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

CRIMINAL APPEAL NO.449 OF 2024

Prakash @ Bandubhau Raghunath Gadam
Proprietor of Shriram Machinery and Tools,
Off – in front of ICICI Bank, Akola Road,
Taluka Akot, District Akola,
Occupation: Business,
R/o – Jay Matadi Nagar, Akola Road,
Taluka – Akot, District – Akola.

.... APPELLANT

// VERSUS //

Anup Pundlik Bhojane,
Proprietor of Jai Gurudeo Agro Services,
Off – Chattrapati Shivaji Sankul Athavadi
Bzg, Paratwada, Taluka Achalpaur,
District – Amravati,
R/o Rajana Purna, Taluka Chandur Bazaar,
District – Amravati.

.... RESPONDENT

Mr. A. S. Dhage, Counsel for the appellant.
Mr. D. S. Khushalani, Counsel for the respondent through
video conferencing.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 13.12.2024

ORAL JUDGMENT :

1. **Admit.**
2. Heard finally with the consent of learned Counsel appearing for the parties.
3. By preferring this appeal, the appellant has challenged the order passed by the learned Judicial Magistrate First Class,

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Court No.2, Akot by which the complaint of the complainant i.e. the present appellant is dismissed for want of prosecution and the accused is acquitted.

4. The present appellant is the original complainant who filed the complaint under Section 138 of the Negotiable Instruments Act (for short 'N.I.Act') against the accused, alleging that the accused had taken hand loan of Rs.50,000/- from the complainant and in discharge of the enforceable debt, he has issued the cheque bearing No.219631 dated 24.02.2014 of Rs.50,000/- which was drawn on Jijau Commercial Cooperative Bank. The said cheque was deposited by the complainant, but it was returned with an endorsement "account closed" therefore, the notice was issued. After receipt of the notice also the accused has not repaid the amount and therefore, he constrained to file the complaint.

5. The learned Judicial Magistrate First Class has taken cognizance of the complaint and after recording of the verification, issued the summons against the accused. As the summons was not returned and therefore, the case was fixed for the summons report. But the learned Judicial Magistrate has dismissed the said complaint for want of prosecution by using Section 256 of the Code of Criminal Procedure (for short 'Cr.P.C.').

6. Learned Counsel for the appellant submits that though there are certain lapses on the part of the appellant in prosecuting

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the matter, but the opportunity needs to be given to the appellant to conduct his complaint on merit. He further invited my attention towards the Roznama and submitted that the presence of the complainant was not at all required on the day when the complaint was dismissed, as it was for return of the summons. Thus, the powers under Section 256 of Cr. P.C. was wrongly invoked by the learned Magistrate and dismissed the complaint for want of prosecution.

7. Learned Counsel Mr. Khushalani appeared through the video conferencing for the respondent and submitted that despite sufficient opportunity granted to the present appellant, he has not taken steps, and therefore, rightly, the complaint was dismissed and the appeal is devoid of merits and liable to be dismissed.

8. On perusal of the Roznama and the recitals of the complaint, it revealed that there was legal and enforceable debt and to discharge the legal and enforceable debt, the cheque was issued, which was dishonoured and therefore, the complainant constrained to file the complaint. The entire Roznama shows that on the day of the dismissal of the complaint, it was fixed for return of the summons. The Roznama further shows that on various occasions the presence of the complainant was marked by the Court. As far as the invoking the powers under Section 256 of the Cr.P.C. is concerned, which shows that if the summons has been issued on

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complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. The proviso of Section 256 of Cr.P.C. says that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

9. Thus, considering the submissions made by the learned Counsel for the appellant and on perusal of the Roznama, it is not the fact that the complainant was negligent in prosecuting his complaint, but he has already taken the steps and the case was fixed for return of the summons therefore, the presence of the complainant on the day of the dismissal was not at all required. The Magistrate has to adjourn the case by assigning the appropriate reason, which is not done. Thus, it is apparent that the Magistrate has used the powers illegally, and therefore, the order passed by the Magistrate deserves to be quashed and set aside. Moreover, considering the ground raised by the appellant, one more opportunity is required to be given to the complainant to prosecute

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his complaint on merit. In the result, I proceed to pass following order:

ORDER

- (i) Order dated 05.12.2023 passed by the learned Judicial Magistrate First Class, Court No.2, Akot, in Summary Criminal Case No.596/2016 is hereby quashed and set aside.
- (ii) Summary Criminal Case No.596/2016 stands restored at its original stage.
- (iii) Learned Judicial Magistrate First Class, Court No. 2, Akot shall decide the complaint on its own merits by giving sufficient opportunity to the complainant as well as the accused.
- (iv) The parties to appear before the learned trial Court on 07.01.2025.

The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.