

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

CRIMINAL APPEAL NO. 644 OF 2019

APPELLANT: Nitin s/o Mukund Pagar,
Aged about 42 years, Occu: Agriculturist,
R/o Sarathi Niwas New Irrigation Colony,
Civil Lines, Washim, District Washim.

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

RESPONDENT Saiyyad Musharraf, Proprietor Siddhiki
Tour and Travels, R/o A-302, Even Shine
Cosmoc Link Road Andheri West,
Mumbai.

Shri A.S. Deshpande, counsel for the appellant.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 20/06/2023

ORAL JUDGMENT :

1. Present appeal is preferred by the appellant challenging the order passed by the Judicial Magistrate First Class, Washim for dismissing the complaint as the complainant was absent in Summary Criminal Case No. 24/2016 dated 02/07/2019. The appeal is dismissed by observing that though summons has been issued to the

complainant, and on the day of appointed on the appearance of the accused, or any day subsequent thereto which the hearing is adjourned. The complainant does not appear and dismissed the complaint.

2. Heard learned counsel for the appellant. The respondent served but failed to appear before this Court.

3. Learned counsel for the appellant submitted that present appellant has filed complaint under Section 138 of the Negotiable instruments Act against the respondent/accused on the submissions that respondent is a proprietor of Siddhiki Tours and Travels. The complainant and the accused being friends known each other since long and out of the trust, the amount of Rs. 10,00,000/- was paid to the respondent. The complainant has paid Rs. 7,00,000/- by online transaction and Rs. 3,00,000/- is paid to the accused in cash. On demand, the accused issued a cheque bearing No. 376126 of account no. 3015575109. The said cheque was deposited by the complainant in his account but said cheque was not honored and returned back with endorsement funds

in sufficient. Thereafter, the complainant had issued a legal notice to the accused by registered post acknowledgment and demanded the amount. However, accused failed to pay amount, therefore, the complainant preferred the criminal complaint before the learned Judicial Magistrate First Class, Washim.

4. Learned trial Court after verification of the complaint document placed on record, issued process against the accused vide order dated 15/03/2016. On 13/06/2016, a report from Ambooli Police Station was received and on that day, the learned counsel for the complainant had filed application for issuance of warrant. Thereafter, the matter was posted for return of summons. Subsequently, the learned trial Court had issued the bailable warrant against the accused and was fixed for return of the same. Thereafter, on various dates, the learned counsel for the appellant was present and the matter was fixed for return for bailable warrant issued against the accused/respondent..

5. Learned counsel submitted that since the non-

bailable warrant was not returned back then matter was fixed for arrest warrant of the respondent as the matter was posted for return of the non-bailable warrant. The complainant was not present, and the learned trial Court has dismissed the complaint. In fact, the presence of the complainant was not required on that day, as the matter was fixed for return of non-bailable warrant. He submitted that the learned Judicial Magistrate First Class has dismissed the complaint erroneously without considering the provision and therefore, the order passed by the learned Judicial Magistrate First Class deserves to be set aside.

6. In support of his contention, he placed reliance in the case of ***Baliram Ramchandra Patil V/s Ashok Pundlaik Patil reported in 2017 ALL MR (Cri)3089***, wherein this Court considered the scope of Section 256 of the Code of Criminal Procedure, and held that the case was lying at the stage of service of summons. In default of taking steps, at the most, the complaint could have been dismissed by exercising the powers under Section 204 (4) of Code of Criminal Procedure

and not in exercise of powers under Section 256 of the Code of Criminal Procedure and therefore, the impugned order is not sustainable in law.

7. In order to appreciate the submissions advanced, I have perused the record. The appellant has also placed on record the copy of the Roznama. Perusal of the Roznama shows that the complaint was filed under Section 138 of the Negotiable Instruments Act. On due consideration of the fact and the verification, learned Magistrate has passed the order of issuance of process under Section 138 of the Negotiable Instrument Act. After issuance of the process notice was issued to the respondent accused after service of notice also, the respondent/accused has not appeared before the Court, therefore, initially bailable warrant was issued. After service of bailable warrant also, the respondent remained absent and therefore, the non-bailable warrant was issued against the respondent. Thus, the complaint was fixed for receipt of report of non-bailable warrant.

8. The learned Judicial Magistrate First Class has

passed order by referring Section 256 that if the summons has been issued on complaint as on the day appointed for the appearance of the Accused, or any day subsequent thereto to which the hearing may be adjourned. On the face of the record, impugned order appears to be erroneous for the reason that the stage has not reached the power under Section 256 of the Code of Criminal Procedure to dismiss the complaint and acquit the accused. The complaint was fixed for return of the non-bailable warrant. The order of dismissal of the complaint and acquittal of accused under Section 256 can be passed only after the process was issued and the accused has appeared in the matter, but the complainant failed to appear on the date listed for the case of hearing of the case. In the instant case, the respondent/accused has not appeared before the Court so also the case not listed for hearing. The case was lying at the stage of awaiting the report of service of non-bailable warrant.

In view of above, the appeal liable to be **allowed**.

Therefore, I proceed to pass following order:

- a) Criminal Appeal allowed in terms of prayer clause (1).
- b) The order passed by the learned Judicial Magistrate First Class, Court No.4, Washim dated 02/07/2019 in Summary Criminal Case No. 24/2016 is hereby quashed and set aside.
- c) The criminal case is remanded to the learned trial Court.
- d) The appellant is directed to appear before the learned trial Court on 10/07/2023.
- e) In case, the appellant appears before the trial Court Washim, the trial Court shall take necessary steps and further directed to proceed with the matter according to law.

Criminal appeal is **disposed of**

JUDGE

RKN

Signed By: RAJESH K
NANDURKAR

Signing Date: 06.07.2023 18:41