

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 729 of 2019**

Smt. Sobha Sharma, W/o - Naresh Sharma, Aged about - 64 years, R/o - 29, Shivam Vihar Colony, Khamtarai Road, Police Station Sarkanda, Tahsil & District - Bilaspur (C.G.)

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

M.S. Soni, S/o - Late Lakhanlal Soni, Aged about - 38 years, M/s - M.S. Soni Architect & Builders, R/o - Second Floor Kamla Complex, Beside Tahsil Office, Nehru Chowk Police Station Civil Line, Tahsil & District - Bilaspur (C.G.)

---- **Respondent**

 For the petitioner : Mr. Rohit Sharma, Advocate
 For the respondent : None

Hon'ble Shri Justice Ram Prasanna Sharma**Order on Board****25.03.2019.**

1. Heard on application under Section 378(4) of CrMP for grant of leave to appeal.
2. On due consideration, leave is granted.
3. This petition is preferred against the order dated 7th January, 2019 passed by Judicial Magistrate First Class, Bilaspur (CG), in Complaint Case No.832/2019 wherein the said Court acquitted the respondent for the charge under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act") as the case was dismissed for want of prosecution.
4. This petition is nothing but restoration of complaint case which is dismissed in default. Therefore, appearance of the respondent is

not compulsory because he will get opportunity of hearing before the trial Court.

5. 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 the 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.

6. 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 provide opportunity to pay process fee for appearance of the respondent, it should not have sent to record room without deciding issues between the parties but that is not done in the present case, therefore, the order passed by the trial Court is not sustainable.

7. 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 to the petitioner to pay process fee and after appearance of the respondent, the case shall be decided on merit.

8. The petitioner is directed to appear before the trial Court on 3rd May, 2019 for further proceedings.

Sd/-

(Ram Prasanna Sharma)
JUDGE