

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.913 OF 2018

IN

CRIMINAL APPEAL NO.234 OF 2015

M/s.Aawas Builders ... **Applicant**
V/s.
Ajeet Ramnath Pathare & Anr.... **Respondent**

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Shri.Suparnaraj B. Dhotre, Advocate for the Applicant.

Mr.Ajay Panicker i/b. Ajay Law Associates, Advocate for the Respondent No.2.

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

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CORAM : A.M.BADAR J.

DATED : 31st JULY 2018.

P.C. :

1 This is an application for restoration of Criminal Appeal bearing No.234 of 2015 dismissed for want of prosecution by this Court. The appeal came to be filed by the original complainant challenging acquittal of the respondent of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. This Court vide Order dated 2nd February 2015 was pleased to grant leave to appeal and had admitted the appeal for final

hearing after hearing the original complainant as well as the accused. However, thereafter as office objections were not removed conditional Order dated 19th September 2017 came to be passed by this Court. The office objections were directed to be removed within a period of one week and it was even ordered that failing to remove the office objections within the prescribed period, the appeal shall stand dismissed without reference to the Court. That is how the appeal came to be dismissed for want of prosecution because of non-removal of office objections. The office objections which were directed to be removed were in respect of non-payment of Court fees and not effecting the amendment in the application for leave to appeal in order consider it as Memo of Appeal.

2 Heard the learned Advocate appearing for the parties.

3 The learned Advocate appearing for the respondent/original accused opposed the application by contending that quantum of delay stated in the application is 73 days whereas actual delay is 225 days. The learned Advocate further argued that except inadvertence and oversight of the Advocate of the appellant, no other ground is stated for condoning the delay in filing the application for restoration as well as for restoration of the Criminal Appeal dismissed for default. It is further argued that there is no provision in Criminal Procedure

Code to restore the appeal which is dismissed for want of prosecution. The application is suffering from suppression of facts as quantum of delay is not properly stated.

4 Way back in the year 1987, the Honourable Apex Court in the matter of *Collector Land Acquisition, Anant Nag & Another vs. Mst. Katiji & Ors.*¹ has held thus while for considering prayer for condonation of delay. :

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical

¹ 1987 AIR 1353

considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

5 It is thus clear that prayer for condonation of delay is required to be considered by adopting the liberal approach as primary function of the Court is to adjudicate the dispute on its own merit rather than adhering to the technicality of law. It is well settled that once the criminal appeal is admitted for final hearing then it needs to be taken to its logical end rather than dismissing it in default. The subject criminal appeal in this case was admitted for final hearing after hearing both the parties. This Court has ample power to restore the admitted appeal to the file and Section 482 of the Criminal Procedure Code is one of them. It cannot be said that this Court is not having inherent powers while

exercising criminal jurisdiction. Therefore, I see no merits in the submission of the learned Counsel for the respondent/original accused that this Court has no power to restore the admitted appeal to the file once it is dismissed for default.

6 The complaint came to be filed by the applicant alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act. It was dismissed after due trial. This Court has granted leave to appeal and the appeal was admitted after hearing all parties. Considering this aspect of the matter, I see no reason to refuse the relief as claimed merely because there is delay in approaching the Court for its restoration. Once a case for consideration is made out, then the fact that there is delay in approaching the Court for restoration goes into oblivion. Quantum of delay in such case is not material. What is material is sufficient cause. Duly sworn application is mentioning the reason of inadvertence and oversight of the learned Advocate appearing for the appellant in removing the office objections resulting in dismissal of the appeal in default. For the mistake of the Counsel, the litigants should not suffer. By condoning the delay and restoring the Criminal Appeal to the file, the end result will be decision on merits of the case. This cannot prejudice anyone.

7 In this view of the matter, I hold that the applicant was prohibited from approaching the Court within limitation by

sufficient cause. Case for restoration of appeal is made out because the appeal was already admitted for final hearing.

Therefore, the Order :

ORDER

- (i) The Application is allowed.
- (ii) The delay in filing the application is condoned.
- (iii) Criminal Appeal No.234 of 2015 is restored to the file of this Court with a direction that the office objection, if any, be removed within a period of two weeks from today.
- (iv) The application is disposed of accordingly.

(A.M.BADAR J.)

Raju
Dattatraya
Gaikwad

Digitally signed by
Raju Dattatraya
Gaikwad
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