

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 1646 of 2024**

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AZADKUMAR BALDEVJI THAKOR

Versus

RASIKJI JIVANJI THAKOR &amp; ANR.

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Appearance:

MR NARENDRA RANAMALJI MADHU(13497) for the Appellant(s) No. 1

MR. ABHISHEK D JAIN(7115) for the Appellant(s) No. 1

BAILABLE WARRANT SERVED for the Opponent(s)/Respondent(s) No. 1

JIGNESHKUMAR M NAYAK(8558) for the Opponent(s)/Respondent(s) No. 1

MS JYOTI BHATT, APP for the Opponent(s)/Respondent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK****Date : 14/10/2024****ORAL ORDER**

1. The present appeal is filed by the appellant – original complainant under Section 378(4) of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) against the judgment and order of acquittal dated 21.06.2024 passed by the learned 2<sup>nd</sup> Additional Civil Judge, & JMFC, Kalol (hereinafter referred to as “the trial court”) in Criminal Case No. 2593 of 2023, whereby, the learned Trial Judge has acquitted the original accused respondent No.1 herein for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short “the N.I. Act”).

2. Heard learned advocate Mr. Narendra Ranamalji Madhu appearing on behalf of the appellant – original complainant, learned advocate Mr. Jigneshkumar Nayak, appearing on behalf of the respondent No.1 - original accused and learned APP Ms.

Jyoti Bhatt, appearing on behalf of the respondent No.2 – State of Gujarat.

3. It appears from the record that non-appearance of the appellant-complainant from last five dates and also it was recorded that on the date on which the matter was listed, neither the complainant nor the representative of the complainant remained present before the Court and therefore, the complaint was dismissed and the order was passed under Section 256 of the Cr.P.C. and thereby acquitted the respondent accused. In fact, the complaint was filed in the year 2023 only and within a year, the trial court has dismissed the complaint under Section 256 of Cr.P.C., since the learned advocate engaged by the complainant did not remain present before the trial court on three occasions and therefore, in his absence, the order was passed by the trial Court.

4.1 At this stage, it would be appropriate to refer to the decision of the Hon'ble Apex Court in case of "***State of Gujarat v. Keshavram Shivram Devmurari reported in [1977] GLR 524,***" wherein, this Court has laid down the principle that while dealing with the complaint the trial court cannot pass an order under Section 256 of Cr.P.C. The power under Sec. 256 of the Criminal Procedure Code has been conferred on the Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. The proviso to Sec. 256 further lays down 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 his attendance and proceed with the case. In the instant case, the situation on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section, which is really unfortunate, as the discussion made in paragraph and thereafter, the Hon'ble Apex Court time and again referred the aforesaid judgment passed by this Court.

4.2 At this juncture, it would also be appropriate to refer to the following decisions with regard to Section 256 of Cr.P.C. :-

[I] *Mohd. Azeem v. A. Venkatesh and Another*, [2002] 7 SCC 726, para-3,4;

[II] *State of Gujarat v. Pritesh @ Munno Vasudev Brahmhatt*, [2007] LawSuit [Guj] 673, para-8,9;

[III] *Biren Chandulal Mehta v. State of Gujarat and Ors.*, [2012] LawSuit (Guj) 1229, para-6,7;

[IV] *Ankur Arunrao Pawale v. Ritaben Rameshbhai Bhatt and Another*, [2013] 3 GLR 2429, para-14,15,20

*“(A) Criminal Procedure Code, 1973 (2 of 1974) - Sec. 256 - Negotiable Instruments Act, 1881 (26 of 1881) - Sec. 138 - Dismissal of complaint for non-appearance of complainant - Complainant present in first sitting, but absent in second sitting as he went in search of his Advocate - Held, Magistrate require to adopt pragmatic approach, he should not exercise power under Sec. 256 in haste - Considering that reason for absence of complainant proper, dismissal of complaint unjust - Order by Magistrate, set aside.”*

*[V] Harisinh Bhagwatsinh Sarvaiya v. State of Gujarat and Ors., [2013] 3 GLR 2723, para-10-15,17,18*

*“Code of Criminal Procedure, 1973 - Sec 256(1) - Negotiable Instruments Act, 1881 - Sec 138 - Complaint for dishonour of cheque dismissed for non-appearance of complainant or his advocate - Accused acquitted - Appeal - While exercising powers u/s 256(1) of the code, Magistrate should have pragmatic approach matter should be heard on merits, complaint cannot be thrown out for absence of advocate - Complaint restored setting aside order of Magistrate - Appeal allowed.”*

*[VI] H.D.F.C. Bank Ltd. through P.O.A. Holder Piyush Jaswantlal v. State of Gujarat & Anr., [2023] 3 GLR 1877, para-6,6.1,6.2*

5. Considering all these aspects and the submissions canvassed by the learned advocate for the appellant, for which learned advocate for respondent No.1 has no answer to that and in view of the decisions as cited above, that merely because, on one or two occasions, if the complainant did not remain present, the complaint cannot be dismissed. Even in case of “**Pritesh @ Munno Vasudev Brahmhatt (Supra)**”, this Court has observed that for more than 2 years neither the complainant nor his advocate remained present and under such circumstances, this Court has rightly dismissed the appeal preferred by the complainant under Section 378 of Cr.P.C. but, herein the present case, only within a year and that too only on three occasions, the learned advocate representing the complainant did not remain present and in his absence, the trial court has passed the order of acquittal and therefore, the same deserves to be quashed and set aside and the matter is required to be remanded back to the concerned trial court for deciding the issue afresh.

6. In the result, the present appeal is hereby partly allowed. The judgment and order of acquittal dated 21.06.2024 passed by the learned 2<sup>nd</sup> Additional Civil Judge, & JMFC, Kalol in Criminal Case No. 2593 of 2023 is quashed and set aside. The matter is remanded back to the concerned trial court for deciding the issue afresh. Consequently, aforesaid Criminal Case No. 2593 of 2023 is ordered to be restored to file and the trial court to decide and dispose of the same in accordance with law and on merits at the earliest but not later than 12 months from today, after giving due opportunities to both the sides and without being influenced by any orders.

6.1 It is also noted herein that the respondent accused will remain present before the concerned trial court and co-operate to the proceedings without seeking any unnecessary adjournments. It is also expected from the applicant-complainant that if he is unable to attend the proceedings, he may file appropriate exemption application for his not remaining present before the trial court or grant exemption for personal attendance and the same shall be decided by the trial court after considering the facts of the case. Rule is made absolute to the aforesaid extent.

6.2 Record and Proceedings, if any, be sent back to the concerned Trial Court forthwith.

Direct service is permitted.

**(HEMANT M. PRACHCHHAK,J)**

SALIM/