

(2011) 04 BOM CK 0090

In the Bombay High Court

Case No : Criminal Application No. 597 of 2011

The Maharashtra State Cooperative Marketing Federation Ltd. **APPELLANT**
Vs

Baliraja Krushiseva Bijotpadak Va Vi tarak Sahakari Sanstha **RESPONDENT**
Ltd., Sadhu Mule, Chairman of Baliraja Krushiseva Bijotpadak
Va Vi tarak Sahakari Sanstha Ltd. and Shankar Laxman Puri

Date of Decision : 11-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142
Penal Code, 1860 (IPC) — Section 420

Citation : (2011) 4 BC 291 : (2011) 113 BOMLR 1646 : (2011) 4 RCR(Civil)
152 : (2011) 4 RCR(Civil) 152 : (2011) 4 RCR(Criminal) 38

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : S.S. Thombre, for the Appellant; S.J. Salgare holding for S.S. Jadhav, for the Respondent

Final Decision : Allowed

Judgement

Shrihari P. Davare, J.—Heard Mr. Thombre learned Counsel for the applicant (Original Complainant) and Mr. S. J. Salgare, holding for Smt. S.S. Jadhav, 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 23rd September, 2009, passed by the learned 3rd Joint Judicial Magistrate First Class, Osmanabad in S.C.C. No. 1252 of 2004, thereby dismissing the complaint filed by the complainant i.e. applicant herein in default, u/s 256 of the Code of Criminal Procedure and acquitting the Respondents accused for the offence punishable u/s 138 of the Negotiable Instruments Act.

3. I have perused the impugned order dated 23rd September, 2009, as well as considered the submissions advanced by the learned Counsel for the parties.

Since the dismissal of the complaint by order dated 23rd September, 2009, is technical dismissal i.e. dismissal in default u/s 256 of the Code of Criminal Procedure, and not on its own merits, the 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 an appeal challenging the impugned order dated 23rd September, 2009, passed by the learned 3rd Judicial Magistrate First Class, Osmanabad, in the interest of justice.

4. Accordingly, present application is allowed. Leave to file appeal is granted and present application itself is treated as Appeal.

Admit.

5. The learned Counsel for Respondents waives the service of notice after admission.

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

7. Heard learned Counsel for the parties. The Appellant herein is original complainant, whereas Respondents herein are original accused.

8. The Appellant herein is carrying the business of manufacturing of chemical fertilizers, and as well as sell and purchase thereof, and is having its offices situated in entire Maharashtra, and one of its offices was based at Osmanabad and Mr. S.P. Kasar was appointed and was working as District Marketing Officer, in the said office at the relevant time, as well as one Balasaheb Rangnath Magar, who filed the complaint working as District Marketing Officer, who was authorized to file complaint and to do the acts as per resolution passed by the complainant. Accused No. 1 is registered Agricultural Seeds Manufacturing and Distribution Co-Operative Society, and accused Nos. 2 and 3 were their Chairman and Secretary respectively, at the relevant time. It is alleged that, there are business transactions between the complainant and accused, and accused purchased material from the complainant on credit, and amount of Rs. 5,95,038/(Rupees Five Lacs Ninety Five Thousand Thirty Eight) was due towards the accused. Hence, the complainant demanded the said amount from the accused, and thereupon accused issued two cheques i.e. one for Rs. 2,95,038/(Rupees Two lacs Ninety Five Thousand and Thirty Eight) bearing No. 251356 dated 31st March, 2004 and another for Rs. 3,00,000/(Rupees Three lacs) bearing No. 251357 dated 31st March, 2004, towards repayment of the said bill/dues.

9. The complainant presented the said cheques for encashment purpose, however, both the said cheques were dishonoured and returned unpaid with endorsement "Funds Insufficient" on 21st May, 2004. Hence, complainant issued demand Notice on 21st June, 2004, calling upon the accused Respondents to pay an amount under cheque in question within 15 days, and the notice charges as mentioned therein. However, the accused Respondents refused to accept the said

notice and did not repay the amount of the cheques within stipulated period, and hence the complainant filed complaint against the accused Respondents for the offence punishable u/s 138 read with Sections 141, 142 of the Negotiable instruments Act, and u/s 420 of the Indian Penal Code, before the Judicial Magistrate First Class, Osmanabad, on 06th August, 2004. It appears that the accused appeared therein and their plea was recorded on 2nd February, 2009.

10. Thereafter, it also appears that, the complainant remained absent on the subsequent dates, 06th May, 2009, 26th August, 2009, 16th September, 2009, and on 23rd September, 2009, therefore, the learned trial Judge has observed that complainant is repeatedly absent since long and even absent on 23rd September, 2009 and also he has not filed his evidence, therefore the learned trial Judge further observed that, from the conduct of the complainant, it appears that he is not interested in prosecuting the matter and dismissed the complaint in default for want of prosecution and acquitted the accused for the offence punishable u/s 138 of the Negotiable instruments Act, by order dated 23rd September, 2009.

