

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.284 OF 2015

M/s.Earnest Health Care Ltd. & Anr.

105, Earnest House, 10th Floor,
Nariman Point, Mumbai – 400 021.

V/s.

Mr.O.P.Verma & Anr.

R/at Flat No.301, Madhu Park CHS Ltd.,
155, Sher-E-Punjab Colony, Andheri(West)
Mumbai – 400 069.

...Appellants

(Org.Complainants)

...Respondents

(Org.Accused)

Mrs.Sugandha Kumbhat, for the applicant-appellant.

Mrs.Anamika Malhotra, APP for respondent-State.

Mr.Aditya Chitale a/w Mrs.Debarati Nag, for the respondent No.1

CORAM : A.R. JOSHI, J.

DATE : 30TH JULY 2015

ORAL JUDGMENT

1. Heard rival submissions at length on this Criminal Appeal preferred by the appellant-original complainant company. Challenge in the appeal is to the order dated 17th January 2012 passed by Additional C.M.M. 37th Court in case no.2/SS/2000. The final order passed by the trial Court and which is impugned in the appeal is required to be reproduce here under, in order to appreciate the arguments of rival parties and to see whether the trial Court was just in putting an end to the entire complaint of

the present appellant. The said order reads thus :-

“None has appeared for the Complainant/Company whenever called. It's Counsel is also absent. Accused is present alongwith his counsel. Perused the record. It is seen that the Complainant (P.W.1) remains absent since long. He was under cross-exam but failed to appear since 25.1.2011. On previous date his Counsel filed application stating that P.W. is died and sought adjournment to take necessary steps. Same was granted as last chance but none has appeared today. It is seen that since long the Complainant failed to produce P.W.1 and none has appeared to represent the Complainant. The case is summons triable but the Complainant failed to produce P.W.1 since long and also failed to take necessary steps after the death of P.W.1. It shows that Complainant. is not interested to proceed with case. Hence complaint is dismissed in default and for want of prosecution and also closed u/s 258 of Cr.P.C. Accused is hereby released. His bail bonds stands cancelled.”

2. Prior to discussing the rival arguments the case of the appellant-original complainant is required to be mentioned in nutshell in order to have proper perspective of the matter.

3. In the year 1999 a private complaint was lodged by the present appellant against the present respondent no.1 and one

more original accused no.2. Presently it is a position as reported by the learned counsel of rival parties that said original accused no.2 subsequently remained absconding as such case against her was separated and kept on dormant file on 10th November 2003. The complaint was lodged for taking action against then accused including the present respondent-original accused no.1 under section 406 and 441 read with section 34 of Indian Penal Code and under section 630 of Companies Act. Said complaint was lodged on the premise that the present respondent-original accused no.1 has no right to continue in the possession of the flat belonging to the original complainant-present appellant. Though the lodging of the complaint by two companies and the right to ask the action under section 630 of Companies Act is disputed and arguments are advanced to that effect by learned counsel for the respondent no.1, in the considered view of this Court this is not the main aspect to be dealt in the present appeal. All that defenses which are available to the respondent-original accused no.1 are required to be dealt with by the trial Court at the appropriate stage. Presently, this Court is dealing with the legality

or otherwise of the order impugned.

4. The complaint as mentioned above remained pending with the trial Court for number of years. Some time in the year 2003 the plea of the accused was recorded. Thereafter on or about 20th March 2006 the examination-in-chief of P.W. No.1, the Director of appellant no.1 and 2 was recorded and it is crucial to note that his cross-examination was started only in January 2009 after the lapse of the three years. The cross-examination remain continued even till the year 2011 when on 14th January 2011 said P.W.No.1 expired. Apparently the death of said P.W.No.1 was not reported to the Trial Court immediately and thereafter matter was got adjourned by consent of the parties. This is substantiated by the roznamma which is reproduced in the matter at the time of the hearing of the application for leave to file appeal. Lastly, on 18th November 2011 an application was made on behalf of the present appellant-original complainant to take steps to bring another person on record in place of P.W.No.1, who had by then expired. Apparently this step was taken so that the matter should

