

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 03rd May, 2012
PRONOUNCED ON: 08th May, 2012

+ **CRL.L.P. 611/2011**

ICICI BANK LTD. Appellant
Through: Mr. Karan Heera, Adv.,
proxy for Mr.Rakesh
Mukhija, Adv.

Versus

STATE & ANR. Respondent
Through: Ms.Rajdipa Behura, APP for
State – R-1.
Mr.Akash Bhalla, Adv. for
R-2.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

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1. The present Criminal Leave to Appeal is filed by appellant/complainant ICICI Bank impugning the order dated 2nd May, 2011 vide which the complaint filed by the Appellant Bank under Section 138 NI Act was dismissed under Section 256 (1) Cr.P.C and accused i.e. respondent No.2 was acquitted.

2. The case of the appellant is that the appellant/complainant was prosecuting the matter diligently and appearing on each date. On the date 02.05.2011 when the complaint was dismissed, the AR could not appear before the learned Trial Court due to wrong noting of the date of hearing of the said complaint by the counsel for the

complainant.

3. The impugned order has been challenged on the ground that the learned M.M could have adjourned the matter to some other date instead of dismissing the complaint. In the circumstances, that the amount of Rs.11 lacs is involved and it would be a loss of public exchequer if the complaint is not restored, it has been prayed that the complaint be restored in the interest of justice and matter be allowed to be proceeded in accordance with law.

4. Notice of the petition was given to State as well as issued to the respondents No.2 and 3. Respondent No.3, Director of the respondent No.2-company failed to appear despite service of notice.

5. On 23th December, 2011, Id. Counsel for the appellant appeared and submitted that total amount of Rs.11,00,000/- is involved in this case and if this petition is not allowed, it will be a loss to the exchequer of the public and that on instructions from appellant bank, he is ready to pay the cost for non-appearance of the appellant and for wasting the public time. Thereafter the matter was re-notified for 3rd February, 2012 and then for 3rd May, 2012. On 3rd May, 2012 despite the matter being passed over number of times, learned counsel for the appellant did not appear till afternoon and the proxy counsel Mr.Karan Heera, Adv. though claimed that he was ready with the arguments, when asked to argue, was not able to make any submissions.

6. The case of the appellant bank as pleaded in the complaint under Sec. 138 Negotiable Instrument Act is that

the accused named in the complaint had availed loan facility under the loan account No.603805017211 from the appellant bank and in order to discharge his part liability/debt accrued on account of dues, respondent No.2 issued and handed over a cheque bearing No.045796 dated 21.08.2009 for an amount of Rs.11,00,000/ drawn on Allahabad Bank in favour of the complainant/appellant bank. On presentation for encashment, the said cheque was returned unpaid by the drawer's bank alongwith return memo dated 26.08.2009 for the reasons 'Insufficient Funds'. Thereafter on 04.09.2009 a demand/legal notice was sent to accused/respondent No.2 by the appellant bank through its counsel thereby calling upon him to make payment of the dishonoured cheque within 15 days from the receipt of legal notice but despite that accused/respondents No.2 failed to make the payment. Hence, complaint under Sec.138 Negotiable Instrument Act was filed.

7. The submissions made by learned counsel for the petitioner that it was due to wrong noting of date that the AR or counsel could not appear on the date when the complaint was dismissed under Sec. 256(1) Cr.P.C, are contrary to the proceedings recorded on 2nd May, 2011. The order of learned Metropolitan Magistrate is extracted hereunder :-

*"ICICI Bank Ltd. vs. Tarun Mehrotra'
CC No.25920/09*

02.05.2011 (At 10:10 AM)

*Present : None for complainant despite calls.
 Accused in person with counsel Sh. Ajit Singh.
 Be awaited.*

*sd/-
(VIPIN KHARB)
MM : DWARKA :
02.05.2011*

At 11.15 AM

Present : None for complainant despite calls.
 Accused in person with counsel Sh. Ajit Singh.
 Be awaited.

sd/-
(VIPIN KHARB)
MM : DWARKA :
02.05.2011

At 12.55 PM

Present : None for complainant despite calls.
 Accused in person with counsel Sh. Ajit Singh.

