

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 53 of 2011**

- R.K. Kesharwani, S/o- Late Shri G.L. Kesharwani, Aged about-45 years, R/o- Green Park Colony, Jarhabhata, District- Bilaspur (C.G.) **---- Appellant**

Versus

- Dhirajdhvaj Tiwari, S/o- Late Shri Dewdatta Tiwari, Aged about-60 years, R/o- Tilak Nagar, J-272, Gudhiyari, Raipur, District- Raipur (C.G.) **---- Respondent**

For Appellant : Ms. Nisha Tolwani, Advocate.

For Respondent : Mr. Avinash Mishra, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

Order on Board**04/12/2019**

1. Heard on I.A. No. 01/2019, which is an application for urgent hearing.
2. Also heard on application for grant of leave to appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973.
3. This appeal is preferred against the order dated 19th November, 2010 passed by Judicial Magistrate First Class, Bilaspur (C.G.) in Complaint Case No. 1122/2010 filed under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act, 1881') wherein the said Court dismissed the complaint filed by the appellant for want of prosecution.
4. From the record, it appears that the case was fixed for further proceeding on 16th December, 2010. On the said date presence of the appellant/complainant was not compulsory.
5. Dismissal of complaint was not the only option before the trial Court. The trial Court should have adjourned the case for some other date as per the provisions of Section 256(1) of the Cr.P.C. The

trial Court should have proceeded to decide the case on merit between the parties, but that is not done in the present case and without deciding the issues between the parties, the record was sent to record room.

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. Accordingly, the instant appeal is allowed and the order passed by the trial Court is hereby set aside. Now the case is remanded back to the trial Court for deciding the case afresh after hearing the parties. The trial Court is directed to decide the case on merit after providing opportunity of hearing for adducing evidence to both sides.
8. Both parties shall remain present before the trial Court for further proceeding on 25th February, 2020.

Sd/-

(Ram Prasanna Sharma)
Judge