

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

CRIMINAL APPEAL NO.65 OF 2023

Maresh s/o Satyanarayan Sharma,
Aged about 33 years, Occu. Business,
R/o. Shukrawar Peth, in front of
Kaleshwar Pat Sanstha Washim,
Taluka and District Washim.

..... APPELLANT

// VERSUS //

Vilas s/o Bhagwan Gawai,
Aged about 49 years,
Occup. Service,
R/o. Shri Khirade's House,
Postal Colony, Akola,
Serving at Z. P. Prarthamik Shala,
Devthana (Khamb),
Taluka Malegaon, District Washim.

..... RESPONDENT

Shri. B. T. Parwe, Advocate for appellant.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 26/06/2023

JUDGMENT :

1. Heard learned Counsel for the appellant.
2. **ADMIT.**

3. By this appeal, the appellant has challenged the order passed by the Chief Judicial Magistrate First Class, Washim by which the complaint filed under Section 138 of the Negotiable Instruments Act is dismissed for want of prosecution.

4. As per the contention of the appellant, he is the original complainant who has filed the complaint under Section 138 of the Negotiable Instruments Act (for short "N.I. Act"), as the respondent has obtained the hand loan of Rs.1,50,000/- from the present appellant, as there was a cordial relations between them and the respondent is a teacher. The complainant gave Rs.1,50,000/- to the accused. The respondent agreed to repay the said amount, however has not repaid the same. On demand, the respondent issued the cheque. The said cheque was deposited by the present appellant in his account, but it was not honoured and returned back with endorsement "insufficient funds". Therefore, notice was issued to the present respondent. The said notice was served on him and after service of notice also he has not repaid the amount therefore, present appellant constrained to file complaint against the respondent.

5. The learned Chief Judicial Magistrate has recorded the verification and on satisfaction that *prima facie* case is made out issued the process against the present respondent. In compliance of the order passed by the Magistrate, the summons was issued to the present

respondent. However, said summons could not be served. Thereafter on 05.01.2022, the Court has issued the summons and the said summons was served, however, accused failed to appear before the Court and therefore, bailable warrant was issued and subsequently non bailable warrant was issued. As non bail bailable warrant was not served on the accused, after sufficient opportunity, therefore Court has observed that the complainant has not taken effective steps to secure the presence of the accused and therefore, there is no purpose to keep the matter pending more than five years and dismissed the complaint for want of prosecution.

6. Being aggrieved and dissatisfied with the order passed by the Chief Judicial Magistrate First Class, Washim, the present appellant preferred an application for setting aside the said application is also rejected by the trial Court. Hence this appeal.

7. As per the contention of the appellant that the trial Court erroneously dismissed the appeal when the complaint was at the stage of report of the non bailable warrant. At the relevant time, the presence of the complainant was not at all required. The learned trial Court has not considered the same. The learned trial Court ought to have considered that the non bailable warrant was issued against the present respondent and it was the police authority who has to execute the said warrant. No

report is submitted by the concerned Police Station. The learned trial Court erroneously dismissed the complaint.

8. Heard learned Counsel for the appellant. He reiterated the contention and submitted that the order passed by the learned trial Court itself is erroneous as the presence of the complainant was not at all required as the case was not fixed for hearing, but it was fixed for report of the non bailable warrant. In support of his contention, he placed reliance on **Mahadeo Vs. Vasanta Namdeo Kothale** reported in **II-1989(1) Crimes 350** wherein this Court has considered that though recording of the plea of the accused may be considered as a part of process of hearing of a case, a Magistrate is at liberty to split up the process of hearing as recording of plea and recording of evidence.

9. After hearing the learned Counsel for the appellant and though respondent is served, he remained absent, therefore appeal proceeded. On consideration of the material placed before the Court, it reveals that the order of the Magistrate was challenged in the present appeal as the Magistrate has dismissed the complaint for want of prosecution by observing that the complainant has not taken effective steps to secure the presence of the respondent. The roznama which is placed on record shows that after service of the summons the appellant has applied for the non bailable warrant. Though appellant has obtained the *hamdast* for serving the said warrant on the respondent, however it

is the police machinery who has to serve the warrant and not the appellant. Learned trial Court has not considered the same. From the order passed by the learned trial Court it reveals that it is observed by the trial Court that appellant has not taken the effective steps. The appellant after service of the notice applied for the bailable warrant thereafter, the appellant has applied for the non bailable warrant. Thus, the record shows that the appellant has already taken the steps to secure the presence of the accused i.e. the respondent. It was the police officials who have to submit the report regarding the service of the warrant. The examination of the ingredients of Section 256 of the Code of Civil Procedure shows that while passing an order of acquittal under Section 256 (1) of the Code of Civil Procedure the Court has to bear in mind ingredient of the proviso to it also. The main provision applies when the case is posted to a date appointed for the appearance of the accused or any date subsequent thereto which the case may be adjourned for hearing. Even then the Magistrate has to on exercising his discretion record that there is no reason for which it would be proper for adjourn, hearing of the case to some other day. Thus, in view of the provision of Section 256 such order of the acquittal can be passed. When the case is posted to a date appointed for the appearance of the accused or when the case is fixed for any day subsequent thereto for the

hearing purpose. Here in the present case, the record shows case was not fixed for hearing but is fixed for service of the non bailable warrant.

10. In this back ground, it is crystal clear that the learned trial Court had not considered the provision while passing the order and erroneously passed the order of acquittal by dismissing the complaint. The order passed by the Magistrate is wrong and erroneous which is liable to be set aside and quashed. In view of that, I proceed to pass following order.

- (i) Appeal is allowed.
- (ii) The order passed by the learned Chief Judicial Magistrate, Washim dismissing the complaint for want of prosecution is hereby quashed and set aside.
- (iii) The criminal complaint is restored at its original stage.
- (iv) The complainant to appear before the trial Court on 14.07.2023 and shall take effective steps to secure the presence of the accused.
- (v) The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)