

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

Criminal Appeal (APEAL) No. 30/2021

Unique Traders, Pusad,
Through its Proprietor of:
Mohd. Iqbal s/o. Haji Noor Mohammad,
aged about 65 yrs,
Occupation : Business,
R/o. Nehru Ward, Pusad,
Tq. Pusad, Dist. Yavatmal.

... **APPELLANT**

.....VERSUS.....

Mohd. Saleem S/o Hohd. Yunus Agawan,
aged about 47 years,
Occupation : Business,
R/o Maharashtra Body Builders,
Transport Nagar, Walgaon Raod,
Amravati (Police Station, Walgaon)

... **RESPONDENT**

Shri S. Raisuddin, Advocate for the appellant
None for the respondent

CORAM: VINAY JOSHI, J.

DATED : 21/08/2021

ORAL JUDGMENT

Heard Shri S. Raisuddin learned Counsel for the appellant.

Though served, none appears for the respondent.

2. Considering the short issue involved in the matter, the
appeal is taken for final disposal.

3. **Admit.**

4. This is an appeal of original complainant challenging the order of dismissal of private complaint passed by the Judicial Magistrate First Class, Pusad (for short the “trial Court”) dated 03.12.2018. Initially, the appellant/complainant has filed private complaint bearing Summary Criminal Case No. 1969/2012 for the offence punishable under Section 138 of the Negotiable Instrument Act. It is alleged that the respondent-accused has issued a cheque tuning to Rs.1,26,363/- drawn with his banker towards discharge of liability. When the appellant-complainant has deposited the cheque, it was dishonoured, hence, after making necessary statutory compliances, a private complaint has been filed.

5. On perusal of the complaint and documents tendered on record, the learned Magistrate took the cognizance and issued the process vide order dated 26.11.2012. In pursuance of summons, the respondent-accused appeared in the proceeding and the complaint was posted for recording of evidence. The learned Magistrate noted the continuous absence of the appellant/complainant and ultimately, was pleased to dismissed the complaint due to absence of complainant’s leading evidence.

6. The learned Counsel appearing for the appellant has argued that the complainant did appeared in the trial Court on various dates.

Most of the times, the case was adjourned due to absence of accused. According to him, due to occasional unintentional absence of the complainant, the trial Court has dismissed the complaint. It is argued that the complainant has genuine cause to be decided on merits hence, prayed to set aside the impugned order and for restoration of complaint.

7. Perused the entire proceeding alongwith Roznama. It reveals that on several dates, the complainant and his Advocate were present. On 09.10.2018, the complainant was present, however, at the instance of the application filed by the accused, the matter was adjourned to 30.10.2018. Roznama dated 30.10.2018 indicates that the complainant and his Advocate were present, however, again the matter was adjourned at the instance of the accused. It is pointed out that though, the complainant's presence was noted in the Roznama, the trial Court has passed an order on Exh. 1 stating that the complainant was absent. On the following date due to the absence of the complainant, the case was dismissed.

8. It is not the case that the complainant was throughout absent in the proceeding. Sometime, the matter was adjourned due to absence of respondent/accused. In these circumstances, the trial Court ought to have given one more opportunity to the complainant to lead evidence. The interest of justice demands that the matter should be

heard on merits rather than disposing it on technicality. Since, there are some lapses on the part of the complainant, the other side can be compensated. It requires to be noted that though notice of appeal was served on the respondent-accused, he remained absent. In that view, following order:

ORDER

- (a) The appeal stands **allowed**.
- (b) The impugned order dated 03.12.2018 passed in Summary Criminal Case No. 1969/2012 is hereby quashed and set aside.
- (c) The complaint (Summary Criminal Case No. 1969/2012) is restored at its original stage with directions to the appellant/complainant to appear in trial Court on **06.09.2021**.
- (d) The appellant/complainant shall deposit cost amount of Rs.3000/- in trial Court on or before 06.09.2021. The respondent/accused is at liberty to withdraw the same.
- (e) The trial Court to issue fresh notice to the accused on the restoration of the complaint and proceed expeditiously in accordance with law.

JUDGE