

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 2909 OF 2016**

Shabbir Sharafali Golawala	...Petitioner
Versus	
Arun Popatlal Chavda & Anr.	...Respondents

Mr. S. Shamim for the Petitioner

Mr. Harshad Sathe i/b Mr. H. Bhadbhade for the Respondent No. 1

Ms. Pallavi Dabholkar, A.P.P for the Respondent No. 2-State

CORAM : REVATI MOHITE DERE, J.
MONDAY, 3rd OCTOBER, 2016

P.C. :

1. Heard learned Counsel for the parties.
2. Rule. Rule made returnable forthwith, by consent.
Respondents waive notice through their respective Counsel.
3. Petition is taken up for final disposal forthwith, by consent.
4. By this petition, the petitioner has impugned the order dated dated 12th July, 2016 passed by the learned Metropolitan Magistrate, 6th

Court at Mazgaon/Sewree, below Exhibit 1 as well as the order dated 30th July, 2016 passed by the learned Metropolitan Magistrate, 6th Court at Mazgaon/Sewree, below Exhibits 37 and 38.

5. Learned Counsel for the petitioner (original complainant), states that the petitioner had filed a complaint under Section 138 of the Negotiable Instruments Act as against the respondent No. 1. According to the learned Counsel, the petitioner (original complainant) filed his affidavit of evidence on 24th November, 2015 and thereafter, the matter was adjourned to 5th January, 2016. He submitted that on 5th January, 2016, the respondent No. 1 filed an application (Exhibit 23), wherein, the issue of jurisdiction of the Court to entertain the complaint was raised. He submitted that the petitioner (original complainant) being a resident of Dubai, was not present on a few dates, pursuant to which, his Advocate filed exemption applications. He submitted that the trial Court, vide order dated 12th July, 2016, was pleased to reject the exemption application filed on behalf of the petitioner (original complainant). He submitted that thereafter, the Advocate for the petitioner (original complainant) filed an

application being Exhibit 38 praying therein, for setting aside the order by which the evidence of the petitioner (original complainant) was closed, however, the learned trial Court was pleased to also reject the said application and fixed the matter for recording the evidence of respondent No. 1 under Section 313 of Cr. P.C. According to the learned Counsel, the petitioner being the original complainant was not going to achieve anything by delaying the trial. He submits that his non-attendance was neither deliberate nor intentional. He submits that in the interest of parties, the impugned orders be quashed and set-aside.

6. Learned Counsel for the respondent No. 1 opposed the application. He submitted that the petitioner (original complainant) ought to have remained present on the dates given by the trial Court to enable the respondent No. 1's Advocate to cross-examine him. He submitted that the petitioner (original complainant) was present in India on 13th July, 2016, however, failed to make himself available for cross-examination.

7. Perused the papers including the orders passed by the trial Court rejecting the exemption applications filed by the Advocate for the

petitioner (original complainant), the order dated 12th July, 2016 passed below Exhibit 36 as well as the order dated 30th July, 2016 passed below Exhibits 37 and 38. A perusal of the Roznama shows that the petitioner (original complainant) had filed his affidavit of examination-in- chief on 24th November, 2015, after which, the matter was adjourned to 5th January, 2016. It appears that on 5th January, 2016, the petitioner (original complainant)) and his Advocate were present, however, the accused was absent, pursuant to which, his Advocate filed an exemption application, which was granted. It appears that the Advocate for the respondent No. 1 filed an application (Exhibit 23) on 5th January, 2016, raising the issue of the jurisdiction of the Court to entertain the complaint. Accordingly, the matter was adjourned for say of the petitioner (original complainant) to 15th January, 2016. It appears that on 15th January, 2016, the petitioner (original complainant) was absent, however, his Advocate was present and that the respondent No. 1 (original accused) was absent and his Advocate was present. The exemption application filed by the respondent No. 1 (original accused) was granted and the say filed by the petitioner (original complainant) to the application (Exhibit 23) was taken on record. Thereafter, the matter was posted for arguments on Exhibit 23/cross on 5th

February, 2016. On 5th February, 2016, the petitioner (original complainant) as well as the respondent No.1 (original accused) were absent, however, their respective Advocates were present. The exemption application filed by the accused (Exhibit 27) was granted and arguments were heard on Exhibit 23 and the matter was adjourned for orders on Exhibit 23 to 24th February, 2016. On 24th February, 2016, the complainant as well as the respondent No. 1 (original accused) were absent, however, their Advocates were present. The exemption application filed by the respondent No. 1 (original accused) was granted and the trial Court was pleased to reject the application (Exhibit 23) filed by the respondent No. 1. Thereafter, the matter was adjourned to 18th March, 2016. On 18th March, 2016, the petitioner (original complainant) and his advocate were present, however, the respondent No. 1 (original accused) was absent and the exemption application filed by the respondent No. 1 was granted. On the next date i.e. on 22nd April, 2016, the petitioner (original complainant) and the respondent No. 1 (original accused) were absent, however their Advocates were present and the matter was adjourned for cross to 7th June, 2016. On 7th June, 2016, both the petitioner (original complainant) and the respondent No. 1 (original accused) were absent, however, their Advocates

were present. The exemption application filed by the respondent No. 1 (original accused) was granted and the exemption application filed by the petitioner (original complainant) was granted only by way of last chance. Thereafter, on 12th July, 2016, again the petitioner (original complainant) and the accused were absent, however, their respective Advocates were present. The application of the respondent No. 1 (original accused) for exemption was granted, however, the application (Exhibit 35) of the petitioner (original complainant) seeking his exemption was rejected. Even the adjournment application (Exhibit 36) filed by the petitioner (original complainant) was rejected and the impugned order dated 12th July, 2016 closing the cross was passed and the matter was posted for recording 313 of the respondent No. 1 (original accused). On 30th July, 2016, an application was filed by the petitioner's (original complainant) advocate for setting aside the order by which the petitioner's evidence was closed. However, the said application was also rejected vide order dated 30th July, 2016.

8. A perusal of the Roznama shows that on a number of dates, the petitioner (original complainant) as well as the respondent No. 1 (original accused) were absent. From the Roznama, it appears that the matter was

heard on a couple of dates on the application filed by the respondent No. 1-accused i.e. on Exhibit 23.

9. The learned Counsel for the petitioner (original complainant) states on the instructions of the petitioner, that the petitioner will remain present in the trial Court on 18th October, 2016 and will make himself available for cross-examination on the said date or immediately thereafter.

10. In view of the statement made by the learned Counsel for the petitioner (original complainant), in the interest of justice, the impugned orders dated 12th July, 2016 and 30th July, 2016 are quashed and set-aside.

11. The petitioner (original complainant) shall remain present before the trial Court on 18th October, 2016 for recording of his cross-examination on the said date and on any date thereafter, as may be given by the trial Court.

12. Rule is made absolute on the above terms.

13. Petition is disposed of accordingly.
14. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.