

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 87 OF 2017

IndusInd Bank Ltd. having its
Regd. Office at 2401, General
Thimmayya Road, Cantonment
Pune and having its Branch
office at "Chounde Complex"
Rajiv Gandhi Chowk, Latur,
Dist. Latur Thr. its authorized
person - Sharad s/o Madhukarrao
Rudre, Age : 40 Yrs., Occ. Service,
R/o : Beed Bypass, Satara Parisar, **APPELLANT/**
Aurangabad. **[ORI.COMPLAINANT]**

VERSUS

K.M.Construction Company
Thr. its partner/
authorized signatory
Govind s/o Narayan Munde
Age : Major, Occ. Business,
R/o : Munde Niwas,
Meera Nagar, Old Ausa Road, **RESPONDENT/**
Latur. **[ORI.ACCUSED]**

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Mr. M.D.Narwadkar, Advocate for Appellant.

Mr. A.A.Mukhedkar, Advocate for Respondent.

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CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 12/07/2017

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ORAL JUDGMENT :

1. In view of the limited challenge raised in the Appeal as to the order of dismissal of the complaint in default of the complainant, by consent the Appeal is finally heard at the stage of admission by dispensing with paper book.

2. The challenge raised in the Appeal confines to the legality of the Order dated 11/04/2014 passed by the Judicial Magistrate First Class [Court No. 8], Latur in S.T.C. No. 1403/2012. By the impugned order, learned Magistrate dismissed the complaint and acquitted the accused by observing that the complainant is not interested in the matter. By recording absence of the complainant, dismissed the complaint for want of prosecution and acquitted the accused. So also, passed order to cancel his bail bonds. The order reads as under,

" Complainant and his Advocate are absent since long. Case was fixed for steps. No steps has been taken by complainant. This Court has passed order below Exh. 1 on 29/01/2014 to put up the case for dismissal order on next date i.e. on 26/03/2014. Even on 26/03/2014 also opportunity was given to the complainant, but on that day also he remained absent and did not take any steps. On 26/03/2014 also complainant and his Advocate were absent. Therefore, case is put up today for dismissal order. Today also complainant and his Advocate are absent when called repeatedly till 5.45 p.m. It appears that complainant is not interested in the matter. Hence, complaint stands dismissed for want of prosecution. The accused is acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act. Bail bonds of accused stand cancelled. "

3. Learned counsel for the appellant assailed the impugned order with contention that the order is passed without proper application of mind. It is contended that there was no occasion for the Court to invoke the provisions of Section 256 of the Code of Criminal

Procedure and to dismiss the complaint and acquit the accused. It is pointed out that the case was lying at the stage of service of summons to the accused. The summons issued to the accused returned unserved for one or the other reason. The appellant has taken all necessary steps to serve the summons and also furnish new address of accused. It is pointed out that the applicant has paid one time process fee as per the rules prevailing. Service of summons upon the accused was dependent upon the efforts to be made on the part of police machinery. In spite of efforts taken by complainant, if the accused was not served, the trial Court should not have dismissed the complaint and acquitted the accused. It is pointed out that the complaint was dismissed at the stage of service of summons. In this back-ground, learned counsel submits that the order is not sustainable in law.

4. On the other hand, learned counsel for the respondent strenuously contended that the impugned order is fully in consonance with law and there is absolutely no illegality and impropriety committed on the part of the trial Court in passing the order. He submits that the case was repeatedly adjourned for taking steps to effect service of summons upon the accused. The

complainant and its Advocate failed to record their appearance on the date of listing of case before the Court. Taking note of continuous non appearance of the complainant and its Advocate, the trial Court has passed the impugned order in exercise of powers u/s 256 of the Code of Criminal Procedure. He, therefore, urge to dismiss the Appeal.

5. In order to appreciate the submissions advanced, I have perused the record and proceedings of the case. The complainant is a Bank registered under the provisions of the Companies Act. The complainant – Bank filed complaint u/s 138 of the Negotiable Instruments Act as against the accused alleging therein that he had secured loan of Rs. 9,00,000/- in the year 2009, which he agreed to pay within the period of three years. The accused failed to pay the amount as per the agreement. He had issued three cheques of Rs. 1,40,000/- each bearing Nos. 14657, 14658 and 14659 dated 05/07/2012 drawn and payable from his account with Axis Bank, branch at Ausa, District Latur towards the payment of outstanding dues. When those cheques were presented for encashment, same were dis-honoured with remarks “for want of sufficient funds “. In spite of receipt of

statutory notice, the accused failed to comply with the notice. Therefore, the complainant filed complaint u/s 138 of the Negotiable Instruments Act. The complaint was presented on 20/09/2012. On due consideration of the complaint, the documents produced and the affidavit filed in support of the complaint as verification statement, learned Magistrate pleased to issue process u/s 138 of the Negotiable Instruments Act vide order dated 02/02/2013.

6. Perusal of the record and particularly Roznama reveals that the summons which was issued to the accused was returned unserved with an endorsement that the accused was not found on the address given and the premises found to be permanently locked. Thereafter, the complainant moved an application seeking issuance of fresh summons at the new address of the accused mentioned in the application. The application was moved on 04/07/2013 vide Exh. 6. The application was granted and the order was passed to re-issue summons as per the prayer made in the application. Subsequent thereto the summons was issued at new address, which was also returned unserved with report that as the police machinery was busy in maintaining law and order, service could not be effected within time. Thereafter, the

complainant again moved an application vide Exh. 7 to re-issue summons. The summons was re-issued again returned unserved with the report that the accused was not found at the given address.

