

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.173 OF 2017
IN
CRIMINAL APPEAL NO. __ OF 2017

M/s.Samadhan Agency, through Mr.Hanumant Sarjerao Barge	Applicant
versus	
Rajekhan Noorkhan Pathan and another	Respondents

Mr.Ajit J. Kenjale for applicant.
Mr.Vishwanath S. Talkute for respondent nop.1.
Ms.R.M.Gadhvi, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 23rd January 2018

PC :

1. This application was heard finally on 22nd January 2018. Today the matter is posted for passing order. This is an application seeking leave to file an appeal against the judgment and order dated 24th May 2013 passed by the Court of Judicial Magistrate, First Class, Koregaon in SCC No.789 of 2006.

2. The applicant is the original complainant. The respondent no.1 was impleaded as accused in the said complaint. The complaint was filed alleging offence under Section 138 of Negotiable Instruments Act. The same was filed on 19th December 2005. The Trial Court took cognizance of the complaint and issued process against the accused on 17th November 2006. In pursuant to the order of issuance of process, the matter was posted before the Trial

Court on several occasions. Since the accused was absent, non-bailable warrant was issued against the accused. Since the complainant did not take steps for securing the presence of the accused, the complaint was kept for dismissal. On 24th May 2013, the complainant and his advocate were absent. Learned Judicial Magistrate, First Class dismissed the complaint for want of steps u/s 256 of Code of Criminal Procedure. The accused was acquitted.

3. The applicant thereafter filed an application before the same Court for recalling the order of dismissal of the complaint. The said application was filed on 19th June 2013. The learned Judicial Magistrate, First Class vide order dated 7th December 2015 rejected the said application on the ground that the Court cannot recall its order and the application is not maintainable in law. The applicant thereafter approached this Court. Since there was delay in filing the application seeking leave to file an appeal, the applicant filed Criminal Application No.48 of 2016 seeking condonation of delay. This Court vide order dated 1st July 2016 condoned the delay.

4. It appears that the complainant was attending the proceedings for a long period of time. The accused was remaining absent and therefore, the Trial Court was required to issue warrants. It is submitted that the Trial Court ought not to have dismissed the complaint only on the ground that the steps for execution of warrants were not initiated by the complainant. It is submitted that the warrants which are issued by the Court, are required to be executed by police machinery. The applicant was absent on the date of dismissal on account of his illness. It is further submitted that the Trial Court ought to have considered the fact that the proceedings

were pending since 2005 and on account of absence on that date, the complaint ought not to have dismissed.

5. Learned advocate for respondent no.1 submitted that the complainant ought to have been diligent in pursuing the prosecution. The complaint was filed in the year 2005 and it was pending for a long period of time. The accused cannot be subjected to mental harassment for such a long time and, therefore, the complaint may not be restored at this stage.

6. On perusal of the documents on record it is apparent that the proceedings were pending since 2005. From the roznama it also appears that the accused had remained absent and the Court was required to issue warrant. The non-bailable warrant issued by the Court could not be executed. The complainant has been pursuing the prosecution for a long period of time. The complainant ought to be given an opportunity to contest the proceedings on merits. It is true that on 24th May 2013, the complainant and his advocate were absent, however, it is to be noted that the prosecution is pending since 2005 and on account of absence of accused, it was not proceeded further. The impugned order itself indicate that non-bailable warrant was issued against the accused repeatedly. The power under Section 256 of Cr.PC are to be used sparingly. The Court is required to consider the fact whether complainant's presence on the date of dismissal was necessary to proceed with the matter and on account of his absence, there is miscarriage of justice. In the circumstances, the order dated 24th May 2013 dismissing the complaint and acquitting the accused is required to be quashed and set aside.

7. Hence, I pass following order :

ORDER

- (i) Leave granted;
- (ii) The impugned order dated 24th October 2013 passed by Judicial Magistrate, First Class, Koregaon in SCC No.789 of 2006 is quashed and set aside and the complaint is restored to file;
- (iii) The Trial Court is directed to proceed with the complaint in accordance with law;
- (iv) The parties are directed to appear before the Trial Court on 12th February 2018 at 11 a.m..

(PRAKASH D. NAIK, J.)

MST