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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

Crl.Rev.Pet.No. 1110 of 2015

AGAINST THE JUDGMENT IN CRA 45/2008 of THE SESSIONS COURT,
THALASSERY DATED 20-01-2015

AGAINST THE JUDGMENT IN ST 5359/2004 of
J.M.F.C., KUTHUPARAMBA DATED 11-01-2008

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

KALLACHI MAMMU

S/O.KUNHEED, KALLACHI HOUSE, KUPPADITHARA AMSOM DESOM
PUTHUSSERIKDAU P.O., WYTHIRI TALUK, WYNAD DISTRICT.

BY ADV. SRI.CIBI THOMAS

RESPONDENT(S)/COMPLAINANT/STATE:

1. V.V.ANDRUMAN

S/O.KADARKUTTY, MASSERAS, KOYILODE AMSOM
MANGATTIDAM DESOM, SANKARANELLOOR P.O.-670121.

2. STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.

R1 BY ADV. SRI.P.SAJU, ADV. SRI.R.SUDHEER

BY ADV. SRI.R.PRATHEESH (ARANMULA)

BY PUBLIC PROSECUTOR R. GITESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 11-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

B.SUDHEENDRA KUMAR, J.

.....
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.....

Dated this the 11th day of September 2015

O R D E R

The short question that arises for consideration is whether a Criminal Appeal once admitted can be dismissed for default due to the absence of the counsel for the appellant.

2. The revision petitioner was the accused in S.T. No. 359 of 2015 on the files of the Court of the Judicial Magistrate of First Class, Kuthuparamba. The trial court convicted the revision petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act') and sentenced him thereunder to simple imprisonment for three months and to pay a compensation of Rs. 75,000/- to the complainant under Section 357 (3) Cr.P.C. Against the said conviction and sentence, the revision petitioner filed appeal. As per the judgment dated 20-1-2015 in Crl.Appeal

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No. 45 of 2008, the Sessions Court, Thalassery dismissed the appeal for default, for the reason that there was no representation for the appellant. Aggrieved by the dismissal of appeal for default, this revision petition has been filed by the accused before the trial court.

3. Heard the learned counsel for the petitioner, the learned counsel for the first respondent and the learned Public Prosecutor.

4. The learned counsel for the revision petitioner has argued that once the criminal appeal is admitted, it cannot be dismissed for default and hence the dismissal of the appeal for default by the appellate court in this case cannot be sustained.

5. Now the question to be considered is as to whether the dismissal of the appeal for default is correct. In this context, it is profitable to analyse the provisions of Sections 385 and 386 of Cr.P.C. which are extracted hereunder:-

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“Sec. 385: Procedure for hearing appeals not dismissed summarily:-

(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given :-

- i) to the appellant or his pleader;
- ii) to such officer as the State Government may appoint in this behalf;
- iii) if the appeal is from a judgment of conviction in a case instituted upon complaint to the complainant;
- iv) if the appeal is under Section 377 or Section 378, to the accused and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal

(2) The Appellate Court shall then send for the record of the case, if such record, is not already available in that Court and hear the parties;

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

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(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground”.

“Sec. 386: Powers of the Appellate Court :- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction -

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or

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- committed for trial, or
- (ii) alter the finding, maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
- (c) in an appeal for enhancement of sentence –
- (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
 - (ii) alter the finding maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
- (d) in an appeal from any other order, alter or reverse such order;
- (e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement;

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Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal”.

6. The plain language of Section 385 makes it clear that if the Appellate court does not dismiss the appeal summarily, it must call for the record from the lower Court. Section 386 IPC mandates that after the record is received, after hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears, the appellate court may dismiss the appeal or dispose of the appeal as provided under Section 386 (b) Cr.P.C. Thus, the plain language of Sections 385 and 386 Cr.P.C. does not contemplate disposal of the appeal for non-prosecution simplicitor. Thus, it is clear from the above provisions that the law envisages the disposal of the appeal only on merits after perusal and scrutiny of the records.

