

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 1955 of 2019

- Amit Rawani, S/o- Shri Kishore Rawani, Aged about- 34 years, R/o-Railway Banglapara, Raigarh, Tahsil & District- Raigarh (C.G.)

---- Petitioner

Versus

- Alekh Patel, S/o- Shri Damrudhar Patel, R/o- Village- Bhagwanpur, Tahsil & District- Raigarh (C.G.)

---- Respondent

For Petitioner : Shri Prabhat Kumar Saxena, Advocate.

For Respondent : None.

Hon'ble Shri Justice Ram Prasanna Sharma

Order on Board

13/11/2019

1. Heard on application for grant of leave to appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973.
2. This petition is preferred against the judgment dated 26th July, 2018 passed by Judicial Magistrate First Class, Raigarh (C.G.) in Complaint Case No. 57/2015 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.
3. From the record, it appears that the case was fixed for appearance of respondent/accused on the said date. It also appears that bailable warrant was issued against the respondent, but it is not clear whether the said warrant was served or not or service report is awaited. When case was fixed for appearance of the respondent, presence of appellant/complainant 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. Dismissal of complaint was not the only option before the trial Court.
The trial Court should have proceeded with the case for assuring

appearance of the respondent and thereafter should have proceeded with the case to record evidence and decide the issue between the parties, 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 procedure adopted by the trial Court is not proper and same is liable to be set aside.

6. Accordingly, the instant appeal is allowed and the order passed by the trial Court is hereby set aside. The trial Court is directed to decide the case according to law and after service of summon to the respondent shall proceed to decide the issues between the parties on merit.
7. The appellant to appear before the trial Court for further proceeding on 7th January, 2020.

Sd/-

(Ram Prasanna Sharma)
Judge