

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1166 of 2018**

- Himanshu Chandrawanshi S/o Ramphal Chandrawanshi Aged About 40 Years R/o- Adarsh Nagar, Ward No. 3, Kawardha, Police Station And Tahsil Kawardha, District- Kabirdham, Chhattisgarh.

---- **Petitioner****Versus**

- Surendra Kumar Sahu S/o Tularam Sahu R/o- Village Sonpuri, Post Gudha, Police Station Pipariya, Tahsil Kawardha, District- Kabirdham, Chhattisgarh.

---- **Respondent**

 For the Petitioner : Ms. Upasana Mehta, Advocate
 For the respondent : Shri Govind Dewangan, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

03.12.2018.

1. Heard on IA No.01/2018 for condonation of delay in filing the instant CrMP.
2. For the reasons mentioned in the application, the same is allowed and the delay of 237 days in filing the petition is hereby condoned.
3. Also heard on application for grant of leave to appeal under Section 378(4) of CrPC.
4. This petition has been preferred against Order dated 18.7.17 passed by Judicial Magistrate First Class, Kabirdham (CG) in Criminal Case No.103/2014 wherein the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed for want of prosecution.

5. As per the version of the complainant, he was earlier examined before the trial Court and it was fixed for examination of the Bank officer for proving dishonour of the cheque. Dismissal of the complaint was not the only option before the trial Court. The matter could have been adjourned for some other date as per the provisions of Section 256(1) CrPC.

6. 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.”

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. In view of this Court, the case should have been decided on merits and it should not have sent to record room without deciding issues between the parties and without providing opportunity to adduce evidence. But that is not done in the present case, therefore, 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 on merits after providing opportunity to adduce evidence to both the sides.

9. Both the parties shall appear before the trial Court on **23.01.2019** and the trial Court shall proceed further.

Sd/-
(Ram Prasanna Sharma)
JUDGE