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

CRIMINAL APPEAL NO.490 OF 2019

Umang Ferro Alloys Pvt. Ltd.,
Having Registered Office,
R/o. R. R. Plaza, Plot No.1,
10 No. Puliya, Kamptee Road,
Baizan Bagh, Nagpur,
District Nagpur – 440017
through its Managing Director
Shri Sanjay s/o Dhanendra Kasal,
Age 49 Years.

..... APPELLANT

// VERSUS //

M/s. Krishna Enterprises,
through its Proprietor
Shri Ganpati Murli Krishna Raju,
Aged about 37 Years,
Occupation Business,
Registered Office at Flat No.303,
Sai Vihar, Complex Gudiyari Road,
Srinagar, Raipur (C.G.) - 492009.

.... RESPONDENT

Mr. S. A. Dutonde, Counsel for appellant.

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

ORAL JUDGMENT :

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

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3. By preferring this appeal, the appellant has challenged the order passed by the 29th Joint Civil Judge Junior Division and Judicial Magistrate First Class, Special Court for 138 of Negotiable Instruments Act, by which the accused is acquitted under Section 256 of the Code of Criminal Procedure.

4. The complainant has filed the Criminal Complainant under Section 138 of the Negotiable Instruments Act. The complainant is a Private Limited Company, named and styled as "UMANG FERRO ALLOYS PVT. LTD." having registered Office, at R. R. Plaza, Plot No.1, Nagpur and dealing with the business of trading minerals and Ferro-Alloys. The accused is sole Propriety firm and is also involved in the business of trading Manganese-ore, having its Office at Raipur (Chhattisgarh). The complainant and the accused are having business relations since more than one year and the accused was regular and punctual in making the payment for materials purchased and therefore, the complainant has supplied 30 metric tons of Manganese for Rs.5,70,367/-. The accused promised to transfer the amount within seven days through RTGS but failed to do so and therefore, on demand the accused has issued a cheque bearing No.009398 of Axis Bank Ltd., Branch Urla, dated 20.11.2013 of Rs.5,00,000/-. The said cheque was deposited by the complainant but it was not honoured and returned with

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endorsement "Funds Insufficient". As the cheque was dishonoured the complainant has issued a notice to the accused. After receipt of the notice also, the complainant has not received the amount and therefore, he constrained to file the complaint.

5. The learned trial Court has taken the cognizance of the said complaint on 25.03.2014. On taking cognizance, process was issued and the summons was issued to the accused. On 06.07.2017 the fresh summons was issued to the accused but report of the same was not received and case was fixed for return of the summons. After issuance of the summons, the matter was listed on 14.09.2017 and thereafter on 27.11.2017 by observing that the complainant failed to take steps though sufficient opportunity is granted and dismissed the complaint for want of prosecution under Section 256 of the Code of Criminal Procedure.

6. Being aggrieved and dissatisfied with the same, present appeal is preferred by the complainant who is the appellant. Learned Counsel for the appellant pointed out that the observation of the trial Court that from last 4 to 5 dates complainant has not taken steps is contrary to the roznama in fact, the roznama shows that on 06.07.2017 the summons was issued and but the report was not received. After 06.07.2017 the matter was fixed for 14.09.2017 and thereafter, on

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27.11.2017. As far as the absence of the complainant is concerned, it is only for the two dates. But the presence of the complainant was not required as the report of the summons is to be received. Thus, the observation of the trial that the complainant failed to take steps and remained absent and prolonging the matter is contrary to the record and therefore, the order passed by the learned Magistrate deserves to be quashed and set aside.

7. 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 para No.28 this Court has considered 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

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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.

8. This observation is squarely applicable to the present case also as the roznama shows that the summon was issued on 06.07.2017 in pursuance of the order issued on 05.07.2017. Thereafter, case was fixed for return of the summons on 14.09.2017. The roznama nowhere discloses whether any report is received by the Court regarding the service of the summons. Thus, the learned trial Court has not considered that it was for the return of the report regarding the service of the summons and therefore, presence of the complainant was not required, but ignoring the same, and ignoring the object behind Section 256 of the Code of Criminal Procedure the case was dismissed. Thus, the complaint of the complainant was dismissed on a technical ground and therefore, the appeal deserves to be allowed. Accordingly, I proceed to pass following order:

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ORDER

- (i) The appeal is allowed.
- (ii) The impugned order dated 27.11.2017 passed by the learned 29th Joint Civil Judge Junior Division and Judicial Magistrate First Class, Special Court for 138 of Negotiable Instruments Act, acquitting the accused is hereby quashed and set aside.
- (iii) The matter is remanded back to the 29th Joint Civil Judge Junior Division and Judicial Magistrate First Class, Special Court for 138 of Negotiable Instruments Act, Nagpur for retrial.
- (iv) The parties to appear before the 29th Joint Civil Judge Junior Division and Judicial Magistrate First Class, Nagpur on **25.09.2024**.
- (v) The parties to co-operate with the Court for disposal of the trial.

9. The appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.