

**AFR****HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 22-09-2021****Pronounced on 23-11-2021****CRMP No. 802 of 2020**

- Basant Kumar Katariya S/o Shri Champalal Aged About 59 Years Proprietor Rishab Builders, R/o Rishab Nagar, Durg, Tahsil And District- Durg, Chhattisgarh.,

**---- Petitioner****Versus**

- Amjad Ali S/o Shri Khadar Ali Aged About 39 Years R/o House No. R-13, Rishab Green City, Pulgaon Naka Durg, Tahsil And District- Durg, Chhattisgarh.,

**---- Respondent**


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| For Petitioner | : Shri P.R. Patankar, Advocate   |
| For respondent | : Shri Rahul Tamaskar, Advocate. |

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**Hon'ble Shri Justice Narendra Kumar Vyas****C.A.V. ORDER**

1. The petitioner has filed present Cr.M.P assailing the order dated 31-1-2020 passed by Second Additional Judge to the Court of 1st Additional Sessions Judge, Durg in Criminal Appeal No. 48 of 2020 whereby learned Second Additional Sessions Judge, Durg has dismissed the appeal filed by the petitioner for want of prosecution.
2. The brief facts as projected by the petitioner are that the petitioner has filed a complaint on 13-8-2015 against respondent stating that the respondent Amjad Ali had issued a cheque drawn by Allahabad Bank New Khursipar Bhilai bearing cheque No. 63225 dated 27-10-2010 for Rs.10,00,000/- to the petitioner and when petitioner deposited said cheque in the bank, same was dishonoured on account of insufficient funds in the bank on account of the

respondent. Thereafter the petitioner filed a complaint under Section 138 of Negotiable Instruments Act, 1881 against the respondent was registered as criminal complaint No. 3837 of 2015. Learned Judicial Magistrate First Class, vide its order dated 21-11-2019 has allowed the complaint filed by the petitioner and convicted the accused/respondent as allegation made against the accused for dishonour of cheque dated 27-10-2010 for Rs.10,00,000/- was found proved and directed the accused to pay Rs.1,00,000/- as compensation to the complainant, in default of payment of compensation, to undergo simple imprisonment for one month and twenty days.

3. Being aggrieved by the said order to the extent in not granting adequate compensation, respondent filed an appeal before the Sessions Judge, Durg, contending that as per Section 138 of the Negotiable Instruments Act, 1881, if commission of offence of dishonour of cheque found proved then the accused is liable to pay the double amount of compensation whereas the learned Judicial Magistrate has only granted Rs.1,00,000/- as compensation, therefore, it is clear violation of Section 138 of the Act, 1881. The appeal was filed before the learned Sessions Judge, Durg on 7-1-2020 thereafter learned Sessions Judge, Durg directed for registration of the case and fixed the case for preliminary arguments on 16-1-2020. On that day the learned Sessions Judge, Durg transferred the case to Second Additional Judge to the Court of First Additional Sessions Judge, Durg. . The learned appellate Court fixed the case for motion hearing on 24-1-2020. On that day the appellant was absent, therefore, the case was adjourned to 31-1-2020 and on

31-1-2020 since the appellant and his counsel were absent the appellate Court dismissed the appeal for want of prosecution. This order is being challenged by the petitioner before this court by filing present petition under Section 482 of Cr.P.C.

4. Learned counsel for the petitioner would submit that the impugned order dated 31-1-2020 passed by the court below in Criminal Appeal No. 48 of 2020 is contrary to law, facts and circumstances of the case. The learned court below ought to have appreciated that on 16-1-2020 the case was fixed for preliminary arguments, but as there was strike of the Advocates, nobody could appear and the next date was neither known to the petitioner nor to his counsel, therefore, appeal should not have been dismissed for want of prosecution. He would further submit that it is settled law that for the mistake committed by the Advocate the litigant ie., present petitioner should not suffer.. There was no deliberate negligence on the part of the petitioner or his counsel for non prosecuting his case properly and as such the petitioner should not have been punished. He would further submit the cheque was of Rs.10,00,000/- (Rupees Ten lakhs) whereas the petitioner was only awarded compensation of Rs.1,00,000/- (Rupees one lakh) for which he has preferred an appeal as Section 372 of Cr.PC requires to be heard on merits, therefore, the impugned order dated 31-10-2020 is *per se* illegal, and deserves to be set aside and the appeal requires to be restored to its original number for further hearing on merit.
5. On the other hand, learned counsel for the respondent supports the impugned order.

