

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

CRIMINAL APPEAL NO. 96/2014

(Shikshak Sahakari Bank Ltd. Vs. M/s. Seva Marketing (Partnership) Firm & ors.)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Mrs/Mr. R. D. Bhuihar, Advocate for petitioner.
 Mr. T. Mandekar, Advocate for respondent No. 1 & 4.
 Mr. V. A. Bagaddeo, Advocate for respondent No.2.

CORAM: M. M. NERLIKAR, J.

DATED : 01/12/2025.

Heard.

2. The present appeal is directed against the order dated 07.05.2012 passed by the learned Judicial Magistrate First Class, Nagpur, in SCC No.2627/2011 wherein the complaint of the appellant was dismissed under Section 256 of the Code of Criminal Procedure ('Code') for want of prosecution and the accused was acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act ('NI Act').

3. The learned counsel for the appellant submits that so far as the impugned order is concerned, the said order is passed without going through the record of the case as the Advocate concerned in the Trial Court was not feeling well and therefore, was required to take treatment and advised

to take bed rest. In support of the same copies of medical certificates issued by the Om Surgical Hospital and Trauma Center, Sawali, Fracture, Accident & Orthopedic Hospital and Suretech Hospital and Research Centre Ltd. are placed on record. She further submitted that due to the fault of the Advocate, the client should not suffer and therefore, the Court below ought not to have dismissed the case for want of prosecution under Section 256 of the Code.

4. On the other hand, learned counsel for the respondent submits that the Court has rightly passed the order, as consistently neither the counsel nor the complainant were present. He invited my attention to the Roznama, and submitted that after giving an opportunity, the appellant chose to remain absent, therefore no fault can be seen in the impugned order. He submits that even if it is accepted that the counsel was not feeling well, the fact remains that the complainant had also remained absent, therefore it could be gathered that the complainant was not interested in prosecuting the complaint and lastly he submits that there is no merit in the appeal.

5. The learned counsel for the appellant relied upon this Court's judgment in ***Shri Shaikh Akbar Talab VS Shri A.G. Pushpakaran & Another, 2018 ALL MR (Cri) 1208***, particularly the observations in Paragraph 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.”

6. Upon perusal of the record and after hearing the arguments advanced by the parties, it appears that the complaint was instituted on 29.01.2011. It further appears from the Roznama that evidence on affidavit was filed by the complainant on 09.01.2012 and thereafter, respondent/accused filed an application at Exh.25 on 20.01.2012 praying for dismissal of complaint. However, neither the complainant nor the Advocate were present.

Accordingly the case was adjourned to 14.02.2012 on which date neither the complainant and his Advocate were present nor any say was filed to Exh.25 by the complainant. Again it was adjourned to 28.02.2012. However, it appears that the counsel for the complainant was present on that date and say was given at Exh.28, however, the case was adjourned for 03.03.2012 for orders at Exh.25 and 26. On the said date, complainant and his Advocate were absent, but accused was present. It appears that on 03.03.2012, respondent/accused has filed application under Section 258 of the Code for discharge at Exh. 27. Therefore, the matter was adjourned for passing orders at Exh. 25 and 27. On 16.03.2012, 07.04.2012 and 25.04.2012, the counsel and complainant were absent. However, on 25.04.2012, the application at Exh.25 and 27 were rejected by the Trial Court and accordingly, the matter was kept on 07.05.2012. On that date, also the complainant and his Advocate were absent and on the same day, the case was dismissed for want of prosecution and the accused was acquitted.

7. Considering the above factual background, it appears that on several occasions, the matter was adjourned, however Roznama shows that application at Exh.25, 26 and 27 were pending and the matter was adjourned for passing orders on the said Exhibits. However, it is only on 25.04.2012, that the order of rejection was passed on Exhibit 25 and Exhibit 27. Thereafter, matter was listed on 07.05.2012 and on the same date, the matter was dismissed-in-default.

8. After perusal of the entire record, it could be gathered that the Court ought not to have dismissed the complaint for want of prosecution and should have granted one more opportunity to the complainant. Considering the factual background that the applications filed by the accused were pending, one more opportunity ought to have been granted by the Trial Court. Further, it could be gathered that the counsel for the complainant was not present and an explanation to that effect was tendered that due to ill-health, she was unable to attend the Court, therefore the matter went unattended. Considering these facts and circumstances, the Trial Court has failed to appreciate the facts in its true perspective, as it is a settled

position that the rights of the parties should be crystallized on the basis of merits and not on technical ground as the procedure is man-made, therefore, it cannot frustrate the substantial rights of the parties.

9. Considering the above facts and circumstances of the case and in the light of the legal principles laid down in *Shaikh Akbar Talab* (supra), this Court holds that the learned Trial Court ought not to have dismissed the complaint for want of prosecution nor acquitted the accused for the offence under Section 138 of the Negotiable Instruments Act. This Court is inclined to allow the appeal on imposing cost, hence the following order is passed:-

(I) The appeal is allowed.

(II) The impugned order dated 07.05.2012 below Exh.1 passed by the learned Judicial Magistrate First Class, Nagpur is hereby quashed and set aside.

(III) The Trial Court is directed to restore the file at its original position.

(IV) The above order is subject to cost of Rs.25,000/-. It is to be deposited within two weeks from the date of uploading of this order in the Trial Court and after depositing the cost, the respondent is at liberty to withdraw the same.

(V) It is made clear that both the parties should co-operate with the Trial Court in deciding the matter, as the matter is of 2011.

10. Appeal stands disposed of in above terms.

(M. M. NERLIKAR, J.)

Gohane