

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.5838 OF 2018

Sayyed Abbas Naseem Rizvi, Age 37 years,
Occ.Auto Rickshaw Driver,
r/o.20, Sabira & Son Estate,
Chirag Nagar, Near Fish Market,
Ghatkopar (W), Mumbai-400 086.

Petitioner

versus

1. Aslam Akhtar Shaikh, Age 40 years,
R/o.Room No.12, 1st Floor,
Jama Masjid Building, Chirag Nagar,
Ghatkopar (W), Mumbai-400 086.
2. The State of Maharashtra.

Respondents

Mr.Himanshu V. Kode with Ms.J.S.Karnik, i/by Mr.Sherali S. Khan,
Advocate for Petitioner.
Mr.Tariq Khan, Advocate for Respondent no.1.
Mr.A.R.Patil, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 29th September 2022

PC :

1. The petitioner challenges the order dated 27th November 2018 passed by Sessions Judge for Greater Bombay in Criminal Revision Application No.436 of 2018 whereby learned Sessions Judge allowed said revision application and condoned delay of 44 days in filing Complaint No.1640/SS/2015.

2. Respondent no.1 is the complainant in C.C No.1640/SS/2015. The complaint was filed for offence u/s.138 of Negotiable instruments Act ('N.I.Act'). It was alleged that the complainant had advanced a sum of Rs.18 lakh to the accused as friendly loan for his

business. Part amount of Rs.3 lakh was returned and balance amount of Rs.15 lakh was unpaid. In discharge of liability, accused issued three cheque dated 25th April 2015, 25th July 2015 and 25th October 2015 for amount of Rs.5 lakh each. The complainant deposited cheque dated 25th July 2015 on its due date in his bank. The cheque was dishonoured with remark 'funds insufficient'. The complainant issued demand notice dated 6th August 2015 to the accused. The demand notice was duly served by accused. The amount was not paid. Complaint was filed on 5th November 2015 before the Court of Metropolitan Magistrate, 30th Court, at Kurla, Mumbai. Affidavit in support of the complaint was filed. Application for condonation of delay for filing the complaint was filed along with complaint. Affidavit in support of application for condonation of delay was also filed. The accused filed reply to the application for condonation of delay in filing the complaint and opposed the prayer for condonation of delay.

3. Learned Magistrate vide order dated 5th March 2018 rejected the application for condonation of delay.

4. The complainant challenged the order dated 5th March 2018 by preferring Criminal Revision Application No.436 of 2018 before the Court of Sessions for Greater Bombay. The accused filed reply opposing the relief sought in the revision application. The learned Sessions Judge vide order dated 27th November 2018 allowed the revision application and condoned delay of 44 days in filing the complaint subject to cost of Rs.5,000/- to be paid to the accused or to be deposited in the Trial Court. The Trial Court was directed to register case and try according to law.

5. The petitioner/accused is aggrieved by the aforesaid order passed by the Sessions Court condoning delay.

6. Learned advocate for petitioner submitted that learned Magistrate has rightly rejected the application for condonation of delay. No cause was shown to condone the delay. Learned Sessions Judge ought to have confirmed the order of Trial Court. The medical documents relied upon by the complainant do not support his grounds for condonation of delay. Medical documents were produced after one year. Sufficient cause was not given. Delay cannot be condoned mechanically. Learned Sessions Judge has exercised jurisdiction beyond scope of Section 397 of Cr.P.C. Evidence adduced by CW-1 Dr.Mohammed Farooqui and DW-1 Mohammed Irfan Sayyed Chaudhary was not rebutted by complainant which shows that documentary evidence led by the complainant was contrary to the factual position advanced by complainant for condoning delay. Respondent no.1 has failed to produce documentary evidence, such as, hospital bill, discharge card issued by hospital, pathology report and medicine purchase receipts etc; although it is claimed that he was admitted in hospital. The delay in filing the complaint was not explained. According to the complainant, he received intimation from his bank regarding dishonour of cheque on 30th June 2015. As per proviso-B to Section 138 of N.I.Act, demand for payment is required to be made within a period of 30 days of receipt of intimation of cheque not being honoured. In the present case demand of payment should have been made on or before 30th July 2015. Payment of cheque which was dishonoured, should be made within 15 days of the receipt of notice

by drawer. The cause of action arises on the 16th day of the notice of demand by drawee. Section 142 of N.I.Act gives discretion to the Court to condone delay in filing complaint. The statute does not give jurisdiction to the Court to condone the delay in making demand. The documents relied upon by complainant are suspicious. Learned Sessions Judge has committed error in condoning delay.

7. Learned counsel for respondent no.1 submitted that there is no illegality in the order passed by Sessions Court. Learned Magistrate has erroneously rejected the application for condonation of delay. The Sessions Court has assigned reasons for condoning the delay. The complainant had shown sufficient cause for condoning delay in filing the complaint. In support of application for condonation of delay, the complainant had examined witness. The defense evidence was not sufficient to discard the cause shown by complainant for condonation of delay.

8. Perused the documents on record. The complaint relates to offence us.138 of N.I.Act. Since there was delay in filing the complaint, application for condonation of delay was moved at the instance of complainant. The complainant had also examined witness CW-1 in support of his application for condonation of delay. Learned Magistrate, however, rejected the application vide order dated 5th March 2018. Learned Sessions Judge, however, vide order dated 27th November 2018 set aside the order of Magistrate and condoned the delay. On perusal of the order passed by Revisional Court it is apparent that the Court has adopted pragmatic approach while condoning delay in filing the complaint. Learned Sessions Judge has taken note of the fact that if delay is not condoned, the

litigant would be thrown out of justice system. The material evidence shows that complainant had sustained injuries prior to expiry of period of limitation of filing the complaint. The Trial Court ought to have considered that. The complainant could not have benefited himself by filing complaint belatedly. Learned Sessions Judge rightly observed that view taken by the Trial Court was hyper-technical, which thrown the complainant out of justice at the threshold. The learned Judge has also observed that material evidence shows that complainant had sustained injuries prior to expiry of period of limitation of filing the complaint.

9. In the light of evidence on record, I do not find any reason to interfere in the order passed by Sessions Court. The complainant had shown sufficient cause to condone the delay. The Trial Court, however, has adopted hyper-technical approach while rejecting the application for condonation of delay. The complainant examined Dr.Mohammed Farooqui on the point of delay. He has stated that he was present in Global Nursing Home. He admitted prescription dated 20th July 2015 filed along with list of documents Exhibit-14 to be written by him to complainant. It was advised for injury and pain. He admitted the contents of prescription. He admitted the certificate. As per certificate, the complainant was under his treatment. He was admitted in hospital for 4 to 5 days. He was cross-examined by advocate for accused. The cross-examination does not discard the evidence of complainant. The accused examined defense witness DW-1 on the point of condonation of delay. He stated that he is the owner of Global Nursing Home and Research Centre. He was called upon to produce documents regarding admission of complainant. He stated that patient was not

admitted in the hospital and they do not keep record of OPD patient. In the cross-examination it was stated that they do not maintain record of OPD patient. He is only the owner of hospital. The Doctors deputed there check the patients. Taking into consideration the evidence on record, settled principles of law relating to condonation of delay, no case is made out to set aside the order passed by learned Revisional Court. The petition is devoid of merits and deserves to be dismissed.

ORDER

- (i) Criminal Writ Petition No.5838 of 2018 is rejected and disposed of;
- (ii) Trial is expedited.

(PRAKASH D. NAIK, J.)

MST