

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.RC.No.742/2019

A.Subash

... Petitioner/Appellant/ Accused

Vs

J.Aranganathan

... Respondent /Respondent/Complainant

Prayer:- This Criminal Appeal is filed under Section 397 and 401 of Cr.P.C, to call for the records on the file of the learned III Additional District and Sessions Judge, Vellore @ Thiruppathur, Vellore District in Crl.A.No.2/2018 dated 04.06.2019, confirming the judgment passed in S.T.C.No.265/2017 on the file of the learned Additional District Munsif cum Judicial Magistrate, Ambur, Vellore District dated 18.12.2018 and set aside the judgment dated 04.06.2019.

For petitioner : Mr.E.Kannadasan

For Respondent : No appearance

JUDGEMENT

- 1.This Criminal Revision Petition has been filed by the petitioner/ accused . against the judgement dated 04.06.2019, made in Crl.A.No.2/2018, by the III Additional District and Sessions Judge, Vellore @ Thiruppathur, Vellore District, dismissing the Appeal for default and confirming the judgement passed in S.T.C.No.265/2017 on the file of the learned Additional District Munsif cum Judicial Magistrate, Ambur, Vellore District dated 18.12.2018 and set aside the judgement dated 04.06.2019.
- 2.This court heard the learned counsel for the petitioner and also perused the materials placed on record.
- 3.The facts, in a nutshell, are that the petitioner/accused is well acquainted to the respondent/complainant, the petitioner/accused had borrowed a sum of Rs.1,50,000/- from the

complainant on 09.09.2016 and on the same day, he had executed a promissory note and agreed to pay interest at the rate of Rs.2 per month per Rs.100/-. On repeated demands, in order to discharge the said loan amount, the petitioner/accused had issued a post dated cheque on 15.02.2017 bearing No.047737 drawn on HDFC Bank, Ambur Branch, dated 15.03.2017 and when the said cheque was presented for collection on 15.03.2017, it was returned unpaid on the ground of 'Account Closed' on the same day. Hence, a legal notice, dated 01.04.2017, came to be issued by the complainant and the said legal notice was received by the petitioner/accused on 04.04.2017 and thereafter, the petitioner/accused sent a reply notice dated 12.04.2017 with false allegations and did not choose to pay the cheque amount. Hence, the complainant filed a complaint under Section 200 of Cr.P.C against the accused for the offence punishable under Section 138 of Negotiable Instrument Act.

4. The complaint was taken up in STC.No.265/2017 by the trial Court and the sworn statement was recorded. After appearance of the petitioner/accused, the trial court furnished copies under Section 207 of Cr.P.C to the accused and thereafter, questioned the accused by explaining the offence. But the accused denied the offence. Thereafter, the complainant was examined as PW1 and the chief examination by proof affidavit filed was in consonance with the written complaint. Through PW1, Ex.P1 to Ex.P8 were marked. The evidence of complainant side was closed with PW1. When the incriminating circumstances were explained to the accused under Section 313(1)(b) of Cr.P.C., the accused denied the same and he himself examined as DW.1 and his pass book was marked as Ex.R:1, and further evidences of DW.2 and DW.3 were recorded. Based on the complaint, evidence on both side, documents and answers given by the accused during the trial, the trial Court found that the complainant has proved his case found the accused guilty of an offence under section 138 of NI Act and convicted as per Section 255(2) of Cr.P.C and sentenced to undergo simple imprisonment for 3 months and to pay a fine of Rs.1,50,000/- towards compensation within two months from the date of that judgement and in default to pay fine directed to undergo 2 months simple imprisonment. Against the said judgement of conviction and sentence, the petitioner/accused has preferred an appeal under Section 374(3) of Cr.P.C. The appeal was numbered as Crl.A.No.2/2018, admitted and notice was ordered to the respondent/complainant and the respondent/ complainant had entered appearance through his counsel. On 04.06.2019, the matter had come up for hearing, the learned Appellate Judge, finding that notice was served on the appellant and finding that the appellant was absent, had dismissed the appeal for default. Against which, the present revision has been filed.

