

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Criminal Appeal No.434/2019

Ashesh Bahadur Mathur,
 Aged about 49 years,
 R/o.-54, Joshi Wadi, Behind S.B.I. Colony,
 Gopal Nagar, Nagpur 440022.

.... Appellant
 (Org. Complainant)

- Versus -

- | | | |
|----|---|--------------------|
| 1] | K.K. Travels
through its Proprietor S.S. Bagga,
8/23, Rambagh colony, Medical Square, Nagpur. | (Original accused) |
| 2] | Kalpesh Kumar,
Proprietor K.K. Travels,
8/23, Rambagh colony, Medical Square, Nagpur. | ... Respondents. |

 Shri Amit Khare, Adv for appellant.

CORAM : S.M. MODAK, J.
DATE : 07-11-2019.

ORAL JUDGMENT

After leave was granted and the appeal was listed on 19-06-2019, the appellant complainant was granted permission to serve the respondents accused by way of paper publication. The appellant did this and filed a Pursis bearing Stamp No. 2259/2019. A copy of notice published in local newspaper is also annexed. Still, the office note says that necessary leave to serve by way of paper publication is not sought. It is not correct. In spite of the paper publication, the respondents have not appeared.

2. I have heard learned Advocate for the complainant appellant. The same thing happened before the trial Court. After putting initial appearance, the accused have chosen to remain absent. The complainant took all possible steps for securing the presence of the accused. The learned Magistrate instead of assisting the complaint has exercised the power and dismissed the complaint on 26-07-2018.

3. The same is challenged on factual and on legal aspects. With the assistance of learned Advocate for the appellant, I have perused the roznama. The complainant was compelled to take last resort as contemplated under Sections 82 and 83 of the Code of Criminal Procedure, 1973. The request made on 01-12-2015 vide Exhibit-48 for issuing proclamation was allowed. The complainant prayed for service of the proclamation by way of paper publication as per the request on 16-09-2016 vide Exhibit-49. Similarly on 10-11-2017 and on 30-11-2017, he has filed certain documents and made certain request. On this background, the matter was adjourned for steps.

4. Thereafter, there are certain rozنامas generated with the help of computer. The rozنامas dated 21-02-2018 and 14-05-2018, have been mechanically used in this case. It refers to plaintiff whereas this is not a suit. Ultimately, the Court dismissed the proceeding on 26-07-2018. I think the mode adopted by the trial Court was not proper. Whether the proclamation and attachment under Sections 82 and 83 of the Cr.P.C. have been served or not is not material. The complainant was interested in their service by way of paper publication. The fact remains that the learned Magistrate could have directed the

complainant to take steps if the procedural compliance remains to be done from the side of the complainant. Instead of that the proceeding was closed and it has caused grave injustice on the complainant.

5. If the procedural compliance has been done, the case could have been kept on dormant file. The case could have been taken up for hearing if the respondents accused could have been appeared in future. The litigant who cannot be faulted for those acts which are not within his control cannot be denied an opportunity to seek justice. The order needs to be set aside.

6. The complainant can take steps, if he feels anything remains to be done. If such steps are taken, the Magistrate may allow the same. After that if the accused does not appear, the matter needs to be kept pending. With these observations, the following order is passed :-

ORDER

- a] Criminal Appeal No.434/2019 is allowed.
- b] The order dated 26-07-2018 passed by the Judicial Magistrate First Class and Special Court for 138 of the Negotiable Instruments Act, Nagpur in Summary Criminal Case No.13184/2006 is set aside.
- c] The complaint be restored to the file.

- d] The appellant is granted permission to take steps which are permissible by law for securing the presence of the respondents.
- e] After taking those steps and necessary compliance, if the accused persons fail to appear, the case be kept on dormant file till the time the accused persons appear.
- f] Learned Magistrate is at liberty to give all sort of directions to the complainant in that behalf.
- g] The appeal is disposed of.

JUDGE