

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL (AGAINST ACQUITTAL) no. 2044 of 2025**

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NIRAJKUMAR LALJIBHAI MAURYA
Versus
AKHILESH SATYAPRASAD MAURYA & ANR.

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Appearance:

MR ADITYA T PANCHOLI(13067) for the appellant(s) no. 1
RAFIK LOKHANDWALA(5590) for the appellant(s) no. 1
BAILABLE WARRANT SERVED for the Opponent(s)/Respondent(s) no. 1
MR DIPESH D SONI(9996) for the Opponent(s)/Respondent(s) no. 1
MR. ADITYA JADEJA, APP for the Opponent(s)/Respondent(s) no. 2

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CORAM: HOno.RABLE MS. JUSTICE S.V. PINTO

Date : 06/10/2025

ORAL ORDER

1. When the matter is called out, learned advocate Mr. Dipesh Soni for the accused is not present.
2. The present appeal is filed by the appellant – original complainant under Section 419 of Bharatiya Nagarik Surakhsha Sanhita, 2023 against the order dated 14.05.2025 passed by the learned 15th Additional Judicial Magistrate First Class, Surat (hereinafter referred to as the “learned Trial Court”) in Criminal Case no. 86336/2023, whereby the learned Trial Court has dismissed the Criminal Case for want of prosecution as the appellant did not remain present under the provisions of Section 256 of Code

of Criminal Procedure, 1973 (for short “Cr.P.C.”) and the accused - original accused came to be acquitted from the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as ‘the N I Act’).

2.1 The appellant and the respondent no. 1 are hereinafter referred to as the “complainant” and the “accused” as they stood in the original case for the sake of convenience, clarity and brevity.

3. The brief facts culled out from the memo of the present appeal as well as the record and proceedings are as under:

3.1 The complainant and the accused were known to each other and were good friends. The accused wanted a hand loan for his personal expenses and the complainant had given an amount of Rs.6,30,000/- in parts to the accused. The accused had executed a notarized undertaking on 01.03.2022 and had issued cheque no. 000010 dated 07.07.2023 for Rs.6,30,000/- from his account with The Kalupur Cooperative Bank Limited, Adajan, Surat Branch. The cheque was deposited by the complainant in his account with Bank of Baroda, Bhestan Branch, Surat but

the cheque returned unpaid with the endorsement "Funds Insufficient". The complainant gave the demand statutory notice which was duly served to the accused but the accused did not send any reply and did not repay the amount within the stipulated period and hence, the complainant filed a criminal complaint under Section 138 of the NI Act before the Court of the Chief Judicial Magistrate, Surat which was registered as Criminal Case no. 86336 of 2023.

3.2 The learned Trial Court was pleased to take cognizance for the offence under Section 138 of the NI Act and passed an order to issue summons to the accused which was duly served to accused and the accused appeared before the learned Trial Court and his plea was recorded at Exh. 7. The complainant had filed the affidavit of examination in chief and other documents and the matter was pending for cross examination of the complainant. By an order dated 14.05.2025, the learned Trial Court was pleased to dismiss the complaint for want of prosecution on the part of the complainant.

4. Being aggrieved and dissatisfied by the impugned order the complainant has preferred present Criminal Appeal under Section 419 of Bharatiya Nagarik Surakhsha Sanhita, 2023.

5. Heard learned advocate Mr. Rafik Lokhandwala appearing for the complainant and learned APP Mr. Aditya Jadeja for the respondent – State. Learned advocate Mr. Dipesh Soni is not present before this Court to make any submissions.

6. Learned advocate Mr. Rafik Lokhandwala for the complainant has submitted that the learned Trial Court has failed to appreciate the facts and provisions of law in proper perspective and therefore, the impugned order is unsustainable and bad in law. Learned advocate further submits that the learned Trial Court has not appreciated the evidence on record and has passed the impugned order and hence, the same may be quashed and set aside and the appeal be allowed.

7. Learned APP Mr. Aditya Jadeja for the respondent –

State has submitted that after recording the absence of learned advocate for the complainant, the learned Trial Court has passed the impugned order under Section 256 of the Cr.P.C. and hence, this Court may not interfere with the impugned order and has urged this Court to dismiss the present appeal.

8. As the matter has been dismissed by an order under Section 256 of the Cr.P.C. it is appropriate to have a glance of Section 256 of Cr.P.C. which reads as under:-

"256. no.-appearance or death of complainant.—

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does no. appear, the Magistrate shall, no.withstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is no. necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the no.-appearance of the complainant is due to his death."

