

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

CRIMINAL APPEAL (ST.) NO. 3591 OF 2022

Textron Technologies,
through its proprietor Viral Kirtikumar
Kachalia, Age – years. Occ. Business,
Off/Shop Opp. Vidyut Bhavan,
Ground Floor, Shakambari Complex,
Akola.

.... **APPLICANT**

// **VERSUS** //

Gopal Kisanrao Bhatkar,
Age-Adult, Occ. Business,
R/o. Opp. Omkar Doke Petrol Pump,
Near Shree Sant Ravidas Maharaj Temple,
Chotti Umari, Akola,
Tq. and Dist. Akola.

.... **RESPONDENT**

Mr. N.R. Tekade, Advocate for the appellant.
Mr. S.V. Sirpurkar, Advocate for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : JUNE 21, 2023

CRIMINAL APPLICATION (APPA) NO.499/2022

Leave is granted to file appeal. Application is disposed of.

CRIMINAL APPEAL (ST.) NO. 3591 OF 2022

ORAL JUDGMENT :

1. Heard. **ADMIT**. Heard finally by consent of the learned counsel appearing for the parties.

2. Present appeal is preferred against the order passed by the Judicial Magistrate, First Class (Court No.2), Akola by which, the criminal complaint – Summary Criminal Case No.5787/2018 has been dismissed for default as complainant failed to adduce the evidence.

3. Learned counsel for the appellant submitted that due to Covid Pandemic, there were restrictions on the movement of the public at large, said restrictions were somewhat lifted in June 2022. As the appellant could not get any instructions about his matter, he remained absent. He further submitted that the learned Counsel of the appellant also stopped the practice due to the Covid Pandemic situation and therefore, he also remained absent. Due to the continuous absence of the complainant, the Judicial Magistrate, First Class observed that the complainant failed to adduce the evidence after sufficient opportunity and dismissed the complaint.

4. The learned counsel for the respondent pointed out that though sufficient opportunity already granted to the appellant, he failed to adduce the evidence and therefore, trial Court has rightly evoked the powers under Section 256 of the Code of Criminal Procedure and has dismissed the complaint for default. He submitted that law helps to the diligence and not the negligence. The appellant

was completely negligent in attending the proceeding and therefore the appeal has no merits and liable to be dismissed.

5. Learned Counsel Mr. Tekade placed the reliance on the decision of this Court in the case of ***Shaikh Akbar Talab Vs. A.G. Pushpakaran & Another***, reported in ***2018 ALL MR (Cri), 1208*** wherein this Court has considered the aspect of the absence of the complainant and held that opportunity is to be given to the complainant to prosecute the complaint on merits. He further placed reliance on ***Rajendra Chandrarao Patil Vs. Manish***, reported in ***2018(2) NIJ, 788*** wherein, also this Court by considering that sufficient opportunity is to be granted to the complainant to litigate the cause on merits and allowed the appeal.

6. Having heard both the sides and on perusal of the order passed by the Judicial Magistrate, First Class, Akola as well as the Roznamas, it reveals that the present complaint was fixed for recording the evidence since 25.02.2020. Admittedly, there were restrictions on the movements of public at large from March 2020 till approximately August 2021. From the Roznamas it reflects that not only the complainant but his counsel was also absent and therefore, the matter was dismissed on 01.01.2022. It is apparent that sufficient opportunity was already granted to the complainant to adduce the evidence. At the

same time, the submission of the learned Counsel that the complainant was never informed by his counsel about the dates which are fixed for the hearing is to be taken into consideration. He further submitted that learned Counsel for the complainant has also stopped the practice due to the Covid Pandemic situation.

7. In the light of the submissions and settled principle that no-one should be condemned unheard. It is also held in number of matters that the sufficient opportunity is to be granted to the parties to litigate their cause on merits. I have perused the decisions relied by learned counsel for the appellant wherein, also it is held that a party should not be allowed to suffer because of the negligence of his counsel. Herein also, the submissions made by the learned counsel Mr. Tekade that the counsel for the complainant also remained absent as he stopped the practice due to the Covid Pandemic situation is also supported by the Roznamas. In Roznamas, it is reflected that not only the complainant but his counsel is also absent continuously for more than two to three dates, the learned Magistrate therefore proceeded under Section 256 of the Code of Criminal Procedure and dismissed the complaint which has resulted in acquittal of the accused. Admittedly, the complainant has filed complaint under Section 138 of the Negotiable Instruments Act, which shows that there was monetary transactions between the present appellant and the respondent.

8. In both the decisions relied upon by the appellant, wherein it is observed by this Court that opportunity is to be granted to the complainant to litigate the dispute on merits as well as an opportunity is to be given to the accused to contest the complaint on merits. In view of that, the matter requires to be restored by quashing and setting aside the impugned order.

9. The disposal of the complaint herein filed by the appellant under Section 138 of Negotiable Instruments Act resulting into the acquittal of the respondent due to the absence of the complainant and his counsel on that day and as such the said dismissal was on technical ground and not on merits. Why the rights of the complainant are involved in the said complaint as seen apparently there was a transaction between the complainant and the respondent which is in the nature of monetary transaction and therefore, appeal deserves to be allowed.

10. In the light of the aforesaid discussion and in the facts and circumstances, I proceed to pass the following order :

- (i) The Appeal is allowed.
- (ii) The impugned order dated 01.01.2022 passed by Judicial Magistrate, First Class (Court No.2), Akola in Summary Criminal Case No.5787/2018 dismissing the complaint for default is hereby quashed and set aside.

- (iii) The Criminal complaint is restored at its original stage.
 - (iv) The complainant and the respondent shall appear before the trial Court on 11.07.2023.
 - (v) The complainant shall co-operate with the Court to dispose of the matter as earliest and shall adduce his evidence without seeking any adjournment.
11. The Appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

Kirtak