

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal (A-SB) No. 55 of 2026

Date of Decision: 03.07.2026

M/s Roop Hardwares

.....Appellant

Versus

Sh. Joginder Singh Chauhan

.....Respondent

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting?

For the Appellant: Mr. Jeevesh Sharma, Advocate.

For the Respondents: Nemo.

Sandeep Sharma, J. (Oral)

Cr.MP(M) No.1175 of 2026

2. Heard. Leave to appeal is granted. Application stands disposed of.

Cr. Appeal (A-SB) No.55 of 2026

3. Having regard to the nature of dispute and order proposed to be passed, this Court sees no necessity to issue notice to the respondent and as such, same is dispensed with.

4. Being aggrieved and dissatisfied with order dated 20.04.2026 passed by learned Chief Judicial Magistrate, Shimla, Himachal Pradesh, whereby criminal case No.84 of 2024, titled ***M/s Roop Hardwares Vs. Joginder Singh***, came to be dismissed in default, appellant-complainant has approached this Court in the instant proceedings filed under Section 419

of the Bharatiya Nagarik Suraksha Sanhita, 2023, praying therein to set aside the aforesaid order and restore the complaint filed under Section 138 of the Negotiable Instruments Act.

5. Learned counsel representing the appellant fairly states that on account of some unavoidable circumstances, appellant/complainant was unable to come present on the date of passing of the impugned order and he was under impression that his counsel will come present and seek further time, however, Court below, taking note of his absence as well as his counsel, dismissed the complaint for want of prosecution.

6. Having heard learned counsel for the parties and perused material adduced on record, this Court finds that on 20.04.2026, case was listed for appearance of complainant. No doubt, perusal of the *zimni* order placed on record reveals that on 20.04.2026, matter was adjourned thrice, enabling complainant or his counsel to come present, but certainly trial Court ought not have straightway proceeded to dismiss the complaint in default, rather in such a situation, Court could either issue fresh notice to the complainant or its counsel, specifically calling upon him to come present or his counsel, or could have adjourned the matter.

7. In terms of Section 143 of the Act, offence under Section 138 of the Act is to be tried summarily and accordingly, procedure for summons case provided in Chapter XX of the Code of Criminal Procedure is applicable

during the trial initiated on filing a complaint under Section 138 of the Act. Section 256 of Cr.P.C (now Section 279 of BNSS), specifically deals with a situation of non-appearance of the complainant or death of the complainant.

8. At this stage, it would be apt to take note of Section 279 of the Bharatiya Nagarik Suraksha Sanhita, 2023, which reads as under:-

“279. Non-appearance or death of complainant.

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, after giving thirty days' time to the complainant to be present, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by an advocate or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.”

9. Bare reading of aforesaid provision of law provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper. Proviso to aforesaid section further empowers the Magistrate to dispense with the complainant from his personal attendance, if it is found not necessary and to proceed with the case. If the complainant is represented by a pleader or by the officer conducting the prosecution, the Magistrate may proceed with the case in

absence of the complainant. When the Magistrate, in a summons case, dismisses the complaint and acquits the accused due to absence of the complainant on the date of hearing, it becomes final and it cannot be restored in view of Section 362 Cr.P.C. At this stage, it would be profitable to reproduce Section 362 Cr.P.C., herein below:

“362. Court not to alter judgment. -Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

10. Having taken note of effect of dismissal of complaint under Section 138 of the Act, Hon'ble Apex Court in case titled **Associated Cement Co. Ltd. v. Keshvanand**, reported in (1998) 1 SCC 687, elaborately dealt with the scope of Section 256 Cr.P.C (now Section 279 of BNSS), and held that though, afore Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court can straightway proceed to acquit the accused in invitum. It has been specifically held in the afore judgment that power under Section 256 Cr.P.C (now Section 279 of BNSS) must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

11. Similarly in case titled **Mohd. Azeem v. A. Venkatesh**, reported in (2002) 7 SCC 726, Hon'ble Apex Court held that dismissal of the

complaint on account of one singular default in appearance on the part of the complainant, if permitted would result in failure of justice.

