

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION [APPLN] NO.78 OF 2015

Dr. Mohd. Mustufa Haji Md. Momin
Hindustanwala

..Applicant

Versus

Ishtiyah Ah. Nehal Ahmed and another.

..Respondents

....

Mr. Gajendra K. Jadhav, Advocate for the Applicant.

Mr. Sachin Dhakephalkar, for Respondent No.1.

Mrs. P.P. Bhosale, APP, for the Respondent No.2-State.

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CORAM : A. R. JOSHI, J.

DATE : 7th JULY, 2015

P.C.

1. Heard rival submissions on this application for condonation of delay of more than three years.

2. The main emphasis placed during the arguments by the learned Counsel for the applicant / original complainant is on the time taken by the complainant in pressing the matter

before the Revisional Court after dismissal of the complaint for default by the trial Court. It is also brought to the notice of this Court that though belatedly said application for revision was made after eight months of passing of the dismissal order, the revision was pending before the Sessions Court for about two years and then it was dismissed on the ground that it was not maintainable and the course open for the complainant was to appear before the High Court challenging the order of acquittal in the matter of offence punishable under Section 138 of Negotiable Instruments Act. In short, it is the submission on behalf of the complainant that wrong forum was chosen by the complainant under ill-advice and as such the delay is caused to come before this Court with an application for leave to file appeal.

3. The above submissions were vehemently opposed by the learned Counsel for the respondent No.1 / original acquitted accused mentioning that in fact there is no explanation about the initial eight month's delay in approaching the wrong forum before the Sessions Court under revision. As such, now the complainant cannot blame the delay caused by the revisional

Court in deciding his revision as *per se* it was not maintainable, further argued.

4. So far as the merits of the entire matter are concerned, the original complaint lodged by the complainant for the offence punishable under Section 138 of Negotiable Instruments Act was dismissed for want of prosecution and as such there was no decision by the trial Court on the merits of the case. In fact, this is the only issue which is required to be dealt with in the appeal after the appeal is to be heard before this Court after grant of the application for condonation of delay and also granting leave to file appeal.

5. The factual position stands today is that the case of the original complainant lodged for recovery of the dishonored cheque of more than Rs.6.5 Lakhs was dismissed for want of prosecution without there being any adjudication on the merits of the matter. In fact, this is an unfortunate situation that though the law for the cases under Section 138 of Negotiable Instruments Act mentions that such cases are required to be disposed of within six months, the reality is otherwise and in fact the cases are pending for years together and in this matter

there is dismissal without adjudication on merits. In any event, in the opinion of this Court considering the pendency of the revision, wrongly chosen, before the Sessions Court and considering that still initially the complainant took eight months time to file such revision, the matter is required to be remanded back to the trial Court for adjudication on merits on imposing certain costs to be paid by the complainant to the present respondent No.1 / acquitted accused.

6. Considering the above, in the opinion of this Court the present application for condonation of delay is required to be allowed and the same is accordingly allowed. Application for leave to file appeal be numbered. So also after considering the circumstances in the present case, the application for leave to file is also allowed and the appeal is admitted. Even considering the small question as to whether the present appeal can be allowed as challenge is to the order of acquittal for want of prosecution, the appeal is also allowed and accordingly disposed of. This order will take effect subject to payment of costs of Rs.5000/- (Rupees Five Thousand Only) by the complainant to the respondent No.1 to be paid before the trial Court and on satisfaction of such payment the trial Court shall

proceed further with the matter in accordance with the following directions. Hence, the order :

:: O R D E R ::

- [i] Application for condonation of delay is allowed.
- [ii] The application for leave to file appeal be numbered and is allowed and also the appeal challenging the judgment and order of acquittal of the respondent is admitted and allowed. The original complaint case No.1603 of 2006 is restored to the file of the concerned trial Court with directions to deal with the said matter in accordance with law after securing the presence of both the parties.
- [iii] All contentions of rival parties are kept open. Both the parties are directed to appear before the trial Court on 27th July, 2015.
- [iv] This order will take effect subject to payment of costs of Rs.5000/- (Rupees Five Thousand Only) by the complainant to the respondent No.1 to be paid before the trial Court and on satisfaction of such payment the trial Court shall proceed further.

(A. R. JOSHI, J.)