

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

CRIMINAL APPEAL NO. 600 OF 2015

Rajendra Balkrushna Wagh .. Applicant

v/s.

Ravindra P Dandgavhal & Ors. ..Respondents

Mr. Amey Deshpande for the applicant

None for respondent no.1

Mr. J.H. Ramugade, APP for respondent State

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 22nd SEPTEMBER, 2015.

P.C.

1. By order dated 5th May, 2015, leave was granted to appeal and it was made clear that the appeal would be heard finally at the stage of admission itself. Though the notice was duly served on the respondent no.1, none present on behalf of the respondent no.1.

2. The applicant herein was the complainant in C.C. No.463 of 2011, pending before the learned Judicial Magistrate, First Class,

Nashik, filed under Section 138 of the Negotiable Instrument Act. The applicant has challenged the order dated 18th January, 2014 whereby the learned Magistrate has dismissed the complaint under Section 256 of the Cr.P.C. and acquitted the respondent-accused for the offence under Section 138 of the N.I. Act.

3. The section 256 of the Cr.P.C. empowers the Magistrate to acquit the accused on non-appearance or death of the complainant. Section 256 of the Code reads as under:-

“256. Non-appearance or death of complainant - (1)
If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or

where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to case where the non-appearance of the complainant is due to his death.”

4. A plain reading of Section 256 of the Cr.P.C. makes it clear that if the summons has been issued to the accused on a complaint or on any subsequent order fixed for appearance of the accused or on any subsequent day, if the complainant does not appear, the Magistrate is empowered to acquit the accused, unless he thinks it proper to adjourn the hearing to some other day.

5. Furthermore, the section also gives discretion to the Magistrate to dispense with the presence of the complainant if he is represented by a pleader or if his personal presence is not necessary and proceed with the case in the absence of the complainant.

6. It is therefore, not obligatory for the Magistrate to acquit the accused for non-appearance of the complainant. The Magistrate has discretion to adjourn the hearing of the case to some other day or to dispense with the presence of the complainant and proceed with the case in the absence of the complainant.

7. In the instant case, the records reveal that by order dated 18th January, 2014 process was issued against the respondent-accused for the offence punishable under Section 138 of the N.I. Act. The summons was duly served on the respondent-accused and he had put in his appearance. The respondent-accused, subsequently failed to remain present in the Court and hence, non bailable warrant was issued against the respondent-accused on 21st January, 2012. The said warrant of arrest was not cancelled or executed. The learned Magistrate had also not received any report about its non-execution. The warrant of arrest was, therefore, still in force. Hence, the presence of the complainant

was not necessary on the relevant day for the progress of the case. The Magistrate was, therefore, not justified in dismissing the complaint, particularly when execution of warrant of arrest is pending.

8. Under the circumstances, the Appeal is allowed. The impugned order dated 18th January, 2014 is quashed and set aside. The learned Magistrate is directed to proceed with the complaint in accordance with law.

9. Parties to appear before the trial Court on 19th October, 2015. The record & proceedings be forwarded to the learned J.M.F.C. Nashik forthwith.

(ANUJA PRABHUDESSAI, J.)

Certificate

Certified to be true and correct copy of the original signed
judgment / order.