

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 1715 of 2018**

- Vimal Chandra Das S/o Late Nath Das Aged About 50 Years
R/o- Maa Durga Chowk Jagdalpur, District- Bastar,
Chhattisgarh., District : Bastar(Jagdalpur), Chhattisgarh

---- Petitioner**Versus**

- Sushnat Khosala Department/employee No. 67/6940 Junior
Fireman Hindustan Aronatrix Ltd. Koraput Division Sunabeda-
2 District Koraput (Odisha), District : Koraput, Orissa

---- Respondent

 For Petitioner : Mr. P.K. Tulsyan, Advocate.
 For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****26/11/2018**

1. Heard on I.A.No.1/2018, application for condonation of delay in filing the petition.
2. For the reasons mentioned in the application, same is allowed and delay of 35 days in filing the petition is hereby condoned.
3. Also heard on application filed under Section 378(4) of the Code of Criminal Procedure, 1973 for grant of leave to appeal.
4. On due consideration, leave is granted.
5. This petition is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against order dated 30.4.2018, passed by Judicial Magistrate First Class Bastar at Jagdalpur (C.G.) in Criminal Complaint Case No. 248/2013, whereby the said court has dismissed the complaint filed under Section 138 of the Negotiable Instrument Act, 1881 for want of prosecution.

6. It appears that the case was fixed for stating particulars of offence to the respondent and it was not fixed for appearance of the petitioner/complainant.

7. 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.”

8. 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.

9. 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. In view of this Court, all the cases should be decided on merits should not be sent to the record room without deciding the issues between the parties. As the matter was fixed for stating particulars to the respondents, the order passed by the trial court is not sustainable and same is hereby set aside allowing the petition.
10. The trial court is directed to proceed with the case in accordance with law after providing opportunity of adducing evidence to the parties and shall decide the issues between the parties on merit.
11. The petitioner shall appear before the trial court on 5th February, 2019 and the trial court shall proceed further.

Sd/
(Ram Prasanna Sharma)
Judge