

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLN. FOR LEAVE TO APPEAL BY PVT. PARTY NO.47 OF 2022

DHONDIRAM KASHINATHRAO GHATUL
VERSUS
PRAKASH NAMDEVRAO SHEWALE

...
Mr. Shaikh Wajeed Ahmed, Advocate for applicant.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 08.06.2022

ORDER :-

. Present application for grant of leave to appeal has been filed by the original complainant. He had filed complaint bearing S.C.C. No.343 of 2014 against the present respondent alleging that the respondent has committed offence punishable under Section 138 of the Negotiable Instruments Act, however, the said complaint came to be dismissed by the learned Judicial Magistrate First Class, Court No.2, Jintur, Dist. Parbhani on 09.11.2017 under Section 256 of the Code of Criminal Procedure.

2. Heard learned Advocate for the applicant. It is not even necessary to issue notice to the respondent.

3. Learned Advocate for the appellant has submitted that the complainant was remaining present till 08.12.2016 and on the basis of application filed by him for issuance of warrant against the accused, who had remained absent, the learned Magistrate has issued the warrant. However, thereafter the complainant has not remained present, but his presence was not required for the matter to proceed. The learned Magistrate wrongly inferred that the complainant has not taken steps since 21.01.2017 and, therefore, he is not serious to proceed with the matter. The learned Magistrate ought not to have exercised his powers under Section 256 of the Code of Criminal Procedure when the matter was not for hearing and, therefore, the appeal deserves to be admitted under Section 378(4) of the Code of Criminal Procedure. He placed reliance on the decision in *Govindji Trikamdas and Co. Vs. The State of Maharashtra and Ors.*, [2016 ALL MR (Cri) 2827], wherein this Court considered that the dismissal of the complaint under Section 138 of the Negotiable Instruments Act was on account of failure on the part of complainant to take steps for securing presence of the accused pursuant to the warrant of arrest, however, what 'step' were expected from complainant were not made clear and no report was submitted by police for not executing the said warrant. When the Magistrate had the power to put the question for the police for their failure to execute the warrant,

the complainant was not responsible for the said failure on the part of the police to arrest the accused and, therefore, the complaint ought not to have been disposed of under Section 256 of the Code of Criminal Procedure.

4. It is to be noted that the complaint was filed under Section 138 of the Negotiable Instruments Act and the steps were taken after the issuance of process by the concerned Court. The copy of the roznama before the Magistrate has been produced on the day the accused appeared and was released on bail. His plea was recorded and the matter was kept for adducing evidence. Thereafter, on 20.02.2016, even the affidavit-in-chief was filed by the complainant, however, matter was adjourned due to the absence of the accused, but application for his examination was filed. Thereafter, it appears that on some occasions either the accused was absent or the complainant was absent. On 16.09.2016, the accused was absent and, therefore, on that day, it appears that the order was passed for issuing Non Bailable Warrant against the accused and the matter was kept on 08.11.2016. On 08.11.2016 though the accused was absent and the complainant along with his Advocate were present, oral submission was made on behalf of the complainant that the matter should be taken up before the Lok Adalat. Thereafter, the matter was taken up before the Lok Adalat,

however, no settlement could be possible and, therefore, matter was again taken on board on 12.11.2016. On that day, neither the complainant, nor the accused were present. On 08.12.2016, accused was absent and, therefore, application at Exhibit-29 was given by the complainant for issuing Non Bailable Warrant and accordingly, it was issued. It was made returnable on 21.01.2017. On 21.01.2017, the warrant returned unserved and the matter was kept for taking steps by the complainant. Thereafter, it appears that the complainant remained absent and had not taken any steps till 09.11.2017. When he was found absent, the learned Magistrate dismissed the complaint under Section 256 of the Code of Criminal Procedure. The difference in the facts in *Govindji Trikamdas & Co. (Supra)* and the present case is that in that case, the report of the warrant was not given by the police to the concerned Magistrate, whereas in this case, the report was given. The applicant has not produced that report on record for the perusal of this Court. What was the reason with which that warrant was returned and why the complainant was supposed to take steps is therefore kept in dark by the applicant. Specific question was asked to the learned Advocate for the applicant in that respect, but he could not give any satisfactory answer. Only upon the return of the said warrant, the matter has been posted for taking steps by the complainant. When

neither the steps were taken nor the complainant was present, it was inferred by the learned Magistrate that the complainant appears to be not serious. In the present application also, the applicant has not given any reason as to why he was absent since 21.01.2017 till 09.11.2017 and why he had not taken any steps for securing the presence of the accused. He cannot blame the learned Magistrate only on some technical ground as well as some decision of this Court of which facts are different. A wrong statement has been made that the learned trial Court has not considered the efforts taken by the complainant. No doubt, the complainant had taken steps, but it was prior to 21.01.2017 and not thereafter. When no justifiable reason for his absence and for not taking appropriate steps has been given by the applicant, there is no question of granting permission/leave to appeal to the applicant and, therefore, the application stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm