

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.167 OF 2014
WITH
CRIMINAL APPLICATION NO.168 OF 2014**

M/S.ABC ENTERPRISES)...APPLICANT

V/s.

PRAKASH R. ZAVERI AND ANR.)...RESPONDENTS

Mr.K.J.Hakani, Advocate for the Applicant.

Mr.Yashpal Thakur i/b. PKA Advocates, Advocate for Respondent No.1.

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

CORAM : A. M. BADAR, J.

DATE : 25th JUNE 2018

P.C. :

1 Application for leave to appeal bearing no.167 of 2014 is moved for challenging the order dated 18th October 2013 (wrongly mentioned as 17th October 2013) passed by learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai, in

Criminal Case No.2804000/SS/2012 (old C.C.No.1072/SS/2006) by which the said complaint filed by the present applicant came to be dismissed for want of prosecution by exercising powers under Section 256 of the Code of Criminal Procedure. Criminal Application bearing no.168 of 2014 is arising out of Criminal Case No.2804001/SS/2012 (old C.C.No.1073/SS/2006) filed by the applicant/original complainant. By this application for leave to appeal, the order dated 18th October 2013 passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai, rejecting the said complaint for want of prosecution by exercising powers under Section 256 of the Code of Criminal Procedure, is challenged.

2 Heard. Leave, as prayed, is granted. Admit. Heard finally, by consent of parties, as Record and Proceedings are also called.

3 The learned counsel appearing for the applicant/original complainant vehemently argued that

complaints were dismissed for want of prosecution, but, infact, evidence of complainant Hiren Patel was also on record and he was partly cross-examined. Therefore, the learned trial court ought not to have resorted to the provisions of Section 256 of the Code of Criminal Procedure. He further argued that the applicant /original complainant was prevented from sufficient cause for not appearing before the learned Metropolitan Magistrate, when the complaint was called out for hearing. He was ill, and therefore, he was not present. The application for adjournment as well as for exemption was duly moved, and therefore, considering the amount involved in the subject complaints, learned trial court ought not to have dismissed the complaint.

4 I have also heard the learned advocate appearing for respondent no.1/original accused. He argued that despite thirteen adjournments claimed by the applicant/original complainant, he was found to be not interested in prosecuting the complaints, and therefore, discretion was rightly exercised by the learned Metropolitan Magistrate. In submission of the learned

advocate appearing for the respondent/original accused, on each and every date fixed for hearing/recording cross-examination, complainant Hiren Patel was absent, and ultimately, his cross-examination came to be closed on 25th March 2011. Still, he had chosen to remain absent successively on several dates and therefore, there was no alternative but to dismiss the complaints.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings. It appears that initially the complaints were filed by authorizing one employee named Kirit Parekh. He had tendered his evidence on affidavit and was also cross-examined partly and had left the employment of the applicant /original complainant. Therefore, applicant/original complainant Hiren Patel came to be substituted as the complainant and he had entered in the witness box for subjecting himself to cross-examination after tendering his evidence on affidavit. It is seen from the record that his evidence came to be closed as he failed to appear for cross-examination on 25th March 2011. Thereafter, the complaints were adjourned on some

occasions and ultimately, on 18th October 2013, application for exemption as well as adjournment came to be filed in both the complaints. Those were rejected by the learned trial court and that is how, by impugned orders below Exhibit 1, both complaints came to be dismissed for want of prosecution.

6 Undisputedly, both criminal complaints are in respect of cheques amounting to Rs.30 lakh and Rs.20 lakh respectively. It is trite that primary function of the court is to adjudicate the disputes on their own merits rather than adhering to the technicalities of law. Considering the amount of cheques involved in both complaints, interest of justice would be served if the respondent no.1/original accused is compensated in terms of money by awarding costs for adjournments taken by the applicant/original complainant from time to time. In my considered view, costs of Rs.15,000/- in each case, would meet the interest of justice and is sufficient to compensate the respondent no.1/original accused. Therefore, the following order :

ORDER

- i) Criminal Application Nos.167 of 2014 and 168 of 2014 are allowed subject to payment of costs of Rs.15,000/- in each application, payable by the applicant/original complainant to the respondent no.1/original accused, within four weeks from today.
- ii) Impugned orders dated 18th October 2013 (wrongly mentioned as 17th October 2013 in Criminal Case No. Nos.2804000/SS/2012) passed in both complaints viz. Criminal Case Nos. Nos.2804000/SS/2012 and 2804001/SS/2012, thereby dismissing the complaints for want of complainant under Section 256 of the Code of Criminal Procedure are quashed and set aside.
- iii) Both complaints are restored to file of the learned trial court in their original numbers, for disposal according to law. The parties to appear before the learned trial court on 31.7.2018.
- iv) The applications/appeals are accordingly disposed of.
- v) Record and Proceedings be sent back to the trial court expeditiously and the trial court is directed to dispose of both the complaints by following due process of law expeditiously.

(A. M. BADAR, J.)