

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.43 OF 2019.

Santous D'Costa, thr.
POA, Vincent D'Costa.

.... Petitioner.

Vs.

Sandra Santous D'Costa

.... Respondent.

Mr. D. Vernenkar, Advocate for the petitioner.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Date:-9th August 2019.

ORDER

Despite opportunities none appears for the respondent.

2. Leave granted to amend paragraph 6 of the petition.

Amendment to be carried out forthwith.

3. By this petition under Section 482 of Cr.P.C. and under Article 227 of the Constitution of India, the petitioner has impugned the order of dismissal of his Criminal Miscellaneous Application No.173/2017 by the Additional Sessions Judge on 1.11.2018 due to

absence of petitioner and his counsel.

4. Heard Mr. Vernekar, learned counsel for the petitioner.

5. Without going into the merits of the case, it seems that the learned Additional Sessions Judge dismissed the appeal for non prosecution due to absence of the petitioner and his counsel as above which ought not to have been dismissed in view of the mandate of law provided under Section 386 of Cr.P.C.

6. Section 384 (1)(a) of Cr.P.C. contemplates that no appeal presented under Section 382 of Cr.P.C. shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

7. Learned Counsel for the petitioner submits that the appeal came to be filed under Section 29 of the Protection of Women from Domestic Violence Act 2005. Section 28 of the said Act provides the procedure which reads thus:-

(1) Save as otherwise provided in this Act, all

proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

8. Proceedings under Domestic Violence Act are governed by Criminal Procedure Code.

9. Besides, the learned counsel for the petitioner has tendered on record his medical certificate issued by “Sancheti Institute for Orthopaedics and Rehabilitation,” Pune indicating that he was diagnosed with left femur shaft osteoid osteoma and was an indoor patient from 20.9.2018 to 22.09.2018 and was advised rest from 23.9.2018 to 22.10.2018. Certificate also reveals that medical expert would decide as to when the patient would be fit to resume his normal duties. The learned Counsel for the petitioner submits that thereafter also he was not in a position to make movements and, therefore, could not instruct the petitioner resulting into the dismissal of the appeal as above.

10. Learned Counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Parsuram Patel Vs. State of Orissa***¹. It is held that an appeal cannot be dismissed on the ground of default in appearance. The Court has to go through the record of the case even in the absence of the appellant or their counsel and decide the matter on merit.

11. Having considered the reasons assigned hereinabove, the learned Judge ought to have considered the legal position vis-a-vis the reason assigned for absence of the petitioner and his counsel.

12. In such circumstances, the impugned order needs to be quashed and set aside and, as such, it stands quashed and set aside. Criminal Misc. Application No.173 of 2017 stands restored to the file. The petitioner shall remain present in the Court of Additional Sessions Judge, Mapusa on 16.8.2019 at 2.30.p.m. The learned Additional Sessions Judge shall proceed further in accordance with law.

¹ 1994(4) SCC 664.

13. Petition stands disposed of in aforesaid terms.
14. Authenticated copy of this order be expedited.

PRITHVIRAJ K. CHAVAN, J.

vn*