

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL APPEAL NO.127 OF 2017**

Sulbha w/o Subhash Agarwal,
age 55 years, Occu. Household,
r/o Shivaji Nagar, Aurangabad,
Tq. & Dist. Aurangabad. **... APPELLANT.**

VERSUS

Sadashiv s/o Namdeo Waghmare,
age major, occu. Service,
r/o S.T. Colony, Ambajogai Road,
In front of LIC Office, Latur,
Tq. & Dist. Latur.
At Post Bidkin, Tq. Paithan,
Dist. Aurangabad. **...RESPONDENT.**

...
Mr.M.U. Shelke, Advocate for appellant.
Respondent served – absent.
...

CORAM : V.L. ACHLIYA, J.**DATE: 18th JULY, 2017.****ORAL JUDGMENT:**

The appeal is directed against the order dated
11.12.2015 passed in S.C.C. No.5624 of 2015 by the
Judicial Magistrate, First Class, Court No.7, Aurangabad.

By the impugned order, the learned Judge has dismissed the complaint and acquitted the accused by exercising powers u/s 256 of Cr.P.C.

2. In view of the limited challenge raised in the appeal as to the correctness of the impugned order dated 11.12.2015, notice of final disposal was issued to respondent. In spite of service of notice of final disposal, the respondent failed to appear.

3. In short, it is contention of the learned Counsel for the appellant that the impugned order is not sustainable in law for the reason that such order could not have been passed in exercise of powers u/s 256 of Cr.P.C. It is pointed out that the case was lying at the stage of recording of verification statement of complainant. The order of issuance of summons was not passed in the matter.

4. In order to appreciate the submissions advanced, I have perused the record & proceedings of the case. In

my view, the impugned order is not sustainable in law. It is apparent from the face of record that the complaint was presented on 17.8.2015. Since thereafter, the case was adjourned for one or the other reason which includes absence of complainant for verification statement. Ultimately, the complaint was dismissed with following order passed on 11.12.2015:

“ **ORDER BELOW EXH.1.**
(Passed on 11.12.2015)

The complainant and the advocate are absent. The complainant is continuously absent since 02.09.2015. Not made verification of the complaint. It appears that the complainant is not interested in conducting the case. Hence, the complaint is dismissed and the accused is acquitted of under section 256 of the Code of Criminal Procedure.

Date : 11.12.2015.

Sd/-
Judicial Magistrate First Class,
Court No.7, Aurangabad.”

5. From the face of the order, it reveals that the learned Judge has invoked the powers u/s 256 of Cr.P.C. in dismissing the complaint and acquitting the accused. In fact, the stage has not reached to invoke the powers

u/s 256 of Cr.P.C. In the instant case, the order of issuance of summons was not passed. Therefore, the complaint ought to have been dealt with as per the procedure prescribed in Chapter XV of Cr.P.C. Failure of complainant to appear for recording of verification statement, the Court ought to have looked into the complaint and decided either to dismiss the complaint or to issue process in the matter as per the provisions contained in Chapter XV of Cr.P.C. The powers u/s 256 of Cr.P.C. can be invoked if the Court has already issued process against the accused i.e. the order has been passed u/s 204 of Cr.P.C. to summon the accused to face prosecution. If, on the date appointed for appearance of the accused or any subsequent date, if the complainant fails to attend hearing fixed by the Court, then the Court may, if thinks proper, dismiss the complaint. Section 256 of Cr.P.C. 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 cases where the non-appearance of the complainant is due to his death."

6. Thus, on due consideration of the submissions advanced in the light of provisions of section 256 of Cr.P.C., I have no hesitation to hold that the order passed by the learned Judge dismissing the complaint and acquitting the accused in exercise of powers u/s 256 of Cr.P.C., is not sustainable in law. In the instant case, the stage has not reached to exercise powers u/s 256 of Cr.P.C. by the trial Court. In this view, the appeal deserves to be allowed and impugned order is liable to be set aside. I am, therefore, inclined to allow the appeal and pass the following order:

: ORDER :

- i) The impugned order dated 11.12.2015 passed in S.C.C. No.5624 of 2015 by the Judicial Magistrate, First Class, Court No.7, Aurangabad dismissing the complaint and acquitting accused, is set aside. The complaint is restored to its original number;
- ii) The complainant is directed to appear before the trial Court on 7th August, 2017;
- iii) The trial Court is directed to proceed further with the matter from the stage of recording of evidence and verification.
- iv) In case the complainant fails to appear as directed, the trial Court will be at liberty to proceed with the matter and pass appropriate order as deemed fit and proper as per the provisions of Cr.P.C.

v) Record & proceedings be sent back to the trial Court;

vi) Appeal disposed of in above terms.

[V.L. ACHLIYA, J]

Kadam.