7. Thus, on the basis of the record, it can not be stated that the complainant was not interested to prosecute the proceeding or failed to take steps to effect service upon the accused. On the contrary, the complainant has taken steps necessary for effecting the service. It is due to fault on the part of the machinery entrusted with the job to effect service on the accused, the summons could not be served. The summons issued were returned for one or the other reason.

8. It is pointed out by the learned counsel for the applicant that by virtue of rules framed in the year 2006, the procedure of payment of process fee was simplified. In stead of repeatedly paying process fee, the procedure of payment of one time process fee was introduced. The relevant rule reads as under :

“ *The following Rules made by the High Court under section 32 of the*

Bombay Court-fees Act, 1959 have been approved by the Government of Maharashtra and published in the Official Gazette.

The fees chargeable for serving and executing processes issued by Criminal Courts in the case of offences, other than offences for which Police Officers may arrest without a warrant, shall be as prescribed below :

[a] Irrespective of nature and valuation of subject-matter of dispute for all type of processes like, summonses, notices, warrants, proclamation, injunction orders, sale notices etc. but shall not include poundage fees, fees shall be charged at the rate of Rs. 50 for each defendant/respondent/non-applicant or accused.

[b] [Such process fees shall be charged and paid within three days from the date of [Charging of process fees] issuing notice. No process fee shall be charged for serving the process again on the same set of defendants/respondents/non-applicants/accused or their legal representatives till the proceedings is disposed of by the Court :

Provided that failure to pay the process fees within two weeks from the date of order passed by the Court will result in automatic dismissal of the proceedings for non-prosecution :

Provided that no fees shall be levied on any process issued upon the complaint to any Public Officer acting as such Public Officer].

[c] The Court may remit the process fees in any case, in whole or in part, whenever the Court is satisfied that the complainant or accused has not the means of paying them.

[d] Process fees are leviable from Municipalities in respect of summonses and warrants issued in cases falling under section 296 (3) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965.]."

9. In the back-ground of the provisions providing one time payment of process fee, learned counsel submitted that as the complainant has paid one time process fee, the complaint should not to have been dismissed. So also the accused should not have been acquitted. It is contended that if the summons issued was returned, it was expected that the order of re-issuance of

summons ought to have been passed at the motion of the Court. The presence of complainant was not required for passing such order. It is further pointed out that the respondent/accused had not appeared in the matter. Still the Court has passed order of acquittal of the accused and cancellation of bail bonds, which reflects non application of mind on the part of learned Magistrate.

10. In my view, the order passed by the trial Court is not sustainable in law. As discussed, there was no fault on the part of the complainant to take effective steps to serve the respondent. The complainant has taken necessary steps to effect the service. The service could not be effected for one or the other reason, as discussed above. The order passed by the trial Court reflects non application of mind on the part of learned Magistrate. Although the accused was not served with the summons, nor appeared and furnished the bail; still the learned Magistrate has dismissed the complaint, acquitted the accused and passed order of cancellation of bail which was never furnished by the accused.

11. If we consider the provisions of section 256 of Code of Criminal Procedure, then although the Court is

vested with the power to dismiss the complaint in the eventualities referred in section 256 of the Code of Criminal Procedure, but the exercise of such powers necessarily requires application of mind before passing of such drastic order. Such powers are expected to be exercised when the case is listed for hearing. In the instant case, the case was lying at the stage of service of summons upon the accused. Although the accused was called upon to face the prosecution, the accused had not appeared. The case has not proceeded a stage ahead of issuance of summons to the accused. Thus, there was no stage of effective hearing of the complaint. The complainant is a juristic person i.e. Bank. It has to function through its Officers. While dismissing the complaint, the Court ought to have taken into account the serious consequences to follow of such dismissal. In the facts and circumstances of the case, it was expected on the part of the Court to have re-issued the summons, as the summons earlier could not be served on account of failure of the police machinery to serve the summons to the accused. It is pertinent to note that though the police had reported that the accused was not found on the address given and returned the summons unserved but in the proceeding before this Court, the service of notice of

present proceeding was effected upon accused at same address. In spite of service of notice, the accused failed to appear. Therefore, this Court was required to issue bailable warrant to secure his presence. On service of bailable warrant, the respondent/accused appeared before this Court, which reflects the conduct of the accused to avoid service.

12. Thus, considering overall facts and circumstances of the case, I am of the view that the impugned order deserves to be set aside and the case needs to be remanded to the trial Court. I am, therefore, inclined to allow the Appeal and pass following order.

ORDER

[i] Criminal Appeal is allowed in terms of prayer clause 'D'.

[ii] The complainant and the respondent/accused are directed to appear before the trial Court on 07/08/2017.

[iii] The respondent/accused is directed to furnish bail to the satisfaction of the trial Court.

[iv] In case, the respondent/accused fails to appear, the trial Court will be at liberty to take appropriate

steps to compel the presence of accused by adopting appropriate mode of service as provided under the Code of Criminal Procedure. No fresh service to be effected on the accused.

[v] Record and proceedings be sent to the trial Court forthwith.

[vi] The Appeal stands disposed of in above terms.

[V.L.ACHLIYA, J.]