

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

CRIMINAL APPLICATION [APPA] NO.925 OF 2024

IN

CRIMINAL APPEAL [STAMP] NO. 3341 OF 2023

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Sai Shubham Enterprises,  
Through its Proprietor,  
Nandkishor S/o Angat Biranwar,  
Aged about 45 yrs, Occ. Business,  
R/o Mangaruji Fendarkar Ward No.5,  
Mama Chouk, Gondia,  
Tah. & Dist. Gondia, P.S. Gondia (City).

... **APPELLANT**

**- - V E R S U S - -**

Nusreenbanu W/o Mohhamad Iqbal Gafuli,  
Aged about 55 yrs. Occ. Business,  
Proprietor of Hotel, Mid Town,  
R/o Near Khoja Masjid Road,  
Near Bajrang Dal Office, Ansari Ward,  
Gondia, Tah. & Dist. Gondia,  
P.S. Gondia (City).

... **RESPONDENT**

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Mr. N.R. Tekade, Advocate for the Appellant.

Mr. N.Valesha, Advocate h/f. Mr. Anand Parchure, Advocate for the Respondent.  
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**CORAM : M.M. NERLIKAR, J.**

**DATE : SEPTEMBER 16, 2025.**

**ORAL JUDGMENT :**

Leave granted.

2. **Admit.** Learned counsel for the respondent waives service of notice. Heard finally with the consent of both the parties.

3. The present application is being filed seeking leave to file appeal against the order dated 23/01/2023 passed below Exh.1 by the learned Judicial Magistrate, First Class, Court No.5, Gondia, in Summary Criminal Case No.1226/2015. The appellant further prays for quashing and setting aside of the said order, whereby, the learned Magistrate was pleased to

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dismiss the complaint for want of prosecution, resulting into acquittal of the accused.

4. Brief facts of the case are that the appellant and the respondent are well acquainted. In February 2015, the respondent approached the appellant seeking financial assistance due to personal difficulties. Relying on the respondent's assurance to repay the same within three to four months, the appellant advanced a hand loan of Rs.3,00,000/- on 05/02/2015. Upon demand of repayment, the respondent issued a cheque bearing No. 937285 dated 11/06/2015 for an amount of Rs.3,00,000/- towards discharge of the said debt. The cheque, when presented for encashment, was dishonoured on 12/06/2015 with the remark 'Funds Insufficient.' The appellant thereafter issued a legal notice, which was returned unserved with the remark 'Not claim hence return to the sender.' As the respondent failed to pay the amount within the statutory period, the appellant filed a complaint under Section

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138 of the Negotiable Instruments Act, 1881. Process was issued on 04/02/2016 and the respondent appeared. The matter is pending at the stage of complainant's evidence.

Subsequently, on 23/01/2023, the learned Judicial Magistrate, First Class, Court No.5, Gondia, passed the following impugned order:-

*“1. The complaint is dismissed for want of prosecution vide section 256 of Cr.P.C.*

*2. The accused stands acquitted from the offence p/u/s 138 of the Negotiable Instruments Act.”*

5. The learned counsel for the appellant submits that the order dated 23/01/2023 ought not to have been passed by the learned Magistrate, as the appellant was regularly prosecuting and attending the Court. He further submits that the matter is pending for cross-examination of the appellant, his advocate was attending proceedings on each and every occasion, however, he was not able to remain present on 12-13 dates, i.e., since from January, 2022, till passing of the

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impugned order. He further submits that he may be granted one chance and he would be readily available for cross-examination.

6. On the other hand, learned counsel for the respondent submits that the petitioner remained consistently absent, even though respondent and the counsel for the respondent were present on each and every date. He further submits that the claim of the petitioner is frivolous, and therefore, he is not attending the Court. Though the matter is kept for cross-examination, he has chosen not to appear in the Court, and therefore, the learned Court below has rightly passed the order. The appellant was not diligent and purposefully avoided the cross-examination, and therefore, the present Appeal/ Application may not be entertained.

7. Upon hearing both the parties and upon perusal of the impugned order as well as the record, it appears that the

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petitioner is absent since 18/12/2021. Similarly, it seems from the *roznama* which is placed on record, that on certain occasion, the counsel for the petitioner has filed an application seeking adjournment of the matter and further to give next date. The said application was allowed and accordingly next date was given. On one occasion, the learned Court was not available i.e. on 24/01/2022. Further on some occasion, even the respondent was absent. However, it can be gathered from the *roznama* that Advocates for both the parties were regularly attending the Court, however, as the matter was kept for cross-examination of the complainant / appellant, he was not present as stated above.

8. I have perused the order. It seems from the impugned order passed below Exh-1 that on that day the matter was kept back on several occasions, however, the complainant was absent and it was observed that on 24/08/2022 the case was kept for DID, still the complainant

was absent for cross-examination.

9. No doubt, the petitioner was absent on several occasions, and therefore, the Court below was pleased to dismiss the complaint for want of prosecution and the accused was acquitted under Section 256 of the Criminal Procedure Code. The learned counsel for the petitioner submits that due to some difficulty he was unable to approach the Hon'ble Court and that he is ready to give an undertaking that he would be readily available for cross-examination if one last opportunity is given in order to do substantial justice. Needless to mention at this juncture that it is true that the appellant has not given any reason which demonstrates his absence, however, to meet the ends of justice and as was submitted by the learned counsel for the appellant that he would be readily available for cross-examination, I am inclined to consider the prayer of the appellant. It would be useful to refer to the case of *Shri Shaikh Akbar Talab VS Shri A.G. Pushpakaran & Another, 2018 ALL*

*MR (Cri) 1208*, wherein, it was held that the 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. The principles of natural justice are the cardinal principle of law and backbone of judicial process. Opportunity of hearing and right to present the case are statutory incorporation of natural justice by mandating procedural safeguards, and therefore, the Court below ought not to have taken a harsh and hyper-technical view by dismissing the complaint for want of prosecution and accordingly violates procedural safeguards. For the reasons stated above, I deem it appropriate to allow the appeal. Hence, the following order:-

**ORDER**

- (i) The Appeal is **allowed**.
- (ii) The impugned order passed by the

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Learned Judicial Magistrate First Class, Court No.5, Gondia, in Summary Case No.1226/2015, dated 23/01/2023, 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. 1226/2015, stands restored to file at its original stage.

(iv) The appellant / complainant shall appear before the Trial Court on 07/10/2025 for cross-examination.

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

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may grant adjournment in exceptional circumstances.

(vi) The above order is subject to payment of cost of Rs.20,000/-. 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** ]