



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

CRIMINAL APPEAL NO. 30 OF 2013

...

Anil S/o Shivratan Gandhi,
Aged about 41 years, Occupation: Business,
R/o. Nandura Road, Malkapur,
Tah. Malkapur, Dist. Buldana.

... **APPELLANT**

- - V E R S U S - -

Sau. Lata Gajanan Marathe,
Aged: Major, Occ. Business,
R/o.146, Indira Nagar, Block No.1,
Kishorkumar Gangul Lane,
Behind Nasib Kirana,
Near Royal Hotel Juhutara,
Santakruz, (West) Mumbai.

... **RESPONDENT**

Mr. P.S. Kshirsagar, Advocate a/w Mr. M.P. Kshirsagar,
Advocate for the Appellant.

None for the Respondent.

CORAM : M.M. NERLIKAR, J.

DATE : DECEMBER 02, 2025.

ORAL JUDGMENT :

Heard the learned counsel for the appellant. Though the respondent is served, none appeared on his behalf.

2. Admit.

3. The present appeal is filed for quashing and setting aside the order dated 09/08/2010 passed by the learned 3rd Judicial Magistrate First Class, Malakpur, in Summary Criminal Case No.155/2009, whereby the learned Magistrate dismissed the complaint for want of prosecution, resulting in the acquittal of the accused.

4. Brief facts of the case are that:

The appellant had filed a complaint under Section

3

138 of the Negotiable Instruments Act alleging dishonour of a cheque amounting to Rs.72,000/- issued by the respondent and drawn on the State Bank of India, Malkapur Branch. The cheque was returned unpaid for the reason “funds insufficient.” After issuing the statutory notice and receiving no payment, the appellant instituted Criminal Case No.155/2009 before the Judicial Magistrate First Class, Malkapur, where process was issued on 02/06/2009. As the respondent did not appear, a warrant was issued on 13/08/2009, and the matter was adjourned from time to time for return of the warrant. The appellant and his counsel remained present on all earlier dates, and on 09/02/2010 the case was posted to 18/06/2010. On 18/06/2010, the appellant found that the matter was not on the board, and upon inquiry was informed that the record was not traceable. Repeated inquiries over the following months yielded the same response. During this period, the appellant was undergoing treatment for a lumbar disc lesion and was advised bed rest for three months from 06/10/2010.

4

After resuming normal activities in December 2010, the appellant learned that the case had, in fact, been transferred to the Court of the 3rd Judicial Magistrate First Class, Malkapur. Examination of the record showed that the matter had been listed before the transferee Court on 07/08/2010 and 09/08/2010, though no entry in the *roznama* indicated when or by whose order the transfer had occurred, and no intimation had been given to the appellant. Unaware of the transfer and believing the case remained before the original Court, the appellant did not appear before the transferee Court. On 09/08/2010, noting his absence, the learned 3rd J.M.F.C. dismissed the complaint under Section 256 of the Criminal Procedure Code and discharged the respondent by passing the following order:

“ Present matter is kept for steps on part of Complainant, Complainant and his advocate absent when matter is called. Inspite of several direction and sufficient time nobody is appearing and has taken steps proceeding under such circumstances complaint deserves to be

5

dismissed, hence complaint is dismissed under Section 256 of Criminal Procedure Code. Accused stands discharged.”

5. The learned counsel for the appellant submits that the order passed by the learned 3rd J.M.F.C., Malkapur is vitiated as it was made without proper consideration of the circumstances leading to the appellant's absence. It is contended that the case had been transferred without any notice or intimation to the appellant or his advocate, and therefore the absence could not be treated as deliberate or negligent. It is further submitted that the *roznama* contains no entry indicating the date of transfer, the Court to which the matter was transferred, or the authority directing such transfer. According to the appellant, this omission created a genuine and unavoidable lack of awareness regarding the subsequent listing of the case before the transferee Court. The learned counsel submits that the appellant and his advocate had consistently remained present on all earlier dates up to 09/02/2010, which demonstrates diligence and absence of any intention to delay

6

the proceedings. The long interval between dates, coupled with the unrecorded transfer, is stated to have caused the confusion leading to non-appearance. It is also urged that the matter was pending at the stage of “return of warrant,” and no report regarding execution or non-execution of the warrant had been received from the original Court. In such circumstances, the question of taking further steps by the complainant did not arise, and the trial Court ought to have considered the procedural posture before invoking Section 256 of the Cr.P.C. On these grounds, the learned counsel submits that the impugned order has been passed in a mechanical manner, without examining the factual and procedural aspects reflected in the record, and that the appellant’s absence was not attributable to any lapse on his part.

