

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPLICATION FOR LEAVE TO APPEAL BY PVT.
PARTY NO.189 OF 2019**

Shirode Automobiles Private Limited,
Through the Manager,
Sayyed Dilawar Fakirbhai,
Age-49 years, Occu:The Manager,
R/o-Yeola Road, Kopergaon,
Tq-Kopergaon, District-Ahmednagar.

...APPLICANT

VERSUS

1) Valmik Radhagi Kolpe,
Age-53 years, Occu:Agri.,
R/o-Kolgaon-Thadi,
Tq-Kopergaon, District-Ahmednagar,

2) The State of Maharashtra

...RESPONDENTS

...
Mr.Amol S. Gandhi Advocate for Applicant.
Mr.M.S. Shaikh Advocate for Respondent No.1.
Mr.B.V. Virdhe, A.P.P. for Respondent No.2 – State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 7th JULY, 2022

ORDER :

1. Present Application has been filed for grant of leave to appeal to challenge the Judgment and order of dismissal of the

complaint passed on 26th December 2018 by the learned Judicial Magistrate First Class, Kopargaon, District-Ahmednagar in S.T.C. No.105 of 2015, for the offence punishable under Section 138 of the Negotiable Instruments Act. The present applicant is the original complainant, who filed the said complaint against present respondent No.1. It came to be dismissed in default on 26th December 2018 in view of the failure on the part of the complainant to take steps to secure the presence of respondent No.1. It appears that on the same day the application was filed on behalf of the applicant for restoration of the complaint, however, that came to be rejected on the ground that there is no such provision of restoration and it appears that said order came to be passed on 23rd January 2019.

2. Since the arguable points are made out, leave is granted to file the Appeal. Registry to register the Appeal.

3. Taking into consideration the short point involved, the matter is taken up for final hearing at the stage of admission, with consent of both the parties.

4. **Admit.**

5. Heard learned Advocate Mr. Gandhi for the applicant / appellant, learned Advocate Mr. Shaikh for respondent No.1 and learned APP Mr. Virdhe for respondent No.2 – State.

6. As aforesaid, the complaint appears to have been filed in view of the fact that present respondent No.1 – original accused has issued disputed cheque towards legally enforceable amount of liability. It came to be dishonoured and the complainant says that in spite of issuing statutory notice the amount was not paid and therefore, the accused has committed offence punishable under Section 138 of the Negotiable Instruments Act as well as Section 420 of the Indian Penal Code. Copy of the certified copy of *Roznama* has been made available. Taking into consideration the contents of the complaint, verification of the documents on record, it appears that the process has been issued against the accused by order dated 11th July 2016 and thereafter the matter was pending for appearance of the accused.

7. Several times the summons appears to have been issued and initially no report was given. Ultimately, the summons was served around 28th June 2017, however, on that day accused did not remain present. The matter was adjourned for taking steps by the complainant and thereafter it appears that several times

either bailable warrant was issued or even non-bailable warrant was also issued. Lastly, when the non-bailable warrant was issued against the accused, it was returned un-served and then the matter was pending for taking steps by the complainant from 23rd January 2018. The matter was thereafter adjourned several times but no steps were taken. Under such circumstance, the complaint came to be dismissed in default on 26th December 2018 for not taking those steps against the accused.

8. The learned Advocate for the complainant – applicant admits that the steps were not taken, but as regards the position on 26th December 2018 is concerned, he says that on the same day the concerned person from the complainant company was present, however, due to some medical reasons he had gone to medical shop to buy the medicines and in the meantime the matter was called out. Since he was found absent, the case was dismissed. But after he came to know about the dismissal of the complaint, on the same day he has given application Exhibit-8 for the restoration of the complaint. However, since there is no provision for restoration, that application was ultimately rejected. The complainant was fairly prosecuting the matter and only because of some reason he could not take the steps, for that purpose the complainant need not be punished. The

complainant undertakes that he would pursue the matter promptly.

9. Learned Advocate appearing for respondent No.1 – original complainant strongly opposes the Application and submits that since the matter was for taking steps and those were not taken and no reason has been now given for not taking steps for several dates, the dismissal of the complaint by the learned Judicial Magistrate First Class is justified.

10. At the outset, it can be said that application Exhibit-8 would definitely show that on the day the complaint came to be dismissed, the concerned person from the complainant company was present. It appears that he came to Court after the order of dismissal was passed. Definitely after the order of dismissal, the concerned Court becomes *functus officio* and since there is no provision in the Code of Criminal Procedure, the complaint could not have been restored even though the application was filed on the same date. In ***Maj. Gen. A.S. Gauraya and another vs. S.N. Thakur and another, 1986 AIR 1440***, the Hon'ble Apex Court has held that, there is absolutely no provision in the Code of Criminal Procedure empowering a Magistrate to review or recall an order passed by him. In view of the above said legal

position, we cannot say that there is any fault in the order passed below Exhibit-8 by the learned Judicial Magistrate First Class, Kopargaon.

11. No doubt, for several dates the matter was pending for taking steps and those effective steps were not taken by the complainant for securing presence of the accused. However, taking into consideration the fact that the process was already issued after considering the fact that there is prima facie case against the accused, the order of dismissal of the complaint deserves to be set aside and the complaint deserves to be restored on the file of the learned Judicial Magistrate First Class, Kopargaon. However, for that purpose the applicant should deposit cost amount.

12. For the aforesaid reasons, following order is passed:-

ORDER

(I) The Application / Appeal stands allowed.

(II) The order passed by the learned Judicial Magistrate First Class, Kopargaon, District-Ahmednagar in S.T.C. No.105 of 2015 on 26th December 2018, dismissing the complaint under Section

256 of the Code of Criminal Procedure, stands quashed and set aside.

(III) The said complaint i.e. S.T.C. No.105 of 2015 is restored to the File of learned Judicial Magistrate First Class, Kopargaon. After the authenticated copy of this order or writ, whichever is placed before the learned Magistrate first in time, thereafter, after passing the order of taking the complaint on record once again, the Magistrate to issue summons to the accused and not to take up the matter as per the stage before the order of dismissal was passed.

(IV) Applicant to deposit cost of Rs.5,000/- (Rupees Five Thousand) to the High Court Legal Services Sub-Committee, Aurangabad on or before 25th July 2022.

(V) It is clarified that only after the deposit of the cost, the complaint would be restored.

[SMT. VIBHA KANKANWADI, J.]