

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

94 CRIMINAL APPEAL NO.34 OF 2023

**INDUBAI W/O. ATMARAM SHIRSAT
VERSUS
SUNIL BHIVA JADHAV AND OTHERS**

Mrs. Chaitali R. Kutti Chaudhari, Advocate for the appellant
Mr. M. V. Thorat, Advocate for respondent Nos. 1 to 3

CORAM : KISHORE C. SANT, J.

DATE : 21st FEBRUARY, 2023

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1. Heard the learned advocates for the parties.
2. The appellant is challenging the order passed by the learned JMFC, Erandol dated 22-02-2019 whereby the complaint of the appellant came to be dismissed in default and as such respondent came to be acquitted. It is the case of the appellant that she is an old lady and was required to attend the court by coming from Dhanora a place away from Erandol. Therefore, on some occasions she could not attend the court. On the date on which the order was passed she had in fact reached the court. However, she reached to the court at 03.00 pm whereas the order was passed in the morning sessions. She immediately filed an application for restoration. However, same

came to be rejected by the trial judge observing that once the compliant is dismissed there is no provision for restoration of compliant.

3. Learned advocate for the appellant submits that looking to the age of the appellant it needs to be considered that she is facing difficulty in attending the court on every date by coming from the different place. As a matter of fact on the date on which the order was passed, she immediately thereafter filed an application and the court only for reasons of lack of provisions to restore the case has refused to pass the order of restoration.

4. Learned advocate for the respondent vehemently opposed the appeal stating that it was necessary for the appellant to remain present on each and every date before the court. From the roznama he points out that on many occasions neither the appellant nor her advocate were present, when the matter was called out. He further invited attention to the observation made by the court that there are three advocates engaged by the appellant and still none of them appears in the matter. He relies upon the judgment in the case of *Prema Ramanand Hattangadi Vs State of Maharashtra reported in 2012 (6) Mh.L.J. 210* wherein this court had observed that when court has no option because of consistent absence of the complainant and the case is dismissed, then in the appeal, it

would not be proper to allow the appeal. In that case on all the occasions the complainant remained absent and it was observed that the court has no option but to dismiss the complaint. The second judgment in the case is *S. Rama Krishna Vs S. Rami Reddy (dead) by his Lrs and others reported in (2008) 5 SCC 535* wherein he invited the attention to para Nos. 13 to 15 wherein the Hon'ble Apex Court has observed that Section 256(1) Mandates the Magistrate to acquit the accused unless for some reason he thinks it proper to adjourn hearing of the case. If an exceptional course is to be adopted, it must be spelt out. The discretion conferred upon learned Magistrate however must be exercised with great care and cautious. It is necessary to see the conduct of the complainant and complaint cannot be kept pending for indefinite period. It is further held that the High Court should be slow in interfering with the appeal in such cases of acquittal. As against that the learned advocate for the petitioner relied upon the judgment of Karnataka High Court in the case of *Sri Nagraj Vs Shri Ishwar* wherein in para 11 it is held that the court has to exercise its discretion judiciously and it is only when the court is of the opinion that the personal attendance of the complainant is not necessary, the learned Magistrate may be dispense with attendance of complainant and proceed with the case.

5. There is no doubt about the ratio in the judgments cited before this court what needs to be considered immediately

is to see whether the complainant was prevented from appearing or whether the complainant has deliberately chosen not to remain present and the complainant remains consistently absent. In this case it is found that on the very day the complainant filed an application for restoration. She was present in the court only before she could come in the court, the case was already dismissed in default. It is seen that in the case even the evidence is recorded so it cannot be said that the complainant is totally neglecting and is not attending the court. There is some scope to believe that she could not remain present on some occasions. However at the same time it needs to be kept in mind that the conduct of the case should be taken seriously by the complainant. The complainant is duty bound to remain present and to attend the court as it is the complainant who puts the machinery in motion after lodging of the complaint. The complainant cannot just appear in the court as per the convenience but has to be vigilant. In this case it is seen that though the complainant was present on some occasion roznama shows that on equal number of dates she and her advocate both were absent. It further needs to be kept in mind that accused are required to remain present unless they are exempted from the appearance. Thus, when the complaint is filed and the accused remains present and when the complainant remains absent, it is accused and the court machinery both are put to inconvenience. Therefore, while restoring it is necessary to compensate the accused at the same

time. Hence, the following order:

ORDER

- a] The criminal appeal is allowed.
- b] The order dated 22-02-2019 passed by the learned JMFC, Erandol in SC No. 402/2018 is quashed and set aside.
- c] SC No. 402/2018 stands restored to its original status.
- d] The above order is subject to cost of Rs.10,000/- to be paid to the respondents within two weeks as a condition precedent.
- e] The complainant shall not commit any default henceforth and conduct the case.
- f] The trial court is requested to decide the compliant as early as possible and preferably within a period of six months from today.

[KISHORE C. SANT, J.]