial court, learned Counsel for the Respondent submitted that the Appellant has not produced any medical certificate or any other document to substantiate the said contention. It is further submitted by the learned Counsel for the Respondent that assuming without admitting that the complainant was ill on that date, and therefore, remained absent before trial court on 20.8.2010, still Appellant has not given any reason for absence of his Advocate on that date before the trial court.

17. Besides that, as regards absence of the Appellant and his advocate on 14.10.2010, learned Counsel for the Respondent submitted that although the matter was fixed on that date for dismissal in default, no cogent reason has been given by the Appellant for his absence, or absence of his advocate on that date, and therefore, the trial court rightly dismissed the said complaint u/s 256 of the Code of Criminal Procedure and consequently, acquitted the accused for the offence with which he was charged, and therefore, no interference therein is warranted, in the present appeal. Accordingly, learned Counsel for the Respondent urged that the present appeal bears no substance, and same is devoid of any merits, and hence, same be dismissed.

18. I have considered the submissions advanced by learned Counsel for the parties, anxiously and also considered the judicial pronouncements cited by Appellant carefully, and also perused the impugned order dated 14.10.2010 and it is apparent that dismissal of the complaint filed by the present Appellant u/s 138 of the Negotiable Instruments Act resulting into acquittal of the Respondent accused on 14.10.2010, was due to absence of the complainant and his advocate on that date, and as such, the said dismissal of the complaint was on technical ground and not on merits. Moreover, it appears that the vital rights of the complainant are involved in the said complaint since, apparently, the transaction between the complainant and the accused was in respect of cheque for Rs. 1.00 lac which is involved in the matter and therefore also, opportunity is required to be given to the complainant to prosecute the said matter on its own merits.

19. 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 non bailable warrant, as mentioned hereinabove. 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 alteram partem* 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.

20. 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. 2500/=.

21. In the result, present appeal is allowed and the impugned order dated 14.10.2010 passed by the learned Judicial Magistrate, First Class, Jalgaon, SCC No. 579 of 2004, dismissing the said complaint in default u/s 256 of the Code of Criminal Procedure and consequently, acquitting the accused for the offence punishable u/s 138 of the Negotiable Instruments Act, stands quashed and set aside, and said SCC No. 579 of 2004 stands restored to the file at its original stage, and the matter is remanded back to the trial court to decide the same afresh, on its own merits and parties are directed to remain present before the trial court on 14.6.2011 at 11.00 A.M. and further directed not to seek adjournments unless warranted emergently, and the learned Trial Court to decide the said criminal case, expeditiously, subject to payment of costs quantified at Rs. 2500/= by the Appellant-complainant to the Respondent-accused, on or before 14.6.2011, and present appeal stands disposed of accordingly.