

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR  
BEFORE  
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL  
ON THE 6<sup>th</sup> OF APRIL, 2022**

**CRIMINAL APPEAL No. 5349 of 2018**

**Between:-**

**MOHD. IRFAN QURESHI S/O MOHD. MUSHTAQUE QURESHI ,  
AGED ABOUT 27 YEARS, ISLAMPURA,  
UDAIPURA, TEH. UDAIPURA  
DISTT. RAISEN (MADHYA PRADESH)**

**.....APPELLANT**

**(BY SHRI SUSHIL TIWARI, ADVOCATE)**

**AND**

- NAYEEM KHAN S/O ABDUL QADEER KHAN ,**
- 1. AGED ABOUT 40 YEARS, ISLAMPURA QASBA UDAIPURA,  
P.S. UDAIPURA, TEH. UDAIPURA DISTT. RAISEN (MADHYA PRADESH)  
KALEEM KHAN S/O ABDUL QADEER KHAN ,**
  - 2. AGED ABOUT 35 YEARS, ISLAMPURA QASBA UDAIPURA,  
DIST.RAISEN (MADHYA PRADESH)**
  - 3. FAHEEM KHAN S/O ABDUL QADEER KHAN ,  
AGED ABOUT 37 YEARS, ISLAMPURA QASBA UDAIPURA,**

**DIST.RAISEN (MADHYA PRADESH)**

4. **KABEER KHAN S/O ABDUL QADEER KHAN , AGED ABOUT 27 YEARS, ISLAMPURA QASBA UDAIPURA, DIST.RAISEN (MADHYA PRADESH)**

5. **SADDAM KHAN S/O ABDUL AZIZ KHAN, AGED ABOUT 35 YEARS, ISLAMPURA QASBA UDAIPURA, DIST.RAISEN (MADHYA PRADESH)**

6. **MEHRAJ S/O AAMEEN , AGED ABOUT 27 YEARS, ISLAMPURA QASBA UDAIPURA, DIST.RAISEN (MADHYA PRADESH)**

7. **SHEHANSHA S/O MANSOOR PATWARI , AGED ABOUT 34 YEARS, ISLAMPURA QASBA UDAIPURA, DIST.RAISEN (MADHYA PRADESH)**

8. **NASEEM KHAN S/O AAMEN , AGED ABOUT 35 YEARS, ISLAMPURA QASBA UDAIPURA, DIST.RAISEN (MADHYA PRADESH)**

9. **THE STATE OF MADHYA PRADESH THROUGH : POLICE STATION, UDAIPURA (MADHYA PRADESH)**

**.....RESPONDENTS**

**(NONE FOR RESPONDENTS NO.1 TO 8 THOUGH SERVED.**

**BY SHRI C. L. SETHI, PANEL LAWYER FOR RESPONDENT NO.9/ STATE )**

*This appeal coming on for admission this day, the court passed the following:*

### **JUDGMENT**

This appeal is against the order dated 9.9.2010 passed by the Judicial Magistrate First Class, Udaipura, District Raisen, dismissing the complaint bearing No. R.T. 115/2008 (Irfan Qureshi Vs. Nayeem Khan and others) under Sections 323, 323/34 of IPC filed by the appellant.

2. The order dated 9.9.2010 passed by the learned Magistrate reads as under :-

"परिवादी अनुपस्थित उनकी ओर से कोई अधिवक्ता भी उपस्थित नहीं।

बार बार पुकार लगाई गई कोई भी उपस्थित नहीं।

आरोपीगण नईम एवं कबीर सहित श्री शर्मा अधिवक्ता उपस्थित शेष आरोपीगण की ओर से हाजिरी माफी का आवेदन पेश बाद विचार स्वीकार किया जाता है।

प्रकरण में परिवादी अनुपस्थित है उनकी तरफ से कोई भी उपस्थित नहीं है अतः धारा 256 द.प्र.स. के तहत परिवाद निरस्त किया जाता है तथा आरोपीगण को धारा 323/34 भा.द.वि. के आरोप से दोषमुक्त किया जाता है।

प्रकरण का परिणाम दर्ज होकर नियमानुसार अभिलेखागार में जमा हो।”

3. A perusal of the order sheets drawn in R.T. No.115/2008 (Irfan Qureshi Vs. Nayeem Khan and others) reveals that from 23.5.2007 on-wards when the case was posted for trial, the complainant/appellant was present in the Court on a number of occasions, though he was occasionally absent but he was represented through his lawyer and whenever he did not turn up before the Court, exemption applications were filed by his counsel. On the relevant date i.e. 9.9.2010, the complainant was called absent and the private complaint filed by him was dismissed.

4. According to the learned counsel for the appellant/ complainant, the charges had been framed against the respondents and appellant was represented by a lawyer. Therefore, even if on a singular occasion, appellant/complainant could not appear, it was not proper for learned JMFC to dismiss the complaint as he pursued the complaint since 2007 and remain present on the number of occasions. It is further submitted that on the date when the complaint was dismissed, the personal appearance of the complainant was not necessary as the case was fixed for consideration of compromise application. Learned Magistrate has committed error in dismissing the

complaint. It is submitted by the learned counsel for the appellant that the impugned order dated 9.9.2010 passed by the learned JMFC, dismissing the complaint filed by the appellant is against settled position of law.

