

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.162 OF 2015

Bharat Nana Joshi ... **Appellant**

V/s.

Meena Naresh Matkar & Anr. ... **Respondents**

....

Mr.Vikas Kapile, Advocate for the Appellant.

Ms.Aditi Naikare i/b. Mr.Pradeep J. Thorat, Advocate for the Respondent No.1.

Mr.V. V. Gangurde, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 18th JANUARY 2018.

ORAL JUDGMENT :

1 Admit.

2 Heard finally with the consent of the parties as Record and Proceedings are already called vide Order dated 19th April 2017.

3 By this appeal, the appellant/original complainant is challenging the Order dated 4th December 2014 passed by the Metropolitan Magistrate, 43rd Court, Borivali, Mumbai dismissing his complaint bearing No.4300964/SS/2009 for want of prosecution.

4 The appellant/original complainant has preferred a complaint alleging the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 against the respondent No.1/original accused. On 08/07/2009, verification statement of appellant/original complainant came to be recorded by the learned Metropolitan Magistrate and the process was directed to be issued for securing appearance of the respondent/original accused. Accordingly, the respondent No.1/original accused appeared before the learned Metropolitan Magistrate and his plea came to be recorded on 17/10/2012. He pleaded not guilty and claimed trial. The criminal complaint was then fixed for recording evidence of the complainant. When the criminal complaint was fixed on 21/08/2014, the learned trial Magistrate recorded absence of the appellant/original complainant as well as his advocate and kept the criminal case for dismissal Order on 04/12/2014. On 04/12/2014, the complaint came to be dismissed by the impugned Order for want of prosecution and the respondent No.1/original accused came to be acquitted.

5 I heard the learned Advocate appearing for the appellant/original complainant. He drew my attention to the Order sheets maintained by the learned trial Magistrate and submitted that on almost every occasion, the appellant/original complainant along with his Advocate was present for adducing evidence. However, no evidence was recorded and ultimately for one absence, the complaint came to be dismissed.

6 The learned Advocate appearing for the respondent No.1/original accused justified the impugned Order of dismissal of the criminal complaint by contending that it was duty of the original complainant to attend the trial Court for adducing evidence diligently and as he failed to attend, the complaint was rightly dismissed.

7 I have carefully considered the rival submissions and also perused the Record and Proceedings. The Record and Proceedings reveals that after recording plea of the respondent No.1/original accused, on almost all occasions, the complainant was present with his Advocate or either Advocate for the complainant was present. It is seen that though the complaint was registered in the year 2009, no evidence was recorded by the learned trial Magistrate till August 2014 though the complaint was fixed from time to time. The Roznama/Order sheets does not show that adjournment of the said criminal complaint, at any time, was at the instance of the appellant/original complainant. Even on the date prior to recording absence of the appellant and his counsel i.e. on 10/06/2014, as seen from the Roznama/Order Sheets, the appellant/original complainant was present with his Advocate so also the respondent/original accused was present with his Advocate. The Roznama/Order sheets shows that the complaint was adjourned to 21/08/2014 without there being any request for adjournment from either side. However, on

21/08/2014, the appellant/original complainant and his Advocate were absent and then the Criminal complaint was kept for dismissal order on 04/12/2014. On 04/12/2014, the complaint came to be dismissed.

8 Primary function of the Court is to adjudicate the dispute on its own merits rather than adhering to the technicalities of law. In the case in hand, it is seen that at no point of time either the appellant/original complainant or his Advocate had applied for adjournment. It cannot be said that they are guilty of protracting the trial of the complaint lodged by them. In this view of the matter, only one day's absence ought not to have entailed dismissal of the complaint. In this view of the matter, the impugned Order passed by the learned Metropolitan Magistrate below Exhibit 1 on 04/12/2014 dismissing the complaint filed by appellant/original complainant cannot be justified. Therefore, the Order :

- (i) The appeal is allowed.
- (ii) The impugned Order passed by the learned Metropolitan Magistrate below Exhibit 1 in Criminal Case bearing No.4300964/SS/2009 is quashed and set aside.
- (iii) The complaint is restored to the file of the learned Metropolitan Magistrate, Borivali, Mumbai with a direction to decide it according to law.

- (iv) The appeal accordingly stands disposed of.
- (v) The Record and Proceedings be sent back to the learned Metropolitan Magistrate forthwith.
- (vi) Parties to appear before the learned trial Magistrate on 20th February 2018.

(A.M.BADAR J.)