

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.40 OF 2017
(For Leave to Appeal - Private)**

Shri.Babasaheb Baburao Tilekar
Through His Legal Heirs
Mr.Shashank Babasaheb Tilekar & Ors. ... **Applicants**
V/s.
The State of Maharashtra & Anr. ... **Respondents**

.....

Ms.Amruta R. Mehandale, Advocate for the Applicants.

Mr.S.V.Gavand, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 28th AUGUST 2018.

P.C. :

1 Heard the learned Advocate appearing for the applicant/appellant.

2 Perused the impugned Order as well as record made available so also the impugned Order.

3 Leave, as prayed, is granted.

4 Heard finally in view of notice of final disposal which has already been served on the respondent No.2/original accused. He is absent despite service.

5 The complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 came to be filed by the applicant/original complainant against the respondent No.2/original accused. The complaint was filed as a cheque for Rs.5,00,000/- given by the respondent No.2 to the applicant for legally enforceable debt came to be dishonoured. The said complaint ultimately came to be dismissed because of absence of the complainant by resorting to the provisions of Section 256 of the Code of Criminal procedure on 11/11/2016. This Order passed below Exhibit 1 is impugned in the instant application/appeal.

6 I have gone through the record made available.

7 It is seen that the applicant/original complainant had tendered evidence on affidavit on 04/03/2011 and his further chief-examination came to be recorded on 02/08/2011 in which some documents were also proved. It took 37 adjournments for completing the cross-examination of the applicant/original complainant by the respondent/original accused. Thereafter, the case was adjourned for further evidence. It is seen that the

applicant/original complaint then moved an application for witness summons and the case was adjourned from time to time for service of the witness summons and report thereof. Ultimately the applicant/original complainant moved an application at Exhibit 94 on 29/03/2016 for delivering the witness summons to the complainant for effecting service thereof on the Bank. Though that application became to be allowed on 29/03/2016 itself, the record shows that Hamdast of the witness summons was not granted to the applicant/original complainant. Even it is seen that on 05/10/2016, the learned Advocate for the applicant/original complaint was present before the Court, however, unfortunately on the very next date i.e. on 11/11/2016, the complaint came to be dismissed by recording absence of the applicant/original complainant and his learned Advocate.

8 The learned trial Court in the wake of there being evidence of the complaint on record ought not to have dismissed the complaint in such a hasty manner. The *roznama* shows that the applicant/original complainant was diligent in prosecuting his cause before the Court and had, in fact, adduced his evidence and he was cross-examined by the learned Advocate appearing for the accused. The primary function of the Court is to adjudicate the dispute on its own merit rather than adhering to the technicality of law.

9 In this view of the mater, the following Order :

ORDER

- (i) The application/appeal is allowed.
- (ii) The impugned Order dated 11/11/2016 passed by the learned 22nd Judicial Magistrate First Class, Pune dismissing the Summary Criminal Case No.7694 of 2009 for want of prosecution is quashed and set aside.
- (iii) The Complaint is restored to the file of the learned Judicial Magistrate First Class on its original number for disposal according to law.
- (iv) The application/appeal stands disposed of with this Order.

(A.M.BADAR J.)

Raju
Dattatraya
Gaikwad

Digitally signed by
Raju Dattatraya
Gaikwad
Date: 2018.08.28
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