

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1079 of 2018**

- Umesh S/o Rattilal Chouhan Aged About 38 Years R/o- Shrinagar, Khamtarai, Raipur, District- Raipur, Chhattisgarh.

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

- Shiv Nayak S/o Gadadhar Nayak Aged About 39 Years R/o- Sai Vihar, Tulsi Nagar, Near Shitla Bazar, Kushalpur, Raipur, District- Raipur, Chhattisgarh. Other Address- Shiv Nayak S/o Late Gadadhar Nayak, R/o- C/o Raju Sagar, Nehru Nagar Kalibadi, Raipur, District- Raipur, Chhattisgarh.

---- **Respondent**

 For the Petitioner : Shri MK Bhaduri, Advocate
 For the respondent : None

Hon'ble Shri Justice Ram Prasanna Sharma
Order On Board

07.02.2019.

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 02.5.2018 passed by Judicial Magistrate First Class, Raipur (CG) in Criminal Complaint Case No.3306/2017 wherein the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 has been dismissed for want of prosecution.
3. It appears from the order sheet of the trial Court that the case was fixed for reply to interlocutory application for which presence of the petitioner was not compulsory.

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. When the case was not fixed for recoding the evidence of the petitioner, his presence was not required and dismissal for single default is not permissible. The trial Court could have adjourned the case to some other date as per the provisions of Section 256(1) CrPC.

6. In view of this Court, the case should have been decided on merits 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.

7. Accordingly, order passed by the trial Court is set aside allowing the petition. The trial Court is directed to proceed with the case in accordance with law and after providing opportunity of hearing to both sides and decide the issues on merits.

8. The petitioner to appear before the trial Court on **28.3.2019** for further proceedings.

Sd/-
(Ram Prasanna Sharma)
JUDGE