

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 702 of 2008**

- Bholu Yadav, S/o. Jhabbu Yadav, Aged about 35 years, R/o. Kunya, PS Kamleshwarpur, District Surguja (CG)

---- Applicant**Versus**

- State Of Chhattisgarh, Through the District Magistrate Surguja, Ambikapur (CG)

---- Respondent

For Applicant	: Shri A.K.Prasad, Advocate
For Respondent No.	: Shri Anil Tripathi, PL

Hon'ble Smt. Justice Rajani Dubey**Order On Board****05/09/2019**

Applicant has filed this revision against the order dated 15.10.2008 passed by the Sessions Judge, Ambikapur in unregistered Mis. Criminal Case whereby the learned Sessions Judge has dismissed the appeal preferred by the applicant for want of prosecution and also dismissed the application filed for restoration of the Criminal Case No. 99/08 vide order dated 15.10.2008.

2. Brief facts of the case are that the applicant was prosecuted for the offence punishable under Section 279 and 338 IPC. Learned trial court after recording evidence of the prosecution, convicted and sentenced the applicant under Sections 279 and 338 IPC to undergo RI for three months and two months with fine of Rs. 100/- on each

count plus default stipulation. This order was appealed by the applicant which was dismissed by the appellate court for want of prosecution vide order 17.09.08.

3. Counsel for the applicant filed application for restoration of appeal No. 99/08 which was also dismissed by the Sessions court on the ground that the application is not maintainable for restoration of appeal. Hence the present revision.

4. Counsel for the applicant submits that both the orders are contrary to facts, law and circumstances of the case. The court below have committed error in law while dismissing the application for restoration in which prayer has been made to hear the appeal on merits and it cannot be dismissed for want of prosecution and the same must be disposed of on merits after examining the record of the case and giving opportunity of hearing to the applicant, thus, the impugned order is illegal and the same be set aside. He placed his reliance in the matter of **Bani Singh and Others Vs. State of UP (1996 (3) Crimes 54 (SC))** and in this Court's order dated 05.05.2017 in **Cr.Rev. No. 296 of 2017 (Budhwar and Another Vs. State of Chhattisgarh)**.

5. On the other hand, State counsel has also placed reliance on the same judgment.

6. Heard counsel for the parties and perused the material available on record.

7. It is clear from the record of the case that the applicant was convicted by judgment of conviction and order of sentence dated

17.07.08 passed by the Judicial Magistrate First Class, Sitapur, district Surguja in Cr. Case No. 577/2007 wherein the applicant was convicted for the offence under Sections 338 and 279 IPC and sentenced to undergo SI for three months u/Ss. 338 and two months u/s. 279 IPC. This order was appealed by the applicant on 15.10.2008 when the applicant and his counsel were absent. Learned Sessions Judge dismissed the appeal for want of prosecution.

8. It is a settled proposition of law 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 for 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/applicants.

9. Hon'ble Apex Court in the matter of **Bani Singh and Others** (supra) has held that "once the appellate court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for non-appearance of the 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, ant 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 read 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. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

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. “

The law requires that the dismissal of the appeal shall depend on the exercise by the Judge of his independent and impartial mind after reading the copy of judgment and not upon the failure of the accused to press his appeal. It is therefore, clear that the duty of the appellate court is to examine the appeal under challenge and to consider the same on merits of the case before dismissing the same summarily.

10. 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 order dated 19-10-2016 passed by the court below.

11. 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 applicant. Applicant shall appear before the appellate court on 11th March 2020. Accordingly, the revision petition is allowed.

Sd/-

(Rajani Dubey)
Judge