

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 614 of 2019**

Santosh Kesari, S/o - Late Sarju Prasad Gupta, Aged about - 42 years R/o Sharda Para, Kishan Chowk, Infront Of Durg Temple, Camp-2, Bhilai, Tehsil & District Durg (C.G.)

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

Santosh Kumar P. Vaishnav, S/o - Shri Pancham Das Vaishnav, Aged about - 15 years, R/o - Village Banbarad, Ward No. 15, Ahiwara, Tehsil Dhamdha District Durg (C.G.)

---- **Respondent**

 For the petitioner : Ms. Aditi Singhvi, Advocate
 For the respondent : None

Hon'ble Shri Justice Ram Prasanna Sharma**Order on Board****13.03.2019.**

1. Heard on application for grant of leave to appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973.
2. The petition is preferred against Order dated 3rd January, 2019 passed by Judicial Magistrate First Class, Durg (CG), in Criminal Case No. 2958/2014 wherein the said Court acquitted the respondent for the charge under Section 138 of the Negotiable Instruments Act, 1881 as the case was dismissed for want of prosecution.
3. The application is in the nature of restoration of said complaint case therefore it would not be proper to call the respondent. The case was fixed for recording evidence of appellant and it was dismissed for single default.

4. 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.

5. 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. The court should have proceeded to decide the case on merits after providing opportunity

to adduce evidence to both the sides 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 after stating particulars to the respondent/accused and decide the issues providing opportunity to both side to adduce evidence.

7. Both the parties to appear before the trial Court on 7th May, 2019 for further proceedings.

Sd/-

(Ram Prasanna Sharma)
JUDGE