



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION NO.860 OF 2023

IN

CRIMINAL APPEAL (ST.) NO.5620 OF 2023

(Shri Shashi s/o Indukumar Kothari Vs. Smt. Babytai Namdeorao Pande and ors.)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. M.N. Vilaytkar, Advocate for the appellant.

CORAM:- URMILA JOSHI-PHALKE, J.

DATED :- AUGUST 6, 2024.

Heard learned Counsel for the appellant.

2. Respondents though served and represented by the Counsel, none is present before the Court.

3. This is an application preferred by the appellant seeking leave to file appeal challenging the order dated 26/04/2023 passed by the learned Judicial Magistrate First Class, Court No.1, Kamptee thereby dismissed the complaint filed by the complainant in default and acquitting the accused.

4. Considering that the complaint is filed by the complainant has been dismissed in default thereby acquitting the accused, it is apparent that it is a technical dismissal under Section 256 of the Cr.P.C., and therefore, leave to file appeal is granted.

5. The application is allowed and disposed of accordingly.

6. The appeal be registered.

CRIMINAL APPEAL (ST.) NO.5620 OF 2023

Heard.

2. **ADMIT.**

3. The present appellant is the original complainant to file the complaint in the Court of Judicial Magistrate First Class, Kamptee alleging that Smt.Nirmala Gandhi is the owner of the house property bearing, Municipal House No.N/299, Sheet No.5, Block No.41, situated at Hamalpura, Near Savari Dargah, Kamptee. The said property has been bequeathed to her by one Mr. Chandulal Papalal Agrahani by virtue of WILL, Dt.14/09/2003. Said Chandulal Papalal Agrahani also died on 05/10/2003. Thus, after the death of the said Chandulal Agrahani, the appellant has become the absolute owner of the said property. The complainant is also a duly appointed General Power of Attorney Holder of Smt. Nirmal Gandhi. Thus, the complainant is in actual and physical possession of the said house property. As the said Smt. Nirmala Gandhi who was the permanent resident of Balaghat and she was unable to frequently visit to Kamptee and more particularly to the said house property the complainant was looking after the said property. The complainant has given the said premises on rent to the tenant Shri Ashok Barbate. That since the said Mr. Barbate expressed his inability to further continue with the tenancy, intended to vacate the said portion of

the house property in his possession. Thereafter the complainant is using the said premises for godown purpose, and is also intending to purchase the said property. The market price of the said property was also considered and he has kept the valuable goods comprising of 2 Steel Racks and other goods in the said property. Prior to using the said premises as a godown, he has also carried out repairing work in the said premises. By taking disadvantage of the absence of the complainant as well as Smt. Gandhi, on 15/09/2010, the accused Nos.1 to 3 with the help of other co-accused tried to break open the lock of the said house property of the complainant so as to take forceful possession of the said property by dispossessing the complainant from the said house premises. The structure of the house under the possession of the complainant is surrounded by a boundary wall on the front side i.e. the entry position of the house. Regarding the said incident, the crime was registered against the present accused persons. Accused Nos.1 to 3 in furtherance of their illegal motive and malafides intention, once again on 19/09/2010 attempted to break open the lock of the said house regarding the same also the Investigating Officer, has issued the notice under Section 149 of the Cr.PC to the complainant. Thus, as the investigating agency have not taken any action against the present accused, the complainant has filed the complaint to take cognizance against the accused persons.

4. The learned trial Court has taken the cognizance and the complainant was directed to lead the evidence in support of his application. Accordingly, the complainant has led the evidence and on perusal of the evidence and the documents filed by the complainant the Magistrate has declined to issue process against the accused persons under Section 120-B, 447, 448, 452 read with Section 34 of the IPC. However, the process was issued under Section 448 of the IPC. When the case was pending before the Magistrate as the complainant and her Counsel are absent and as the complainant has not taken any effective steps in this proceeding therefore, the case was dismissed for default by the Judicial Magistrate First Class.

5. Heard learned Counsel for the appellant who submitted that the case was fixed for taking the steps in this proceeding and by passing order on 01/04/2023, the case was dismissed for want of prosecution. However, on 01/04/2023, the complainant was absent for the genuine reason. The complainant could not inform his Counsel also, and therefore, the absence of the complainant was marked. He submitted that without giving an opportunity to the complainant the learned Magistrate has dismissed the complaint. The complainant came to know about the dismissal of the complaint on 18/05/2023. Immediately on noticing the dismissal of the complaint, he obtained the certified copy and filed this appeal. He submitted that learned trial Court ought to have considered that the

complaint was filed by the complainant to initiate the action against the accused persons. The complainant has also attempted to lodge the prosecution but the investigating agency have not taken cognizance of the same. Learned trial Court has also not considered that the complainant who is lady and there was a genuine reason for her non-appearance. He submitted that as the complaint is dismissed for the technical grounds, she be permitted to prosecute the same complaint on its own merits, and therefore, the order passed by the Magistrate deserves to be quashed and set aside.

6. I have heard learned Counsel for the appellant and the complainant. The respondent fails to appear. Considering the aforesaid position and applying the parameters of the natural justice, learned trial Court ought to have considered that there was a genuine reason for non-appearance of the complainant on the day fixed. The complaint was not fixed for recording the evidence, and therefore, on the relevant date the presence of the complainant was also not required. It was the Counsel who has to take the appropriate steps in the said complaint but as complainant could not communicate with her Counsel, and therefore, no steps are taken by the Counsel.

7. It is pertinent to note that, vital legal rights of the complainant are involved in the complaint before the trial Court and the principle of natural justice require that

an opportunity to be given to the complainant to prosecute said complaint on its own merits, and therefore, the matter deserves to be remitted back to the learned trial Court by setting aside the impugned order dated 26/04/2023.

8. In the result, present appeal is allowed.

9. The impugned order dated 26/04/2023 stands quashed and set aside.

10. The matter is remitted back to the learned trial Court with a directions to the parties to remain present before the said Court on 28/08/2024.

11. R. & P. if called, be sent back to the concerned trial Court.

12. The appeal is disposed of accordingly.

(URMILA JOSHI-PHALKE, J.)