

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.87 OF 2016

(For Leave to Appeal – Private)

WITH

CRIMINAL APPEAL NO.928 OF 2018

Mr.Kamlesh R. Kanojia ... **Applicant/Appellant**

V/s.

Smt.Shashikala Pandey & Anr. ... Respondents

Mr.Prashant Aher i/b. J.P.Jaiswal, Advocate for the
Applicant/Appellant.

None for the Respondent No.1.

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

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CORAM : A.M.BADAR J.

DATED : 24th JULY 2018.

ORAL JUDGMENT :

1 Considering the short controversy involved in the instant application, this Court vide Order dated 28th August 2017 had directed issuance of fresh notice of final disposal to respondent No.1/original accused. Despite receipt of that notice, none appeared for the respondent No.1/original accused.

2 Heard.

3 Leave, as prayed, is granted.

4 The memo of application for leave to appeal is being considered as memo of appeal.

5 The appeal is admitted and taken up for final hearing in view of Order dated 28th August 2017.

6 Heard the learned Advocate for the applicant/appellant/original complainant. He drew my attention to the Order below Exhibit 1 dated 24/11/2014 passed by the learned Metropolitan Magistrate 44th Court, Andheri, Mumbai and submitted that it is mentioned therein that the complaint is returned to the complainant for filing before the proper Court. The order sheet dated 02/12/2014 of the learned Metropolitan Magistrate, 43rd Court, Borivali shows that the complaint case is received by that Court from 44th Court, Andheri, Mumbai. After transfer of the complaint from the Court of Andheri, Mumbai to Court at Borivali, the applicant/appellant/original complainant was never noticed and, therefore, ultimately the complaint was dismissed for want of prosecution on 06/11/2015.

7 I have considered the submissions so advanced on behalf of the applicant/appellant. Perused the record made available.

8 On 06/11/2015, Criminal Case No.4304803/SS/2014

filed by the applicant/appellant for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 against the respondent No.1 came to be dismissed with a reason that the complainant is absent since long and the case is old. It is seen that the complaint was initially filed in the Court of the learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai, where it was registered as C.C.No.63/SS/2014. In view of Judgment in the matter of *Dashrath Rupsingh Rathod v. State of Maharashtra*¹, the learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai had ordered for return of the complaint to the complainant for filing it before the proper Court. However, order sheet dated 02/12/2014 of the Court of Metropolitan Magistrate, 43rd Court, Borivali makes it clear that the complaint was never returned to the complainant for presentation before the appropriate Court, but through the intra-Court transfer, it was transferred to the Court of the learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai, where it came to be registered as C.C.No.4304803/SS/2014. The record does not indicate that the applicant/appellant/original complainant was informed about this transfer. Subsequently, the Court at Borivali noted absence of the complainant on various dates and ultimately by the Order dated 06/11/2015, the said complaint came to be dismissed.

9 It is basic principle that act of the Court should not cause prejudice to anyone. At the time of transfer of the complaint

1 2014 (WEB) 499 SC.

from the Court of Andheri to the Court of Borivali, the applicant/appellant/original complainant ought to have been noticed by the concerned Court. This was not done. Even the Court at Borivali had also not noticed the complainant in the matter of transfer of his complaint to that Court.

10 In this view of the matter, dismissal of the complaint on 06/11/2015 by noting absence of the applicant/appellant/original complainant cannot be justified. The appeal, therefore, deserves to be allowed as without noticing the applicant/appellant /original complainant, his complaint was transferred to some other Court where it was dismissed for want of prosecution. Hence, the Order :

ORDER

- (i) The appeal is allowed.
- (ii) The impugned Order dated 06/11/2015 passed by the learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai dismissing the Criminal Case No.4304803/SS/2014 between the parties is quashed and set aside.
- (iii) The said complaint is restored to the file of the learned Metropolitan Magistrate.

(A.M.BADAR J.)

Raju
Dattatraya
Gaikwad

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Gaikwad
Date: 2018.07.24
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Gaikwad RD