

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1088 of 2015

Shri Ashok Shripal Arwade ... **Appellant**
V/s.
Shri Darshan Appasaheb Khot & Anr. ... **Respondents**

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Ms.Sukhman Rait i/b. Mr.S.S.Patwardhan, Advocate for the Appellant.

Ms. Anamika Malhotra, APP for the Respondent No.2/State.

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CORAM : A.M.BADAR J.

DATED : 24th APRIL 2018.

ORAL JUDGMENT :

1 This is an appeal filed by the original complainant
challenging the Order dated 2nd March 2013 passed by the 15th
Judicial Magistrate First Class, Kolhapur in Summary Criminal
Case No.2305 of 2010 whereby his complaint for the offence
punishable under Section 138 of the Negotiable Instruments Act,
1881 came to be dismissed for want of prosecution, which has
resulted in acquittal of the respondent No.1/accused.

2 Vide Order dated 4th January 2016, this Court while
issuing notice to the respondents has directed that the notice

should indicate that the appeal shall be decided at the stage of admission itself. Thereafter, again vide Order dated 27th February 2018, this Court directed issuance of fresh notice to the respondent No.1/original accused indicating that the appeal shall be disposed of finally at the stage of admission itself in pursuant to the earlier Order dated 4th January 2016. Despite service of this fresh notice to the respondent No.1 for final disposal of the appeal, the respondent No.1/original accused is again absent. That is how, the appeal is being taken up for the final disposal at the stage of admission itself.

3 Heard the learned Advocate appearing for the appellant/original complainant.

4 Admit. Heard finally in pursuant to the Order dated 4th January 2016.

5 The learned Advocate for the Appellant argued that the appellant/ original complainant was diligent in prosecuting the complaint filed by him alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881, but, unfortunately, on 2nd March 2013, the learned Advocate of the appellant/original complainant was preoccupied with other matters and the appellant being senior citizen could not attend the Court due to financial constrains. That is how, the complaint came to be dismissed.

6 The learned Additional Public Prosecutor is appearing for the respondent No.2/State.

7 I have carefully considered the submissions so advanced and perused the Record and Proceedings. The *roznama* reveals that the appellant/original complainant was diligent in prosecuting the complaint filed by him alleging the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. After recording his verification statement, summons was issued against the respondent No.1/original accused. Thereafter, it is seen from the record that the complaint was posted for filing of documents in original. On 27th December 2012, the documents came to be filed by the complainant along with list Exhibit 25. Thereafter, the complaint came to be adjourned for tendering evidence on affidavit. On 22nd February 2013, the appellant/original complainant was absent. Similarly, on 2nd March 2013, the appellant so also his learned Advocate were absent and by noting their absence, the learned trial Magistrate was pleased to dismiss the complaint.

8 Absence of the appellant/original accused is explained in the Memorandum of Appeal. It is seen that the appellant/original complainant, who is a senior citizen aged more than 83 years, was residing in an ashram named as Shantisadhak Ashram in remote Taluka of Kolhapur District. Because of financial

constrains, he was not attending the complaint and his learned Advocate was taking care thereof. It is stated that even the evidence affidavit was ready on 2nd March 2013, but the same could not be filed, when the matter was called out, as the learned Advocate for the appellant was busy before the another Court.

9 Be that as it may, as it is seen from the record that the appellant/original complainant, who is a senior citizen, aged more than 83 years, was duly prosecuting his complaint, the learned trial Court ought not to have dismissed the complaint merely because on two occasions, the complainant and his counsel were absent. The primary duty of the Court is to do the substantial justice rather than adhering to the technicality of law.

10 In this view of the matter, the appeal deserves to be allowed and, therefore, the Order :

ORDER

- (i) The appeal is allowed.
- (ii) The impugned Order dated 2nd March 2013 passed by the learned trial Magistrate below Exhibit 1 acquitting the respondent No.1/accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 is quashed and set aside.

- (iii) The complaint is restored to the file of the learned trial Magistrate with the same number.
- (iv) The learned trial Court is directed to proceed in the matter according to law.
- (v) Record and Proceedings be sent back to the trial Court forthwith.
- (vi) The appellant is directed to appear before the learned trial Court on 8th June 2018 through his Advocate.

(A.M.BADAR J.)