

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 1051 of 2019**

Birendra Naik, S/o- Late Surendranath Naik, Aged about- 28 years, R/o - Vijay Ward No. 2, Jagdalpur, District- Bastar (C.G.)

---- **Petitioner**

Versus

Jitendra Shrivastava, S/o- Dinesh Kumar Shrivastava, Aged about- 48 years, Through Smt. Rupali Shrivastava Principal, R/o- Vrindavan Colony, Near House of Dr. Pradeep Pandey Jagdalpur, District – Bastar (C.G.)

---- **Respondent**

 For Petitioner : Shri Pravin Kumar Tulsyan, Advocate.
 For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

29/04/2019

1. Heard on application for grant of leave to appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973.
2. On due consideration, leave is granted.
3. This petition is preferred against the order dated 2nd March, 2019 passed by Chief Judicial Magistrate, Jagdalpur, District- Bastar (C.G.) in Complaint Case No. 152/2016 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.
4. It appears from the order-sheet of the trial Court that the case was fixed for hearing on application filed under Section 269 of the Income Tax Act for which presence of appellant/complainant was not compulsory and the trial Court dismissed the complaint filed

under Section 138 of the Negotiable Instruments Act, 1881 for want of prosecution.

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 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.

6. 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) of the CrPC. The trial Court should have made effort to decide the issue but that is not done in the present case. Without deciding the issues between the parties, the record was sent to record room, therefore, the order passed by the trial Court is not sustainable and same is liable to be set aside.

7. Accordingly, the instant petition is allowed and the order passed by the trial Court is hereby set aside. The trial Court is directed to decide the case on merit after hearing both sides, the trial Court to proceed with the case on merit.
8. The appellant/complainant to appear before the trial Court for further proceeding on 26th June, 2019.

Sd/-
(Ram Prasanna Sharma)
Judge