

HIGH COURT OF CHHATTISGARH, BILASPUR**Acq.Appeal No.139 of 2015**

- Rajkumar Jain, S/o Kapoor Chand Jain, aged about 43 years, R/o Maharaja Square, Adarsh Nagar, PS Adarsh Nagar, Durg, District Durg (C.G.)

---- Appellant**Versus**

- Jitendra Kumar Sahu, S/o A.R.Sahu, aged about 39 years, R/o Sahu Jalebi Bhandar, Niyogi Square, Dallirajahara, Tahsil Balod, District Blod (C.G.) (though in the impugned order mentioned as District Durg')

---- Respondent

For Appellant	:	Shri Ashish Surana, Advocate
For Respondent	:	Shri Jitendra Gupta, Advocate along with respondent Jitendra Kumar Sahu

Hon'ble Shri Justice P. Sam Koshy**Order On Board****20/06/2016**

1. The present acquittal appeal has been preferred by the appellant against the order dated 16.05.2013 passed in Criminal Complaint Case No. 781/2009 by the Judicial Magistrate First Class, Durg, dismissing the complaint case under Section 138 of the Negotiable Instruments Act (for brevity 'the Act') and as a consequence granting acquittal to the respondent – Jitendra Kumar Sahu.

2. Counsel for the appellant submits that it is a case where there was a complaint lodged by the appellant/complainant against the respondent for initiation of proceedings under Section 138 of the Act as five cheques issued by the respondent in favour of the appellant for repayment of loan amount on presentation before the Bank got dishonoured on the ground of insufficient funds. The Court below, i.e., Court of Judicial Magistrate First Class registered the complaint on 23.08.2007 and summons were issued for presence of the respondent since 2007 onwards.

3. According to the counsel for the appellant, right from the year 2007 till 2013, the appellant has been pursuing his case for action against the respondent so that the proceedings under Section 138 of the Act can be given a logical conclusion by appropriate punishment against respondent and also by imposing sufficient penalty and compensation from the respondent. Counsel for the appellant submits that however in between on 16.05.2013 the appellant on account of certain bona fide reasons could not enter his appearance before the Court below and the trial Court dismissed the complaint case for want of prosecution and acquitted the respondent of the charge under Section 138 of the Act.

4. Counsel for the appellant submits that the dismissal of the complaint case for want of prosecution on 16.05.2013 was too harsh decision taken by the trial Court and the Court below ought to have appreciated the fact that right from 23.08.2007, i.e., the date on which the complaint case had been filed by the complainant till 16.05.2013, the appellant has been contesting the case with all seriousness and was trying to get for the presence of the respondent for an effective hearing to take place before the trial Court. Counsel for the appellant also submitted that the Court below did not appreciate the fact that the presence of the appellant on 16.05.2013 was not of much relevance as right from the August 2007, i.e., the period when the complaint case was registered and summons were issued till 2013 the respondent has been avoiding to remain service of notice of the Court below on some pretext or the other. Therefore, the Court should have proceeded further with the complaint ensuring the presence of the respondent rather than dismissing the complaint case itself for want of prosecution and, as such, the appellant because of the dismissal of the complaint case has been put to considerable loss.

5. Counsel for the appellant further relies on a decision in the case of ***Associated Cement Co. Ltd. v. Keshvanand***, AIR 1998 SC 596 wherein it has been held by the Supreme Court in para – 18 as under:

“18. Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is when the Magistrate considers that personal

attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.”

6. For the foregoing observation by the Supreme Court, counsel for the appellant sought for quashing of the order dated 16.05.2013 and remitting the matter back to the trial Court for fair trial and for proceeding further with the complaint case from the stage for which it was fixed on 16.05.2013.

7. Shri Jitendra Gupta, counsel for the respondent, opposes the appeal on the ground that the reasons assigned have not been satisfactory and the fact that it was not the first occasion where there was no representation on behalf of the appellant before the Court below. Earlier also, there was no representation on behalf of the appellant / complainant before the trial Court which had led to the dismissal of the complainant case by the Court below and taking into consideration these facts the appeal does not call for any interference with the impugned order and the appeal deserves to be rejected.

8. Having considered the rival contentions and on perusal of the factual matrix of the case, what is an admitted position is that the appellant had in fact filed a complaint on 28.07.2007 and since then the matter has been listed before the trial Court on umpteen number of times the appellant has been seriously pursuing his case for prosecuting the respondent for charge under Section 138 of the Act and the matter went on from 2007 till 2013, i.e., almost 6 years but presence of the respondent could not be obtained and he had been avoiding to remain present before the Court below on some pretext or other and finally

when the matter was listed on 16.05.2013 unfortunately the complainant or his counsel could not enter his appearance before the Court below leading to the dismissal of the complaint.

9. Having considered the ratio laid down by the Supreme Court in the above case at para -18, wherein it clearly denotes the power of the Magistrate who shall dispense with the presence of complainant on a date on which he is not represented and the matter is not, in fact, fixed for any necessary proceedings to be drawn with his presence. Rather the case was fixed for seeking the presence of the respondent and according to the Hon'ble Supreme Court the decision of the Magistrate for axing down the complaint may not be a proper step to be taken. The Supreme Court, again in the case of ***Mohd. Azeem v. A. Venkatesh and another, (2002) 7 SCC 726***, has categorically held that in a proceeding under Section 138 of the Negotiable Instruments Act, 1881, the one singular default in appearance on part of the complainant, the dismissal of the complaint case is not proper, legal and justified.

10. In the light of the aforesaid referred two judgments, this Court is of the opinion that the rejection of the complaint case by the Court below on 16.05.2013 for want prosecution on behalf of the appellant was totally uncalled for and the same deserves to be and is accordingly set aside.

11. In view of above, the matter is remitted back to the trial Court, i.e., Court of Judicial Magistrate First Class, Durg, for proceeding further with the complaint case from the stage for which it was fixed on 16.05.2013. Since the respondent and his counsel both are present before this Court and they undertook that they shall appear before the Court below on a date to be given by this Court, it is directed that let respondent now enter his appearance before the Court below on **25.07.2016** and it is further directed that Court below shall proceed with the matter in accordance with law from the stage that it was fixed on 16.05.2013.

12. With the aforesaid observation and direction, the present acquittal appeal is allowed.

Sd/-
(**P. Sam Koshy**)
Judge