5. The case of the appellant in nut-shell is that he filed complaint under Sections 147, 148, 149, 323, 324, 452, 506 of IPC before learned JMFC. After recording the evidence under Section 200 and 202 of Cr.P.C. learned JMFC took cognizance against the respondents / accused for commission of offence under Section 323, 323/34 of IPC. Respondents/ accused appeared before the Court and were released on bail. Learned Trial Court stated particulars of crime and framed charges against respondents/accused on 18.11.2009. On 26.7.2010 parties filed compromise application under Section 320(1) of Cr.P.C. On 9.9.2010, case was fixed for consideration of compromise application. Therefore, it was not necessary for the complainant to remain present in the Court. Thus, learned JMFC committed error in dismissing the complaint.

6. The facts of the case are not in dispute. It is also not in dispute that on the date when the complaint was listed for hearing, complainant was not present in the Court and in his absence, learned Trial Court dismissed the complaint and acquitted the respondents/ accused persons.

7. No doubt offence under Section 323 of IPC is triable in Chapter XX as a Trial of summons cases by Magistrate. The procedure which is to be followed in case of non appearance of complainant or death of complainant has been provided under Section 256 of Cr.P.C. It has been held by the Supreme Court in relation to Section-256 of the Code in the case of Mohd. Azeem v. A. Venkatesh and Anr., reported in (2002) 7 SCC 726, as under :-

12. It has been held by the Supreme Court in relation to Section-256 of the Code in the case of *Mohd. Azeem v. A. Venkatesh and Anr.*, reported in (2002) 7 SCC 726, that on one singular default in appearance on the part of the complainant, the dismissal of the complaint under Section 138 of the Negotiable Instruments Act is not proper. The cause shown by the complainant of his absence that he had wrongly noted the date should not have been disbelieved and it should have been held to be a valid ground for restoration of the complaint. The Supreme Court has further held that the learned Magistrate and the High Court had adopted a very strict and unjust attitude resulting in failure of justice and the Supreme Court has set aside the orders and restored the complaint and directed the Magistrate to proceed with the trial of the case after issuance of formal notices to both the parties.

13. Again in the case of ***Associated Cement Co. Ltd. v. Keshvanand***, reported in AIR 1998 SC 596, the Supreme Court has considered the scope of Section 256 of the Code in relation to the complaint filed under Section 138 of the Negotiable Instruments Act and has held as under :--

*"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 the progress of the case and also whether the situation does not justify the case being adjourned to another date 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.** The Coordinate Bench of this Court in the case of **Right Services Vs. Chhotu Bhaiya Road Lines reported in 2004 Cri.LJ 406** has held as under :-

*19. From the aforesaid discussion; case laws; and the view taken by the Courts, it is clear that while dismissing the complaints in the absence of complainant, the Court should not pass the orders of dismissal of complaints and acquit the accused persons mechanically. The Court should consider the nature of the offence and the material produced by the complainant and also the stake which complainant is having in the matter. If on solitary hearing or hearings for one or the other reason if the complainant is not present, normally the Court should adjourn the case and should not arbitrarily exercise its discretion refusing the exemption. Normally in complaint cases filed under Section 138 of the Act when a complaint is filed, the complainant is having a stake in the matter. Therefore, in the absence of the complainant, complaint should not be dismissed immediately. The Court should either adjourn the case or may proceed to hear the*

*case under the proviso of Section 256 of the Code and if the complainant is represented by an Advocate or by officer conducting the prosecution or if the personal attendance of the complainant is not necessary, the Court should either grant exemption, suo-motu or on the application of the advocate, as the order of dismissal of complainant operates as a final order. Therefore, normally it should be passed after proper application of mind and exercise of judicial discretion.*

9. In the instant case, from the perusal of the impugned order, it is clear that on the date when the case was dismissed, it was fixed for consideration of compromise application filed under Section 320(1) of Cr.P.C.. It also cannot be overlooked that complainant/appellant had attended the Court on number of occasions after the case was posted for trial. Therefore, I am of the view that learned Magistrate ought to have given an opportunity to the complainant/ appellant for proceeding with the trial of the case by adjourning the case to another date. The impugned order is not an order passed on merits of the case. It was also obligatory on the part of learned JMFC to decide compromise application as under first table of the Section 320 of Cr.P.C., the person whom hurt has been caused can compound the offence under Section 323 of IPC without permission of the Court. In such fact situation it was not justified on the part of learned Trial Court to dismiss the complaint on a singular day when complainant was absent. In the absence of complainant Court ought to have adjourn the case instead of dismissing it and acquitting the accused persons. Looking to the nature of the case, Trial Court has not exercised its discretion properly and judicially. Therefore, order dated 9.9.2010 passed by the learned JMFC is set aside and in the result, this appeal is allowed.

**10.** The impugned order dated 9.9.2010 dismissing the complaint and acquitting the respondents/ accused is hereby set aside. The complaint case is restored to its original number and learned Trial Court is directed to proceed with the Trial of the case in accordance with law.

**11.** A copy of this order along with Trial Court record be transmitted to learned Trial Court immediately.

**( DINESH KUMAR PALIWAL )**

**JUDGE**