12. In case titled **S. Anand v. Vasumathi Chandrasekar**, reported in (2008) 4 SCC 67, Hon'ble Apex Court also deprecated practice of trial Court in dismissing the complaint on account of default in appearance. In the afore case complaint under Section 138 of the Act was dismissed by the trial Court exercising the power under Section 256 Cr.P.C on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence. Hon'ble Apex Court after having considered the provisions of Section 256 Cr.P.C, observed that Court instead of disposal of a complaint in default, could have proceeded to decide the matter on merits on the basis of evidence already adduced on record by the complainant and the statement of accused recorded under Section 313 Cr.P.C.

13. In yet another case titled **N.K. Sharma's case vs. M/S Accord Plantations Private Lintied and another**, reported in 2008(2) Latest HLJ 1249, Co-ordinate Bench of this Court relying upon **Associated Cement Co. Ltd.'s** case (supra), categorically held that when the Court notices that complainant is absent on a particular day, it must consider that whether the 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 due to any other reason and if the situation

does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint, may not be a proper exercise of power envisaged under Section 256 Cr.P.C.

14. No doubt, in the case at hand, on 20.04.2026, case was actually listed for the appearance of complainant, but since complainant or its counsel could not come present on the afore date, Court ought to have granted one more opportunity to the appellant to do the needful before dismissing the case for non-prosecution. Dismissal of complaint in default for non-appearance of the complainant on the date fixed, without affording him even a single opportunity, is wholly unjustified. Since, very effect of dismissal of complaint in default has serious consequence of acquittal of accused, who admittedly had been avoiding service, Court below was expected to exercise its discretion with care and caution.

15. Reliance is placed upon the judgment dated 01.03.2023 passed by Hon'ble Apex Court in ***M/s BLS Infrastructure Limited versus M/s Rajwanti Singh and others*** in Criminal Appeal Nos. 657-664 of 2023, where, in similar facts and circumstances, Hon'ble Apex Court held that action of learned Magistrate not justified in straight away dismissing the complaint(s) and ordering acquittal of the accused on mere non appearance

of the complainant. Relevant paras No.13 and 14 of afore judgment are as under:-

“13. In the instant case, we notice that there is a specific averment in the Special Leave Petition(s) that the appellant had led its evidence in the case and thereafter had moved an application under Section 311 of the Code to summon and examine further witnesses. In Paragraph 5(u), it is stated that the trial court as well as the High Court did not take into consideration that the complainant’s cross-examination had been over in Complaint Case Nos.621742/16, 621743/16 and 621744/16, and no cross-examination was sought in other cases. Rather, CW-1’s cross-examination in the above three complaint cases was adopted. There appears no specific denial of the aforesaid factual position. However, we find that neither the High Court nor the learned Magistrate has taken notice of the aforesaid position. Both the courts below thus failed to consider whether in the facts of the case under the proviso to sub-section (1) of Section 256, the court could proceed with the matter after dispensing with the attendance of the complainant. Further, if the complainant had not appeared to press the application under Section 311 of the Code, the learned Magistrate could have rejected the application under Section 311 of the Code and proceeded with the case on basis of the available evidence. We are, therefore, of the considered view that the learned Magistrate was not justified in straight away dismissing the complaint(s) and ordering acquittal of the accused on mere nonappearance of the complainant. The High Court too failed to take notice of the aforesaid aspects. Thus, the orders impugned are liable to be set aside.

14. For the reasons above, the order(s) of the High Court as well as of the learned Magistrate are set-aside. The proceedings shall stand restored to their original number(s) on the file of the learned Magistrate and the prosecution shall now proceed from the stage where it was when the order of acquittal/dismissal of the complaint(s) was passed.”

16. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, the present appeal is

allowed, order dated 20.04.2026 is quashed and set aside and criminal case No.84 of 2024, titled **M/s Roop Hardwares Vs. Joginder Singh**, is ordered to be restored to its original number and position, with a direction to learned Court below to proceed with the trial from the stage, it was dismissed.

17. Learned counsel representing the parties undertake to cause presence of their respective clients before the learned Court below on **15.07.2026**, enabling Court below to proceed with the matter.

Pending applications, if any, also stand disposed of.

July 03, 2026
Rajeev Raturi

(Sandeep Sharma),
Judge