



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

CRIMINAL APPEAL NO. 459 OF 2024

APPELLANT: Mr. Akash Kumar s/o Shri Ramshankar
(Original Complainant) Choudhary, R/o Plot No. 102-B,
Prabhuram Apartment, Manav Seva
Nagar, Seminary Hills, Nagpur
Pin Code:440006.

...V E R S U S...

RESPONDENT Mr. Amit Rajesh Chheniya s/o Rajesh
(Original Accused) Chenniya, Mahatma Fule Nagar, Opposite
Telephone Exchange, Saoner, Tahsil
Saoner, District Nagpur (M.S.).

Mr. S.M. Mate, counsel for appellant.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 13/11/2024

ORAL JUDGMENT :

1. The present appeal is preferred by the appellant, challenging the order passed by the Judicial Magistrate First Class, Nagpur, by which the complaint of the complainant filed under Section 138 of the Negotiable Instruments Act, 1881, is dismissed for want of prosecution. The complaint is dismissed by observing

that though sufficient opportunity is granted, the complainant and his advocate are not attending the court since 19/01/2021, and for want of prosecution, the complaint is dismissed by acquitting the accused.

2. Heard learned counsel for the appellant. The respondent though served but failed to appear before this Court.

3. **Admit.**

4. Learned counsel for the appellant submitted that the present appellant has filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 against the respondent/accused on the ground that the accused and his family members run a bakery products business and also have agricultural land and other properties. The accused is in friendship with the complainant, and out of the family relationship, the accused has obtained the financial support from the complainant. As the accused was in need of financial support, he requested it from the complainant, and the complainant has paid him Rs. 80,000/- on 24/03/2016 for the medical treatment, Rs. 90,000/- on 12/05/2016, and Rs. 1,90,000/- on 30/06/2016. The accused has given in writing on stamp paper dated 30/07/2016 admitting his liability but has not repaid the amount. On the demand of the

complainant, he has issued the cheque dated 10/10/2017 bearing 375494 dated 11/10/2017 of Rs. 3,60,000/- drawn on Arvind Sahakari Bank Ltd., Saoner, District Nagpur. The complainant presented the cheque, which was returned with the endorsement “funds insufficient” therefore, the complainant has issued notice. The said notice was served on 08/11/2017. The accused neither replied to the notice nor paid the amount, and therefore, the complainant is constrained to file the present complaint under Section 138 of the Negotiable Instrument Act, 1881.

5. The complainant could not remain present before the Court for recording his verification, and therefore, the summons was not issued, but the same was dismissed for want of prosecution, and the accused is acquitted of the offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

6. Learned counsel for the complainant submitted that the provision under Section 256 is wrongfully applied by the learned trial Court. He submitted that the complaint is dismissed erroneously without considering the provision, and therefore, the order passed by the Judicial Magistrate First Class, Nagpur deserves to be set aside.

7. In support of his contention, he placed reliance in the case of ***Baliram Ramchandra Patil V/s Ashok Pundlaik Patil [2017 ALL MR (Cri) 3089]***, wherein this Court considered the scope of Section 256 of the Code of Criminal Procedure, and held that the case was lying at the stage of service of summons. In default of taking steps, at the most, the complaint could have been dismissed by exercising the powers under Section 204 (4) of the Code of Criminal Procedure and not in exercise of powers under Section 256 of the Code of Criminal Procedure, and therefore, the impugned order is not sustainable in law.

8. Learned counsel for the appellant submitted that the process was issued against the accused. After receipt of summons, the accused failed to appear therefore, non-bailable warrant was issued. After issuance of the non-bailable warrant also, the accused does not appear, and therefore, it was for taking steps. Thus, the presence of the complainant was not at all required, as it was for the appearance of the accused. He further submitted that the learned Judicial Magistrate First Class has dismissed the complaint of the complainant as per Section 256 of Cr.P.C. and acquitted the appellant/accused. On the face of the record, the impugned order appears to be erroneous for the reasons that the

stage has not reached to use the power under Section 256 of Cr.P.C. to dismiss the complaint and acquit the accused. The complaint was fixed for the return of the non-bailable warrant against accused. The order of dismissal of the complaint and acquittal of the accused under Section 256 can be passed only after the process was issued and the accused has appeared in the matter, but the accused failed to appear on the date after receipt of the summons also. The complainant failed to appear due to some reasons, and in that case, the Judicial Magistrate First Class shall adjourned the matter. But, in the instant case, the respondent/accused has not appeared before the court, so also the case was not listed for hearing. In fact, the case was lying to at the stage of awaiting the report of non-bailable warrant.

In view of the above circumstances, the appeal is allowed. Accordingly, I proceed to pass the following order.

- a] The criminal appeal is **allowed** and be restored to its original stage.
- b] The parties to appear before the Judicial Magistrate First Class, Nagpur on 02/12/2024.
- c] In case, the appellant appear before the trial Court,

the trial Court shall take necessary steps and complainant shall also take the necessary steps to secure the presence of the accused before the Court.

Criminal appeal is **disposed of**.

JUDGE