

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.623 of 2019**

- Pawan Chandrakar S/o Kamta Prasad Chandrakar Aged About 33 Years R/o Ashok Nagar, Sarkanda, Power Of Attorney Of Dr. Nirmal S/o Mandanlal Nayak, Proprietor- Madan Mahindra, R/o Green Garden, Mungeli Road, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh.

---- **Petitioner****Versus**

- Dilharan Kasturiya S/o Palturam Kasturiya R/o Village- Chanadongri, Post Office- Kathakoni, Tahsil And District- Bilaspur, Chhattisgarh.

---- **Respondent**

 For the Petitioner : Shri Manoj Mishra, Advocate
 For the respondent : None

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

13.3.2019.

1. Heard on IA No.01/2019 for condonation of delay in filing the instant petition.
2. For the reasons mentioned in the application, the same is allowed and the delay of 106 days in filing the petition is hereby condoned.
3. Also heard on application for grant of leave to appeal under Section 378(4) of CrPC.
4. This petition has been preferred against Order dated 23.8.2018 passed by Judicial Magistrate First Class, Bilaspur (CG) in Complaint Case No.4525/2015 wherein the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed for want of prosecution.

5. As the petition is nature of restoration of proceedings before the trial Court and the matter is not going to be decided on merits, presence of the respondent is not required.

6. It appears from the order sheet of the trial Court that the case was fixed for appearance of the respondent/accused because summon was not served to him. The case was not fixed for appearance of the petitioner/complainant but the complaint was dismissed for non appearance of the complainant. On the said date appearance 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. From the order sheet it is not clear whether summon sent to the respondent was served or not or whether service report is awaited. 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 secure the presence of the respondent as per the order sheet 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 **02.5.2019** for further proceedings.

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