

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

922 CRIMINAL APPEAL NO.926 OF 2019

DR. KISANRAO S/O. YADAVRAO GADEKAR
VERSUS
CHANGDEO S/O. KHANDERAO PHATANGARE AND ANR

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Advocate for Appellant : Mr. P. P. Mandlik H/F Mr. Gandhi Amol S.
APP for Respondent No.2-State : Mr. B. V. Virdhe
Advocate for Respondent No.1 : Mr. Y. H. Lagad H/F Mr. R. R. Karpe

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 14-06-2022

ORDER JUDGMENT :

1. Admit.
2. The appeal is taken up for hearing immediately by consent of both the parties.
3. Heard learned Advocate Mr. p. p. Mandlik HOLDING FOR Mr. a. s. Gandhif OR APEPLLANT, LEARNED app Mr. B. V. Virdhe for respondent No.2-State, and learned Advocate Mr. Y. H. Lagad holding for Mr. R. R. Karpe for respondent No.1.
4. The appellant is the original complainant and respondent No.1 is the original accused. The complainant has filed S.C.C.No.600 of 2016 before the learned Judicial Magistrate First Class, Rahata, District

Ahmednagar, contending that respondent No.1 accused has committed offence punishable under Section 138 of Negotiable Instruments Act. It appears that after the verification was recorded, summons i.e. process was issued against the accused and the matter was for issuance of summons return thereof and it appears that it was not received, and therefore, again the complainant had taken steps for issuance of the summons. On 09-08-2017, as per the copy of the Roznama, though the complainant was absent he had already filed an application at Exhibit 7 for issuance of summons which was allowed and it was the clerical act that was remaining to actually draw the summons. However, again at Exhibit 8 the complainant had given application for reissuance of the summons and then on 31-10-2017 actually it was drawn and was sent for its service. The next date that was kept was 23-01-2018 and the stage is also mentioned as "प्रकरणात समन्स येणे", that means to receive the summons. However, suddenly on 23-01-2018 an order was passed on Exhibit 1 and it appears that the Court directed that unready matters list should be prepared for passing order under Section 256 of Cr.P.C., and then the matter was kept. If we consider the Roznama as it is no next date was given on 23-01-2018 and then suddenly on 17-02-2018 the impugned order has been passed

stating that the complainant is absent since long and the matter was kept for dismissal order as per the order dated 23-01-2018. In fact, when there was no date in between 23-01-2018 and the 17-02-2018, yet the learned Magistrate observes that, "But thereafter complainant is consistently absent. Even today complainant is called repeatedly but he and his pleader remained absent." This order appears to be passed with sheer negligence without looking after the Roznama. Unnecessary further observations have been made by the concerned Judicial Magistrate First Class that complainant not taking further steps for effective progress. It was because of his own staff the summons was not issued and it was in fact his duty to supervise his staff and get the summonses prepared and send it for its service. Magistrate cannot say that it is not his job. Supervision over his Court is the integral part of his duty. A complaint can be dismissed under Section 256 of Cr.P.C. for the absence of a complainant only if the matter was for taking effective steps. If the matter is for return of the summons, then it cannot be said that the presence of the complainant was required on that day. The observations in *Baliram Ramchandra Patil Vs. Ashok Pundalik Patil*, reported in 2017 DGLS (Bom.) 2160 : 2017 ALL M.R. (Cri) 3089, will have to be allowed to be incorporated in the present decision wherein it has been observed

that :-

“On the face of record the impugned order is not sustainable in law for the sole reason that stage has not reached to exercise power under section 256 of the Code of Criminal Procedure to dismiss the complaint and acquit the accused. The order of the dismissal of the complaint and acquittal of accused under Section 256 of Cr.P.C. can be passed only after the process was issued and the accused had appeared in the matter but the complainant failed to appear on the date listed for hearing of the case. In the instant case respondent/accused has not served nor appeared before the Court. So also the case was not listed for hearing. The case was lying at the stage of the service of the summons. In default of taking steps at the most the complaint could have been dismissed by exercising the powers under section 204(4) of the Code of Criminal Procedure and not in exercise of powers under section 256 of the Code of Criminal Procedure. Therefore, the impugned orders is not sustainable in law. Since the impugned order could not have been passed in exercise of the powers under Section 256 of the Code of Criminal Procedure the order deserves to be set-aside.”

The impugned order dated 17-02-2018 is patently illegal, and therefore, deserves to be set aside.

5. Now in view of setting aside of the order dated 17-02-2018 the matter would be restored on the file of Judicial Magistrate First Class, however a fact for which this Court cannot shut its eyes is, that the accused is resident of Takali Taluka Rahuri, District Ahmednagar and certainly for Rahuri Taluka there is another Court i.e. Judicial Magistrate First class, Rahuri. Rahata is different Taluka, and therefore, the learned Judicial Magistrate First Class, Rahata on whose file the complaint would be restored, should consider that the accused is not residing within his jurisdiction, and therefore, there should be a compliance under Section 202 of Cr.P.C., and for that purpose the order of issuing process against the accused passed on 03-03-2016 is also set aside. The learned Magistrate should take up the steps once again after the verification, get the compliance of section 202 of Cr.P.C. done and then proceed with the matter further. Since record and proceedings is there, perusal of the order below Exhibit 1 dated 16-03-2016 would show that there is no compliance of Section 202 of Cr.P.C. and the leaned Magistrate did not even took into consideration the fact that the accused was residing beyond his jurisdiction. This Court is aware that respondent No.1 has not challenged the order dated 16-03-2016, however, when this Court is restoring the complaint, then its legality and

correctness will have to be considered, and therefore, necessary order deserves to be passed. Accordingly, following order is passed.

ORDER

- 1) Appeal stands partly allowed.
- 2) The order passed by the learned Judicial Magistrate First Class, Rahata, District Ahmednagar, on 17-02-2018 below Exhibit 01 in S.C.C.No.600 of 2016 is hereby set aside. The said complaint is restored on the file of learned Judicial Magistrate First Class, Rahata.
- 3) The order passed below Exhibit 1 issuing summons on 16-03-2016 stands set aside.
- 4) The learned Judicial Magistrate First Class, Rahata, District Ahmednagar, to get the compliance under Section 202 of Cr.P.C. done in view of the fact that the accused is residing beyond his jurisdiction and thereafter take up the procedure as per law.
- 5) Record and proceeding be sent back.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.