

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

CRIMINAL APPEAL NO. 195 OF 2020

APPELLANT : Mohd. Galib s/o Ab. Raheman,
(Ori. Complainant) Aged about 44 years, Occu: Proprietor,
of M.G. Hardware, R/o Dharolives,
Akot, Tq. Akot, Dist. Akola.

...V E R S U S...

RESPONDENT : Asif Shah s/o Yusuf Shah,
(Ori. Accused) Aged about 40 years, Occ: Contractor,
R/o Pach Mohari, Beside Dargah,
Tq. & Dist. Akola.

Shri A.B. Mirza, counsel for the Appellant.
None for the respondent.

CORAM : ANIL S. KILOR, J.
DATE : 15th FEBRUARY, 2022

ORAL JUDGMENT :

1. Heard learned counsel for the appellant.
2. **Admit.**
3. The impugned order dated 01/07/2019, passed

below Exhibit No. 1 in Summary Criminal Case No. 669/2017 by the learned Judicial Magistrate First Class, Akot, dismissing the Summary Criminal Case No. 669/2017, is assailed in the present appeal.

4. Brief facts of the present case are as follows:-

It is the case of the appellant/complainant that, respondent and appellant both were having friendly and cordial relations. The respondent being the contractor had purchased ACC Cement Bags and Iron rods of Rs.37,803/- from the complainant's shop running under the name and style as "M.G. Hardware" on 18/01/2017. On the same date, the cheque was issued by the respondent for Rs. 37,803/- bearing cheque no. 015075 of Bank of Maharashtra, Branch Panaj.

5. It is the case for the appellant that, on presenting the said cheque for encashment, it was dishonoured, on the ground that "opening balance insufficient". Thereafter, the notice was issued on 21/02/2017 to the respondent calling upon him to pay the amount of Rs. 37,803/- within fifteen days from the date of receipt of the notice. On failure of the respondent to pay the said amount, the complaint was filed under Section 138 of the Negotiable Instruments Act, 1881 before, the Judicial Magistrate First Class, Akot against the respondent.

6. On 19/01/2018, a bailable warrant was issued in the said matter and accordingly application was moved for serving warrant through Local Crime Branch. The application was allowed and thereby permitted to serve bailable warrant through Superintendent of Police and the returnable date was 22/01/2019.

7. However, bailable warrant was not returned and matter was kept for taking steps. Thereafter, the report was awaited, as regards the service of warrant. On 01/07/2019, the Summary Criminal Proceeding was dismissed on the ground that, the appellant/complainant was continuously absent and not taking steps to serve the warrant on the respondent. The said order dated 01/07/2019 passed below Exhibit-1 dismissing Summary Criminal Case No. 669/2017 is under challenged in this appeal.

8. Heard Shri A.B. Mirza, learned counsel for the appellant. None for the respondent though served.

9. Shri A.B. Mirza, learned counsel for the appellant points out from the order-sheet that the matter was fixed for report as regards service of warrant and only on two occasions i.e. 16/04/2019 and 01/07/2019, the complainant/appellant was absent, however, his advocate was present. By pointing out the said fact, he submits that

the learned Magistrate has committed error in observing that the complainant is continuously absent since beginning and the complainant failed to bring the respondent/accused before the Court. He, therefore, submits that on the erroneous findings recorded by the learned trial Court which are contrary to the record of the Court, the proceeding was dismissed. It is, therefore, prayed that the Summary Criminal Proceeding No.669/2017 be restored by setting aside the impugned order dated 01/07/2019.

10. To consider the contentions raised by the learned counsel for the appellant, I have gone through the record.

11. From the record, it is clear that on 16/04/2019 and 01/07/2019, the appellant/complainant was absent. However, his advocate was present on 01/07/2019. It is further revealed from the observations made by the learned Magistrate that since beginning the complainant was absent, is not contrary to record. Whereas, on few dates, the complainant was present.

12. As regards the observations made by the learned Magistrate that the complainant has not taken necessary steps to get the respondent before the Court, is also erroneous and contrary to record, as after issuance of warrant, the matter was time to time adjourned for report as

regards the service of warrant.

13. In that view of the matter, as the finding recorded by the learned Magistrate while dismissing the Summary Criminal Proceeding No. 669/2017, are erroneous and contrary to record, I am of the opinion that the impugned order needs to be set aside. Accordingly, I pass following order:-

ORDER

- i) Criminal Appeal is allowed.
- ii) The impugned order dated 01/07/2019 passed below Exhibit No.1 in Summary Criminal Case No. 669/2017 by the learned Judicial Magistrate First Class, Akot, is hereby set aside and the Summary Criminal Case No.669/2017 is restored back to the file of learned Judicial Magistrate First Class, Akot.
- iii) Criminal Appeal is disposed of.

[ANIL S. KILOR, J.]