proceed further and the witness of the company shall be brought before the Court for further cross-examination on the part of the respondent no.1-accused. The matter was then adjourned by the trial Court to 17th January 2012 and on 17th January 2012 the matter came to be dismissed, apparently taking shelter of the provisions of section 258 of Cr.P.C. The detailed order which was passed on 17th January 2012 is already reproduced herein above. Though in the said order it is mentioned that P.W.No.1 remained absent since long though was not cross-examine and failed to appear on 25th January 2011, the fact remain that he had expired on 14th January 2011. Still the fact remain that his death was not brought to the notice of the Court admittedly on various dates since death till November 2011. The matter was got adjourned by consent of the parties. Whatever it is, the fact remain that on 18th November 2011 the application was made for the first time on behalf of the complainant company for bringing some other officer in place of P.W.No.1. As mentioned earlier the complaint was dismissed on the very same date assign to the matter i.e. of 17th January 2011.

5. On the above factual position, learned counsel for the appellants submitted that the recourse to section 258 of Cr.P.C. taken by the Trial Court is not only erroneous but also illegal inasmuch as the provisions of section 258 are not applicable for the summons cases instituted upon complaint as the starting words of section 258 of Cr.P.C. specifically mentioned as follows;

“In any summons-case instituted otherwise than upon complaint, a Magistrate of First Class ...”

The matter before the trial Court was definitely a summons trial case and was dealt with by the Court accordingly. Even it is so mentioned in the impugned order. Apparently there is no answer on behalf of the respondent no.1 as to how the recourse under section 258 of Cr.P.C. could have been taken by the trial Court. As such in view of this, the impugned order could not have been passed under section 258 of Cr.P.C.

6. Apart from the above, if at all, it is considered that the said order is not under section 258 of Cr.P.C. but under section 256 of Cr.P.C. of then also the present stage of the matter at the time of

its dismissal was relevant and that aspect has been lost sight of by the trial Court by dismissing the complaint. The factual position that P.W. No.1 was under cross-examination and part of the cross-examination was already over and the application was made on behalf of the complainant party to substitute P.W.No.1 on account of his death, was pending, it was necessary for the trial Court to take appropriate course of action on the adjourned date i.e. on 17th January 2012. The matter could have been put to the logical end but not by dismissal of the complaint, either taking recourse to section 256 to section 258 of Cr.P.C.

7. In view of the above factual position, in the opinion of this Court the learned Magistrate had erred in passing the order which is impugned in the matter. Moreover, it should always be endeavor of the trial Court to dispose of the matters on merits and only in exceptional cases when there is a prolonged delay and the laches on the part of the particular party then, to put an end to the litigation on technicalities. Even otherwise also on the adjourned date on which the impugned order was passed a recourse could

have been taken by the Magistrate by imposing certain costs or allowing still one more date as only on the earlier date i.e. on 18th November 2011 there was an application on behalf of the complainant company asking for substitution of P.W. No.1 due to his death. In any way in the opinion of this Court the said impugned order is required to be quashed and set aside and matter is required to be remanded back to the trial Court. Hence order.

:: ORDER ::

- (i) Appeal is allowed.
- (ii) The impugned order is quashed and set aside.
- (iii) Case no. 2/SS/2000 is restored to the file of the concerned CMM Court No.37, Mumbai for disposal according to law and proceeding further with the said matter from the stage it was on 17th January 2012. Needless to mention that the trial Court shall allow both the parties to lead their respective evidence.
- (iv) All the contentions of rival parties are kept open including the defence of the accused as to maintainability of

complaint etc.

(v) Considering the time taken in this litigation since the year 1999 till 2015, directions are given to the concerned trial Court to expeditiously deal with the matter and dispose it of as far as possible within a period of one year from this order.

(vi) Both the parties are directed to appear before the trial Court on 20th August 2015.

(A.R. JOSHI, J.)