9. At this stage, it is also appropriate to take into account the observations made by the Hon'ble Apex Court in the **M/s. BLS Infrastructure Limited Vs M/s. Rajwant Singh & Others** reported in **2023 4 SCC 326** in Para 20 which is reproduced as under:

“12. In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:

“16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.”

After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of acquittal was set aside and it was directed that the prosecution would proceed from the stage where it reached before the order of acquittal was passed.”

9.1 A coordinate bench of this Court in the case of **Sureshchandra Chandulal Patni Vs Natwarlal Keshavlal Patni** reported in **1992 1 GLR 626** observed in para 4 to 7 as under:

“(4) Section 256 of the Code of Criminal Procedure provides that if the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. The proviso to Sec. 256 further contemplates that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(5) In the instant case, the learned Magistrate has not recorded any reason about his thinking it proper to adjourn the hearing of the case to some other date. It appears that he has ignored the proviso to Sec. 256 of the Code of Criminal Procedure. The power under Sec. 256 of the code of Criminal Procedure has been conferred on the Magistrate obviously in the interest of justice, with a view to seeing that the accused is not subjected to any undue harassment. It is clear from the proviso to Sec. 256 of the Code of Criminal Procedure that when the complainant is represented by a pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the personal

attendance of the complainant and proceed with the case. In the instant case, the learned Magistrate does not appear to have applied his mind in dispensing with the personal attendance of the complainant and to proceed with the case or to adjourn the case to some other date as requested in the application submitted by the Advocate for the complainant. In the present case, the situation as on 5/03/1984 squarely falls within the aforesaid proviso and still the learned magistrate acted under sub-sec. (1) of Sec. 256 of the Code of Criminal Procedure acquitting the accused. It is, therefore, clear that the learned Magistrate has ignored the provision contained in proviso to Sec. 256 of the Code of Criminal procedure and therefore the order passed by him is illegal and unsustainable.

(6) In the case of State of Gujarat v. Keshavaram Shivram Devmurari and Anr. , (1977) XVIII GLR 524, this Court [Coram : N. H. Bhatt, J. (as he then was)] observed that it was really unfortunate to dismiss the complaint in absence of the complainant and ignoring the proviso to Sec. 256 of the Code of Criminal procedure and it was held that the repetition of such instances would not be there in future in the Court of the Magistrate. However, it appears that this has been ignored while dismissing the complaint and acquitting the accused in the present case.

(7) SIMILARLY, in the case of State of Gujarat v. Dhirajlal Pranslianker. Bhatt, reported in 1990 (1) GLH 466: (1990 (1) GLR 201), it is observed that the Court should exercise sound judicial discretion and should adjourn the case when the complainant is absent and particularly when he is represented by an Advocate.”

10. On scrutiny of the rojakam produced on record by the learned advocate for the complainant, it transpires that the

complainant submitted his affidavit of examination in chief and other documents including the undertaking given by the complainant at Exh. 8 and the matter was pending for cross-examination of the complainant. The complainant could not remain present before the learned Trial Court on a couple of occasions as the health of the father of the complainant was not well and in the absence of the complainant, the learned Trial Court was pleased to pass the impugned order of dismissal on the ground of non-prosecution.

11. It is pertinent to note that the case has been dismissed for want of prosecution. In light of the settled principle of law of the Apex Court in M/s BLS Infrastructure Limited (supra), it appears that the trial Court has committed an error in dismissing the matter even though the evidence of the complainant was on record.

12. Considering the facts and circumstances of the case and considering the observations made in the decision of the Apex Court and this Court referred hereinabove, this

Court is of the considered opinion that the present appeal is required allowed and the matter is to be remanded back to the learned Trial Court for trial on merits.

13. Accordingly, the present appeal is allowed. The order dated 14.05.2025 passed by the learned 15th Additional Judicial Magistrate First Class, Surat in Criminal Case no. 86336/2023 is hereby quashed and set aside and the complaint is restored to its original status for trial in accordance with law.

14. The learned Trial Court is directed to decide the complaint on its own merits after giving proper opportunity to all the parties. The parties are directed to cooperate with the learned Trial Court in the proceedings without seeking any unnecessary adjournment.

VASIM S. SAIYED

(S. V. PINTO,J)

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: VASIM SHABBIR SAIYED(HC01902), PRIVATE SECRETARY, at High Court of Gujarat on 06/10/2025 15:45:31