

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Acquittal Appeal No. 141 of 2016**

Smt. Usha Varmani W/o Late Shri Shital Prakash Kumar, aged about 68 years, R/o Sonpur Road, Police Station Narayanpur, District Narayanpur, Chhattisgarh.

---- Appellant

Versus

Ratan Dubey S/o Shri B.G. Dubey R/o Mahaveer Chowk, Police Station Narayanpur, District Narayanpur, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Ravindra Sharma, Advocate
For Respondent	:	Shri Vaibhav Goverdhan, Advocate

Hon'ble Shri Justice P. Sam Koshy**Order On Board****14.12.2016**

The present acquittal appeal has been preferred seeking for quashment of the order dated 06.04.2015 passed by the Chief Judicial Magistrate, Narayanpur in Criminal Case No. 122 of 2011. Vide the said impugned order the complaint case preferred by the appellant under Section 138 of Negotiable Instrument Act got dismissed for want of prosecution as a result of which the respondent stood acquitted.

2. Counsel for the appellant submits that the respondent had issued two cheques; one bearing No. 535149 dated 15.11.2010 in favour of the husband of the appellant and the other bearing No.663667 dated 03.02.2011 in favour of the appellant. When the said cheques were put for clearance in the Bank, the same got dishonoured on account of insufficient fund. The appellant after due compliance of the provisions

under Section 138 of NI Act lodged a complaint case before the Court of CJM, Narayanpur where the case was registered as Criminal Case No. 122/2011. Charges were framed on 28.04.2012 and the prosecution witnesses on behalf of the complainant/appellant were examined as early as on 02.09.2014. Thereafter the matter was fixed for examination of the defence witnesses. Unfortunately, on 06.04.2015, neither the complainant nor her counsel could appear before the Court below and therefore, the Court below vide its order dated 06.04.2015 dismissed the criminal case for want of prosecution. Consequently, the accused/respondent stood acquitted of the charge levelled against him leading to the filing of the present acquittal appeal.

3. Counsel for the appellant submits that if the complaint case is not restored to its original number, the appellant would be rendered remediless for getting the amount which was recoverable from the respondent. Thus, prayed for setting aside of the impugned order.

4. The issue involved in the present case is no longer res integra. The Supreme Court in a couple of judgments has held that once when the Court takes cognizance and proceed further with the case, if there is a default in one of the dates, the complainant's case should not be dismissed in default as the same would result irreparable loss to the complainant.

5. The Supreme Court in the case of **Associated Cement Co. Ltd. v. Keshvanand** reported in (1998) 1 SCC 687 in paragraph 18 has held 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. The Supreme Court again in the case of **Mohd. Azeem v. A. Venkatesh and Another** reported in **(2002) 7 SCC 726** has very categorically held that in a proceeding under Section 138 of the Negotiable Instruments Act, the dismissal of the complaint case on account of only one singular default in appearance on the part of the complainant is not proper, legal and justified.

7. Taking into consideration the aforesaid judicial pronouncements and also the fact that since beginning till 06.04.2015 the complainant had been effectively prosecuting her case before the Court below and the appearance of the complainant on 06.04.2015 was not of much relevance, this Court is of the opinion that ends of justice would meet if the impugned order dated 06.04.2015 dismissing the criminal case for want of prosecution is set aside and the matter is remitted back to the trial Court for further proceedings with the case from the stage it stood at on 06.04.2015. It is ordered accordingly.

8. It is directed that both the parties shall remain present before the trial Court on 17th of January, 2017 and the trial Court in turn shall

proceed further with the case and decide the same as expeditiously as possible subject to the co-operation rendered by the parties.

Sd/-

P. Sam Koshy

Judge

Bhola