

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 15 of 2013**

- Alok Mukharjee S/o Late B.P. Mukharjee Aged About 48 Years R/o Hemu Nagar, Bilaspur, Ps Torwa, Tah. - Distt. - Bilaspur C.G.

---Appellant**Versus**

Sameer Kumar Adhikari S/o Pradeeptate Kumar Aged About 23 Years
R/o Pratappur Naka, Behind Vishwakarma Temple, Bank Colony,
Ambikapur, Tah. And Distt. - Surguja C.G.

---- Respondent

For Appellant : Mr. Akhtar Hussain, Advocate.
For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****22/11/2018**

1. Heard on application filed under Section 378(4) of the Code of Criminal Procedure, 1973 for grant of leave to appeal.
2. On due consideration, leave is granted.
3. This petition is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against order dated 18.10.2010 passed by Chief Judicial Magistrate, Bilaspur(C.G.) in Complaint Case No. 354/2010, whereby the said court has dismissed the complaint filed under Section 138 of the Negotiable Instrument Act, 1881(for short the Act 1881) for want of prosecution.
4. It appears from the order-sheet of the said court that the case was fixed for recording evidence of the appellant and in his absence, the trial Court dismissed the complaint for single default.

5. In the matter of **Associated Cement Co. Ltd. Vs. Keshvanand** reported in **(1998) 1 SCC 687**, Hon'ble the Apex Court 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 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. Again, in the matter of **Mohd. Azeem Vs. A. Venkatesh & another** reported in **(2002) 7 SCC 726**, Hon'ble the Apex Court held that in a proceeding under Section 138 of the Negotiable Instruments Act, 1881, the single default in appearance on the part of the complainant, the dismissal of the complaint case is not proper, legal and justified.
7. Dismissal of complaint was not the only option before the trial court. The trial court should have adjourned the case for some other day as provided under Section 256 (1) of Cr.P.C. but that is not done in the present case. Court should try to decide the case on merits and it should not be sent to the record room without deciding the issues

between the parties. As dismissal for single default is not just and proper, the order passed by the trial Court is not sustainable.

8. Accordingly, order passed by the trial court is set aside allowing the petition. The trial court is directed to proceed with the case in accordance with law after providing opportunity to both the parties and decide the issues between the parties on merit.
9. The appellant shall appear before the trial court for further proceedings on 29th January, 2019.

Sd/

(Ram Prasanna Sharma)
Judge