

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPP) NO.1339/2018

IN

CRIMINAL APPLICATION (ABA) NO.453/2018

Sunil S/o Kashinath Meshram

..Vs..

State of Maharashtra, through Police Station Officer, P.S. Kotwali, Nagpur

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri M.K. Pathan, A.P.P. for the respondent / State.

CORAM : Z.A. HAQ, J.

DATE : 1.10.2018.

Criminal Application (ABA) No.453/2018 was filed before this Court under Section 438 of the Criminal Procedure Code. This Court issued notice by order dated 12th July, 2018. The order dated 19th July, 2018 reads as follows:

“None present for the applicant. A.P.P. Pathan for the respondent. Reply taken on record. S.O. to next week.”

Matter was listed on 26th July, 2018 and came to be dismissed for want of prosecution. The order reads as follows:

“None appears on behalf of the applicant.

2] None appeared even on the date last date of the hearing i.e. 19.07.2018.

3] The criminal application is dismissed for want of prosecution.”

The applicant then filed the present application praying that Criminal Application (ABA) No.453/2018 be restored. The matter was listed before the Court on 19th September, 2018 and following order was passed:

“Mr. Bhangde, the learned Counsel for Applicant submits that the Applicant has undergone major orthopedic surgery and wish to surrender the Investigating Officer within a period of four weeks from today. He intend to file an undertaking to that effect in this Court specifying the date and time of surrender before the Investigating Officer.

2. Stand over to 24th September 2018 by way of last chance.”

The the matter was listed on 24th September, 2018 and following order was passed:

“The learned Counsel for Applicant assures that he shall work out the matter on 27th September 2018, failing which, it will be open for the Court to dismiss the same.

2. Stand over to 27th September 2018.”

Then the matter was listed on 27th September, 2018 and following order was passed:

“Perused the medical record produced by the learned counsel for the applicant. I hardly noticed any convincing reason to grant temporary protection as prayed for.

Shri Bhangde, learned counsel for the applicant wants time to work out the matter on merit.

List the matter on 01.10.2018”

Shri M.K. Pathan, learned A.P.P. has strongly opposed the application mainly on the ground that the explanation given in the application for absence of the Advocate of the applicant cannot be accepted. It is submitted that if the explanation given is accepted then it will amount to accepting the allegations made in the application. The relevant averments are found in paragraph No.1 of the application as follows:

“1. Thereafter the said matter was listed on 25.07.2018 at serial no.902 in Court Room No.G. The counsel was waiting for his number outside Court Room door. On that day there was a heavy rush in the court room and display board was also not working. One of the junior colleagues called counsel for applicant that the serial no.902 is called out. The counsel for applicant appeared before the court but the Hon'ble Court passed the order. Thereafter the counsel for applicant immediately made oral request due to the said unforeseen event. The Hon'ble Court had not accepted the oral request.”

It is further submitted by the learned A.P.P. that the affidavit in support of the application is affirmed by the applicant and not by the Advocate who appeared on that date as alleged in the application and further there is nothing on record to show that applicant was present in the Court and the averments in the application are made by the applicant as per his personal knowledge, though in the affidavit it is stated that the contents of paragraph No.1 of the application are true

and correct to personal knowledge of the applicant. I find considerable force in the submissions made by the learned A.P.P.. Such unthoughtful averments cannot be accepted. It is further relevant to note that three lawyers, namely, Shri A.K. Bhangde, Shri L.B. Thawkar and Shri N.N. Adhikari represent the applicant, however, in paragraph No.1 of the application it is not stated which Advocate was present in Court when order dismissing the application in default came to be passed. In the above facts, I am not inclined to consider the prayer made in the application. The application is **dismissed**. For filing such application, making incorrect statements / averments, the applicant / his Advocates shall deposit Rs.25,000/- (Rs. Twenty Five Thousand) with the High Court Legal Services Sub-Committee, Nagpur and produce receipt of it on record within one week.

It is clarified that dismissal of this application will not come in the way of the applicant in filing fresh application under Section 438 of the Code of Criminal Procedure. However, if any fresh application is filed, the applicant shall place copy of this order on record of that application and also point it out to the Court at the time of hearing of such application.

JUDGE