6. The point required to be considered by this court is whether the learned Appellate Court can dismiss the criminal appeal filed by the complainant for enhancement of sentence for want of prosecution in absence of complainant/appellant or his counsel?.
7. Before advertng to the facts of the case, it is expedient for this court to examine the scheme of Cr.P.C while hearing the criminal appeal. The relevant Sections 384, 385 and 386 of Cr.P.C. are necessary which are extracted herein-below for ready reference.

**“384. Summary dismissal of appeal.**

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law.

**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.

**386. Power 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 or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried 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”.

8. From bare perusal of the order dated 31-1-2020 it is evident that the learned Appellate Court has not decided the appeal on merit but has dismissed the appeal at the admission stage without going into the merits of the case the appeal has been dismissed for want of prosecution which is glaring mistake on the part of the Appellate court as even if the complainant or counsel is absent before the court on the date of hearing, the appellate court should have decided the appeal on merit as held by Hon'ble Supreme Court in **Bani Singh and others vs. State of Uttar Pradesh, reported in (1996) 4 SCC 720** in paras 14, 15, 16 and 17 which are extracted herein-below for ready reference.

“14. 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.

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 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.

16. 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.

17. In view of the position in law explained above, we are of the view that the High Court erred in dismissing the appeal for non-prosecution simpliciter without examining the merits. We, therefore, set aside the impugned order and remit the appeal to the High Court for disposal on merits in the light of this judgment. The appeal will stand allowed accordingly.

9. Hon'ble Supreme Court in **K.S. Panduranga vs. State of Karnataka**, reported in (2013) 3 SCC 721, has held in para 32 which is extracted herein-below for ready reference.

“32. In view of the aforesaid annunciation of law, it can safely be concluded that the dictum in Mohd. Sukur Ali (supra) to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh (supra), is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to

say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the obtaining factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with”.

- 10.** Very recently, Hon'ble the Supreme Court in **Sakunthala vs. State represented by the Inspector of Police** decided on 8-7-2020 in Criminal Appeal No. 474 of 2020 (arising out of SLP (Cri) No. 3031 of 2020) has held as under:

“Mr. Thomas Franklin Caesar, learned counsel appears on behalf of the appellant. He has submitted before us that given judgment in K.S. Panduranga vs. State of Karnataka (2013) 3 SCC 721, an appeal against an order of conviction cannot be dismissed in default but must be taken up and decided on merits even if the appellant in person or the counsel representing him, is not present”.

- 11.** Considering all the facts and circumstances of the case, material available on record and in view of the legal position, it is clear that the appellate Court has committed illegality and irregularity in dismissing the criminal appeal without examining the record of the case, therefore, the order dated 31-1-2020 passed in Criminal Appeal No. 48 of 2020 is liable to be and is hereby set aside, Criminal Appeal No. 48 of 2020 be restored to its original number and thereafter, the appellate Court shall decide the appeal on its own merits.
- 12.** Accordingly, the matter is remanded back to the court of 1st Additional Sessions Judge, Durg for adjudicating the matter afresh. It is directed that the appellate Court after giving proper opportunity of

hearing to both parties and after considering the material on record, record of the trial court, shall decide the appeal on its merits. It is made clear that this Court has not expressed any opinion on the merits of the case. The appellate Court shall list the appeal on admission. The petitioner is directed to appear before the appellate Court on 21-12-2021. The record of this case be sent immediately to the appellate Court.

- 13.** In view of aforesaid observation and direction, present CRMP is allowed.

**Sd/-  
(Narendra Kumar Vyas)  
Judge**

Raju