

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 432 OF 2015
(For Leave to file Appeal)**

Deepak Narayan Rasal	...Applicant
Versus	
Sameer Yusuf Nakhava & Anr.	...Respondents

Mr. Rajesh S. Patil for the Applicant

None for the Respondent No. 1

Ms. R. V. Newton, A.P.P for the Respondent No.2-State

CORAM : REVATI MOHITE DERE, J.
WEDNESDAY, 3rd AUGUST, 2016

P.C. :

1. Heard learned Counsel for the applicant.

2. It appears that the respondent No. 1 has been served and that Advocate Uttam Ashok Chavan has put in his appearance on behalf of respondent No. 1. Yesterday, when the matter was called out, none appeared for the respondent No. 1 and hence, the matter was kept today. Today also, none appears for the respondent No. 1.

3. Heard learned Counsel for the applicant. Leave granted.

4. Admit. Leave application to be treated as appeal memo and be numbered accordingly.

5. It may be noted that parties were put to notice vide order dated 23rd September, 2015 while issuing notice to the respondent No. 1 that the application would be taken up for final disposal. Hence, the appeal is taken up for final hearing forthwith.

6. Learned Counsel for the applicant submits that the applicant (original complainant) had filed a complaint in the Court of the learned Judicial Magistrate First Class, Ratnagiri, alleging an offence punishable under Section 138 of the Negotiable Instruments Act as against the respondent No. 1 on 31st January, 2012 and that process was issued on 16th June, 2012. He submits that after process was issued and summons was served on the respondent No. 1, the respondent No. 1 appeared through his Advocate; and that on 15th January, 2014, the applicant (original complainant) filed his affidavit of evidence in SCC No. 45 of 2012. Learned Counsel for the applicant submits that the matter was referred for mediation on 10th March, 2014 and that on 28th October, 2014 it was

recorded that mediation had failed. According to the learned Counsel for the applicant, the applicant (original complainant) and his Advocate were regularly attending the proceedings, however on 11th June, 2015, the applicant (original complainant) and his Advocate could not remain present before the learned JMFC, due to some misunderstanding regarding the date and hence, the matter was adjourned to 1st July, 2015. Learned Counsel for the applicant states that when the matter was called out on 1st July, 2015, the applicant and his Advocate were not present in the Court; and that they reached the Court late. He submits that the applicant and his Advocate were informed that the matter was called out and that the learned JMFC, Ratnagiri, had dismissed the complaint for want of prosecution and had acquitted the respondent/accused under Section 256 of the Cr. P.C. He further submitted that on learning the said fact, they mentioned the matter seeking restoration of the complaint on the very same day i.e. on 1st July, 2015 before rising of the Court, however, the learned Magistrate directed the Advocate for the applicant to file a written application on the next date. He further submitted that on 2nd July, 2015, the applicant's Advocate mentioned the matter and filed a written application seeking restoration of SCC No. 45 of 2012, however, the learned Judge refused to entertain the

said application on the ground of maintainability. Learned Counsel for the applicant submitted that considering the peculiar facts of this case, the impugned judgment and order dated 1st July, 2015 be quashed and set-aside and the complaint be restored back to its original file. He has tendered a copy of the Roznama from 10th February, 2015 till 1st July, 2015.

7. Perused the papers. As noted above, the respondent No. 1 has been served, however, neither the respondent No. 1 nor his Advocate are present. It appears that on 15th January, 2014, the applicant had filed his affidavit of evidence and that on 10th March, 2014, the matter was referred for mediation. It appears that as mediation failed on 28th October, 2014, the matter was again listed before the trial Court. From a perusal of the Roznama, it appears that on 16th February, 2015, the applicant was absent, however his Advocate was present and that the Advocate for the respondent accused had filed an application seeking exemption, as the respondent accused was not present. On 10th March, 2015, it appears that both the applicant as well as the accused were absent, however, their Advocates were present and that an application was moved by the Advocate for the accused seeking his exemption, which was granted. On 12th May, 2015,

when the matter was called out, the respondent accused as well as their Advocate were present however, the Court was on leave and hence, the matter was adjourned for cross-examination of the applicant to 11th June, 2015. It also appears from the perusal of the Roznama that on 11th June, 2015, when the matter was called out, the applicant and his Advocate were absent and the respondent accused and his Advocate were present and hence the following order was passed :

“Complainant absent when called out case is pending for recording evidence of Complainant but he is absent though presence is necessary. Hence keep for dismissal Order.”

Accordingly, the matter was adjourned to 1st July, 2015 and was kept for dismissal. On 1st July, 2015, when the matter was called out, neither the applicant nor the accused nor their Advocates were present and the learned trial Court was pleased to pass the following order :

“Complaint is dismissed for want of prosecution as Accused stand acquitted vide sec. 256 of Code of Criminal Procedure, 1973.

Personal bond of Accused stands cancelled and surety stands discharged.”

8. It appears that the applicant and the Advocate reached the Court after the said order was passed and had mentioned the matter for restoration. It also appears that on the next date, an application was preferred by the Advocate for the applicant seeking restoration of the complaint, however, the learned Magistrate rightly refused to entertain the said application on the ground of maintainability.

9. Learned Counsel for the applicant submitted that the applicant be given one opportunity in the interest of justice, to pursue his case. He states that the applicant is ready to file an undertaking in the trial Court stating therein, that he will appear on every date of the hearing and that he will cooperate in the conduct of the trial and will not seek unnecessary adjournments. Only by way of indulgence and considering the fact, that the applicant is ready to furnish an undertaking as aforesaid, the appeal is allowed and the impugned order dated 1st July, 2015 passed by the learned JMFC in SCC No. 45/2015 is quashed and set-aside and the SCC No. 45 of 2012 is restored back to its original file. The applicant and respondent No. 1 to appear before the trial Court on 22nd August, 2016. The applicant

shall file an undertaking before the trial Court, stating therein that he will appear on every date before the trial Court; that he will cooperate with the trial and will not seek unnecessary adjournment.

10. Accordingly, the appeal is allowed and is disposed of.
11. Parties to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.