

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1199 of 2019**

- Asgar Ali S/o Late Sajid Ali Aged About 33 Years R/o Rasulpur, Dr. Jakir Hussain, Ward No. 39, Ambikapur, Tahsil And Police Station Ambikapur, District Surguja Chhattisgarh.

---- Petitioner

Versus

- Vinod Tripathi S/o Late Chandrashekhar Tripathi Aged About 51 Years R/o Tripathi Complex Bramh Road, Shitla Ward, Ambikapur District Surguja Chhattisgarh.

---- Respondent

 For the Petitioner : Shri Dashrath Kushwaha, Advocate
 For the Respondent : None

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****15.5.2019**

1. Heard on application for grant of leave to appeal under Section 378(4) of CrPC.
2. This petition has been preferred against Order dated 05.4.2019 passed by Judicial Magistrate First Class, Ambikapur Distt. Surguja (CG) in Complaint Case No.870/2015 wherein the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed for want of prosecution.
3. As the petition is in nature of restoration of complaint case, presence of the respondent is not required.
4. It appears from the order sheet of the trial Court that the case was fixed for recording the evidence of the defence

witnesses and it was not fixed for appearance of the petitioner/complainant.

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.”

6. 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 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. When the case was fixed for recording the evidence of the defence

witnesses, the trial Court should have proceeded with the case to decide the same on merits, but that is not done and the case was dismissed for default at the fag end of the trial. The trial Court should have decided the issues between the parties but that is not done and the record was sent to record room. Therefore, the order passed by the trial Court is not sustainable.

8. 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 defece side to adduce the witnesses and thereafter to decide the case on its merits after hearing both sides.

9. The complainant/petitioner to appear before the trial Court for further proceedings on **08.7.2019**.

Sd/-
(Ram Prasanna Sharma)
JUDGE