

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 2671 of 2019**

Gudiya Mobile Through Its Proprietor Shri Kamlesh Dewangan
Aged About 33 Years S/o Tikaram Dewangan, R/o Village Keshla
Kharora Tahsil Tilda, District Raipur, Chhattisgarh.

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

Rakesh Kumar Sonwan S/o Shri Bhadriprasad Sonwan R/o Ward
No. 02, Kandara Para Kharora Tahsil Tilda, District Raipur,
Chhattisgarh.

---- **Respondent**

For petitioner : Mr. P.K.Tulsyan, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**Order on Board****12.12.2019.**

1. Heard on I.A. No. 01/2019, which is an application for condonation of delay in filing instant petition.
2. On due consideration, the application is allowed and the delay of 9 days in filing the instant petition is hereby condoned.
3. Also heard on application under Section 378(4) of CrMP for grant of leave to appeal.
4. On due consideration, leave is granted.
5. As the respondent/accused is still unserved by the trial Court, issuance of notice to the respondent is not required for deciding the present petition.
6. This petition is preferred against the order dated 02/09/2019, passed by Learned Judicial Magistrate First Class, Raipur (C.G.) in Criminal Complaint Case No. not allotted, 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.

7. It appears from the record of the trial Court that the trial Court directed for issuance of summons to the respondent on 18th July, 2019, 5th August, 2019 and 28th August, 2019 but it is not clear from the order sheet of the trial Court whether summons was issued or not and whether it is served or not or its service is still awaited. The case was fixed on 2nd September, 2019 for appearance of the respondent and it was not fixed for appearance of the complainant where presence of the complainant was not compulsory.

8. 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.

9. 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.
10. 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 the respondent shall decide the issues between the parties on merit.
11. Appellant shall appear before the trial Court on 4th February, 2020 for further proceedings.

Sd/-

(Ram Prasanna Sharma)
JUDGE