

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 939 of 2019

Mohd. Niyaj, S/o - Mohd. Riyaj, Aged about - 30 years, R/o Ward No. 8 Manendragarh, Tehsil - Manendragarh District - Koriya (C.G.)

---- Petitioner

Versus

Ankit Goyal, S/o - Ashok Goyal, Aged about - 28 years, R/o Bus Stand, Manendragarh, Tehsil – Manendragarh, District - Koriya (C.G.)

---- Respondent

For Petitioner : Shri Nishi Kant Sinha, Advocate.
For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

12.04.2019

1. Heard on I.A. No. 01/2019, application for condonation of delay in filing the petition.
2. For the reasons mentioned in the application, I am satisfied that sufficient cause has been shown for the delay, therefore, delay of 214 days in filing the petition is condoned.
3. Also heard on application for grant of leave to appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973.
4. This appeal is preferred against the order dated 22nd May, 2018 passed by Judicial Magistrate First Class, Manendragarh, District Koria (C.G.) in Complaint Case No. 88/2018 filed under Section 138 of the Negotiable Instruments Act, 1881 (for short the Act, 1881) wherein the said Court dismissed the complaint for want of prosecution.
5. It appears from the order-sheet that respondent is unserved because summon is not issued to him. The case was fixed for appearance of

respondent and it was not fixed for appearance of the appellant/complainant.

6. 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.

7. Dismissal of complaint was not the only option before the trial Court.

The trial Court could have adjourned the case for some other date as per the provisions of Section 256(1) CrPC. The trial Court should have

made effort for appearance of respondent and for hearing of the case but that is not done. In the present case, without deciding the issues between the parties, the record was sent to record room. The trial Court should have provided opportunity of paying of process fee to the appellant. It is also not clear from the order-sheet whether counsel of the appellant was called before termination of proceeding. Order passed by the trial Court is not sustainable and same is liable to be set aside.

8. Accordingly, the instant petition is allowed and the order passed by the trial Court is hereby set aside. The trial Court to proceed with the case after providing opportunity of paying process fee for summoning the respondent and dispose of the matter according to law after providing opportunity to adduce evidence to both sides.
9. The appellant/complainant to appear before the trial Court for further proceeding on 20th June, 2019.

Sd/-
(Ram Prasanna Sharma)
Judge

Vasant.