

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.2187 of 2018**

- Ajay Verma S/o Gend Singh Verma Aged About 44 Years R/o Village -Bharrigaon, Tahsil -Gurur, District - Balod Chhattisgarh Present R/o Housing Board, Dhamtari, Tahsil And District -Dhamtari Chhattisgarh

---- Petitioner

Versus

- Smt. Rupoutin Bai Nagvanshi W/o Sugriv Nagwanshi, Aged About 35 Years R/o Village Keregaon, Tahsil -Nagri, District - Dhamtari Chhattisgarh.

---- Respondent

 For the Petitioner : Shri Shivedu Pandya, Advocate
 For the respondent : Not noticed

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

04.12.2018.

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 46 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 11.6.2018 passed by Chief Judicial Magistrate, Dhamtari (CG) in Criminal Case No.466/2018 wherein the said Court dismissed the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 for want of prosecution.

5. It appears that on the said date the respondent was not present before the trial Court, therefore, his presence before this Court is not required.

6. It appears from the order sheet of the trial Court that the case was fixed for recording the evidence of the petitioner/complainant. 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.

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.”

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.

8. 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.

9. 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.

10. Both the parties shall appear before the trial Court on **05.02.2019** and the trial Court shall proceed further.

**Sd/-
(Ram Prasanna Sharma)
JUDGE**