

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.403 of 2019**

- Ashok Kumar Sinha S/o Late Awadhesh Kumar Sinha Aged About 67 Years Occupation Agriculture And Advocate R/o Saraswati Niwas Bhatthi Road, Kedarpur, Ambikapur Tahsil Ambikapur District Surguja, Civil And Revenue District Sarguja Chhattisgarh.

---- Petitioner**Versus**

1. Tapan Sigdar S/o Shri Umesh Sigdar Aged About 35 Years, Pro. Krishi Vikas Sansthan Sanjay Nagar, Post Office Ajab Nagar, Tah Surajpur District Surajpur Chhattisgarh.
2. The District Magistrate Ambikapur District Sarguja Chhattisgarh.

---- Respondents

 For the Petitioner : Shri Manoj Kumar Sinha, Advocate
 For respondent No.2/State : Shri VB Singh, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

08.4.2019

1. Heard on IA No.02/2019 for substitution of legal heirs on record.
2. As per the application, the petitioner died on 12.02.2019 and persons namely Smt. Kamini Kaushal Sinha, Shramdeep Sinha, Jaydeep Sinha and Shefali Sinha are the legal representative of the said petitioner. The application is supported by an affidavit of Smt. Kamini Kaushal Sinha.
3. On due consideration, the application is allowed and the name of the deceased petitioner be deleted from the memo of petition and names of the above mentioned legal representatives be substituted in his place.

4. Heard on application for grant of leave to appeal under Section 378(4) of CrPC.

5. This petition has been preferred against Order dated 17.9.2018 passed by Judicial Magistrate First Class, Ambikapur (CG) in Criminal Complaint Case No.1992/2014 wherein the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed for want of prosecution.

6. It appears from the order sheet of the trial Court that the case was fixed for appearance of the respondent/accused. The trial court should have made efforts for appearance of the respondent and then should have proceeded to dispose of the matter on merits but that is not done. When the case was fixed for appearance of the respondent, presence of the complainant/petitioner was not compulsory.

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 in appearance on the part of the complainant, the dismissal of the complaint case is not proper, legal and justified.

9. Dismissal of the complaint was not the only option before the trial Court. It could have adjourned the case to some other date as per the provisions of Section 256(1) CrPC. The trial Court should have proceeded to secure the presence of the respondent but that is not done and the record was sent to record room without deciding issues between the parties and without providing opportunity to adduce evidence. Therefore, the 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 after providing opportunity of summoning the respondent and after his appearance, the court shall proceed to hear the case after providing opportunity of adducing evidence to both sides.

11. The complainant/petitioner to appear before the trial Court on **15.5.2019** for further proceedings.

Sd/-
(Ram Prasanna Sharma)
JUDGE