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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

***CRIMINAL APPLICATION NO.443 OF 2019
(FOR LEAVE)***

Jaysingh Ratinath Nageshkar (Deceased)
through legal heir Samit Jaysingh Nageshkar ..Applicant.
V/s.
Indrajeet Shankarrao Nageshwar & Ors. ..Respondents.

Mr.Kuldeep Patil for the applicant.

Mr.Tejas Hilage for respondent Nos.1 to 6.

Mr.A.R.Kapadnis, APP for the respondent-State.

CORAM : NITIN W.SAMBRE, J.

DATE : NOVEMBER 13, 2019

P.C. :-

Heard respective counsel.

2. This application is for grant of leave to prefer appeal by the applicant against the order dated January 21, 2018 of dismissal of the complaint being Regular Criminal Case No.584/2009 for offences punishable under section 406, 409, 418, 420, 467 and 468 read with 34 of the Indian Penal Code.

3. The learned Magistrate initially ordered issuance of

process against all the accused persons. However, accused Nos.1, 2 and 6 questioned the said order in a revision. The Revisional Court on May 19, 2015 set aside the order of issuance of process against accused Nos.1, 2 and 6.

4. I am informed that the order of May 19, 2015 setting aside the issuance of process against accused Nos.1, 2 and 6, writ petition came to be filed in this Court which is pending till date. My attention is also invited to the fact that in the said petition, all accused Nos.1 to 6 are added as respondents under the *bona fide* impression that the complaint itself is dismissed against all the accused persons.

5. Forming the aforesaid misconception about setting aside the order of issuance of process, learned counsel for the applicant submits that in the complaint steps to effect service of order of Magistrate could not have been taken. According to him, writ petition is pending before this Court against the order dated May 19, 2015. According to him, the complainant expired on January 3, 2017 and under proviso to section 394(2) of the Criminal Procedure Code right vests in the legal heir of the accused or the original complainant to claim for substitution and based on the same, it is claimed by the applicant that he has preferred the present application

through the legal heir of deceased complainant.

6. It is also claimed that such substitution in the writ petition is still pending for consideration.

7. As such, in the aforesaid backdrop, submissions are, in view of misconception or *bona fide* mistake, the application remained to be attended and as a consequences of which order impugned came to be passed. As such leave is sought.

8. Learned counsel for the non applicant and learned APP support the order.

9. Fact remains that the original complainant expired on January 3, 2017 and pendency of the writ petition in this Court questioning the order of the Revisional Court passed on May 19, 2015 is not disputed.

10. Fact remains that in the pending writ petition there is no interim order operating and as such, it was obligatory on the part of the applicant to pursue the complaint case. In the alleged complaint case, the complainant has not taken any steps till 2015 for pursuing his complaint further.

11. Apart from above, in view of the death of original complainant on January 3, 2017 in the present proceeding, no application for substitution is moved or such substitution is

not sought to be incorporated.

12. There is one more facet to the matter. Even if it is presumed that the writ petition is *bona fide* filed by the petitioner-applicant questioning the order of the Revisional Court dated May 19, 2015, fact remains that the order of quashing of issuance of process was restricted only to the extent of accused Nos.1, 2 and 6 and not against accused Nos.3, 4 and 5 who remained unserved since 2009 i.e. since the date of inception of the complaint.

13. Another matter which is brought to the notice of the Court is, after the order of issuance of process is set aside against accused Nos.1, 2 and 6, the applicant has not taken any steps to delete accused Nos.3, 4 and 5 from the array of respondents in the writ petition and to pursue the complaint against the accused persons.

14. It appears that since inception, the complainant is negligent and not *bona fide* in pursuing his case. That being so, no case is made out for grant of leave. Leave is refused.

(NITIN W.SAMBRE, J.)