11. Being aggrieved and dissatisfied by the said judgment and order of dismissal of the complaint and acquittal of the accused as aforesaid, the complainant has filed present appeal and prayed for quashing the said order.

12. It is contention of the applicant Appellant that learned trial Judge has not considered the fact that matter was in respect of huge amount covered under the cheques and conveniently overlooked the principles of natural justice, and the impugned order of the trial Judge is perverse and therefore, same is liable to be quashed and set aside. It is also contention of the Appellant that there was lack of communication between the applicant - Appellant, its officers and Advocate, and therefore, the Appellant could not secure his presence on 06th May, 2009, 26th August, 2009, 16th September, 2009, which resulted into passing of the impugned order, although the Appellant was diligent in prosecuting the matter, and therefore, prays for remanding the matter to the learned trial Court for fresh trial.

13. It is further contention of the Appellant that the learned trial Court ought to have considered that there was communication gap between the Appellant and its advocate, therefore complainant may not be suffered therefor.

Therefore, he also submitted that the impugned order dated 23rd September, 2009 needs to be quashed and set aside and an opportunity of fresh trial be afforded to the Appellant original complainant.

14. Learned Counsel for the Respondents (original Accused) opposed the present appeal vehemently and submitted that the complaint was filed by the complainant in the year 2004, and complainant was not diligent in prosecuting the said complaint. It is also canvassed that, although plea of the accused Respondents was recorded on 2nd February, 2009, and the matter was subsequently put up on 06th May, 2009, 26th August, 2009, 16th September,

2009 for dismissal by the learned trial Court, but still complainant remained absent on the said dates and ultimately complainant remained absent on 23rd September, 2009, therefore, the learned trial Judge has rightly dismissed the complaint of the complainant and acquitted the Respondent accused for the offence punishable u/s 138 of the Negotiable Instruments Act and no interference therein is called for in the present appeal.

15. It is further submitted that ground put forth by the Appellant for his absence bears no substance and accordingly the Appellant applicant complainant has failed to prove the sufficient grounds for its nonappearance on the date of dismissal and submitted that present appeal be dismissed.

16. I have perused the contents of the complaint filed by the complainant, contents of the impugned order dated 23rd September, 2009, passed by the learned trial Judge, and also considered the submissions advanced by the learned Counsel for the parties. It appears from the contents of the impugned order and there can not be any dispute that complainant was not diligent in prosecuting the complaint and he remained absent after recording plea of the accused Respondents, i.e. on 06th May, 2009, 26th August, 2009, 16th September, 2009 and ultimately remained absent on 23rd September, 2009, which resulted into dismissal of the complaint on same day. However, the ground put forth by the Appellant for the said absence is that there was communication gap between the Appellant and its Advocate and Appellant was not aware of the aforesaid dates, therefore, he could not remain present on the aforesaid dates, is required to be considered in proper perspective.

17. Admittedly, the Appellant is an Institution and not private person. There is no reason to disbelieve the ground put forth by the Appellant for absence of its officers on the aforesaid dates. Moreover, opportunity is required to be given to the Appellant to adduce its evidence and prosecute the complaint on its own merits.

18. Having comprehensive regard to the facts of the case, it is apparent that Appellant has pleaded and proved sufficient grounds for his absence before the learned trial Judge on the date of dismissal on 23rd September, 2009, therefore, the impugned order of dismissal of complaint, passed by the learned Judge, on the said date deserves to be quashed and set aside, but simultaneously accused is required to be compensated aptly by payment of costs.

19. Besides, it is apparent that dismissal of the complaint, filed by the complainant, is in default, on 23rd September, 2009 which is technical dismissal and not dismissal of the complaint on its merits, therefore, also opportunity is required to be given to the Appellant to put forth his case and prosecute it, as well as to the accused to put up his defence and contest its case on its merits, and hence matter deserves to be remanded back to the learned trial Judge to decide it on its own merits, after quashing and setting aside the impugned order dated 23rd September, 2009 passed by the learned trial Judge, but after

compensating the accused by awarding reasonable costs.

20. Accordingly, present appeal is allowed, and the impugned order dated 23rd September, 2009 passed by the 3rd Judicial Magistrate First Class Osmanabad, in S.C.C. No. 1252 of 2004 dismissing the complaint 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, stands quashed and set aside subject to payment of costs of Rs. 5000/(Rupees Five Thousand), by the applicant Appellant complainant to the Respondents accused before the learned trial Court, within a period of two weeks from today, and the matter is remitted back to the learned trial Court, with direction to decide it on its own merits afresh, in accordance with law. Moreover, the parties are directed to remain present before the learned trial Court on 2nd May, 2011 at 11.00 a. m. and the parties are further directed not seek adjournments unless warranted emergently and cooperate with 14 Cri.A.597.11 learned trial Judge to decide the matter expeditiously.

21. Appeal stands disposed of accordingly.