

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Acquittal Appeal No.24 of 2017**

- Abhay Kale S/o Shri B.K.Kale Aged About 46 Years R/o D-90/1, Tagore Nagar, Raipur, District Raipur, Chhattisgarh., Chhattisgarh

---- Appellant**Versus**

- Om Narayan Singh @ Munna Singh S/o Late Surajpal Singh, Aged About 52 Years R/o 534/20, Chowrasiya Colony, Matpurana Santoshi Nagar, Tikrapara, Raipur, Chhattisgarh., Chhattisgarh

---- Respondent

For the appellant : Shri Shobhit Koshta, Advocate

For the respondent : Shri Banhiman Roy, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****18.02.2019.**

1. The appeal is preferred against Order dated 14.6.2012 passed by Judicial Magistrate First Class, Raipur (CG) in Criminal Case No.305/2009 wherein the said Court acquitted the respondent for the charges under Section 138 of the Negotiable Instruments Act, 1881 as the case was dismissed for want of prosecution.

2. It appears from the order sheet of the trial Court that the appellant/complainant and the respondent/accused both were absent on the said date. It appears from the order sheet of the trial Court that the case was registered on 06.12.2008 thereafter summon and bailable warrant were issued to the respondent for his appearance, but he did not appear. From the order sheet it is not clear whether the warrant was served to the respondent or

not. On the date of dismissal for want of prosecution, presence of the appellant was not required because the case was already fixed for hearing of the respondent.

3. 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.

4. Dismissal of the complaint case was not the only option before the trial Court. The trial Court could have adjourned the case to some other date as per the provisions of Section 256(1) CrPC.

5. Efforts should have been made to secure the presence of the respondent and the matter should have been decided on merits and it should not have been 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.

6. 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 securing the presence of the respondent and decide the issues on merits.

7. Both the parties to appear before the trial Court on **10.4.2019** for further proceedings.

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