

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

**INTERIM APPLICATION NO. 2747 OF 2022
IN
CRIMINAL APPEAL NO. 871 OF 2008**

Venugopal Jainarayan Bhatta ...Applicant
vs.
Harischandra and Co. Jaliwala and Ors. ...Respondents

Mr. Sumita Kothari - Advocate for the Applicant
Mr. H. R. Desai - Advocate for the Respondent Nos. 1 and 2.
Mr. H. J. Dedhia – APP for the Respondent-State

CORAM : S. M. MODAK, J.

DATE : 22nd JUNE, 2023

P. C. :-

1. Learned Advocate for the Law Global submitted that they have given NOC to the learned Advocate Mr. Kothari, so Law Global be discharged.

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2. The Appellant-original Complainant is praying for expedite hearing of his appeal. Heard both the sides.

3. The Respondents-accused are acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act as

per judgment dated 22/08/2006, at page no. 20. The Complainant has filed an affidavit of evidence. There was one lacunae. It was not affirmed before any of the authorities as prescribed under Section 297 of the Criminal Procedure Code. The relevant observation finds place in para no. 7 of the Order.

4. While admitting the appeal on 12/08/2008, even this Court has observed that “*ends of the justice would be defeated in case of such faulty affidavit is taken on record*”. It is further observed that learned Magistrate ought to have returned the said affidavit.

5. Considering the limited issue involved and even otherwise the Appeal is of the year 2008, the hearing is expedited. Interim Application is allowed in terms of prayer clause-(a) and it is disposed of.

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6. Learned Advocate for the Respondents pointed out that yet record and proceeding is not received from the concerned Court of the Metropolitan Magistrate.

7. According to the learned Advocate for the Appellant considering the limited controversy involved, the record and proceeding is not necessary.

8. It is true that there is factual observation that the affidavit of the evidence of the Complainant has not complied with the provisions of Section 297 of the Criminal Procedure Code. Even in para no. 7 of the impugned judgment, the trial Magistrate has observed thus

“....it was informed by me in person that the affidavit put on record is not in consonance with the provisions of Section 297 of the Cr. P.C., but he stubbornly insisted to continue with that affidavit....”

9. Considering this factual observation, it needs to be seen whether this direction was given and under which circumstances, hence record and proceeding is required.

10. The farad sheet dated 15/06/2023 mentions that the there is a letter received from the concerned Court of Metropolitan Magistrate dated 09/02/2023. Read that letter.

11. It mentions that the matter is old and yet it is not traced out. It is further mentions that Mazgaon Court is shifted to the building of the Sewree Court and hence records are not kept properly. Hence following directions are issued:-

(i) Let 6th Court of the Metropolitan Magistrate,

Mazgaon at Mumbai is directed to see that record and proceeding will be traced out and will send as early as possible.

12. Even the Appellant can follow up that matter with the concerned staff. Even the Appellant is at liberty to file the certified copy or plain copy of the documents which are available with him by way of compilation, before this Court. Trial court to act on these directions even though sending of writ is delayed from the office.

13. Matter be kept on **28th July, 2023**.

[S. M. MODAK, J.]