

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

CRIMINAL APPEAL NO.156 OF 2020

Nagesh s/o. Uttam Malwad,
Age : 33 years, Occu : Agriculture,
R/o. Yelam Galli, Tq : Ausa,
Dist. Latur.

... Appellant

VERSUS

Rajppa s/o Kashinath Katke,
Age : 50 years, Occu : Business
Proprietor Uday Auto Service
R/o : Uday Petrol Pump, Ausa
Tq: Ausa, Dist : Latur

... Respondent

...

Advocate for Appellant : Mr. N.S. Shah h/f. Mr. Sharad V. Nattu
Advocate for Respondent : Mr. V. S. Undre.

...

CORAM : MANGESH S. PATIL, J.

DATE : 23.02.2021

PER COURT :

Heard.

2. Admit.

3. The learned advocate for the respondent waives service after admission. With the consent of both the sides, the matter is heard finally.

4. The Magistrate by the impugned order has dismissed the complaint purportedly by invoking the powers under Section 256 of the Code of Criminal Procedure on the ground that the appellant complainant was absent on the date the order was passed.

5. Having heard both the sides it transpires that the appellant had filed a complaint under Section 138 of the Negotiable Instruments Act and the process was issued. The respondent accused put his appearance and the matter was awaiting for recording the plea. It is at that stage, by the impugned order the learned Magistrate dismissed the complaint. The order reads as under :

“ORDER BELOW EXH.1

Perused the records of the case. Complainant absent since long. The matter is pending for recording plea of accused since 23.01.2018. Accused is absent since 24.04.2018. However, no steps are taken by complainant since long. Therefore, the matter was kept for dismissal order since 29.11.2018. But complainant failed to take steps in the matter. It is seen that, complainant is not interested in proceeding with the matter. Hence the following order :

ORDER

Complaint stands dismissed for want of prosecution and accordingly disposed off.”

6. The learned advocate for the appellant would submit that the matter was awaiting recording of the plea and when the respondent accused was also absent, the Magistrate could have directed a warrant to be issued to him, instead thereof, he dismissed the complaint by noting that the appellant was absent. The learned Magistrate clearly overlooked the fact that presence of the appellant was not necessary at that stage of the proceeding. Merely because he was absent on some previous dates will not make any difference. The matter could have proceeded further even in his absence. Therefore the impugned order is illegal and the matter may be remanded.

7. The learned advocate for the respondent submits that having noticed that the complaint was remiss in prosecuting the matter the Magistrate was left with no other alternative but to dismiss the complaint by noticing that the appellant could have taken steps to cause the respondent

accused to remain present but had failed. There is no illegality in the order and the Appeal may be dismissed.

8. Admittedly, it was a summons case to be tried following a procedure prescribed under Chapter XX of the Code of Criminal Procedure. The learned Magistrate has not mentioned but it is apparent that he could have dismissed the complaint for want of presence of the complainant appellant by invoking the provision of Section 256 of the Criminal Procedure Code. However, the power comes with a rider contained in the proviso which reads thus:

Section 256 (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.

9. Taking into account the proviso it is conspicuous that if the Magistrate can proceed with the case even in the absence of the complainant, he is not expected to dismissed it under Sub-section 1 of Section 256. When, admittedly, the matter before the Magistrate was awaiting recording of the plea as can be seen from the copy of the Roznama, one cannot comprehend as to why and how presence of the appellant complainant at that stage was necessary. Irrespective of his previous absence, the Magistrate could have gone ahead with the case and could have *suo moto* directed a warrant to be issued to the respondent accused who was also absent on that day.

10. Being a case, of which cognizance was already taken by the Magistrate, the complainant was not supposed to take any further steps as is being expected by the Magistrate in the impugned order. It is quite apparent that the learned Magistrate overlooking the proviso which regulates the powers to be exercised by him under Sub-section 1 of Section 256 of the Code of Criminal Procedure has dismissed the complaint for unsustainable reasons. The impugned order is clearly erroneous and illegal and is liable to be quashed and set aside.

11. The Criminal Appeal is allowed.

12. The impugned order is quashed and set aside. The Magistrate shall proceed from the stage at which the matter had reached.

(MANGESH S. PATIL, J.)