



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.1133 OF 2023
IN
CRIMINAL APPLICATION (ALP) (ST) NO.5194 OF 2023
in
CRIMINAL APPEAL (ST) NO. OF

Azmat Jamal Azmi ...Applicant
vs.
Wajihuddin Khan and anr. ...Respondents

Mr. Omkar Gawade a/w Mr. Shivram Gawade, Mr. Amit Mishra for
the Applicant.

Mr.S. R. Agarkar, APP for the Respondent-State.

CORAM : S. M. MODAK, J.

DATED : 18 AUGUST 2023

P. C. :

1. Heard learned counsel for the Applicant – complainant and learned APP for the Respondent-State.
2. Thought the Court notice is served on Respondent No.1-accused, he has not appeared. He refused to accept the private notice. The affidavit of service is tendered on record which is marked as 'x' for identification.

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The order is modified and corrected as per speaking to minutes order dated 30.08.2023.

3. In order dated 28 March 2023, this Court has issued notice on delay condonation Application as well as Special Leave Application.

4. Respondent No.1 was acquitted by the learned 6th Additional Chief Judicial Magistrate, Thane as per order dated 10 November 2022 by exercising power under Section 256 of the Code of Criminal Procedure, 1973. In fact, the Non Bailable Warrant was issued against the accused which was not served. There is one more Application for issuance of fresh Non Bailable Warrant dated 7 September 2021 at page No.78 to the Application. The trial Court has not issued fresh Warrant but it was kept for order. On this background, the trial Court hurriedly dismissed the complaint.

5. For the reasons stated in the Application, the delay is condoned.

6. **Interim Application No.1133 of 2023 stands disposed of.**

7. As per the provisions of Section 256 of the Criminal Procedure Code, 1973, the complaint can be dismissed for non appearance of the complainant. There are two exceptions. One is presence of the complainant is not required, and the second is adjournment is not justified. When, already, there is an Application

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pending for issuance of Warrant dated 7 September 2021, it was not proper for the learned 6th Additional Chief Judicial Magistrate, Thane to dismiss the complaint case. On this ground, the case for grant of leave is made out. Leave to prefer the Appeal is granted.

8. **Criminal Application (ALP) (ST) No.5194 of 2023 is allowed and disposed of.**

9. Office is directed to number the Appeal.

10. **Appeal is admitted.**

11. The Appeal is taken up for final hearing considering the limited issue involved. Respondent has not appeared inspite of service of the Court's notice and private notice. Learned APP waives service of notice after admission.

12. The complainant has already filed an affidavit of examination-in-chief. Even the documents are also exhibited on 12 March 2018 which reflected at page No.61 to the Application. Thereafter, the accused remained absent and even the complainant on few occasions. Learned counsel appearing for the Applicant-complaint has relied upon the observations in the case of ***Terna Shetkari Sahakari Sakhar Karkhana Ltd, Ternanagar (Dhoki) vs.***

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*Anant s/o Laxman Ghogre and anr.*¹ ; and in the case of *Shaikh Akbar Talab vs. A.G. Pushpakaran and anr.*²

13. Firstly, the Court has issued non bailable warrant against the accused on 23 January 2018 which has been placed at page 71 to the Application. It was cancelled by taking the matter on board on 12 March 2018.

14. Another Application dated 7 September 2021 for issuance of fresh Warrant was not allowed. But the Court simply passed an order as 'keep for order'.

15. The impugned order came to be passed on 10 November 2022. The learned Judge has referred to the instructions issued by this Court dated 17 October 2022 and the letter 21 October 2022 of the District Court, Thane, granting permission to undertake Special Drive to dispose of cases under Section 256 of the Code of Criminal Procedure, 1973. It does not mean that the cases should be disposed of without considering the stage of the case. So the complainant has asked for issuance of warrant, the Court has not issued it but simply kept it for order. On which background, the complainant cannot be blamed. The impugned order cannot be sustained. It is not proper to

¹ 2012(2) Mh.L.J.

² 2017 SCC Online Bom 8616

exercise the power under Section 256 the Code of Criminal Procedure, 1973. It needs to be set aside. At the same time, the matter needs to be remanded with certain directions. Hence, the following order;

- (a) Appeal is allowed.
- (b) Order dated 10 November 2022 passed by the learned 6th Additional Chief Judicial Magistrate, Thane, is hereby set aside.
- (c) The complaint is restored to file.
- (d) The trial Court is directed to pass order on Application dated 7 September 2021 for issuance of Non Bailable Warrant.
- (e) The complaint case may be disposed of as early as possible.
- (f) The trial Court is at liberty to regulate the conduct of irregular litigants by imposing costs of Rs.5000/-.

[S. M. MODAK, J.]

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