

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 384 of 2019**

Bishambhar Singh (Manager Danteshwari Compressers), S/o Late Shree Kripal Singh, Aged About 63 Years, R/o Anand Nagar Raipur, House No. 29, (Opposite Dr. Trivedi), P.O. & Thana- Talibandha Raipur, Tah. & District- Raipur (C.G.)

---- **Petitioner**

Versus

Somnath Choudhari, S/o Unknown, Aged About 64 Years, Caste- Bengali, Profession- Contractorship, R/o Balaji Apartment (In front of Chaya Garden Road) Prgati Nagar Bhilai, P.O. Resali, Thana- Nevae, Tah. & District- Durg (C.G.)

---- **Respondent**

 For Petitioner : Mr. Hemant Kumar Mishra, Advocate.
 For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

13/02/2019

1. Heard on I.A. No. 01/2019, application for condonation of delay in filing the petition.
2. On due consideration and for the reasons mentioned in the application, the same is allowed and delay of 28 days in filing the petition is condoned.
3. Also heard on application filed under Section 378 (4) of the Code of Criminal Procedure, 1973 for grant of leave to appeal.
4. On due consideration, leave is granted.
5. This petition is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against order dated 26.09.2018 passed by Judicial Magistrate First Class, Raipur (C.G.) in Complaint Case No. 2377/2016, whereby the said court

dismissed the complaint filed under Section 138 of the Negotiable Instrument Act, 1881 for want of prosecution.

6. It appears from the order-sheet of the said court that the case was fixed on 26.09.2018 for recording evidence of the petitioner and the said court dismissed the case on single default with respect to the petitioner/ complainant.
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.”

8. 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 with respect to the

petitioner/ complainant, the dismissal of the complaint case is not proper, legal and justified.

9. In view of this Court, all the cases should decide on merit 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. The petition is in the nature of restoration of complaint case, therefore, order passed by the trial court is not sustainable.
10. 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 both side. The trial court shall proceed with the case and decide the issue between the parties on merit.
11. The petitioner/ complainant shall appear before the trial court on 28th March, 2019 and the trial court shall proceed further.

Sd/-
(Ram Prasanna Sharma)
Judge