

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.427 OF 2015

BHAIRAV ENTERPRISES through Proprietor)
MADANLAL P. JAIN)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ORS.)...RESPONDENTS

Mr.J.S.Kenny i/b. Mr.Suresh Dubey, Advocate for the Applicant.

Mr.A.Maheshwari, Advocate for Respondent Nos.2 and 3.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 1st FEBRUARY 2017.

P.C. :

1 This is an application by original complainant in a complaint in respect of offence punishable under Section 138 read with Section 142 of the Negotiable Instruments Act seeking condonation of delay in filing an application for leave to appeal

for challenging judgment and order of acquittal of respondent recorded by the learned Additional Chief Metropolitan Magistrate, Mumbai, on 21st December 2012.

2 Heard the learned counsel appearing for the applicant / original complainant. He argued that the complaint for the offence punishable under Section 138 read with 142 of the Negotiable Instruments Act lodged by the applicant came to be dismissed and respondent / accused were acquitted on 21st December 2012. Thereafter, the applicant / original complainant preferred an application for leave to appeal before this court, and subsequently, the same was withdrawn as the applicant was advised that remedy lies elsewhere. According to the learned advocate for the applicant, then, the applicant preferred revision petition before the learned Sessions Judge which was accompanied by the application for condonation of delay. Ultimately, on 16th April 2015, that application for condonation of delay came to be rejected by the Additional Sessions Judge, Greater Bombay, Mumbai, with a reason that the revision petition

itself is not maintainable. Hence, the application for leave to appeal is filed with the present application as the delay occasioned because of prosecuting the remedy under the wrong forum.

3 The application for condonation of delay came to be opposed strongly by the respondent / original accused by contending that even the initial application for leave to appeal filed before this court was barred by limitation and as issue of limitation had arisen, that application came to be withdrawn by the applicant / original complainant. It is further argued that, infact, the old case was got expedited by the accused persons by moving this court and now the present application is filed, just in order to keep a sword hanging on heads of respondents / accused. It is argued that when it was made clear to the applicant / original complainant that the appeal is not maintainable, then, at that point of time itself, the applicant could have approached this court instead of filing revision petition. This was done only to delay the matter. It is further argued that even after dismissal of the application for condonation of delay by the learned Additional

Sessions Judge, the applicant did not approach this court immediately and caused further delay.

4 For opposing the application for condonation of delay, the learned advocate for the respondent / accused placed reliance on judgment of a learned Single Judge of this court in the matter of Rajesh @ Prabhuraja vs. State of Maharashtra & Another¹ and Hari s/o. Narayan Mudkhede vs. The State of Maharashtra & Others².

5 I have carefully considered the rival submissions and also perused the pleadings.

6 The complaint bearing no.3896/SS/2008 filed by the applicant for the offence punishable under Section 138 read with Section 142 of the Negotiable Instruments Act came to be rejected on 21st December 2012 by the learned Additional Chief Metropolitan Magistrate, Greater Bombay, Mumbai, by holding

1 2013 ALL MR (CRI) 1937

2 2013 ALL MR (CRI) 3502

that the applicant / original complainant failed to prove that respondent / accused had issued the cheque for Rs.3 Lakh in order to discharge their legal liability.

7 It is seen from the record that Criminal Application bearing No.111 of 2013 came to be filed by the applicant / original complainant before this court for assailing the acquittal of accused persons recorded by the learned Trial Court. It is seen that on 25th July 2013, the learned advocate for the applicant / original complainant sought liberty to withdraw that application in order to avail alternate remedy.

8 After withdrawal of the said application, it is seen that the applicant / original complainant filed revision petition before the learned Sessions Judge at Mumbai, accompanied by an application for condonation of delay which was registered as Miscellaneous Criminal Application No.2698 of 2013. After noticing non-applicants therein, by an order dated 16th April 2015, the learned Additional Sessions Judge, Greater Bombay, Mumbai,

was pleased to reject the application for condonation of delay by holding that the complainant in the complaint for the offence punishable under Section 138 of the Negotiable Instruments Act cannot be termed as victim for the purpose of Section 372 of the Code of Criminal Procedure, and therefore, he cannot approach the Sessions court.

9 After rejection of the application for condonation of delay in filing revision petition, by the learned Additional Sessions Judge, Greater Bombay, Mumbai, the applicant / original complainant has approached this court by filing an application for leave to appeal along with the instant application for condonation of delay. The delay occasioned appears to be that of 2 years and 138 days. The applicant has narrated chronologically, all steps taken by him for prosecuting his remedy, in the application for condonation of delay, which is on affidavit.

10 It is well settled that if the remedy is prosecuted before the wrong forum under bonafide belief that the remedy lies before

that forum, then, the period spent on prosecuting the remedy before the wrong forum can be condoned for deciding the matter on merit. By condoning the delay, what happens at the most is decision of the matter on merit. It is well settled that when cause of substantial justice is pitted against technicality, then cause of justice should receive weightage. Applications for condonation of delay are to be considered liberally. In the case in hand, it is seen that the applicant, who is original complainant, was prosecuting his remedies after dismissal of his complaint by the learned Trial Court. No doubt, he has prosecuted his remedies before wrong forum, but now only because of that reason, he cannot be estopped from challenging the judgment and order of the learned Trial Court at the threshold itself, by rejecting his application for condonation of delay. At the same time, interest of the respondents can be protected by awarding proper cost to them. However, learned advocate appearing for respondent graciously stated that his client does not want cost.

11 Following principles are laid down by the Hon'ble Supreme Court in the matter of **Collector Land Acquisition, Anant Nag & Another vs. Mst.Katiji & Ors.**³ while considering the question of condonation of delay :

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

3 1987 AIR 1353

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

12 Ruling cited by learned advocate for respondents has not application to the facts of the instant case.

13 In this view of the matter, the application is allowed.

14 Delay in filing application for leave to appeal is condoned.

(A. M. BADAR, J.)