



CRL.A.No.295 of 2021

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D.Bharatha Chakravarthy, J.

Today this matter was listed under the caption of “Being mentioned” in an additional list and it was taken up at the instance of the learned counsel for the Appellants.

2.It is seen that there is an inadvertent error has been occurred in the order dated 05.07.2021 in Crl.A.No.295 of 2021, the fourth line of the paragraph No.13, where the words must be included as “2 & 3” after the word “appellants”.

3.Registry is directed to carry out the necessary corrections in the said paragraph No.13, and issue fresh copy of the Judgment to the parties concerned.

21.07.2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.07.2022

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THE HONOURABLE Mr. JUSTICE D.BHARATHA CHAKRAVARTHY

CRL.A.No.295 of 2021

and

Crl.M.P.Nos.6173 & 6174 of 2021

1.M/s.R.K.Emu Farms,
No.2/216, Pattakaranpalayam
Perundurai Taluk,
Erode District,
Represented by the petitioner 2 and 3.

2.R.Kannusamy

3.P.Mohanasundaram .. Appellants/Accused 3, 4 and 5

Vs.

State Represented By
Inspector of Police,
Economic Offences Wing-II, Erode,
Crime No.1005 of 2012

.. Respondent /Complainant

Prayer: Criminal Appeal filed under section 374(2) of the Code of Criminal Procedure, 1973, to set aside order of conviction dated 11.12.2020 in C.C.No.07 of 2014 on the file of the Special Judge, Special Court under TNPID Act, Coimbatore.

For Appellants	:	Mr.M.Guruprasad
For Respondent	:	Mr.S.Vinoth Kumar Government Advocate



JUDGMENT

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This appeal is filed as against the judgment of the Special Judge, Special Court under TNPID Act, Coimbatore, dated 11.12.2020, in C.C.No.07 of 2014, in and by which, the first appellant firm and the second and third appellants being its partners were found guilty for the offences under Sections 120B, 420 and 406 IPC and Section 5 of the TNPID Act and imposed the sentence as below:

- *A1, namely M/s.R.K.Emu Farms to pay fine of Rs.10,000/- for each offences and each counts under Sec.420 and 406 of I.P.C. and Sec.5 of TNPID Act (10,000 x 3 x 110 = Rs.33,00,000/-). The A2 and A3 shall pay the fine amount equally imposed on the 1st Accused Firm, in default of payment of fine by A2 and A3, they should undergo further period of 1 year simple imprisonment for each offences;*
- *A2 and A3 each to undergo two years simple imprisonment and to pay fine of Rs.10,000/- for each counts (10,000 x 110 x 2 accused) = Rs.22,00,000/-) under Sec.120B of I.P.C., in default of payment of fine to undergo further one year simple imprisonment;*
- *A2 and A3 each to undergo three years simple imprisonment*



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and to pay fine of Rs.10,000/- for each counts (10,000 x 110 x 2 accused) = Rs.22,00,000/-) under Sec.406 of I.P.C., in default of payment of fine to undergo further one year simple imprisonment;

- A2 and A3 to undergo three years simple imprisonment and to pay fine of Rs.10,000/- for each counts (10,000 x 110 x 2 accused) = Rs.22,00,000/-) under Sec.420 of I.P.C., in default of payment of fine to undergo further one year simple imprisonment.*

- A2 and A3 to undergo ten years simple imprisonment and to pay fine of Rs.10,000/- for each counts (10,000 x 110 x 2 accused) = Rs.22,00,000/-) under Sec.5 of T.N.P.I.D. Act, 1997, in default of payment of fine to undergo further one year simple imprisonment. Total fine amount Rs.1,21,00,000/-. A2 and A3 has to pay fine Rs.60,50,000/- each.*

- Out of the said total fine of Rs.1,21,00,000/-, a sum of Rs.1,20,00,000/- shall be distributed to the victims Pw2 to Pw105 as per their respective dues mentioned in the final report proportionately, after appeal time is completed.*

