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

CRIMINAL APPLICATION (APPA) NO.546 OF 2019
AND
CRIMINAL APPEAL NO.506 OF 2024

Shri Ganesh Chandra Das,
Aged about 51 Years,
Occupation : Business,
R/o. Plot No.76, Misal Layout,
Jaripatka, Nagpur – 440014. (Original complainant)
[P.S. Jaripatka, Nagpur] **..... APPELLANT**

// VERSUS //

Shri Mahamegha Bahan Dash,
Aged about Years,
Occupation : Service,
R/o. Qtr. No.IC/74, South Balanda,
Talcher, District Angul,
Pin – 759116, ODISHA
(P.S. Colliery, Distt, Angul)
Office Add: Project Officer,
Jagannath Colliery, (Original Accused)
South Balanda, Talcher. **.... RESPONDENT**

Mr. P. S. Khubalkar, Advocate for the applicant/appellant.
Mr. Y. A. Kullarwar, Advocate for the respondent.

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

ORAL JUDGMENT :

1. Heard.
2. **Admit.**

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3. By preferring this application, the appellant is seeking leave to prefer an appeal against the acquittal passed by the 19th Joint Civil Judge Junior Division and Judicial Magistrate First Class and Special Court for 138 Negotiable Instruments Act, Nagpur, who dismissed the complaint in view of Section 256 of the Code of Criminal Procedure and acquitted the accused.

4. Learned Advocate Mr. Khubalkar for the applicant submitted that the applicant is the original complainant who filed a complaint under Section 138 of the Negotiable Instruments Act before the learned Judicial Magistrate First Class, Nagpur alleging that the complainant is originally resident of Odisha and out of friendly relationship with the accused, he has handed over the hand loan amount of Rs.3,71,000/- to the respondent. The respondent agreed to pay the amount, but he has not paid and therefore, demand was made. On making the demand, the accused has issued a cheque bearing No.121664 of Central Bank of India, Talcher branch, Odisha and the said cheque was deposited by the complainant but it was returned with an endorsement "Funds Insufficient", therefore, notice was issued to the respondent on 01.04.2013, after receipt of the notice also the respondent has not paid the amount and therefore, he constrained to file the complaint.

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5. The learned Magistrate has taken cognizance of the complaint and issued a process against the present respondent. Though the present respondent was served with the notice, he failed to appear and therefore, warrant was issued. After repeated efforts, the warrant was not executed against the respondent. The case was fixed for return of the warrant and therefore, the complainant has not attended the proceeding. But learned trial Court has not considered that the attendance of the complainant was not required as matter is fixed for return of the warrant from the Police Station. But learned trial Court held that no effective steps are taken by the complainant and acquitted the accused under Section 256 of the Code of Criminal Procedure which is contrary to the law. In support of his contention, he placed reliance on **Vijay Sanghavi Vs. State of Maharashtra and another** reported in **2016 (4) Mh.L.J. 223** wherein this Court has considered the provisions under Section 256 of the Code of Criminal Procedure and held that 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.

6. Per contra, learned Advocate for the respondent submitted that after sufficient opportunity, no effective steps are

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taken by the present applicant and therefore, the case was dismissed. He placed reliance on **Prema Ramanand Hattangadi Vs. State of Maharashtra and another** reported in **2012 (6) Mh.L.J.210** wherein it is held that complaint filed against accused persons dismissed in default and respondents acquitted of the alleged offence. Complainant and her advocate were continuously absent. Trial Court did not commit any error in dismissing the matter for want of prosecution.

7. After hearing both the sides and on perusal of the roznama, it reveals that after taking cognizance the process was issued against the present respondent. Thereafter, the accused remained absent and therefore, application for issuance of the warrant was filed. On various occasions, the Advocate for the complainant was present and was looking after the proceedings. On 21.01.2019 both parties and Advocate were absent and case adjourned for dismissal. On 16.02.2019 also the complainant and the Advocate absent and on that day itself the complaint was dismissed. Thus, it is apparent that on the day of the dismissal of the complaint, the presence of the complainant was not required as it was awaiting the report of service of the warrant. Learned Advocate for the applicant has made out a case by showing that the presence of the complainant was not at all required, in view of that the order passed by learned trial Court appears to be erroneous, as

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learned Advocate for the applicant has made out the grounds to grant leave therefore, leave is granted.

8. After considering the facts and the order passed by the learned trial Court, the roznama shows that after issuance of the process notice was issued to the accused/respondent but as the accused/respondent failed to appear and therefore, warrant was issued. The complaint was fixed for return of the warrant report prior to the dismissal of the complaint. On the day of the dismissal of the complaint also the matter was fixed for return of the warrant. 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.

9. Thus, as far as the present case is concerned, it reveals that the case was not fixed either for recording the evidence of the complainant or for taking any steps but the complaint was fixed for

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return of the warrant. There was no report received by the Court whether warrant is executed or not. As rightly observed by this Court in the case of **Vijay Sanghavi** (supra) relied upon by the learned Advocate for the complainant wherein it is observed that 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.

10. In view of that, the appeal deserves to be allowed. Accordingly, I proceed to pass following order:

ORDER

(i) The order dated 16.02.2019 passed by the learned trial Court acquitting the accused is hereby quashed and set aside.

(ii) The matter is remanded back to the learned trial Court for retrial.

(iii) The parties to appear before the learned trial Court on **24.09.2024**.

(iv) Both the parties shall co-operate with the trial Court to dispose of the case as earliest.

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(v) The trial Court shall give sufficient opportunity to both the parties to adduce their evidence.

(vi) The learned trial Court shall expedite the trial considering the accused belongs to the Odisha State.

11. The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.