

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2349 of 2018**

- Shri Dilip Kumar Shrivastawa S/o Late Navrang Prasad Shrivastawa aged about 35 years, R/o Gitangali Nagar Gali No. 04 Kashyap Colony Bilaspur ,police Station City Kotwali Bilaspur District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Petitioner**Versus**

- Amit Singh Thakur S/o Bhanu Pratap Singh aged 37 years R/o Street Behind The Rishabh Apartment Near The Shiv Mandir Jabdapara ,bilaspur Police Station Sarkanda, Bilaspur Chhattisgarh. Business Institution Amit C.D. Point Brihaspati Bazar ,police Station Civil Line,district Bilaspur Chhattisgarh ., District : Bilaspur, Chhattisgarh

---- Respondent

For Petitioner	:	Mr. Hemant Kesharwani, Advocate
For Respondent	:	None.

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****01/02/2019**

1. Heard on I.A.No.1/2018 application for condonation of delay in filing the petition.
2. For the reasons mentioned in the application same is allowed and delay of 10 days in filing the petition is hereby condoned.
3. Also heard on application filed under Section 378(4) of the Code of Criminal Procedure, 1973 for grant of leave to appeal.
4. This petition is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against order dated 10th August, 2018 passed by Judicial Magistrate First Class, Bilaspur(C.G.) in Complaint Case No. 211/2014, whereby the said court has dismissed the complaint filed under Section 138 of the Negotiable Instrument Act, 1881(for short the Act 1881) for want of prosecution.

5. It appears from the order-sheet of the said court that the case was fixed for recording statement under Section 313 Cr.P.C. On the said date, respondent/ accused was not present before the trial Court, therefore, the case ought to have adjourned for some other day as per provisions of Section 256 (1) Cr.P.C. but that is not done in the present case. On the said date, appearance of the complainant was not compulsory because case was fixed for recording statement of the respondent/ accused.
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.”

7. 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.

8. The trial Court should have proceeded with the case to decide it on merits and it should not be sent to the record room without deciding the issues between the parties. As dismissal for single default is not just and proper, the order passed by the trial Court is not sustainable.
9. 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 after providing opportunity to both the parties and decide the issues between the parties on merit.
10. The petitioner shall appear before the trial court for further proceedings on 14th March, 2019.

**Sd/
(Ram Prasanna Sharma)
Judge**