

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 841 OF 2016

Shri Raju Kashinath Fadtare	...	Petitioner
vs.		
Mrs. Gauri Raju Fadtare & Anr.	...	Respondents

Mr. Vishal Patil, Advocate for the petitioner.
Ms. Dharini Magde h/f Ms. M.S. Shringarpure, for respondent No.1.
Mr. V.B. Konde-Deshmukh, APP, for the State.

CORAM: SMT. SADHANA S. JADHAV, J.
DATE : 15th June, 2016.

P.C.

Heard. Rule. Rule made returnable forthwith with the consent of the parties.

2. The respondent herein is the original complainant in Case No.13/DV/2012 before the Metropolitan Magistrate, 53rd Court, Mulund, Mumbai.

3. By an order dated 10.9.2013, the learned Metropolitan Magistrate had allowed the application below Exhibit 2 and had directed the respondent No.1 i.e. the present petitioner to pay maintenance at the rate of Rs.7,000/- per month to the applicant-wife and her daughter from the

date of application. He was also directed to deposit the amount in the Court on or before 7th of every month. The petitioner was also directed to pay litigation expenses to the tune of Rs.3,000/-.

4. Being aggrieved by the said order, the petitioner had filed Criminal Appeal No.577 of 2013 before the Sessions Court. An application was filed praying execution and implementation of the order dated 10.9.2013. The application was registered as 2164 of 2013. It appears from the Roznama that the appellant and the advocate remained absent on 9.5.2015. The learned Sessions Judge observed that the record also shows that they were absent on the last occasion. The respondent and her advocate had remained absent and hence the learned appellate Court had arrived at a conclusion that the parties are not interested in proceeding with the above and theretofore, the appeal was dismissed for want of prosecution on 9.5.2015. Hence, this writ petition.

5. The learned counsel for the petitioner submits that in fact, the petitioner and his Advocate were absent only on two occasions. According to him, the respondent was also absent. It is submitted that the appeal filed by the respondent was a statutory appeal and it could not have been dismissed for want of prosecution without giving a fair opportunity to the

parties concerned. It is also submitted that the learned Court could have dismissed Misc. Application No.2164 of 2013 for want of prosecution, but not appeal. In any case, no prejudice would be caused to the respondent since the operation and implementation of the impugned order had not been stayed by any Court. The learned counsel further submits that the dismissal of the appeal for want of prosecution has resulted into grave miscarriage of justice and hence prayed that the order be quashed and set aside.

6. The Hon'ble Apex Court in the case of **Bani Singh and others vs. State of U.P. (1996) 4 SCC 720** observed as follows :-

“The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. If the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so.

Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice.”

It is true that the Hon'ble Apex Court has observed in a catena of decisions

that an appeal ought not to be dismissed for want of prosecution. However, in the eventuality that the appellant had a good case on merits, it ought to have been decided on merits and the appeal ought to have been taken to its logical end without dismissing it for default.

7. In view of this, the order dated 9.5.2015 passed by the learned Sessions Judge in Criminal Appeal No.577 of 2014 is hereby quashed and set aside. The appeal be restored to its original status. The learned Special Judge shall decide the appeal on merits within eight weeks from the date of receipt of this order. The learned Sessions Judge shall issue fresh summons to the respondent therein and inform him about the scheduled date of hearing.

8. The respective counsel, upon instructions, submit that they would co-operate with the Court. In view of this, the petition deserves to be allowed in the above terms. Rule is made absolute. Writ Petition stands disposed of.

(SMT.SADHANA S.JADHAV, J.)