

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2634 of 2019**

- Pankaj Goyal, S/o- Shri Narayan Prasad Goyal, Aged about- 35 years, R/o- Main Road (In Front of M.R. Auto Center) Sitapur, Tahsil- Sitapur, District- Surguja (C.G) Pin- 497111, Mob. 8889075050. **---- Petitioner**

Versus

1. Mohammad Ishtekhar, S/o- Abdul Gaffar Khan, Aged about- 30 years, R/o- Hetriroad, (I.C.C. Computer Center) P.S. & Tahsil- Sitapur, District- Surguja (C.G.), Pin 497111.
2. State of Chhattisgarh, through- District Magistrate- Ambikapur, District- Surguja (C.G.) **---- Respondents**

For Petitioner : Shri Sanjay Pathak, Advocate.

For State/Respondent No. 2 : Shri Afroj Khan, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma**Order on Board****06/12/2019**

1. Heard on application for leave to appeal under Section 378 (4) of the Cr.P.C.
2. On due consideration, leave is granted.
3. As the respondent No. 1 has not been served before the trial Court, the complaint was dismissed for want of prosecution. Notice to respondent No. 1 is not required.
4. This appeal is preferred against the order dated 18th October, 2019 passed by Judicial Magistrate First Class, Sitapur, District- Surguja (C.G.) in Complaint Case No. 421/2019 filed under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act, 1881') wherein the said Court dismissed the complaint filed by the petitioner for want of prosecution.

5. From the record, it appears that the notice was issued to respondent No. 1 on 14th September, 2019 and case was fixed for appearance of respondent No. 1 on 18th October, 2019. It is not clear from the order-sheet of the trial Court whether summon is issued or not and whether summon is served to respondent No. 1 or service report is awaited and when case was fixed for appearance of the respondent presence of appellant was not compulsory.
6. Dismissal of complaint was not the only option before the trial Court. The trial Court should have adjourned the case for some other date as per the provisions of Section 256(1) of the Cr.P.C. The trial Court should have proceeded to decide the case on merit between the parties, but that is not done in the present case and without deciding the issues between the parties, the record was sent to record room.
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.”

8. 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.
9. Accordingly, the instant appeal is allowed and the order passed by the trial Court is hereby set aside. Now the case is remanded back to the trial Court for deciding the case afresh after hearing the parties. The trial Court is directed to decide the case on merit after providing opportunity of hearing and adducing evidence to both sides.
10. The appellant to appear before the trial Court for further proceeding on 22nd February, 2020.

Sd/-

(Ram Prasanna Sharma)
Judge