

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2486 of 2019**

- Moh. Shoeb S/o Rafique Mohammad Aged About 30 Years R/o House No. 8/08, Chhotapara, Bristal Chauk, Raipur District Raipur Chhattisgarh,

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

- Prashant Deshmukh S/o Late Subhash Rao Deshmukh R/o Phool Chauk, Nayapara, Raipur District Raipur Chhattisgarh,

---- **Respondent**

 For the Petitioner : Shri Raj Kumar Gupta, Advocate
 For the Respondent : None

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

1. Heard on I.A.No.1 of 2019, which is an application for condonation of delay in filing the instant petition.
2. for the reasons stated in the application, the application is allowed and delay of 30 days in filing the instant petition is condoned.
3. Also heard on application under Section 378(4) of CrPC for grant of leave to appeal.
4. On due consideration, leave is granted.
5. This petition has been preferred against Order dated 27.07.2019 passed by the Judicial Magistrate First Class, Raipur, District Raipur (CG) in Criminal Case No. 5200 of 2018 for offence under Section 138 of the Negotiable

Instruments Act, 1881, wherein the said Court dismissed the complaint filed by the petitioner for want of prosecution.

6. It appears from the order sheet that the case was fixed for recording evidence of the appellant/complainant for the first time on 27-7-2019 and both parties were not present before the trial court on that day. 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.

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 bailable warrants were issued against the respondents by the said Cou 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 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.

9. Accordingly, order passed by the trial Court is set aside by allowing the petition. Now the matter is remanded back to the trial court for deciding the case afresh. After appearance of the respondent, the trial Court is directed to proceed with the case on merits.

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

Sd/-
(Ram Prasanna Sharma)
JUDGE

Raju