

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.2450 of 2018**

- Amit Kumar Lath S/o Shri Sajan Kumar Lath Aged About 38 Years R/o Agrawal Kirana Store, At Village- Khairtal, Police Station- Janjgir- Champa, Tahsil- Navagarh, Civil And Revenue District- Janjgir- Champa, Chhattisgarh.

---- Petitioner

Versus

- Dilip Singh S/o Shri Dhru Singh Aged About 52 Years Profession- Journalist And Care Taker Of Ambiance Public School, Bus Stand Road- Semra, Tahsil- Navagarh, District- Janjgir- Champa, Chhattisgarh.

---- Respondent

 For the Petitioner : Shri JA Lohani, Advocate
 For the respondent : Not noticed

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

12.12.2018.

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 19 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 23.6.2018 passed by Judicial Magistrate First Class, Pamgarh in Criminal Complaint No.272/2016 filed under Section 138 of the Negotiable Instruments Act, 1881 whereby the said Court dismissed the complaint for want of prosecution.

5. It appears from the order sheet of the trial Court that the case was fixed for appearance of the respondent on the said date. It is also appears that earlier the petitioner/complainant has paid PF for issuance of notice to the respondent. But from the order sheet of the trial Court is it not clear whether the summon is served or not or whether the service report of the summon is awaited. The case was not fixed for presence of the petitioner/complainant, therefore, his presence was not compulsory for the said date.

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. 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.

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 the appellant for serving the summon to the respondent and after appearance of the respondent, the parties be provided with opportunities to adduce evidence.

10. The appellant shall appear before the trial Court on **06.02.2019** and the trial Court shall proceed further.

Sd/-
(Ram Prasanna Sharma)
JUDGE