

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.276 OF 2016

IN

CRIMINAL APPLICATION NO.977 OF 2015

IN

CRIMINAL APPLICATION NO.472 OF 2014

IN

CRIMINAL APPLICATION NO.374 OF 2015

Bhagat Housing Development Pvt. Ltd. & Ors. ... **Applicants**

V/s.

Kiran V. Shetty & Ors.

... **Respondents**

.....

Mr.S.J.Khera, Advocate for Applicants.

Mr.Roshan S. Tanna, Advocate for Respondents.

Mrs.N.J.Jain, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 19th September 2017.

P.C. :

1 By this application, applicants, who are original accused and respondents in an application for condonation of delay filed by the original complainant, are praying for recalling the Order dated 4th August 2015 passed by this Court in Criminal Application No.472 of 2014 thereby condoning the delay in filing an application for leave to appeal.

2 Facts in nutshell leading to file this application are thus:

Respondent No.1 herein namely Kiran V. Shetty had filed a complaint before the learned Judicial Magistrate First Class, Navi Mumbai alleging offences punishable under Sections 120-B, 406, 420, 482 of the Indian Penal Code (hereinafter referred to as “IPC” for the sake of brevity) and Sections 3,4,5,6,7,10,11,12-A and 13 of the Maharashtra Ownership of Flats Act (hereinafter referred to as “MOFA” for the sake of brevity). Said complaint was dismissed and, therefore, the respondent No.1 herein/original complainant had filed an application for leave to appeal. As there was delay, the said application was accompanied with an application for condonation of delay. This Court by the Order dated 4th August 2015 was pleased to condone the delay occasioned in filing an application for leave to appeal. Present applicants/original accused then filed Criminal Application bearing No.977 of 2015 whereby they sought recalling the Order of condonation of delay. On 2nd February 2016, said Criminal Application bearing No.977 of 2015 came to be withdrawn with a liberty to approach appropriate Court/Forum. Now again applicants/original accused have filed this Criminal Application bearing No.276 of 2016 seeking recall of the Order dated 4th August 2015 passed in Criminal Application No.972 of 2015 condoning the delay in filing an application for leave to appeal.

3 Heard the learned Advocate appearing for applicants/original accused. By taking me through the record depicting progress of the Criminal Application No.972 of 2015, the learned Advocate argued that the application was adjourned from time to time and lastly it was posted for hearing on 25th August 2015. He drew my attention to ground No.(nn) in the application and argued that hearing of the said application was pre-poned to 4th August 2015 and on that day, the delay was condoned. Thereby no effective opportunity of hearing was granted to present applicants/original accused/respondents in application for condonation of delay. The learned Advocate further argued that applicants intended to prefer the Special Leave Petition before the Honourable Supreme Court, but their Advocate advised them to approach this Court again by stating that for filing Special Leave Petition, reasoned order is required. The learned Advocate appearing for applicants placed reliance on Judgment of the Honourable Apex Court in the matter of ***Vishnu Agarwal v. State of Uttar Pradesh & Anr.*** reported in (2011)14 Supreme Court Cases 813. My attention is also drawn to the correspondence exchanged between the learned Advocates appearing for both parties seeking copy of the application for condonation of delay and effecting service on the respondent No.4. For contending that no proper opportunity of hearing was granted, reliance is placed on the Judgment in the matter of ***State of Punjab v. Davinder Pal Singh Bhullar & Ors.*** reported in (2011) 14 Supreme Court

Cases 770. With this, it is argued that no prejudice would be caused to the respondent No.1/original complainant if the Order is recalled and opportunity of hearing is granted to present applicants/original accused in the matter of condonation of delay.

4 The learned Advocate appearing for respondent No.1 opposed the application by contending that proper opportunity was granted to applicants/original accused in the matter of condonation of delay and, therefore, the present application needs to be rejected.

5 I have carefully considered the rival submissions and also perused entire material placed on record.

6 *Audi Alteram Partem* is a basic rule of jurisprudence and prior to passing an adverse order, the Court is required to grant opportunity of hearing to all parties which may be affected by the ultimate Order. In the case in hand, applicants are not disputing the fact that they are served with copy of application for condonation of delay. In fact, vide letter dated 28th June 2015, the learned Advocate for the present applicants has requested the learned Advocate appearing for the respondent No.1/original complainant to supply copy of application for condonation of delay. Vide letter dated 30th June 2015, copies of application for condonation of delay were supplied by the learned Advocate for

the respondent No.1/original complainant to the learned Advocate for the applicants. In fact, applicants have placed on record both these communications. The communication dated 28th June 2015 reflects averments of the learned Advocate appearing for applicants to the effect that he is filing *vakalatnama* on behalf of his clients i.e. present applicants.

7 On these background facts, it is seen that by an Order dated 4th August 2015, this Court (Coram : A.R.Joshi J.) pleased to allow the application for condonation of delay by recording absence of present applicants and by giving reason that by condoning the delay, dispute can be decided on merits.

8 Undisputedly, present applicants have taken out a Criminal Application bearing No.977 of 2015 for recalling this Order and ultimately, on 2nd February 2016, the said application was withdrawn with a liberty to approach appropriate Court/Forum. In this view of the matter, the present application is not maintainable.

9 Be that as it may, Section 362 of the Code of Criminal Procedure reads thus :

“362. Court not to alter Judgment : Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its

judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

Bare perusal of this Section makes it clear that after passing the Judgment or final Order, the Court is not empowered to alter or review the same except to correct the clerical or arithmetical error. The Judgment in the matter of ***Vishnu Agarwal (supra)*** cannot be construed in a way to upset the Order passed in the application particularly when it is not disputed that applicants were served with copy of application for condonation of delay and were aware about filing of such application by the original complainant before this Court.

10 In this view of the matter, the application is devoid of merit and the same is rejected.

(A.M.BADAR J.)