

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.15 OF 2016
IN
CRIMINAL APPEAL NO. OF 2016**

Shri Nawab Malik)...Applicant

V/s.
Kadar Karim Shaikh & Anr.)...Respondents

Mr. Umesh Mohite, Advocate for the Applicant.

Ms. A.A.Takalkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 16th JANUARY 2017.

P.C. :

By this application for leave to appeal, applicant/original complainant is challenging the order dated 16.11.2015 passed by the learned Metropolitan Magistrate 60th Court, Kurla, Bombay dismissing the complaint filed by the applicant.

2 Heard learned counsel appearing for the applicant/original complainant. He argued that the original complainant had lodged complaint and has duly attended the

Court on the date of recording verification statement. The learned counsel further argued that thereafter there was transfer of the complaint and ultimately, it was dismissed on account of default on the part of the complainant to prosecute the complaint. The learned counsel by placing reliance upon the judgment of the Apex Court in **Associated Cement Co. Ltd. v. Keshvanand** reported in (1998)1 Supreme Court Cases 687 argued that learned Metropolitan Magistrate ought not to have dismissed the complaint for non-appearance of the complainant in view of provisions of Section 256 of Cr.P.C.

3 I have carefully considered the contention of the learned counsel for the applicant-original complainant and perused the record made available. It is seen from the record that on 23.9.2014, complaint was filed and verification statement of applicant-original complainant came to be recorded. Thereafter, the complainant never attended the Court of Metropolitan Magistrate even for single date. His absence is seen from the order sheets maintained by the learned Metropolitan Magistrate. At this juncture, it is apposite to refer provisions of Section 256 of Cr.P.C.

which deals with contingency of non-appearance of complainant before the Metropolitan Magistrate. If the complainant does not appear before the Magistrate on the dates fixed for hearing, the Magistrate is empowered to dismiss the complaint and acquit accused unless for some reason, he thinks it proper to adjourn the case to some other day. This implies that dismissal is inevitable if complainant remains absent and adjournment is possible only if learned Metropolitan Magistrate is of the opinion that for some reason adjournment is necessary. In the matter of **Associated Cement Co. Ltd. (Supra)** in paragraph 17 the Hon'ble Apex Court has observed thus:

“17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices

that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.”

Even the Apex Court has held that if situation does not justify the case being adjourned then the Court is free to dismiss the complaint and acquit the accused.

4 Perusal of the impugned order passed below Exhibit 1 (Record Page 15) goes to show that the learned Metropolitan Magistrate on 16.11.2015 found that applicant-original complainant and his advocate are absent. The learned Metropolitan Magistrate then perused the record and observed that accused had put his appearance

long back but still the complainant has not taken any steps to prosecute the complaint. With this, the complaint came to be dismissed. As observed in forgoing paragraphs, it is seen from the order sheets that barring the first date, applicant-original complainant never attended the Court of Metropolitan Magistrate for prosecuting his complaint.

5 In this view of the matter, no case for grant of leave is made out. Application is, therefore, rejected.

(A. M. BADAR, J.)