

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2366 of 2018**

Fageshwar Das, S/o Late Shri Mohan Das, Aged About 38 Years,
R/o Village Bhothali, P. S. & Tahsil- Dhamtari, Civil & Revenue
District- Dhamtari (C.G.)

---- **Petitioner**

Versus

Nand Kumar Manikpuri, S/o Shri Dheludas Manikpuri, R/o Basantpur
Ward No. 42 Club Chowk Main Road Basantpur, Rajnandgaon, Civil
& Revenue District- Rajnandgaon (C.G.)

---- **Respondent**

For Petitioner : Mr. Sunil Sahu, Advocate.
For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

19/11/2018

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 27.09.2018 passed by Judicial Magistrate First Class, Dhamtari, District- Dhamtari (C.G.) in Criminal Complaint Case No. 469/2016, whereby the said court dismissed the complaint filed under Section 138 of the Negotiable Instrument Act, 1881 for want of prosecution.
4. It appears from the order-sheet of the said court that the complaint case was registered by the said court on 10.06.2016. Notice was issued to the respondent, but he was not present on any of the hearing. On 20.08.2018 one application was filed to the effect that the complainant is died, therefore, his legal

representatives should be permitted to proceed on behalf of the original complainant. The matter was fixed on 27.09.2018 for statement of legal representatives. When the complainant is already died, the question of his appearance before the trial court does not arise. The trial court ought to have decided the application in continuation of the proceeding through legal representatives, but that is not done and the trial court has dismissed the complaint without deciding the issues between the parties.

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. In view of this Court, all the cases should decide on merits and not send the case to record room without deciding the issues between the parties and without providing opportunity to adduce evidence. Dismissal of complaint was not the only option before the trial court. The trial court should have adjourned the case for some other dates as provided under Section 256 (1) of Cr.P.C. but that is not done in the present case, therefore, 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 the legal representatives of the complainant and after issuing summon to the respondent, the trial court shall proceed with the case and decide the issues between the parties on merit.
9. The petitioner shall appear before the trial court on 4th January, 2019 and the trial court shall proceed further.

Sd/-
(Ram Prasanna Sharma)
Judge