



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

CRIMINAL APPEAL NO.439 OF 2022

Vikas s/o Purushottam Zade
Aged about 40 years,
Occupation – Business,
R/o Chacher, Tq. Mouda,
District Nagpur

...APPELLANT

VERSUS

Javed Ahmad s/o Abdul Sattar
Aged about 49 years,
Occupation – Business,
R/o. Plot No.20, Kohinoor Society,
Yavatmal, Tq. and District Yavatmal

...RESPONDENT

Mr. R.M. Patwardhan, Advocate for the appellant.
None for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : NOVEMBER 18, 2024.

ORAL JUDGMENT :

ADMIT. Heard finally with the consent of learned Counsel
for the parties.

2. Present appeal is preferred by the appellant – original
complainant against the order passed by the Additional Chief Judicial
Magistrate, Nagpur in SCC No.12452/2016 by which the complaint is

dismissed in default for want of prosecution and the accused is acquitted from the charges by order dated 28/04/2022.

3. Heard learned Counsel for the appellant. He submitted that appellant is the original complainant who filed the complaint under Section 138 of the Negotiable Instrument Act on an allegation that he has sold his four wheeler vehicle i.e. TATA truck bearing No.MH-40-N-6570 to the accused on 28/08/2015 for the total consideration amount of Rs.8,20,000/-. Out of the said amount, the accused paid Rs.50,000/-to the complainant and in this regards the Sell agreement was also executed between the complainant and the accused. The said amount was acknowledged by the complainant and the accused gave post dated cheque of remaining amount of Rs.7,70,000/- to the complainant. It was agreed by the accused that if the complainant deposits the said cheque he would get the amount, therefore, the complainant has deposited the cheque in his account but the said cheque was returned with an endorsement "FUNDS INSUFFICIENT" on 02/06/2016. Thereafter the complainant has issued the notice. The said notice was received by the accused but after receipt of the notice also the accused has not paid the amount, and therefore, the complainant constrained to file complaint before the Chief Judicial Magistrate.

4. The Chief Judicial Magistrate has recorded the verification of the complainant and issued the process by issuing summons for the attendance of the accused for alleged offence under Section 138 of the Negotiable Instrument Act vide Section 204 of Cr.P.C. On receipt of the summons the accused appeared and furnished bail bonds and subsequent to that he remained absent, therefore, non-bailable warrant was issued against the accused. Inadvertently, the Counsel of the complainant has not paid the process fee, and therefore, warrant was not issued as per the order passed by the Court. Thus, he submitted that the Counsel was under the impression that he has already paid the process fee but actually he has not paid the process fee and due to which the complaint was dismissed. He submitted that the hard earned money of the complainant is involved. The cheque was issued against the legal and enforceable debt and it was not expected that the complainant should remain present on each and every date. It was the Counsel who has to comply by paying the process fee for issuance of the warrant and for the default of the Counsel, the complainant is not to be punished by dismissing the complaint. He submitted that now complainant would attend the proceeding and would proceed with the matter. In view of that, the order passed by the learned Magistrate deserves to be quashed and set aside.

5. Though notice of the present appeal is served on the respondent, none appears for the respondent.

6. I have heard learned Counsel for the appellant. Perused the entire record as well as the Roznama which shows that as the Counsel of the complainant was absent, and therefore, the complaint is dismissed for want of prosecution and accused has acquitted from the charges made against him. It reveals that for want of step the matter was kept and by using Section 256 of the Cr.P.C., the learned trial Court has acquitted the accused. As far as the provisions under Section 256 of Cr.P.C. is concerned which shows that if the summons has been issued on 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. shows 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. Thus, in the present case, the complainant was already represented by the Counsel

and as the process fee was not paid, and therefore, the order of the issuance of the non-bailable warrant was not complied. Thus, it was the Counsel who has to take the step and presence of the complainant was not at all necessary. Learned Magistrate has not assigned any reasons why he was not able to adjourn the matter or in view of the provisions, fix a date for taking further steps by the Counsel. Thus, considering the reasons and the grounds discussed as above, the complainant has made out a case for remand. In view of that, the appeal deserves to be allowed. Accordingly, I proceed to pass following order:

- (i) The appeal is allowed.
- (ii) The order dated 28/04/2022 passed by the Additional Chief Judicial Magistrate (Spl. Court for S.138 N.I. Act), Nagpur in SCC No.12452/2024, is hereby quashed and set aside.
- (iii) The complainant shall remain present before the Additional Chief Judicial Magistrate, Nagpur on 02/12/2024 and shall take necessary step to secure the presence of the accused before the trial Court.
- (iv) The trial Court shall give an opportunity to the complainant to take the effective step to secure the presence of the accused.

(v) The complainant shall not take the adjournment unnecessarily for taking the steps.

7. The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

**Divya*