

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.2484 of 2019**

- Mohd. Zahid Khan S/o Late Shri Mohd. Zareef Khan Aged About 63 Years Profession- Advocate, R/o Mohd. Rasoolpurr Nagar, Ambikapur, P.S. And Tahsil Ambikapur, District- Surguja, Chhattisgarh.

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

- Arun Kumar Kushwaha S/o Shri Marnath Kushwaha Aged About 48 Years R/o House No. 278, Forest Colony, Village- Wadarfnagar, P.S. Wadarfnagar, District- Balrampur, Chhattisgarh.

---- **Respondent**

 For the Petitioner : Shri JA Lohani, Advocate
 For the Respondent : Not noticed

Hon'ble Shri Justice Ram Prasanna Sharma**Order On Board****20.11.2019.**

1. Heard 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 16.9.2019 passed by Judicial Magistrate First Class, Ambikapur (CG) in an unregistered complaint Case of 2018, 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. As the respondent is not served before the trial Court and the case was dismissed for want of prosecution, presence of the respondent before this Court is not required.

5. It appears from the order sheet that the case was fixed for appearance of the respondent/accused and the case is still not registered. When the case was fixed for arguments on registration, presence of the petitioner was not compulsory.

6. 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 with the case for appearance of the respondent and after his appearance it should have proceeded with providing opportunity to adduce evidence to both sides. But that is not done and the case was sent to record for without deciding the issues between the parties..

7. 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.

8. In view of this Court, the order passed by the trial Court is not in the fitness of proceedings and the same is not sustainable.

9. Accordingly, order passed by the trial Court is set aside by allowing the petition. The trial Court is directed to proceed with the case after appearance of the respondent and thereafter decide the issues between the parties.

10. The petitioner to appear before the trial Court on **09.01.2020** for further proceedings.

Sd/-
(Ram Prasanna Sharma)
JUDGE