

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

CRIMINAL APPEAL NO.646 OF 2019

Appellant : Shri Vishal s/o Vasantrao Korde,
Aged about 40 years,
Occu: Proprietor, Arrow Direct Marketing,
R/o Plot No.52, Gandhi Chouk,
Ayodhyanagar, Nagpur.

-- Versus --

Respondent : Mukul s/o Suresh Dautkhani,
Aged about 49 years, Occu : Business,
R/o Near Sangh Building,
Opp. Bharat Mahila School, Mahal, Nagpur.

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Shri C.F. Bhagwani, Advocate for the Appellant.
Shri S.V. Deshmukh, Advocate for the Respondent.

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CORAM : **S.M. MODAK, J.**
DATE : **19th SEPTEMBER, 2019.**

ORAL JUDGMENT :-

Admit. Heard finally by consent.

The only issue involved in this appeal is, whether the learned Magistrate was justified in dismissing the complaint due to conduct of the complainant in not taking effective steps and that too at the stage of recording the statement of the accused under Section 313 of Code of Criminal Procedure (hereinafter referred to as "Cr.P.C." for short). This has happened in Summary Criminal Complaint No.25305/2012 before the 20th Judicial Magistrate First

Class, (Special Court for 138 N.I. Act), Nagpur. He dismissed the complaint under Section 256 of Cr.P.C. on 20/10/2018.

Observations of Trial Court

02] I have heard the learned Counsel for the appellant/complainant and the learned Counsel for the respondent/accused. Perused the order and the documents including the Roznama filed in this appeal. The learned Magistrate while criticizing the conduct of appellant observed thus -

"1. On perusal of the record and roznama, it is apparent that there is non-compliance of various orders directing the complainant to proceed further on last various dates, of which there is no compliance and there is repetition of the same steps, which is nothing but to keep the matter pending unnecessarily. Orders on Exh.1 are self explanatory, as mere filing of the applications for the sake of taking steps to get another months or years to keep the matter pending, when it appears itself from the record that inspite of years of opportunities nothing could be achieved and there being ineffective steps on the part of the complainant, the Court can not keep the matter pending and increase the pendency."

03] The entire emphasis was on inaction in executing the orders by the complainant. It was observed that "no effective steps

were taken". There cannot be any room for making any grievance about such approach. Court is justified in issuing directions. But, the learned Magistrate has overlooked the stage at which, power under Section 256 of Cr.P.C. was exercised. Though the case was fixed for recording the statement of the accused under Section 313 of Cr.P.C., the impugned order does not refer to that stage. The learned Magistrate has laid all the emphasis on speedy disposal and the conduct of the complainant. The learned Magistrate was vigilant enough in recording the observations of the Apex Court about what is the effect of delay on justice delivery system.

04] There cannot be any dispute about speedy disposal. But, it does not mean that while achieving that object, the provisions of law can be overlooked. If the Roznama of the case is perused, it shows that the case is fixed for return of non-bailable warrant. Even if the same was the stage when the impugned order came to be passed on 20/10/2018. Service of non-bailable warrant depends upon the various factors. It depends upon the time given to police to execute it on respondent, availability of accused on the address mentioned in the complaint etc. For not executing the non-bailable warrant, the complainant cannot entirely be blamed.

05] It is not disputed that the complainant has closed his evidence and the stage was for recording of statement of the accused. The learned Counsel for the respondent-accused emphasized on negligence on the part of complainant to see that non-bailable warrant be executed. According to him, the learned Magistrate was justified in dismissing the complaint, particularly when complainant failed to execute the non-bailable warrant through police for a long period.

Non-Appearance of Complainant

06] Though these offences have to be tried summarily, the procedure laid down under Chapter XX of the Cr.P.C. relating to trial of summons cases by the Magistrate is followed in practice. While passing the impugned order, the learned Magistrate has specifically used Section 256 of the Cr.P.C. It empowers the Court to acquit the accused, if the complainant does not appear. I do not think that the ingredients of Section 256 of the Cr.P.C. are fulfilled in the present case. Ultimately, the Court has to see, what is the stage of the case. It is for return of non-bailable warrant. The impugned order does not show that prior to dismissing the complaint, the learned Magistrate gave directions to the complainant for executing the non-bailable warrant. Ultimately, it is also the job of the Court to

issue orders, which assist the complainant in getting executed the non-bailable warrant. The learned Magistrate has referred (in paragraph 1 of the impugned order) about detailed order passed on Exh.1 by him.

07] There is no reason to doubt the attitude and approach on the part of the learned Magistrate still there is a question - Can you non-suit a litigant (who has fought the litigation for 6 years and who made progress till the stage of completion of evidence) just because he failed to secure the presence of accused through police. The answer is certainly no. It is nothing but travesty of justice and it needs to be corrected by this Court. The record shows that on 13/07/2018, the complainant and his Advocate was very much present. He was not present on 21/09/2018 and 20/10/2018. The learned Magistrate has considered this absence and dismissed the complaint. Since, there is improper exercise of powers given under Section 256 of the Cr.P.C., the order cannot be sustained in the eyes of law and it needs to be set aside.

About Order

08] So, I am inclined to allow the appeal. Now, the respondent-accused can certainly appear before the learned

Magistrate. If the complaint will stand revived, the order of issuance of non-bailable warrant will also get revived. The learned Counsel for the respondent-accused undertakes that he will instruct his client to remain present before the learned Magistrate. Once the respondent-accused will appear before the learned Magistrate, the learned Magistrate can consider his *bona fides* by cancelling the non-bailable warrant. At the same time, certain directions are required to be given for expedite disposal. Hence, the following order is passed:

ORDER

- (i) The appeal is allowed.
- (ii) The impugned order dated 20/10/2018 passed by in S.C.C. No.25305/2012 is set aside.
- (iii) The complaint is restored back.
- (iv) The complainant and the accused are directed to appear before the learned Magistrate on 5th of October, 2019.
- (v) It is made clear that no fresh process is required to be issued against either of the parties.
- (vi) The respondent-accused is at liberty to apply for cancellation of non-bailable warrant and the

learned Magistrate to consider his request positively.

- (vii) The respondent-accused is directed to give his present address to the Magistrate.
- (viii) The learned Magistrate is directed to record the statement of accused within 15 days from the date of appearance of the accused.
- (ix) The respondent-accused is at liberty to examine the witnesses, if he wants, and complete the evidence within one month from the date of recording of his statement.
- (x) On completion of the evidence, the learned Magistrate is directed to dispose of the case within two months thereafter.
- (xi) While adhering to time limit, the learned Magistrate is at liberty to exercise all powers under the law in regulating conduct of the parties (and particularly of dilatory litigant) and even by imposing exemplary costs (and not nominal).
- (xii) In view of the above, the appeal stands disposed of.

(S.M. MODAK, J.)