

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1639 of 2019**

- Dr. Anand Malhotra S/o S.R. Malhotra Aged About 40 Years R/o Om Bhawan, Shikshak Nagar, Behind Garden, Durg, Post Police Station Tahsil And District Durg Chhattisgarh.

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

- Lallan Singh S/o Ram Ashray Singh Aged About 42 Years Proprietor – M/s. Acquirade Constructons And Mechanical Engineers Bhilai, R/o Bappa Flour Mill Chhawani, Bhilai, Post Housing Board Jamul, Police Station Jamul, Tahsil And District Durg Chhattisgarh.

---- **Respondent**

 For the Petitioner : Shri CK Sahu, Advocate
 For the Respondent : Shri Rajesh Jain, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****28.11.2019.**

1. Heard on application under Section 378(4) of CrPC for grant of leave to appeal.
2. On due consideration, leave is granted.
3. This petition has been preferred against Order dated 07.9.2018 passed by Judicial Magistrate First Class, Durg (CG) in Criminal Case No. 30664/2012, filed under Section 138 of the Negotiable Instruments Act, 1881, wherein the said Court dismissed the complaint filed by the petitioner for want of prosecution.
4. It appears from the order sheet that the case was fixed for appearance of the respondent/accused on the said date and it was not fixed for appearance of the petitioner/complainant.

When the case was not fixed for appearance of the complainant, his presence was not compulsory.

5. Dismissal of the complaint case was not the only option before the trial Court. It should have adjourned the case for some other date as per the provisions of Section 256(1) CrMP. The trial Court should have proceeded to issue summon for service against the respondent, but that is not done and the case was dismissed even when the respondent is not served. The trial Court should have made efforts for appearance of the respondent and thereafter should have proceeded to hear the case on merits after providing opportunity of adducing evidence to both sides.

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. The procedure adopted by the trial Court is not proper. Accordingly, order passed by the trial Court is set aside by allowing the petition. The trial Court is directed to proceed with the case and decide the issues between the parties after recording the evidence of both sides and after hearing both parties. After appearance of the respondent, the trial Court is directed to proceed with the case on merits.

8. The parties to appear before the trial Court on **09.01.2020** for further proceedings.

Sd/-

(Ram Prasanna Sharma)
JUDGE