

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION No. 296 OF 2013
(LEAVE TO FILE APPEAL)**

Rajendra Prataprao Hirey

...Applicant

Vs.

Ashok Savliram Wagh and Anr.

...Respondents

Mr. Satyajeet P. Dighe for Applicant

Mr. Mahendra N. Sandhyonshiv for Respondent No.1

Mrs. M.R. Tidke -APP for the State

CORAM : PRAKASH D. NAIK, J.
MONDAY, 8TH JANUARY, 2018

P.C.

1. This is an application seeking leave to file an appeal against the order of dismissal of complaint filed under Section 256 of the Code of Criminal Procedure.

2. The Applicant is original complainant, who had filed a complaint against Respondent No.1 for an offence punishable under section 138 of the Negotiable Instruments Act. The cheque amount involved in the complaint is Rs.10,20,000/- . The complaint was filed on 26th September, 2007. The Trial Court, thereafter, issued process against the accused. The

Applicant was absent before the Trial Court on 9th May, 2008, 20th June, 2008, 22nd July, 2008 and 28th August, 2008. The complaint was dismissed on 28th August, 2008. There was a delay in preferring this application for which a separate application was preferred and the same has been allowed vide order dated 13th March, 2012 subject to Applicant paying the costs of Rs.5,000/- to Respondent No.1. This Court vide order dated 12th July, 2013 has issued notice to Respondent No.1 and the parties were put to notice that the matter will be decided finally at the stage of admission.

3. The learned Advocate for the Applicant submits that the Applicant could not remain present before the Trial Court on account of his illness. The Applicant has relied upon the medical certificate, which has been annexed to this application. In the certificate dated 15.8.2009, it has been stated that the Applicant had suffering chronic low backache - Lumber Spondylitis and he was undergone medical treatment and physiotherapy for the said ailment from 28.8.2008 till the date of issue of certificate.

4. The learned Advocate submitted that the complaint has been dismissed for the absence of the Applicant by the Learned Trial Court. On account of the aforesaid circumstances, the Applicant could not remain present before the Court. It is submitted that the complainant be given an

opportunity to prosecute the Complaint on merits. The learned Advocate placed reliance on the decision of this Court in the case of **Terna Shetkari Sahakari Sakhar Karkhana Ltd., Tq. & Dist.- Osmanabad Vs. Anant s/o. Laxman Ghogre & Anr. [2011 ALL MR (Cri) 1840]**.

5. The learned Advocate for the Respondent No.1 submits that the Applicant was absent continuously on four occasions which has resulted in dismissal of the complaint. The Trial Court had given ample opportunities to the Applicant and at last, the complaint was dismissed. It is submitted that the medical certificate relied upon by the Applicant was issued belatedly for the purported ailment, which is referred in the application. It is submitted that even the appeal, challenging the impugned order was preferred belatedly and, therefore, the Applicant was not prompt in prosecuting his complaint, which has resulted in dismissal of the same. It is submitted that in the circumstances, the application preferred by the Applicant may be dismissed.

6. On perusal of the documents on record, it is apparent that the Applicant/Complainant was absent on four occasions before the Trial Court. The reliance, however, is placed on the medical certificate which reflects that he was suffering from Spondylitis and due to which he was

not present before the Court. It is true that the Applicant did not approach this Court immediately after dismissal of the complaint and on four occasions, he was not present before the Court. However, the delay in preferring the application has been condoned.

7. The Supreme Court in the case of **Associaed Cement Co. Ltd. Vs. Keshvanand** [1998 ALL MR (Cri.) 689 (S.C.)] has observed that when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day, the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to any other date due to any other reason. It is further observed that if the situation does not justify the case being adjourned, the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary, then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged in the section. In paragraph 17 of the said judgment, the Apex Court has considered the factual aspect

of the said matter stating that the complainant had remained absent on the consecutive preceding date of dismissal of the complaint. It is true that the Applicant was absent on the dates as stated hereinabove. However, an opportunity is required to be given to the Complainant to prosecute the complaint on merits.

8. Taking into consideration the circumstances as stated hereinabove, the impugned order will have to be set aside by directing the Trial Court to proceed with the case in accordance with law. Hence, I pass the following order:

Order

- (i) Leave granted;
- (ii) The impugned order dated 28th August, 2008 passed by the JMFC, 4th Court, Malegaon in RCC Case No. 2377 of 2007 is set aside and the said complaint is restored to file. The Learned JMFC is directed to decide the complaint on merits and in accordance with law;
- (iii) The parties are directed to remain present before the Trial Court on 22nd January, 2018 at 11.00 a.m.;
- (iv) The Applicant is directed to pay the costs of Rs.10,000/- to

Respondent No.1 within two weeks, from today.

The criminal application for leave to file appeal stands disposed of,
in the aforesaid terms.

[PRAKASH D. NAIK, J.]