- The sentences shall run concurrently.*



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- *The imprisonment has already undergone by A2 and A3, if any, shall beset off as per Sec.428 of Cr.P.C. No material object available for orders.*

2. Aggrieved by the same, the present appeal is laid before this Court.

When the appeal came up for hearing, the learned counsel for the appellants pointed out the facts that in this case, when the matter came up for arguments on 08.12.2020, the learned counsel representing the accused was not present and without hearing the arguments on behalf of the accused and without appointing any Amicus Curiae, the Trial Court proceeded to hear the learned Public Prosecutor and decided the issue and found the accused guilty. Therefore, in the absence of any counsel representing the accused and as there was nobody to represent the perspectives of the accused, therefore, the conviction is erroneous. In support of his submissions, the learned counsel relied on the judgments of the Hon'ble Supreme Court in the case of **Mohd.Sukur Ali Vs. State of Assam** reported in (2011) 4 SCC 729, **K.S.Panduranga Vs. State of Karnataka** reported in (2013) 3 SCC 721 and the latest judgment of the Hon'ble Supreme Court in **Subedar Vs. State of Uttar Pradesh** reported in (2020) 17 SCC 765. He would submit that therefore, in view of the above judgments, it is the right of



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the accused to be represented by a counsel and without the counsel being heard, the decision made by the trial Court is liable to be set aside.

3.The learned counsel brought to the notice of the Court that there is yet another factor that on behalf of the appellants/accused, an application was filed under Section 311 Cr.P.C., to recall some of the witnesses, who are not cross examined originally. The Trial Court allowed the said application with a condition to deposit a sum of Rs.50,00,000/- and later, the same was dismissed as the condition was not complied. The same was challenged by filing a petition under Section 482 Cr.P.C. before this Court and this Court also confirmed the same. Even though the appellants/accused had filed an appeal by way of a Special Leave Petition before the Hon'ble Supreme Court, before the same could be numbered, the judgment was pronounced and therefore, he would pray that the matter to be remanded back to the Trial Court with an opportunity to cross examine the witnesses, who are not already cross examined.

4.It is also brought to the notice of this Court by the learned counsel for the appellants that pending disposal of the above appeal and pending disposal of



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the suspension of sentence petition, this Court directed the accused to surrender before the Trial Court, pursuant to which, the appellants/accused had surrendered before the trial Court on 29.11.2021 and are under custody. He would submit that the accused were on bail when the trial was conducted and therefore, he would urge that appropriate orders should also be passed for enlarging the appellants/accused on bail in the event of remanding the matter back to the trial Court.

5.Per contra, the learned Government Advocate (Crl.Side) would submit that the Trial Court had in paragraph 31 cited about the repeated opportunities granted to the appellants/accused from the month of March 2020 onwards and only because the counsel for the appellants was continuously absent and did not avail the various opportunities of physical hearing, hearing through video conference, making written submissions through email etc., the Trial Court was finally forced to decide the matter on 08.12.2021, by hearing the learned Public Prosecutor alone. Therefore, the learned Government Advocate would submit that even as per the Hon'ble Supreme Court's judgment produced by the learned counsel for the appellants in **K.S.Panduranga Vs. State of Karnataka**



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reported in **(2013) 3 SCC 721** cited supra, when it is the deliberate attempt made by the counsel for the accused, the course adopted by the trial Court cannot be found fault with.

6.He would submit that in any event the application for recalling the witnesses has become final and has been confirmed by this Court in exercise of its powers under Section 482 Cr.P.C. He would further submit that in this case, it is not that the appellants/accused prayer was not allowed, but they were permitted to deposit a sum of Rs.50,00,000/- which cannot be termed as onerous condition given for the offences under the TNPID Act. The balance amount outstanding is Rs.2crores as per the final report and as a matter of fact, the Trial Court itself has in its judgment found that a sum of Rs.1,10,00,000/- (Rupees one crore and ten lakhs) is further due and the compensation has been awarded. He would further submit, in view of the deliberate protracting of the proceedings, appropriate conditions to be imposed, if they were to be released on bail pending the remand.