5. Notice was ordered to the respondent/complainant. The petitioner had taken private notice and the proof of service has also been filed. Finding that there was no representation for the respondent, this court had directed the Registry to print the name of the respondent/complainant in the cause list, thereby the name of the respondent was also printed in the cause list. There is no appearance for the respondent/complainant.
6. This court heard the submissions of the learned counsel for the petitioner and perused the materials available on record.
7. It is seen from the order that the criminal appeal has not been decided on merits and the appeal has been dismissed for default. The present revision has been filed against the dismissal of the criminal appeal for default.
8. The learned counsel for the revision petitioner would submit that once a criminal appeal is admitted, it cannot be dismissed for default. Hence, the dismissal of the criminal appeal for default by the Appellate court is wrong and has to be set-aside. He would submit that the plain language of Section 385 of Cr.P.C. makes it clear that the disposal of the criminal appeal can be only on merits, after perusal and scrutiny of the records.
9. The learned counsel would further submit that the Court should not decide a criminal case against the accused even 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 situation, the Court should appoint another learned counsel as Amicus Curiae to defend the accused.
10. Now the question to be considered is as to whether the dismissal of the appeal for default is correct. In this context, it is apposite to refer and analyse the provisions of Sections 385 and 386 of Cr.P.C., which are extracted hereunder:-
- "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.

(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 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;

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".

11. 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.

12. The Apex Court in *Parasuram Patel and Another v. State of Orissa* reported in [(1994) 4 SCC 664] has 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.

13. In a later decision in *Bani Singh and Others v. State of U.P.* Reported in [AIR 1996 SC2439] a three Judge Bench of the Hon'ble Apex Court 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 record".

It has been further held that :-

"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".

14. The Hon'ble Apex Court in the above judgment had referred to the scheme of the Code, especially, to Section 384 - 386 of Cr.P.C. and observed that if the appeal is already admitted, Section 384 of Cr.P.C., which enables the Court to summarily dismiss the appeal is not applicable.
15. Further, the Apex Court in a later decision in Rishi Nandan Pandit and Others v. State of Bihar reported in [(1999) 8 SCC 644] has 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.

It has been 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 CrI.R.P. No.1110 of 2015 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".

16. Later the Apex Court in *Md. Sukur Ali v. State of Assam* [AIR 2011 SC 1222] has held thus:-

"22. We reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practising on the criminal side as *Amicus Curiae* and decide the case after fixing another date and hearing him".

17. The law culled out from the above discussion is that the High Court or the Appellate Court, cannot dismiss the appeal for default or for non-prosecution, without examining the case on merits. Though the court is not bound to adjourn the matter if the appellant or his counsel is absent, the Appellate Court can dispose of the appeal on merits after perusing the records and judgment of the Trial court without appointing any learned counsel as *Amicus Curiae*. If the accused is in jail, it would be proper for the Appellate Court, to adjourn the case and fix the date for facilitating the appearance of the accused and if his lawyer is not present and if the lawyer is absent, the appellate court should deem it appropriate to appoint a lawyer for the appellant and nothing in law prevents and the Court from doing so.

18. In the present case, it is seen that the appeal has not been disposed of by the Appellate Court on merits and it has been dismissed for default. In view of the prepositions of law discussed above this Court finds that the judgement of the Appellate Court is erroneous and illegal and thereby the same is liable to be set-aside.

19. In the result, the present criminal revision petition stands allowed and the order passed in Criminal Appeal No.2/2018 dated 04.06.2019 by the learned III Additional District and Sessions Judge, Vellore @ Thiruppathur, Vellore District is set-aside and the matter is remanded back to the Appellate Court for fresh disposal of the appeal in accordance with law, as expeditiously as possible. The appellant/ revision petitioner is directed to appear before the Appellate Court on 01.11.2019 without further notice. Since the respondent is not represented before this Court, the Appellate Court is directed to issue fresh notice to the respondent/complainant and his learned counsel, who represent him in the appeal.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To:

1. The III Additional District and Sessions Judge,
Vellore @ Thiruppathur, Vellore District.
2. The Additional District Munsif cum Judicial Magistrate,
Ambur, Vellore District.

+lcc to Mr.E.Kannadasan, Advocate Sr.86355

Cr1.RC.No.742/2019

srg 21/10/2019



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