6. The learned counsel for the appellant relied on the judgment of this Court in the case of *Shri Shaikh Akbar Talab VS Shri A.G. Pushpakaran & Another, 2018 ALL MR (Cri) 1208*,

7

and referred to the observations made in Paragraph No.14, which are as follows:

“14. In above referred case cited (supra) the complaint was dismissed under Section 256 of CrPC by the learned Magistrate due to absence of the complainant. It is held that principles of natural justice are required to be followed by giving an opportunity to the complainant to prosecute the complaint on merits as well as an opportunity is to be given to the accused to contest the complaint on merits. Therefore, the matters were restored by quashing and setting aside the impugned orders.”

7. Upon perusal of the record and in light of the law laid down by this Court in the case of ***Shri Shaikh Akbar Talab (supra)***, I am of the considered view that the Learned Trial Court ought not to have dismissed the complaint for want of prosecution, nor should have acquitted the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

8. The record indicates that the appellant had been

8

regularly attending the proceedings and had remained present on every earlier date prior to 09/02/2010. The matter was thereafter fixed for 18/06/2010, but during the long interval between the two dates, the case appears to have been transferred without any entry in the *roznama* or any communication to the appellant or his advocate. When the appellant appeared on 18/06/2010, the case was not on the board, and repeated inquiries revealed only that the record could not be traced. It was much later discovered that the case had already been listed before the transferee Court on subsequent dates, which the appellant was never made aware of. The learned Magistrate, without examining these circumstances or the incomplete procedural stage of “return of warrant,” proceeded to dismiss the complaint under Section 256 of the Cr.P.C. The sequence of events suggests that the order was passed mechanically and without considering the appellant’s *bona fide* attempts to follow up the matter, thereby denying him a fair opportunity to pursue the complaint on

merits.

9. A mere absence due to non-intimation of the transfer of the case could not justify dismissal of the complaint and discharge of the respondent. The appellant had diligently attended all earlier dates and repeatedly inquired when the matter was not found on the board. The subsequent discovery that the case had been listed before the transferee Court demonstrates that the appellant's absence was *bona fide*. By overlooking these circumstances and dismissing the complaint without considering the procedural irregularities and the appellant's *bona fide* efforts, the trial Court effectively prevented adjudication on merits, causing undue prejudice to the appellant.

10. Considering the facts on record, including the appellant's consistent presence on all earlier dates and *bona fide* efforts to follow up the matter, it is evident that the

10

dismissal of the complaint by the trial Court was premature and hyper-technical. The case had been transferred without intimation, and the appellant had no knowledge of the subsequent dates before the transferee Court. The approach adopted by the learned trial Court overlooked the procedural irregularities and the stage of “return of warrant,” and is inconsistent with the principles of natural justice. As held by this Court in *Shri Shaikh Akbar Talab (supra)*, the complainant is entitled to a fair opportunity to prosecute the complaint on merits, and similarly, the respondent must have the opportunity to contest it. The trial Court ought to have considered these aspects before dismissing the complaint, and the absence of such consideration demonstrates a rigid and technical application of law contrary to the statutory scheme and the principles of justice. For the reasons stated above, I deem it appropriate to allow the appeal. Hence, the following order:-

ORDER

- (i) The Appeal is **allowed**.

11

(ii) The impugned order passed by the learned 3rd Judicial Magistrate First Class, Malakpur, in Summary Criminal Case No.155/2009, dated 09/08/2010 dismissing the said complaint in default under Section 256 of the Code of Criminal Procedure and consequently acquitting the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, is quashed and set aside.

(iii) Summary Criminal Case No.155/2009, stands restored to file at its original stage and the matter is remanded back to the learned Trial Court to decide the same afresh, on its own merits.

(iv) The parties are directed to remain present before the Learned Trial Court on 07/01/2026.

12

(v) The appellant shall proceed with the matter without seeking any adjournment and shall co-operate with the Trial Court. The Trial Court may grant adjournment in exceptional circumstances.

(vi) The above order is subject to payment of costs of Rs.2,500/-. The cost shall be deposited by the appellant in the Trial Court. The said cost shall be paid to the respondent.

(vii) The appeal is **disposed of**, accordingly.

[**M. M. NERLIKAR, J**]