

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.440 OF 2017
(For Leave to Appeal)
IN
CRIMINAL APPEAL NO. OF 2017**

Nira Bhima Sahkari Sakhar Karkhan Ltd. .. Applicant

Vs.

Gorakh Ramdas Kadam & Anr. .. Respondents

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Mr.Ramdas H. Patil, Advocate for the Applicant.
Mr.Rupesh A. Zade, Advocate for Respondent No.1.
Ms.V.S. Mhaispurkar, APP for the Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 23, 2018.

P.C. :

With the consent of parties, matter was heard finally
at the stage of admission.

2 This is an application seeking leave to file an Appeal
against the impugned order passed by the trial Court dismissing
the complaint and acquitting the accused.

3 The applicant is the original complainant. The
complaint was filed on 16th December, 2013, for an offence

punishable under Section 138 of the Negotiable Instruments Act. Verification statement of the complainant was recorded and the process was issued against the accused on 1st February, 2014. Summons was served upon the accused. After service of summons, the accused appeared before the Court and executed bail bond on 10th September, 2014. Apparently, the complainant and his advocate were absent before Court on several occasions.

4 Since the accused was not present before the Court on 6th January, 2015, the applicant preferred an application for issuance of warrant. The matter was adjourned from time to time thereafter. Report of execution of order was awaited. It appears that the applicant as well as the accused were absent before the Court thereafter. Learned Magistrate passed impugned order on 7th July, 2017, observing that the complainant and his advocate have remained absent. Complainant has failed to take necessary steps despite sufficient opportunity being given to him. From the conduct of the parties, it appears that the complainant is not interested to proceed with the matter. The matter is old and require early disposal. The Court, therefore, dismissed the said complaint and acquitted the accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

Hence, the application has been preferred seeking leave to file an Appeal against the said order with the prayer to set aside the order dismissing the complaint. The complaint was not dismissed on merits but on technical ground that the complainant was absent. In view of these, leave is required to be granted and application is treated as an appeal and heard for final disposal.

5 Learned advocate for the applicant submits that there was a communication gap between the applicant and his advocate. It is submitted that on account of absence of the respondent – accused, an application for issuance of warrant was preferred by the applicant on 6th January, 2016, which warrant was pending for execution and, thereafter, the matter was adjourned from time to time. It is submitted that the respondent accused was absent and the matter was under consideration for execution of warrant against the respondent accused. Learned advocate, therefore, submitted that the Court ought not to have dismissed the complaint. The complainant may be given an opportunity to lead evidence, and adjudicate the complaint on merits.

6 Learned advocate for the respondent vehemently

opposed the grant of any relief to the applicant. In pursuant to the issuance of summons, the respondent had appeared before the Court and the complainant has failed to take steps. The complainant was reportedly absent before the trial Court and in the circumstances, the Court had no other option but to dismiss the complaint in exercise of powers under Section 256 of the Code of Criminal Procedure. It is further submitted that the respondent – accused was put to harassment and he is required to face the proceedings for a long period of time. It is submitted that in the event the Court allows the application, the applicant may be directed to pay appropriate cost to respondent no.1.

7 On perusal of documents, it is apparent that the complaint was filed by the applicant for an offence punishable under Section 138 of the NI Act. The said complaint was filed on 16th December, 2013. It is apparent that the complainant was examined by way of verification statement and the process has been issued against the accused. The process was served upon the respondent and, thereafter, the respondent had appeared before the Court. It is true that the complainant – applicant had remained absent on several occasions, however, it appears that the accused was absent on 6th January, 2015 and, hence an

application was preferred by the applicant who was present in the Court for issuance of warrant against respondent no.1. Learned Magistrate issued Non Bailable Warrant against respondent no.1 which could not be executed for substantial time. Report of execution was also awaited. Thereafter, respondent no.1 did not appear before the Court. It is also evident that even the applicant was not present after issuance of warrant against respondent no.1. The next step in the matter was to record plea of the accused for which the presence of the accused was necessary. Even if the complainant had remained present, the trial Court ought not to have proceeded with the matter in the absence of the accused. The powers under Section 256 of the Code of Criminal Procedure can be exercised only when the complainant is not diligent in pursuing the prosecution and on the date of dismissal the presence of the complainant was necessary to proceed with the matter. In the circumstances, the trial Court ought not to have passed impugned order dated 7th July, 2017.

8 In view of the aforesaid factual matrix, the impugned order is required to be set aside by restoring the complaint to the file with the directions to the trial Court to decide the complaint in accordance with law.

9 Hence, I pass the following order:

:: ORDER ::

- (i) The impugned order dated 7th July, 2017, passed by the Judicial Magistrate First Class, Indapur, in SCC No.715 of 2013, dismissing the complaint and acquitting respondent no.1 is set aside and the complaint is directed to be restored to the file of the trial Court. The Court is directed to deal with the matter in accordance with law;
- (ii) Applicant is directed to pay the costs of Rs.5,000/-, to respondent no.1 within a period of four weeks from today. The payment of costs is condition precedent for restoration of the complaint;
- (iii) Parties are directed to appear before the trial Court on 26th March, 2018 at 11:00 a.m.;
- (iv) Criminal Application No.440 of 2017, stands disposed of.

(PRAKASH D. NAIK, J.)