

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 3795 OF 2017

Mrs. Neelam Sachin Chaubal & Ors.

..Petitioners

v/s.

State of Maharashtra

..Respondent

Mr.Milind Achyut Kale for the Petitioner.

Mr.M.R.Tidke, APP for the Respondent-State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : OCTOBER 03, 2017.**

P.C.

1. Rule. Rule made returnable forthwith.
2. The petitioners herein have challenged the Order dated 19th August, 2017 whereby the learned Addl. Sessions Judge, Thane has dismissed the appeal against conviction for want of arguments of the learned Counsel for the petitioners/appellants.
3. Heard learned Counsel for the petitioners and the learned APP for the State. Perused the record and considered the submissions advanced by the learned Counsels for the respective parties.
4. By judgment dated 25th November, 2016 the learned JMFC.

Thane, convicted the petitioner herein for offences under Section 384 r/w. 34 of the Indian Penal Code and sentenced to undergo imprisonment for 6 months. The petitioners had challenged the said conviction and sentence in Appeal No. 210 of 2010. The appeal was fixed for hearing on 19th August, 2017, on which date the appellants changed their Advocate and the newly appointed advocate filed an application for adjournment on the ground that he was unable to proceed with the matter at a short notice. The learned Judge observed that the appeal was fixed for final hearing and that the appeal could not be disposed of due to constants adjournments sought by the appellants-petitioners herein. The learned Sessions Judge therefore held that the no sufficient grounds were made out to adjourn the appeal. The learned Judge therefore dismissed the application for adjournment and further dismissed the appeal for want of arguments.

5. The question for determination is whether the Judge was justified in dismissing the appeal against order of conviction and sentence for non prosecution. In this regard it would be advantageous to refer to the decision in ***Bani Singh & Ors. vs. State of U.P. (1996) 4 SCC 720*** wherein the three Judge Bench of the Apex

Court while considering the scope of Section 385 and 386 has held thus:-

“14....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 Section 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 the 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 record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

15. 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 presummably 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 case did not apply the provision of Section 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.”

6. In view of the above principles laid down by the Apex Court, the appeal arising from the order of conviction could not have been dismissed for want of arguments or non prosecution. The learned Judge was under obligation to decide the appeal on merits. Under the circumstances, the impugned order cannot be sustained. Hence the Order.

- i) Rule made absolute in terms of prayer clause (a).
- ii) The impugned order dated 19th August, 2017 is quashed and set aside.
- iii) The appeal is restored to the file.
- iv) The learned Addl. Sessions Judge, Thane is directed to decide the appeal in accordance with law.
- v) The appellants-petitioners herein are directed to appear before the learned Addl. Sessions Judge, Thane on 30th October, 2017 at 11.a.m.

(ANUJA PRABHUDESSAI, J.)