

Ghuge

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

WRIT PETITION NO. 4509 OF 2022

M.S.Fabrication, and Anr ... Petitioner

V/s.

The State of Maharashtra and Ors. ... Respondents

Mr. Ganesh Gole a/w Ajeeet Shirodkar for the
petitioner.

Mr. R.M. Pethe, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 12, 2022

P.C.:

1. The petition is directed against the order dated 5th December, 2022 rejecting application for exemption filed by the accused in an appeal against conviction under Section 138 of the Negotiable Instruments Act, 1881. The petitioner filed application below Exhibit-25 annexing medical papers of surgery of cancer.

2. The learned Appellate Court by impugned order rejected the application holding that the petitioner undergone surgery on 16th August, 2018. Thereafter, he attended proceedings of the Court. Only on the date of delivery of the judgment, he filed application stating that as he was suffering from various ailments and is advised to take medical tests, he be exempted. The special judge, rejected application recording a finding that the application has been filed with intent to hold judgment or to keep away the appellant from the Court.

3. Learned advocate for the petitioner relied on the Division Bench of the Judgment of this Court in Criminal Writ Petition No.1455 of 2008 wherein this Court while resolving conflict between two single judges of this Court, observed in paragraph No. 6 and 7 as under :

6. So far as, Section 387 of the Code is concerned, that pertains to the judgment which is to be delivered by the subordinate Appellate Court. Said section reads as under :

S. 353 : “The rules contained in Chapter XXVII as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Sessions or Chief Judicial Magistrate. Provided that unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered”.

7. If the said provision is perused, it would be clear that the proviso to Section 387 of the Code has been added as an exception to the main section. Therefore, it is abundantly clear though the rule contained in Chapter XXVII, so far as the judgment of criminal Court of original jurisdiction (trial court), applies to the judgment in appeal of appellate subordinate Court, the proviso gives discretion to the appellate court whether it thinks it fit and proper for the accused to be brought in Court to hear the judgment to be delivered.

4. The conspectus of the decision rendered by the Division Bench of this court is that the proviso to Section 353 (6) confers a discretion on the Court whether to exempt the accused or direct him to remain present at the time of delivery of judgment. Considering the reasons stated in the application and the reasons assigned in the impugned order, in my opinion, exercise of discretion by the appellate court termed as perverse as the same is based on the material on record. The conclusion drawn by the

learned Special Judge cannot be termed as perverse. In absence of perversity, this court in its extraordinary writ jurisdiction need not interfere with the exercise of discretion.

5. However, it is made clear that it shall be open for the petitioner to remain present on the date of delivery of judgment which is kept tomorrow.

6. Till the petitioner reaches for attending the Court, i.e., tomorrow the non-bailable warrant issued against the petitioner shall not be executed.

7. With this direction the Writ Petition is dismissed. No cost.

(AMIT BORKAR, J.)