

(2017) 10 BOM CK 0038

In the Bombay High Court

Case No : 99 of 2017 and Stamp Number Main No 1021 of 2017

Shri Shaikh Akbar Talab

APPELLANT

Vs

Shri. A.G.Pushpakaran, C/o Nurudddin Khan, & Anr.

RESPONDENT

Date of Decision : 03-10-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 256](#) - Non-appearance or death of complainant
[Negotiable Instruments Act, 1881](#), [Section 138](#) - Dishonour of cheque for insuffici

Citation : (2017) 10 BOM CK 0038

Hon'ble Judges : Prithviraj K. Chavan

Bench : SINGLE BENCH

Advocate : Deepak Gaonkar, Rohan Desai

Final Decision : Allowed

Judgement

1. Special leave to appeal is granted.
2. By consent taken up for final hearing. Admit. The learned counsel waives service for respondent no.1.
3. The applicant herein had filed a complaint under Section 138 of the Negotiable Instruments Act against respondent no.1. They are friends. The applicant is a businessman dealing in the business of construction. Respondent no.1 had purchased cement and other hardware material from the applicant on credit. Respondent no.1 had, therefore, issued a cheque bearing no.915267 of Rs. 1,00,000/- dated 20.12.2014 drawn on Punjab and Sind Bank, Acqyaruys Apartment, Swami Vivekanand Marg, Panaji Goa. On presentation of the said cheque, it was returned back by remarks "no such account". Since the cheque was dishonoured, notice was issued on 29.1.2015, which was duly received by respondent no.1 on 30.1.2015.
4. The applicant, therefore, filed a complaint under Section 138 of the Negotiable

Instruments Act before the learned JMFC. The respondent appeared on 19.8.2016 and sought time to furnish surety. The case was adjourned on 17.9.2016. The respondent no.1 thereafter appeared and furnished surety. He pleaded not guilty and, therefore, the case was fixed for trial on 14.10.2016.

5. On 3.11.2016 the applicant was present before the learned Magistrate and sought time to file affidavit in lieu of evidence. The case was adjourned for taking steps on 17.11.2016. On 17.11.2016 the applicant sought exemption and time to file affidavit-in evidence which was granted and the matter was adjourned to 30.11.2016.

6. The applicant filed an affidavit in lieu of evidence on 30.11.2016 and its copy was given to respondent no.1. The matter, therefore, came to be adjourned to 28.12.2016. On 28.12.2016, the applicant could not remain present on account of his difficulty which was duly considered by the learned Magistrate and granted a last chance to the applicant and adjourned the matter to 19.1.2017.

7. On 19.1.2017 since the mother of the applicant had a fall from bed at her residence, the applicant had to carry her to Goa Medical College for treatment, as she was unconscious. On the same day, the applicant informed his Advocate that he could not remain present in the Court due to illness of his mother. His Advocate promised him to do needful in the Court by mentioning the matter. Since the applicant remained busy with his mother, he could not contact his Advocate and ultimately on 3.2.2017 his Advocate Y. Gauns informed him that the learned Magistrate has dismissed the complaint on 2.2.2017. The Advocate of the applicant informed him that he could not remain present in the Court when the matter was called because of his difficulty.

8. The applicant, therefore, submits that he was under a bonafide impression that his Advocate would attend the matter on 19.1.2017, as he had already informed his Advocate about his inability to attend the Court on that date due to the reason of his mother. It was the duty of the Advocate to remain present or to make some arrangement which he did not do and, therefore, the complaint came to be dismissed by the learned Magistrate.

9. As such, it is submitted that the applicant could not remain present only on 19.1.2017 and 2.2.2017 which was neither intentional nor deliberate and, therefore, he should not be made to suffer on account of failure on the part of his Advocate to remain present in the Court for hearings.

10. I have heard Shri Deepak Gaonkar, learned counsel appearing for the applicant, who argued in support of his application by reiterating that absence of the applicant was bonafide and, therefore, interest of justice would be subserved, if the impugned order of dismissal of the complaint is set aside and the matter is restored to the file of the trial Court for decision on merits. According to the learned counsel, despite intimating by the applicant to his lawyer, he did not appear for which he should not suffer.

11. Per contra, learned counsel for respondent no.1 submits that it was a wilful absence of the applicant, who was aware about the last chance granted to him. It is also submitted that there is no medical proof on record to show that the applicant's mother was ill. If the appeal is allowed, it would cause prejudice to respondent no.1.

12. It is well settled by a catena of decisions that doctrine of audi alteram partem contemplates that no one should be condemned unheard. It is also held in number of decisions that a party should not be allowed to suffer because of a negligence of his counsel. The learned counsel appearing for respondent no.1 has not challenged the contention of the applicant that the complaint came to be dismissed due to the communication gap or rather negligence of the Advocate appearing for the applicant in the trial Court as is evident from the copy of roznama filed on record. It appears that the applicant was diligent enough to inform the counsel on 19.1.2017 as regards his inability to attend the Court on account of illness of his mother who was required to be admitted in Goa Medical College as she became unconscious due to a fall from the bed. The roznama dated 2.2.2017 also confirms the fact that the Advocate for the complainant was also absent. The learned Magistrate, therefore, proceeded under Section 256 of Code of Criminal Procedure and dismissed the complaint, which has resulted in acquittal of the accused. It is pertinent to note that the complainant had already filed an affidavit in lieu of evidence and the matter was posted probably for recording the evidence and cross-examination of the complainant. If the impugned order is allowed to hold ground without any fault on the part of the applicant/complainant, he would indeed feel prejudice as regards his valuable rights.

13. The learned counsel for the applicant has, therefore, rightly placed a useful reliance on a case law of this Court reported in 2011 ALL MR (Cri) 2192 (Shri Pratap s/o Gopaldas Talreja Vs. Shri Bhagwandas s/o Jehumal Matani). The learned counsel has also placed reliance on the cases reported in 2011 ALL MR (Cri) 1840 (Terna Shetkari Sahakari Sakhar Karkhana Ltd., Tq. & Dist. Osmanabad Vs. Anant s/o Laxman Ghogre and Anr.) and 2011 ALL MR (Cri) 2198 (Murlidhar s/o Harkisandas Manwani Vs. Shri Sharangdhar s/o Ramlal Lohar).

14. In all these cases cited (supra) the complaint was dismissed under Section 256 of CrPC by the learned Magistrate due to absence of the complainant. It is held that principles of natural justice are required to be followed by giving an opportunity to the complainant to prosecute the complaint on merits as well as an opportunity is to be given to the accused to contest the complaint on merits. Therefore, the matters were restored by quashing and setting aside the impugned orders.

15. The disposal of the complaint herein filed by the applicant under Section 138 of Negotiable Instruments Act resulting into acquittal of the respondent 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 grounds and not on merits. Vital

rights of the complainant are involved in the said complaint since apparently there was a transaction between the complainant and the accused in respect of cheque of Rs. 1,00,000/- which is involved in the matter and, therefore, an opportunity is required to be given to the complainant to prosecute his complaint on merits.

16. In the light of the aforesaid discussion of facts and taking into consideration the ratio laid down by this Court in the authorities cited (supra) the following order is passed:- Order

The appeal is allowed. The impugned order passed by the learned Magistrate in Criminal Case No.163/OA/138/2016 dated 2.2.2017 is hereby quashed and set aside and the criminal complaint is restored to its original stage. The parties shall appear before the trial Court on 12.10.2017 at 11.00 a.m.. The learned JMFC is directed to proceed with the matter as per law.

Criminal Misc. Application No.99/2017 and Stamp Number Main No.1021 of 2017 are hereby disposed of accordingly.