

HON'BLE SRI JUSTICE P. KESHA RAO

CRIMINAL REVISION CASE No.1361 of 2018

AND

I.A.No. 1 of 2018

COMMON ORDER:

Heard the learned counsel for the petitioner as well as the learned Public Prosecutor appearing for the respondent State.

The present criminal revision case is filed aggrieved by the order dated 28.03.2018 passed by the Principal Sessions Judge, Mahabubnagar, dismissing CrI.A.No.34 of 2018 for non-prosecution.

The facts of the case are that the petitioner herein was originally charged for the offence under Section 498-A IPC and Section 4 of the Dowry Prohibition Act. After trial, the petitioner was convicted vide judgment dated 23.01.2018 in C.C.No.852 of 2013 by the Court of the Judicial Magistrate of First Class, Mahabubnagar. Aggrieved by the said judgment, the petitioner filed an appeal being CrI.A.No.34 of 2018 on the file of the Principal Sessions Judge, Mahabubnagar. The said appeal was posted to 28.03.2018 for hearing. However, as there was no representation on behalf of the petitioner and as the petitioner was called absent, the appeal was dismissed for non-prosecution by order dated 28.03.2018. Aggrieved by the said order, the present criminal revision case is filed.

Learned counsel for the petitioner appearing for the petitioner, without going into the merits of the case, would

contend that on a fateful day i.e., on 28.03.2018 as the petitioner was suffering with viral fever, he could not attend the appellate Court. Even though the matter was passed over during the time of call work and when it was taken up, though the counsel has represented the matter, the Court taking into account the fact that the petitioner was not present in the Court, dismissed the appeal for non-prosecution. Therefore, learned counsel would submit that the appeal would not have been dismissed for non-prosecution, as the counsel was already present and ready to argue the matter. He further contended that when the appeal is listed for hearing, a dismissal simplicitor i.e., dismissed for default or dismissed for non-prosecution is not called for and the appeal has to be disposed of on merits. To substantiate his contentions, he relied on the judgment of the Apex Court in **G. Raj Mallaiah and another v. Sate of A.P.**¹. The relevant portion is as under:

“We may notice a decision of this Court in *Bani Singh vs. State of U.P.* (AIR 1996 SC 2439) in which a bench of three judges considering the scope of Sections 385 and 386, Cr.P.C. took the view that while dealing with an appeal under the Code, both the appellant and his lawyer if absent on the dates set down for hearing, the Court is not bound to adjourn the case and may dispose of the appeal on merits and dismissal of the appeal simplicitor for non-prosecution is not contemplated. In the aforesaid decision, it is also noticed that by adopting this procedure if a case is decided on merits in the absence of the appellant or his advocate, the higher Court can remedy the situation if there has been a failure of justice. In the present case the case was set down for hearing on different dates without notifying the names of the advocates appearing for the appellant, but showing the name of the advocate who had retired from the case. Therefore, it could not be stated that the appellant or his advocate had notice of hearing of the case on the dates set down for hearing. Hence, we must

¹ 1998 (2) ALT (Gr.) 63 (SC)

hold that the decision in the case without hearing the appellants or their advocate has resulted in miscarriage of justice and the principle stated in the decision in *Bani Singh vs. State of U.P.* (1 supra) does not come in the way of the view we have expressed in this case.”

A perusal of the impugned order would indicate that it is a dismissal simplicitor. In fact, the Apex Court while considering the scope of Sections 385 and 386 Cr.P.C. has taken a view while dealing with an appeal under the Code that even though the appellant and his lawyer are absent on the dates set down for hearing, the Court is not bound to adjourn the case and may dispose of the appeal on merits and dismissal of the appeal simplicitor for non-prosecution is not contemplated. In view of the same, the impugned order passed by the lower appellate Court is not sustainable in law.

Accordingly, the criminal revision case is allowed setting aside the order dated 28.03.2018 of the lower appellate Court dismissing Crl.A.No.34 of 2018 for non-prosecution. Consequently, the lower appellate Court is directed to take up the appeal on record, re-hear the same and pass appropriate orders by giving prior intimation to the counsel for the petitioner.

After the orders are pronounced, it is informed by the counsel for the petitioner that in view of dismissal of the appeal, NBWs were issued against the petitioner and he was arrested and produced before the Judicial Magistrate of First Class, Mahabubnagar, on 27.04.2018 and remanded to judicial custody.

In these circumstances and more so in the light of setting aside of the impugned order dated 28.03.2018, the petitioner shall be enlarged on bail subject to furnishing a personal bond for a sum of Rs.10,000/- (Rupees Ten thousand only) with two sureties for a like sum to the satisfaction of the Judicial Magistrate of First Class, Mahabubnagar.

Accordingly, I.A.No.1 of 2008 is ordered.

Miscellaneous petitions, if any, shall stand closed.

Date: 06.06.2018.
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P. KESHA RAO, J