7.By way of a reply, the learned counsel submitted that only because the



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judgment was pronounced, the appeal against the order arising of 311 application was not moved. Even taking into account the amount as determined by the Trial Court, a sum of Rs.50,00,000/- would be onerous. The learned counsel for the appellants would on instructions submit that the appellants are ready to deposit a sum of Rs.20,00,000/- (Rs.10,00,000/- each) for the purpose of bail in the event of this Court remanding the matter back to the Trial Court.

8.Considered the rival submissions on either side and perused the material records in this case. Admittedly, it is seen that the Trial Court did not hear any counsel on behalf of the accused persons. Neither the counsel on record of the accused were present for final hearing and argued the case and neither an Amicus Curiae was appointed. But however, the Trial Court has recorded the various opportunities given to the learned counsel for the accused and according to the Trial Court, the absence of the learned counsel was deliberate in nature. But, however, the learned counsel appearing for the appellants would submit before this Court that it was not deliberate, but only because of the pandemic situation. He would submit that the concept of video conference was working very well at the High Court level but not in the District Courts and as the



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counsel were not accustomed and used to the same. The period in question was in the peak of pandemic situation, even the movements were restricted by getting entry passes. Therefore, he would submit that the absence is not deliberate in nature. In this regard, it is necessary to advert to the pronouncement of the judgment by the Hon'ble Supreme Court. Firstly, in the judgment in **Mohd.Sukur Ali Vs. State of Assam** the Hon'ble Supreme Court recognized the right of the accused to be represented by a counsel as part of Articles 21 and 22 and after referring to the various decisions in this regard, finally, held in paragraph 17 as follows:

"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. If on the next date of hearing the counsel, who ought to have appeared on the previous date but did not appear, now appears, but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to either engage another counsel or the Court may proceed with the hearing of the case by the counsel appointed as amicus curiae".

But, however, the above judgment came up for consideration before the



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Hon'ble Supreme Court in **K.S.Panduranga Vs. State of Karnataka** referred above supra, in which, the Honb'le Supreme Court held that the dictum laid down in **Bani Singh Vs. State of U.P.** reported in (1996) 4 SCC 720 by three Judge Bench will prevail and held that the dictum in the said case is as follows:

"19. From the aforesaid decision, the principles that can be culled out are:

19.1. That the High Court cannot dismiss an appeal for non- prosecution simpliciter without examining the merits;

19.2. That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. That it can dispose of the appeal after perusing the record and judgment of the trial court;

19.5. 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, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation".



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9. Therefore, the Hon'ble Supreme Court in the above judgment held that in view of the same, the judgment of the case **Mohd. Sukur Ali Vs. State of Assam** goes contrary to the pronouncement and is in direct conflict to the judgment laid in **Bani Singh Vs. State of U.P.** case. It is useful to extract the paragraph no.26 and the findings in paragraph no.32.

”26.Regard being had to the principles pertaining to binding precedent, there is no trace of doubt that the principle laid down in Mohd. Sukur Ali (supra) by the learned Judges that the court should not decide a criminal case in the absence of the counsel of the accused as an accused in a criminal case should not suffer for the fault of his counsel and the court should, in such a situation, must appoint another counsel as amicus curiae to defend the accused and further if the counsel does not appear deliberately, even then the court should not decide the appeal on merit is not in accord with the pronouncement by the larger Bench in Bani Singh (supra). It, in fact, is in direct conflict with the ratio laid down in Bani Singh (supra). As far as the observation to the effect that the court should have appointed amicus curiae is in a different realm. It is one thing to say that the court should have appointed an amicus curiae and it is another thing to say that the court cannot decide a criminal appeal in the absence of a counsel for the accused and that too even if he deliberately



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does not appear or shows a negligent attitude in putting his appearance to argue the matter. With great respect, we are disposed to think, had the decision in Bani Singh (supra) been brought to the notice of the learned Judges, the view would have been different.

.....

