

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 286 of 2017

1. Budhwar S/o Shri Amol Das Aged About 68 Years R/o Village- Nanbanka, Police Station- Katghora, District- Korba, Chhattisgarh.
2. Horilal S/o Shri Budhwar Aged About 34 Years R/o Village - Nanbanka , Police Station- Katghora , District - Korba, Chhattisgarh.

---- Applicants

Versus

- State of Chhattisgarh Through The Station House Officer, Police Station- Katghora, District Korba, Chhattisgarh.

For Applicants : Mr. Samir Singh, Advocate.

For Respondent/State : Mrs. M. Asha, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

Order on Board

05-05-2017

1. The short question involved in this revision petition is that whether the appellate Court was justified in dismissing the appeal filed by the accused/appellants against the order of conviction and sentence passed by learned Judicial Magistrate 1st Class Katghora, District Korba, for non-prosecution.
2. This revision petition is directed against the order dated 19-10-2016 passed in Criminal Appeal No. 9 of 2016 by the learned Additional Sessions Judge, Katghora, District Korba, whereby the appeal preferred by the applicants under Section 374 of the Cr.P.C., was dismissed for want of prosecution..
3. Learned counsel appearing for the applicant would submit that the admitted appeal to be heard on merits and it cannot be dismissed for want of prosecution and same must be disposed of on merits

after examining record of case and after giving opportunity of hearing to the appellant. Therefore, the order order 19-10-2016 passed by the court below is illegal and the same be set aside. He placed reliance on **1996 (3) Crimes 54 (SC), Supreme Court of India in the matter of Bani Singh & others Vs. State of UP.**

4. Perusal of the record would show that the applicants were convicted by judgment of conviction and order of sentence dated 30-11-2016 passed by Judicial Magistrate First Class, Katghora in Criminal Case No. 161 of 2009 wherein the applicants were convicted under Sections 452 and 323 of the IPC and sentenced to undergo RI for two years and to pay fine of Rs.700/- each in default of payment of fine to undergo additional SI for 15 days and RI for one year and to pay fine of Rs.300/- each, in default of payment of fine to undergo additional SI for seven days and both the sentences were directed to run concurrently.
5. The aforesaid appeal was preferred before the Additional Sessions Judge, Katghora which was pending for final adjudication and on 19-10-2016 the appeal was dismissed for want of prosecution. The order sheet would show that on 19-10-2016 neither the applicants were present nor their counsel was present and the case was dismissed for want of prosecution.
6. The settled proposition of law is that criminal cases of like nature cannot be dismissed for want of prosecution and if the appellants themselves are not present, the court was under duty to issue arrest warrant or bailable warrant as the case may be on its discretion. In absence of counsel of the appellants, the accused cannot be left unheard and condemned without any hearing and in such cases, legal aid is to be provided to the accused/appellants.

7. Hon'ble the Supreme Court in the matter of **Bani Singh and others (supra)** has held that “once the appellate Court has admitted appeal to be heard on merits, it cannot dismiss appeal for non-prosecution for non-appearance of appellant or his counsel and the appeal must be disposed of on merits after examining record of case and after giving a hearing to the appellant or his counsel if he is present, and to public prosecutor before disposal of appeal on merits. Section 385 provides for a notice of time and place of hearing of appeal to be given to either the appellant or his pleader.

Relevant paras are quoted as under:

“13. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo's case appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of [Section 385](#) makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and [Section 386](#) mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of [Sections 385-386](#) does not contemplate dismissal of the appeal for non-prosecution simplicitor. On the contrary, [the Code](#) envisages disposal of the appeal on merits after perusal and scrutiny of the record. 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 record.

14. Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. [Section 385](#) posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. [Section 386](#) then provides that the Appellate Court shall, after perusing the record, hear the appellant or his pleader, if he

appears. It will be noticed that [Section 385](#) provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also [Section 386](#) provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement [of the Code](#) on a plain reading of [Sections 385-386](#) of the Code. 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. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case did not apply the provisions of [Sections 385-386](#) of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

15. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again , till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted”.

8. In view of law laid down by the Supreme Court in Bani Singh (supra), I am of the considered opinion that the appellate Court erred in dismissing the criminal appeal preferred by the appellants for non-prosecution simplicitor without examining the merits. I therefore, set aside the the order dated 19-10-2016 passed by the court below.
9. Accordingly, the revision petition is allowed and the case is remitted back to the appellate Court for fresh adjudication of the appeal on merits and the appellate Court shall decide the same on its merits after giving opportunity of hearing to the appellants.
10. The applicants shall appear before the appellate Court on 24-7-2017.

Sd/-
(Goutam Bhaduri)
Judge

Raju

HEAD NOTE

“Criminal Appeal cannot be dismissed for want of prosecution”.

क्रिमिनल अपील अदम पैरवी में खरिज नहीं की जा सकती ।

(R. SATYANARAYANA RAJU)
Deputy Registrar