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

CRIMINAL APPLICATION No. 464 OF 2018
(FOR LEAVE TO APPEAL)

M/s. Prince Marine Transport
Services Private Limited
Through Director Hashim Abdu

...Applicant/
Appellant

Vs.

The State of Maharashtra and Anr.

...Respondents

Mr. A.H.H. Ponda i/b. Mr. Shyam M. Kalyankar for Applicant/
Appellant

Ms. Fenila Narayan Nair for Respondent No.2

Mr. S.S. Pednekar -APP

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : FEBRUARY 14, 2019

P.C.:

1. This is a special leave to appeal filed by the Original Complainant, challenging the order dated 14.9.2018 passed by the Metropolitan Magistrate, 16th Court at Ballard Pier, Mumbai thereby dismissing the complaint under Section 256 of the Code of Criminal Procedure, 1973 and acquitting the Respondent of the offence punishable under Section 138 of the Negotiable Instruments Act.

2. The Applicant herein has filed a complaint on 27th January, 2011 in the Court of Metropolitan Magistrate, 16th Court at Ballard Pier, Mumbai. Initially, the accused had challenged the very fact that the name of the accused has not been mentioned correctly.

Thereafter, on 12th August, 2014, the Complainant had filed an affidavit of evidence in lieu of examination-in-chief. The matter had prolonged for some time and, thereafter, on 24th June, 2016, the cross examination had commenced. The cross examination was completed on 25th of July, 2016. The Complainant had then filed an application seeking re-examination. The said application was decided on 22nd September, 2016. The cross examination was continued on 15.11.2016. Thereafter the complainant had filed an application under Section 91 of the Code of Criminal Procedure on 1st of March, 2017 which was allowed on 14th June, 2017.

3. The Roznama would show that on 29th July, 2017, the Complainant was absent. The summons, which was issued to Vishakhapatnam Port Trust, was not collected by the advocate for the Complainant and, thereafter, from 22nd June, 2018 to 4th July, 2018, the Complainant remained absent. It is a matter of record that the advocate had not collected the notice/summons and, therefore, naturally the summons was not served. The Learned Magistrate had finally dismissed the complaint for want of prosecution.

4. The learned counsel for the Applicant has placed reliance on the judgment of the Hon'ble Apex Court in the case of **Associated Cement Co. Ltd. Vs. Keshvanand [(1998) 1 Supreme Court Cases 687]**, more particularly, the observations made in paragraph 17, which are as follows:

“17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

The learned counsel has also placed implicit reliance on the judgment of the Apex Court in case of **S. Anand Vs. Vasumathi Chandrasekar [(2008) 4 Supreme Court Cases 67]**, more

particularly, the observations made in paragraph 15, which are as follows:

“15. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

5. The learned counsel for Respondent No.2 has drawn the attention of this Court to the order dated 12th April, 2018. The learned counsel submits that on most of the occasions, the advocate for the Complainant had remained absent for the cross-examination without assigning any reason and the complainant was absent from 22nd January, 2018. Even prior to that, the advocate for the Complainant remained present in the sessions when the Court was busy and at the end of the day, had expressed difficulty and, therefore, matter had to be adjourned on several occasions. Finally, on 12th April, 2018, the advocate for the accused had filed an application for dismissal of the complaint under section 256 of the Code of Criminal Procedure, 1973. On the same day, the Learned Magistrate was pleased to observe the conduct of the advocate for the complainant and the complainant. It was observed as follows:

“An employee of complainant company is present before the court and he informed to the court that the Learned Advocate is busy in the High Court and she would appear before this court once the hearing is over. Court asked the concerned employee as to whether the complainant is coming to the court and he informed that he will not be coming today. No application for adjournment is filed on the record and the conduct of the complainant clearly shows that he is interested to prolong the matter. Hence, case be fixed for order 'Dismissal'.”

It is pertinent to note that even after the said order was passed, the matter was adjourned to 12th June, 2018, 4th July, 2018 and 14th September, 2018 and on all the three dates, the complainant and his advocate had chosen to remain present. It is quite justifiable for the Magistrate to dismiss the complaint since the complaint was pending before his Court since 2011 and the affidavit could be filed only in 2014. Upon perusal of the order dated 12th April, 2018, it was clear that the Learned Court had shown leniency to its best and had no other alternative but to dismiss the complaint.

6. The learned counsel for the Applicant submits that in the eventuality a time frame is given, the Applicant would cooperate with the Court and, therefore, the Application deserves to be allowed but the complainant/ Applicant deserves to be saddled with costs. Hence, the following order:

ORDER

- (i) Application for leave to Appeal is allowed.
- (ii) The order dated 14th September, 2018 passed by the Metropolitan Magistrate, 16th Court at Ballard Pier, Mumbai is hereby quashed and set aside. The matter is remanded to the Court of Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai and shall stand restored on depositing a cost of Rs.15,000/-. The cost to be deposited on or before 28th of February, 2019.
- (iii) The Complainant and his advocate shall remain present before the Court for cross examination on 28th February, 2019.
- (iv) The Learned Magistrate shall conclude the recording of evidence on or before 30th April, 2019. The parties to co-operate with the same.

[SMT.SADHANA S. JADHAV, J.]

V.A. Tikam