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

CRIMINAL APPLICATION (APPA) NO.8 OF 2024
AND
CRIMINAL APPEAL NO.505 OF 2024

Bisani Trading Company, through
its Sole Proprietor Ramesh
Harivallabh Bisani,
Age 74 Years, Occupation: Business,
R/o. Wardha,
Through its Power of Attorney Holder, (original Complainant)
Urmila Sachin Zade,
Age 35 Years, Occupation: Service,
R/o. Shiv Nagar, Wardha. **..... APPELLANT**

// VERSUS //

1. M/s. Maa Annapurna Agri Care,
Through its Proprietor
Prabhakar Santoshrao Nehare,
R/o. At Post Adegaon, Taluka Hingna,
District Nagpur.
2. Shri Prabhakar Santoshrao Nehare,
Aged Adult, Occupation: Business
under name And style
"Maa Annapurna Agri Care", Being its
Proprietor, R/o. House No.399,
Ward No.2, At Post Adegaon,
Tahsil Hingna, District Nagpur. **.... RESPONDENTS**

Mr. D. U. Thakare, Counsel for appellant.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 09.09.2024

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ORAL JUDGMENT :

1. Heard.

2. Leave granted.

3. By preferring this appeal, the appellant has challenged the order dated 08.09.2023 passed by the learned Judicial Magistrate, First Class, Court No.1, Wardha by which, the case of the complainant is dismissed for want of prosecution and accused is acquitted under Section 256 of the Code of Criminal Procedure.

4. The appellant is the original complainant who filed a complaint under Section 138 of the Negotiable Instruments Act, contending that he is a business man and dealing with the business of agricultural implements, fertilizers, seeds, insecticides under the name and styled as "Bisani Trading Company", Wardha and he is the sole Proprietor of the said company. The accused No.2 also doing the same kind of business under the name and styled as "Maa Annapurna Agri Care" at Adegaon being its sole Proprietor, out of business transactions some implements were obtained by the accused on a credit an amount of Rs.2,92,420/- was due from the accused. In discharge of legally enforceable debt, he has issued a cheque bearing No.001667 for Rs.2,92,420/- dated 17.09.2019 drawn

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Central Bank of India, Branch at Kavdas, in favour of the complainant. The complainant has deposited the said cheque, but the cheque was returned with endorsement "Funds Insufficient". On 18.09.2019 after return of the said cheque, the complainant has issued the notice through RPAD which was received by the accused, but after receipt of the notice, he failed to pay the amount and therefore, complainant constrained to file complaint.

5. After filing of the complaint as the learned trial Court has taken the cognizance and issued the process against the accused. After issuance of the process, the accused failed to appear before the Court and therefore, the warrant was issued against the accused. On 17.10.2022, the application was filed by the complainant for issuance of the warrant and accordingly bailable warrant was issued against the accused. Thereafter, the complainant has attended the proceedings on various occasions but the accused remained absent. On 17.07.2023 and 04.09.2023 as complainant was absent, the matter was fixed for dismissal order and accordingly, on 08.09.2023 it was dismissed.

6. Learned Counsel for the appellant submitted that the presence of the complainant was not all required as the case was fixed for return of the report of the execution of the warrant and only on the two dates the complainant was absent, but the

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learned trial Court erroneously acquitted the accused by dismissing the complainant for want of prosecution. In fact, the presence of the complainant was not at all required on the date of the dismissal therefore, the order passed by the learned Judicial Magistrate First Class, Wardha is erroneous and liable to be set aside.

7. The learned Counsel for the appellant has made out a case by showing that he has many arguable points in the present appeal, therefore leave is granted.

8. Though notice is served upon the respondents, none appears for the respondents. Perused the entire record appeal is **admitted**. As already observed that after taking cognizance as the respondents remained absent and therefore, on 17.10.2022 the complainant filed an application for issuance of warrant. Accordingly, the bailable warrant was issued and the case was fixed for return of the report of the said execution of the bailable warrant. Only on 04.09.2023 and 17.07.2023 the complainant was absent, prior to that on each and every date the complainant has attended the proceedings. But the learned trial Court has not considered the same, in fact, the presence of the complainant was not at all required on the date of the dismissal of the complaint. This Court has considered this aspect in the case of **Vijay Sanghavi Vs. State of Maharashtra and**

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another reported in **2016 (4) Mh.L.J. 223** and it is observed that the provisions under Section 256 of the Code are meant to ensure that the complainant does not drag on the proceedings without taking any real interest in prosecuting the matter. The provisions of Section 256 of the Code come in picture after a summons has been issued and after a trial is expected to commence. The absence of the complainant would result in the Court being unable to proceed with the trial and that is why to prevent the harassment of the accused, who would be required to be present before the Magistrate without there being any prospects of the case proceeding further, that the said Section has been, apparently, enacted. When in a given case the accused is served with a summons, but does not remain present before the Court and a warrant is issued, but still not executed, it would not be just and proper to focus on the absence of the complainant and order the acquittal of the accused, who has defied the process of the Court. When the process to compel the appearance of the accused was undertaken by the Magistrate and was incomplete, the Magistrate ought to have been more concerned with the non-execution of the warrant of arrest by the police and ought to have questioned the police in that regard instead of getting rid of the case by focusing on the absence of the complainant.

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9. The similar facts are in the present case also, the accused / respondents were served with the summons but they failed to appear and therefore, warrant was issued. The roznama further shows that only on two occasions the complainant was absent and the case was dismissed, prior to that though the case was fixed for the return of the warrant, the complainant and his Counsel has attended the proceeding therefore, the Magistrate ought to have been more concerned with the non-execution of the warrant of arrest by the police and ought to have considered that the report regarding the service of warrant is not issued and therefore, the absence of the complainant is not material on the relevant date. Learned Magistrate ought to have considered that the presence of the complainant was not at all required but instead of the same, he has dismissed the complaint which is erroneous and therefore, the order of acquittal deserves to be quashed and set aside. In view of that, I proceed to pass following order:

ORDER

- (i) The appeal is allowed.
- (ii) The impugned order passed by the learned Judicial Magistrate First Class, Court No.1, Wardha dated 08.09.2023 acquitting the accused is hereby quashed and set aside.
- (iii) The matter is remanded back to the learned Judicial Magistrate First Class, Court No.1, Wardha for retrial.
- (iv) The parties to appear before the Judicial Magistrate First Class, Court No.1, Wardha, on **25.09.2024**.

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(v) The parties to co-operate with the Court for the disposal of the trial.

10. The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.