Perusal of the record reveals that on 07.05.2010 accused was present with his counsel and a cost of Rs.500/- was imposed **upon the complainant for his non-appearance. On 28.10.2010 again accused was present with his counsel but none appeared on behalf of complainant despite repeated calls and a cost of Rs.200/- was imposed upon the complainant. On 24.01.2011 case was listed for cross examination of AR but AR of the complainant was absent and a cost of Rs.1000/- was imposed upon the complainant. Again on 03.02.2011 case was listed for cross examination of AR but AR of the complainant did not appear on that date also and a cost of Rs.1500/- was imposed upon the complainant for delaying the trial of case. On 08.04.2011 AR of the complainant was absent and Id. Counsel for complainant sought some time to supply the documents to the accused i.e. in compliance of order dated 11.02.2011 and again the time was granted subject to cost of Rs.1000/- and case was listed for today ie. 02.05.2011. Today none has appeared on behalf of complainant despite calls since morning. It is appears that the complainant is not interested in pursuing the present complaint.**

Section 256 (1) Cr.P.C mandates that if the summons has been issued on complaint and on the date appointed for the appearance of the accused, or any day subsequent to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Considering the fact that the present case and the conduct of the complainant, I do not find it proper to adjourn the hearing of this case my (sic) further.

Therefore, the present complaint case is hereby dismissed U/s 256(1) CrPC.

*Accused stands acquitted.
Bail bond/surety bond, if any, are discharged.
File be consigned to record room.*

*sd/-
(VIPIN KHARB)
MM : DWARKA :
02.05.2011"*

8. Perusal of the above proceedings reveal that neither counsel for the appellant nor the authorized representative of the appellant bank appeared before the learned Trial Court despite enough accommodation being given on the preceding dates i.e. 07.05.2000, 28.10.2000, 24.01.2011, 03.02.2011 and 08.04.2011. Perusal of the proceedings of learned Trial Court further reveal that the appellant had been rather lackadaisical in its approach in prosecuting the complaint. It is not only for the Court to consider that the complainant would not be disinterested in prosecuting his complaint because the cheque dishonoured was of Rs.11 lacs, it was for the appellant-bank also to ensure that its authorized representative and counsel pursue their case(s) vigilantly. The discipline can be enforced by the appellant bank by effecting the recovery of the costs from the defaulting officer/authorized representative.

9. The reason given in the appeal for non-appearance of the complainant before the concerned Court on the date when the complaint was dismissed under Section 256 Cr.P.C. acquitting the respondent, does not seem to be convincing ground for non-appearance on that date, as the conduct of the appellant on the previous dates has also been duly reflected in the proceedings.

10. However, considering the fact that vital rights of the

appellant bank are involved before the learned Trial Court and principles of natural justice require that the appellant be given an opportunity to prosecute its complaint on merits, the complaint deserves to be restored.

11. In the result, the impugned order dated 02.05.2011 dismissing the complaint under Section 256(1) Cr.P.C. and consequently acquitting the respondent is hereby set aside, but at the same time the respondent No. No.2, who had been regularly appearing in the complaint case, is also required to be reasonably compensated. In the facts and circumstances, the amount of costs is quantified at Rs.10,000/- which shall be paid along with previous costs by the appellant to the respondent No.2 on the date when respondent No.2 puts in appearance before the concerned Court on restoration of the complaint. The complaint of the appellant stands restored to its original stage. The Trial Court is directed to decide the matter afresh on merits after giving an opportunity to the appellant to lead evidence. The appellant is directed to appear before the concerned MM on 15.05.2012. Thereafter, the Trial Court shall issue notice to the respondents to enforce their presence in the Court.

12. CRL.L.P. 611/2011 is disposed of in the above terms. Registry is directed to send a copy of this order to the Trial Court for necessary compliance.

(PRATIBHA RANI)
JUDGE

MAY , 2012
dk/ks