

Sarnobat

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4148 OF 2017

Hasmukh Amrutlal Shah.

.. Petitioner.

Vs.

Abhay Gangadhar Pagdhare,
and Anr.

.. Respondents

Mr. A. Ponda, with Ms. Mallika A. Ingale, Advocate for the Petitioner.

Ms. Yogita D. Chitnis, Advocate for Respondent No.1

Mrs. Vinod Chate, APP for the Respondent/State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 11th OCTOBER, 2017.

P. C. :

1. Rule. Rule made returnable forthwith. By consent of the parties matter is taken up for final hearing.

2. By this petition the petitioner has challenged the order dated 5th October, 2017 and 6th October, 2017, whereby the learned Sessions Judge has dismissed the applications for dispensation of personal appearance followed by directions to the petitioner to remain present in the Court on 12th October, 2017 to hear the judgment in Appeal No. 29/2016.

3. Heard learned counsel for the petitioner and learned

counsel for respondents. Perused the records.

4. The petitioner herein has been convicted and sentenced for offence under Section 138 of Negotiable Instruments Act. The petitioner has challenged the said judgment in Criminal Appeal No. 29 of 2016, filed before the Sessions Judge, Pune. It is submitted that the Appeal is heard on merits and was posted for judgment on 5th October, 2017. The application filed by the petitioner to dispense with his personal attendance came to be dismissed by order dated 5th October, 2017 and the appeal was posted for judgment on 6th October, 2017. The petitioner filed an application dated 6th October, 2017 states that he intends challenging the order dated 5th October, 2017 and once again sought dispensation of his personal attendance. The said application also came to be dismissed.

5. Pursuant to the application filed by the respondent No. 1, non-bailable warrant has been issued against the petitioner and appeal was adjourned for judgment on 12th October, 2017.

6. The learned counsel for the petitioner contends that the Appellate Court is not obliged to secure the presence of the accused for pronouncing the judgment. In support of this contention, he has

relied upon the decision of the Division Bench of this Court in **Kanji R. Barot Vs. The State of Maharashtra, Criminal Writ Petition No. 1455 of 2008**. The issue which was referred to the Division Bench in the said case was :-

“Whether the Proviso to Section 387 of the Code of Criminal Procedure, 1973 is controlled by sub-Section 5 and sub-Section 6 of Section 353 of the said Code or whether the Proviso carves out an exception to the rule contained in sub-Section 5 and 6 of Section 353 in so far as the same apply to the judgment in Appeal.”

7. The Division Bench after considering the scope of sub-Section 5 and 6 of Section 353 vis-a-vis Section 387 Cri. P. C. held as under :-

“ If the said provision is perused, it would be clear that the proviso to Section 387 of the Code has been added as an exception to the main section. Therefore, it is abundantly clear though the rule contained in Chapter XXVII, so far as the judgment of criminal Court of original jurisdiction (trial Court), applies to the judgment in appeal of appellate subordinate Court, the proviso gives discretion to the appellate Court whether it thinks it fit and proper for the accused to be brought in Court to hear the judgment to be delivered.

In our view, the said proviso carves out an

exception to the general rule which is provided under Section 353(5) and (6) of the Code.”

8. It is thus well settled that though the provisions of Section 353 Cr. P.C. are applicable, as far as practicable, to the judgment in Appeal before the Sessions Court, the proviso to Section 387 Cri. P.C. carves out an exception to Sub-Sections 5 and 6 of Section 353 Cr. P.C. This proviso stipulates that the presence of the accused at the time of pronouncement of judgment is necessary only when the Appellate Court directs the accused to remain present at the time of pronouncement of judgment. In other words the presence of the accused is not mandatory unless the Appellate Court in exercise of its discretion directs the accused to remain present.

9. In the instant case, the appellate Court has dismissed the application mainly on two grounds that the Court has powers to direct the accused to remain present to hear the judgment and further that the petitioner-accused was not under exemption during the hearing of the appeal and hence, the judgment in Kanji Barot is not applicable.

10. There is no dispute that the Appellate Court has discretion to secure presence of the accused to hear the judgment. Needless to

state that the discretionary powers cannot be exercised routinely but are to be exercised judiciously to meet the ends of justice. In the instant case, the learned Judge has not assigned any reasons to exercise these discretionary powers.

11. It is also pertinent to note that in Kanji Barot (Supra), the Division Bench of this Court has clearly held that Proviso to Section 387 carves out an exception to Sub-Section 5 and Sub-Section 6 of Section 353. Hence, the learned Judge could not have dismissed the application on the ground that the petitioner was not under exemption during hearing of the appeal. The learned Judge has in my considered view, misconstrued and misunderstood the effect and the purport of the judgment.

12. In the circumstances and in view of discussion supra, the impugned order cannot be sustained and is therefore quashed and set aside. The learned Sessions Judge is directed to dispose of the appeal without insisting the presence of the appellant/petitioner for the purpose of hearing of the judgment.

13. The Writ Petition stands disposed of.

[ANUJA PRABHUDESSAI, J]