

HIGH COURT OF CHHATTISGARH, BILASPUR

ACQA No. 452 of 2018

- M/s Sukh Sagar Mineral Comp., Village- Lamani, Proprietor- Shri Kamaldev Jha, S/o Sadanand Jha, Aged About- 42 Years, R/o Danteshwari, Ward- Jagdalpur District- Bastar, Chhattisgarh.

---- Appellant

Versus

- M/s Elegance Mineral Proprietor- Mahendra Wanaker, S/o Prabhu Das Wanker, R/o S.B.I. Colony, Plot No. D-17, Behind Padmawati School, Fafadih, Raipur, Post- Raipur, District- Raipur, C.G.

---- Respondent

For Appellant : Shri Pravin Kumar Tulsyan.

For Respondent : Shri Vikas Srivastava.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

07.03.2019

1. This appeal is preferred under Section 378 (4) of the Code of Criminal Procedure, 1973 against the order dated 18.09.2018 passed by Judicial Magistrate (First Class), Jagdalpur (C.G.) in Criminal Complaint Case No. 6464/2018 filed under Section 138 of the Negotiable Instrument Act, 1881 (for short the Act, 1881) wherein the said Court dismissed the complaint for want of prosecution.
2. It appears that the case was fixed for recording statements of respondent/accused but the case was dismissed for non appearance of the appellant/complainant, the case was not fixed for appearance of appellant and it is dismissed for single default.
3. 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.”

4. 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 could have adjourned the case for some other day as per provision of Section 256(1) of the Cr.P.C.. The evidence of appellant was already closed, therefore, matter should have been decided on merit but that is not done here. Therefore, the order passed by the trial Court is not sustainable.
6. Accordingly, order passed by the trial court is set aside allowing the petition. The trial court is directed to proceed with the case after recording statement of respondent and decide the issues between the parties on merit. The appellant to appear before the trial Court for further proceeding on 30.04.2019.
7. Record of the trial Court be send immediately.

Sd/-

(Ram Prasanna Sharma)
Judge