32. In view of the aforesaid enunciation 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”.



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(Emphasis supplied)

The Hon'ble Supreme Court held that the judgment in **Mohd.Sukur Ali Vs. State of Assam** is *per incuriam* but, however, restricted with only in respect of the findings that the Court cannot proceed in the matter, in case of the deliberate absence of the counsel alone. They specifically held that it is another thing to say that an Amicus curiae should have been appointed thereafter.

10.The Hon'ble Supreme Court of India by a three Judge Bench in **Subedar Vs. State of Uttar Pradesh** reported in (2020) 17 SCC 765 has held as follows:

“5.It is well accepted that right of being represented through a counsel is part of due process clause and is referable to the right guaranteed under Article 21 of the Constitution of India.

6.In case the advocate representing the cause of the accused, for one reason or the other was not available, it was open to the Court to appoint an Amicus Curiae to assist the Court but the cause in any case ought not to be allowed to go unrepresented”.

11.Therefore, from the combined reading of the aforementioned judgments, it would be clear that right of the accused to be represented by a



counsel has been held to be an integral part under Article 21 of the Constitution of India though the Court may not be helpless and proceeded further when the counsel for the accused is absent, still, it is seen that there must be an Advocate to represent the cause of the accused even if the learned counsel for the accused is absent for any reason. In that view of the matter, I hold that the procedure adopted by the Trial Court in not even appointing an Amicus Curiae to represent the accused and hear the said Amicus Curiae before pronouncement of the judgment is not a correct procedure and therefore, the valuable right of the accused which is held to be a part of Article 21 of Constitution of India is violated. In view thereof, I am of the view that the judgment of the Trial Court has to be set aside and the matter has to be remanded back to the Trial Court for fresh consideration.

12.As far as the question of recalling the witnesses is concerned, the same has already attained finality. The Trial Court dismissed the application for non compliance of condition and the same was also upheld by this Court. Therefore, there is no question of permitting any recall application by this Court while remanding the matter back. It is made clear that only on the dictum of the



Hon'ble Supreme Court that the accused is entitled to be heard through a counsel, this matter is remanded back and therefore, remanding is only to the stage of arguments by both side counsel afresh.

13. Now it is seen that the appellants are in prison. Therefore, when this Court is remanding back the matter to the Trial Court, this Court is of the view that upon deposit of a sum of Rs.10,00,000/- each by the appellants, it is a fit case to enlarge them on bail pending fresh decision of the Trial Court in this case. Therefore, this Criminal Appeal is allowed on the following terms:

(i) The judgment of the Special Judge, Special Court under TNPID Act, Coimbatore, dated 11.12.2020, in C.C.No.07 of 2014, convicting and sentencing the appellants is set aside;

(ii) C.C.No.07 of 2014 is remanded back to the file of the Special Judge, Special Court under TNPID Act, Coimbatore to be continued from the stage of arguments by both side counsel;

(iii) The next date of hearing is fixed on 01.08.2022. It is directed that the accused to be present in Court for the hearing of the appeal on the said date and it would be open for the accused to engage a counsel of their choice and they



shall argue the matter on the date fixed by the Trial Court. If the learned counsel appointed by the accused is not appearing, the Trial Court may appoint any counsel through the legal aid cell as Amicus Curiae and hear the said learned counsel and pass appropriate orders in the manner known to law;

(iv) The appellants 2 and 3 shall be enlarged on bail on condition of their depositing a sum of Rs.10,00,000/- each to the credit of C.C.No.07 of 2014;

(v) The Trial Court shall complete the exercise on or before 15.09.2022;

(vi) It will be open for the accused if they want to settle the claims before that period and compound the issue, if they are ready to do so.

14. With the above observations, the criminal appeal is allowed. Consequently, connected miscellaneous petitions are also closed.

05.07.2022

Index: Yes/No

Internet: Yes/No

Speaking Order/Non Speaking Order

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D.BHARATHA CHAKRAVARTHY.,J

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To

1. The Superintendent,
Central Prison, Coimbatore.
2. The Special Judge, Special Court under TNPID Act, Coimbatore.
3. The Public Prosecutor, High Court Madras.

CRL.A.No.295 of 2021

05.07.2022