

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL APPEAL NO.93 OF 2017.**

Shri Vitthalsai Sahakari Sakhar
Karkhana Ltd., Murum,
Tq. Omerga, Dist. Osmanabad,
through its Authorised Officer,
Limbari s/o Subhash Mitkari,
age 43 years, occu. Service,
r/o Murum, Tq. Omerga,
District Osmanabad.

... APPELLANT.

VERSUS

Bapu s/o Dharma Waghmare,
age major, occu. Agri & Contractor,
r/o Devdhanora, Tq.Kalamb,
District Osmanabad.

... RESPONDENT.
(ORI. ACCUSED).

...
Advocate for appellant : Mr.Mukhedkar Amit A.
Respondent though served, failed to appear.

...

CORAM : V.L. ACHLIYA, J.

JUNE 08, 2017.

ORAL JUDGMENT:

Being aggrieved by the order dated 14.09.2016
passed by the Judicial Magistrate, First Class at Omerga,

District Osmanabad in S.C.C. No.180 of 2008 whereby, the complaint filed by the appellant came to be dismissed in default, the appellant has preferred this appeal.

2. Brief facts leading to filing of this appeal are summarized, as under:-

The appellant – original complainant filed complaint under Section 138 of the Negotiable Instruments Act as against respondent – accused alleging therein dishonour of cheque of Rs.1,67,611/- issued by respondent in favour of complainant in discharge of legal liability / debt. It is alleged that in spite of issuance of statutory notice, respondent – accused failed to pay the amount of cheque dishonoured. The complaint was filed in the year, 2008. After due consideration of the allegations made in the complaint and the documents as relied and further recording verification statement, the learned J.M.F.C. was pleased to issue process under Section 138 of the Negotiable

Instruments Act. The efforts made to secure the presence of accused by issuance of summons, warrant and proclamation and attachment of property of accused resulted in vain. Ultimately, the appellant – complainant filed application *vide Exh.28* to sell the attached property of the accused by invoking powers under Sections 84 and 85 of Cr.P.C. so as to secure presence of the accused for trial. The application, duly supported with affidavit and 7/12 extract of property owned by respondent – accused, was presented on 27.5.2016. Instead of passing order, the learned Magistrate placed the application for argument. On 14.9.2016 by recording absence of the complainant and his advocate, the learned Magistrate has dismissed the complaint and discharged the accused by invoking powers under Section 256 of Cr.P.C. Being aggrieved, the appellant has preferred this appeal.

3. I have heard the learned Counsel for the appellant. Respondent though served, failed to appear. In order to appreciate the submissions, I have thoroughly perused the record and proceedings.

4. Mr. Mukhedkar, learned Counsel appearing for appellant strenuously contended that the record and proceedings of the case reflect that the appellant was diligently prosecuting the proceedings and had taken all necessary steps to secure the presence of accused for trial. It is the accused who was avoiding to appear before the Court. As a step to secure presence of the accused, the Court has also issued proclamation and declared the accused as absconding and attached the property of accused. In spite of declaring him absconding, accused failed to appear. Therefore, appellant moved an application under Section 84 of the Cr.P.C. to sell the attached property. In this background the learned Counsel contended that there was no necessity to have posted the matter to advance argument and dismiss the complaint for want of presence of complainant.

5. In order to appreciate the submissions advanced, I have perused the record and proceedings. In my view,

the dismissal of complaint and discharge of the accused is not justified in the light of facts and circumstances of the case. It is apparent on the face of record that in spite of service of summons, the accused failed to appear before the Court. Non-bailable warrant issued against the accused could not be executed as the respondent accused was not found at the address given. In this view, the appellant moved an application on 4.3.2014 to issue proclamation under Section 82 of Cr.P.C. *vide Exh.22*. The request was granted. In spite of proclamation, the accused failed to record his appearance. Therefore, appellant moved an application *vide Exh.23* to attach immovable property of the accused. Accordingly, the order was passed to attach property of the accused. In spite of that, the accused failed to appear. Therefore, the appellant moved an application seeking action under Section 84 of the Cr.P.C. *vide* application dated 27.5.2016 filed in the matter. It appears from the record that the application was posted for hearing on 24.6.2016. On that date, the application could not be heard due to absence of complainant and

his Advocate. On subsequent date, the Presiding Officer was not present. Ultimately, on 14.9.2016, the impugned order came to be passed. In this view, the order of dismissal of complaint is not justified. In fact, the learned Magistrate ought to have considered the application on its own merits instead of dismissing the application in default of appearance of complainant. Personal appearance of the complainant was not necessary for deciding such application. I am, therefore, inclined to allow the appeal and set aside the impugned order. Hence, the following order:

: ORDER :

- i) Criminal Appeal No.93 of 2017 is allowed in terms of prayer clauses (B) and (C). The case is restored to its original number;
- ii) The application (*Exh.28*) is restored to the file.
- iii) The complainant is directed to appear before

the trial Court on 10th July, 2017. The trial Court is directed to decide the application (*Exh.28*) on its own merits, after giving opportunity of hearing to the appellant and proceed further in the matter;

iv) The appeal is disposed of in above terms.

[V.L. ACHLIYA, J]

Kadam.