

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

6 CRIMINAL APPEAL NO. 383 OF 2017

GANESH BALKRUSHNA PATIL .. Appellant

VERSUS

GOPAL SHALIK PATIL .. Respondent

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Advocate for the Appellant : Shri V.P. Patil
Advocate for the Respondent : Shri K.B. Jadhav

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CORAM : P. R. BORA, J.

Dated: November 07, 2017

PER COURT :

1. The appellant has filed the present appeal against the order passed by the Judicial Magistrate, First Class at Chopda on 07.03.2016 in Summary Criminal Case No.288 of 2013. The present appellant had filed the aforesaid complaint against the present respondent under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act'). Vide the impugned order, the learned Magistrate has dismissed the aforesaid complaint in default.

2. Shri V.P. Patil, the learned Counsel appearing for the

appellant submitted that, on 07.03.2016 the complainant could not remain present and the Counsel for the complainant also did not appear before the Court since he was not feeling well and was advised complete bed rest. The learned Counsel invited my attention to the certificate filed on record, which shows that, Advocate Shri P.H. Mali, who was appearing for the complainant before the Trial Court, was suffering from Malaria and was advised bed rest during the period between 05.03.2016 to 10.03.2016. The learned Counsel submitted that, the complainant did not intentionally remain absent before the trial Court. The learned Counsel further submitted that, an opportunity needs to be given to the complainant to prosecute his complaint on merits. The learned Counsel further submitted that, the complainant undertakes to promptly proceed with the complaint in the event the appeal is allowed by this Court.

3. The learned Counsel appearing for the respondent has opposed the submissions made on behalf of the appellant. The learned Counsel submitted that, the Roznama of the case would show that, the complainant was continuously absent and

in such circumstances, the learned Magistrate was constrained to dismiss the complaint in default. The learned Counsel submitted that, having regard to the conduct of the complainant as is revealing from the Roznama of the case before the Trial Court, no relief deserves to be granted in his favour. In the alternative, the learned Counsel submitted that, if the Court inclines to allow the appeal, heavy cost may be imposed on the appellant.

4. From record, it is evident that, the appellant was not diligent in prosecuting his complaint before the trial Court. However, in view of the submission now made before this Court on behalf of the appellant that, he would proceed with the complaint promptly, it appears to me that, an opportunity needs to be given to the complainant to prosecute his complaint on merits. For the negligence shown by the complainant earlier in prosecuting his complaint, he can be saddled with the adequate cost to compensate the respondent. In regard to the absence of the complainant and his advocate on 07.03.2016 sufficient explanation has come on record. I am, therefore, inclined to

allow the present appeal. Hence, the following order.

ORDER

- i) The Criminal Appeal is allowed.
- ii) The order dated 07.03.2016 impugned in the present appeal is quashed and set aside.
- iii) S.C.C. No.288 of 2013 stands restored to its original file subject to the cost of Rs.5,000/- (Rs.Five Thousand Only) to be paid by the appellant to the respondent on or before 22.11.2017.
- iv) The appellant shall deposit the cost amount before the trial Court or may pay the amount of cost directly to the respondent or to the Counsel for the respondent before the Court.
- v) The parties to appear before the Court of Judicial Magistrate, First Class, Chopda, Dist. Jalgaon on 22.11.2017 and shall get abide by the further instructions from the said Court.

(P. R. BORA, J.)