

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2687 of 2019**

Shivnath Prajapati S/o Late Saheb Ram Aged About 41 Years R/o Village And Post Sakhouli, Police Station Darima, District - Surguja Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

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

Shambhu Nath S/o Budhan Ram Aged About 41 Years Caste Luhar, R/o Village And Post Sakhouli, Police Station Darima, District - Surguja Chhattisgarh.

---- **Respondent**

For petitioner : Mr. Govind Dewangan, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**Order on Board****13.12.2019.**

1. Heard on application under Section 378(4) of CrMP for grant of leave to appeal.
2. On due consideration, leave is granted.
3. As the respondent/accused is still unserved in the trial Court, issuance of notice to the respondent is not required for deciding the present petition because it is not a petition to decide issue between the parties but for providing opportunity of hearing to both sides.
4. This petition is preferred against the order dated 05/10/2019 passed by Learned Judicial Magistrate First Class, Ambikapur, District- Surguja (C.G.) in Criminal Complaint Case No. 724/2018, filed under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act") wherein the said Court dismissed the case for want of prosecution.
5. It appears from the record of the trial Court that on 27th September, 2019 parties have wrongly noted next date of

hearing as 5th November, 2019 but case was fixed on 5th October, 2019 and in absence of parties trial Court dismissed the case for want of prosecution.

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.”

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 the 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.

7. Dismissal of the complaint case was not the only option before the Trial Court. The Trial Court could have adjourned the case to some other date as per the provisions of Section 256(1)

CrPC. The Court should have proceeded the case to decide the issues between the parties and it should not have sent the record to record room without deciding issues between the parties but that is not done in the present case, therefore, the order passed by the trial Court is not sustainable.

8. Accordingly, order passed by the trial Court is not proper and same is hereby set aside, allowing the petition. The trial Court is directed to proceed with the case after appearance of both sides and shall decide the issues between the parties on merit.
9. Appellant shall appear before the trial Court on 4th February, 2020 for further proceedings.

Sd/-

(Ram Prasanna Sharma)
JUDGE