7. The Apex Court in *Parasuram Patel and Another v.*

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State of Orissa [(1994) 4 SCC 664] held that no criminal appeal can be dismissed on the ground of default in appearance and the court has to go through the record of the case even in the absence of the appellants or their counsel and decide the matter on merit.

8. A three Judge Bench of the Apex Court in Bani Singh and Others v. State of U.P. [AIR 1996 SC 2439] held thus:-

“The law clearly expects the Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial Court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial Court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the

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record”.

In Bani Singh (supra), the Apex Court further held thus:-

“The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so”.

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9. The Apex Court in Bani Singh (supra) referred to the scheme of the Code, especially, the relevant provisions of Section 384 Cr.P.C. and observed that if the appeal is already admitted, Section 384 Cr.P.C. which enables the Court to summarily dismiss the appeal is not applicable.

10. The Apex Court in Rishi Nandan Pandit and Others v. State of Bihar [(1999) 8 SCC 644 held that when the counsel engaged by the appellant in a criminal appeal does not turn up, there is no obligation on the Court of appeal to wait for him or even to adjourn the case awaiting his presence and the Court can dispose of the appeal on merits after perusing the records.

11. The Apex Court in Rishi Nandan Pandit (supra) further held thus:-

“As a matter of legal position, the Court is not precluded from perusing the records and come to its own conclusion unaided by any legal practitioner to project the points favourable to the accused, when the

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counsel engaged by them does not turn up to argue. But the three-Judge Bench of this Court indicated in *Bani Singh v. State of U.P.* that it is a matter of prudence that the court may, in an appropriate case, appoint a counsel at the State's expense to argue for the cause of the accused. Of course, it is for the court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could not be disposed of unassisted by counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range, it is advisable to seek the assistance of a legal talent".

12. The Apex Court in *Md. Sukur Ali v. State of Assam* [AIR 2011 SC 1222] held thus:-

"We are of the opinion that even assuming that the

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counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation, the Court should appoint another counsel as Amicus Curiae to defend the accused”.

13. The Apex Court in K.S. Panduranga v. State of Karnataka (AIR 2013 SC 2164) held in paragraph 36 thus:-

“In view of the aforesaid annunciation of law, it can safely be concluded that the dictum in Mohd. Sukur Ali (AIR 2011 SC 1222; 2011 AIR SCW 1352) (supra) to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows

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negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh (AIR 1996 SC 2439; 1996 AIR SCW 2986) (supra), is per incuriam”.

The Apex Court in Panduranga (supra) further held thus:

“From the aforesaid decision, the principles that can be culled out are (i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court (v) that if the accused is in jail and

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cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so and (vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation”.

14. The upshot of the above discussion is that the High Court or the Sessions Court cannot dismiss an appeal in default or for non-prosecution without examining the case on merits. The court is not bound to adjourn the matter if the appellant or his counsel is absent. However, as a matter of prudence or indulgence, the Court may adjourn the matter if there is no

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representation for the appellant, but it is not bound to do so. The appellate court can dispose of the appeal on merits after perusing the records and judgment of the trial court, without appointing any counsel as Amicus Curiae. If the accused is in jail, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused if his lawyer is not present and if the lawyer is absent and if the court deems it appropriate to appoint a lawyer, nothing in law would preclude the court from doing so.

15. In the case on hand, the appeal was not disposed of by the court on merits. In the said circumstances, in view of the proposition of law discussed above, the judgment of the appellate Court is not legal, proper and correct and consequently, the same is liable to be set aside, and I do so.

16. In the result, this Criminal Revision Petition stands allowed, setting aside the judgment of the appellate court in Crl. Appeal No. 45 of 2008 and the matter is remitted to the appellate

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court for fresh disposal of the appeal, in accordance with law, as expeditiously as possible.

The parties are directed to appear before the appellate court on 15-10-2015 without further notice. Since all the parties have representation before this Court, the appellate court need not issue fresh notice to the parties.

Sd/-B.SUDHEENDRA KUMAR,
JUDGE

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P.S. to Judge