

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

CRIMINAL APPEAL NO. 718 OF 2019

Paradise Infrastructure, a partnership
 firm having its office at 402, Jai
 Complex, Gandhibagh, Nagpur through
 its Partner, Sanjay s/o Vitthaldas
 Jariwala, Aged about 56 years,
 Occ.- Business, Resident of Plot No. 11,
 Paradise Plaza, Kadbi Chowk, Jaripatka
 Police Station, Nagpur

... **APPELLANT**

VERSUS

Sayyad Arshad Khwaja s/o Sayyad
 Ather Khwaja, aged adult,
 Occ. Business, Resident of A 701 –
 702, Chaitanya Apartment, Clark
 Town, Nagpur.

... **RESPONDENT**

Shri Uday Arun Gosavi, Advocate for the Appellant.
 Shri Raju Kadu, Advocate for Respondent.

CORAM : **VINAY JOSHI, J.**
DATED : **27/08/2021**

JUDGMENT :

Heard learned Counsel appearing for the parties.

2. **ADMIT.** By consent of learned Counsel appearing for the

parties, the appeal is taken up for final hearing.

3. This is an appeal challenging the order of acquittal passed in Summary Criminal Case No.10636 of 2012 on 17.02.2018 by the Judicial Magistrate, First Class, Nagpur. Being aggrieved by the said order, this appeal was preferred along with a prayer for grant of leave to file appeal. This Court has already granted leave to file appeal vide its order dated 16.10.2019.

4. Initially, the appellant/complainant has filed a private complaint for commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881. It was alleged that the respondent/accused has issued a cheque of Rs.25 lakhs to the complainant for discharge of legally enforceable liability. The cheque was dishonored, statutory compliance was made, but as payment was not forthcoming, private complaint has been filed.

5. Learned Magistrate took cognizance of the complaint and issued process against the accused. In response, the accused appeared in the proceedings. The plea was recorded and on its' denial, the appellant (Complainant) filed his evidence on affidavit at Exhibit 16 on

25.09.2013. Further, examination-in-chief was recorded on 21.12.2016, on which the matter was posted for cross-examination of the complainant.

6. In such a background facts, the matter adjourned time to time and finally, as the complainant was absent, the Magistrate was pleased to dispose the compliant in terms of Section 256 of the Code of Criminal Procedure, having effect of acquittal. For the sake of convenience, the impugned order is reproduced, which reads as below :

“ORDER BELOW EXH. 1

As per reference letter of Hon'ble High Court, Bombay letter no.SCMS/227/17 dated 22.12.2017, special drive is conducted for whole month to dispose the cases U/s. 256 Cr.P.C. and relevant provisions.

This is a case of year 2012. In the present chief of the complainant is completed and pending for cross of the complainant. Thereafter, three to four dates complainant is absent. Inspite of repeated opportunity complainant has failed to proceed the matter. Without present of complainant matter can be proceeded further. By order below Exh.1 on 27/10/2017 it was specifically directed that in case of failure of the complainant to adduce the evidence, necessary order would be passed. Today, also no one is present for the complainant and not proceed the matter. Thus, the case is pending without effective and necessary steps The very conduct of the complainant shows that he is no more interested in litigating the matter. No good purpose would be served in prolonging the matter anymore and without any reason. Consequently, the complaint will have to be dismissed. Hence, I pass the following order :

ORDER

Accused is hereby acquitted vide Section 256 of the Code of Criminal Procedure, 1973.”

7. The order speaks that on 27.10.2017 , the complainant was absent, hence, specific direction was given to him to appear on next date to face cross-examination. Then, the Magistrate by noting absence of complainant observed that the case was pending without effective and necessary steps and therefore, the complainant does not have any interest and accordingly, disposed of the complaint.

8. With the assistance of both sides, gone through the entire Roznama, particularly, from 21.12.2016 onward. On 27.01.2017, 18.02.2017, 14.03.2017, the complainant was shown to be present, but there was no progress. On 11.05.2017, the accused sought exemption, which was granted on payment of costs of Rs.400/-. Then on 20.06.2017 and 31.08.2017, the complainant was absent. The Roznama dated 20.06.2017 and 31.08.2017 indicates that the costs are to be deposited and for taking steps. Apparently, there was nothing on the part of the complainant to take steps since it was for accused to deposit costs amount. Then, the matter was adjourned on same stage on 27.10.2017, 14.11.2017, 03.01.2018 and ultimately, on 17.02.2018,

it came to be dismissed. It reveals that the accused has not deposited the costs amount, which was reflected in the Roznama of each date.

9. Learned Counsel appearing for the appellant would submit that the matter was for payment of costs by accused, therefore, the order of dismissal is wholly unjustifiable. On the other hand, learned Counsel for the respondent by supporting the impugned order pointed that though the affidavit of examination was filed on 25.09.2013, however, further examination-in-chief pertaining to exhibiting document was recorded after three years. Be that as it may, it reveals that learned Magistrate has adjourned the matter for some dates for payment of costs of Rs.400/- by the accused, which he appears to have not been paid. Learned Magistrate has passed order on Exhibit-1 on 27.10.2017 directing the complainant to appear for cross-examination, but he has not appeared for next three days.

10. True, there are some lapses on the part of the complainant. However, it reveals that the accused had also not paid costs perhaps that may be the reason for complainant expecting and waiting for said compliance.

11. The impugned order refers High Court letter No.SCMS/227/17, dated 22.12.2017 about special drive. Obviously, on the basis of administrative directions, without assessing the factual aspect of each case, the proceedings cannot be dealt with. The amount involved in the case is tuning Rs.25 lakhs. Having regard to all these facts, the matter requires adjudication on merits, rather than ousting the complainant on technicalities. Since for few dates, the complainant remained absent, he can be directed to pay costs to reasonably compensate the other side. In view of that appeal deserves to be allowed, hence following order :

- (a) Criminal Appeal stands allowed.
- (b) The impugned order dated 17.02.2018 passed on Exhibit 1 by 29th Joint Civil Judge, Junior Division and Judicial Magistrate First Class, Nagpur in Summary Criminal Case No. 10636 of 2012, is hereby quashed and set aside.
- (c) The case is restored on the same stage, on the file of concerned Judicial Magistrate.
- (e) Both parties are directed to appear before the Trial Court on 16.09.2021.
- (f) The appellant/complainant shall pay the costs of Rs.10,000/- to the Respondent/accused on or before 16.09.2021. Deposit of the costs amount in Trial Court would amount to sufficient compliance. In case of deposite

of costs amount the respondent/accused, is at liberty to withdraw the said amount.

- (g) The Respondent/accused is also directed to deposit costs amount of Rs.400/- as directed by the Trial Court, on Exhibit 51, on the date of appearance or prior to that.

JUDGE

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