



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 15TH DAY OF JULY 2024 / 24TH ASHADHA, 1946

CRL.REV.PET NO. 26 OF 2020

AGAINST THE JUDGMENT DATED 12.11.2019 IN CRL.APPEAL NO.102 OF 2019 OF
SESSIONS COURT, THALASSERY ARISING OUT OF THE ORDER DATED 11.09.2018

IN M.C. NO.37 OF 2014 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,

TALIPARAMBA

REVISION PETITIONER/APPELLANT/RESPONDENT:

RAMESH V.V
AGED 47 YEARS
S/O.C.V.NARAYANAN NAMBIAR, KOONAM, PANNIYOOR (PO),
TALIPARAMBA TALUK, KANNUR DISTRICT.
BY ADVS.
V.T.MADHAVANUNNI
SRI.V.A.SATHEESH

RESPONDENTS/RESPONDENTS/PETITIONER & STATE:

- 1 JYOTHI MARUTHIYODAN
AGED 40 YEARS
D/O.M.PRABHAKARAN, KARIYIL HOUSE, PANNERI, MORAZHA (PO),
TALIPARAMBA TALUK, KANNUR DISTRICT-670 331.
- 2 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.

SR PP - RENJIT GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
15.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**“C.R.”****ORDER****Dated this the 15th day of July, 2024**

This revision petition has been filed under Sections 397 and 401 of Code of Criminal Procedure (hereinafter referred as ‘Cr.P.C.’ for convenience) challenging the judgment dated 12.11.2019 in CrL. Appeal No.102/2019 on the files of the Sessions Court, Thalassery arose out of the order dated 11.09.2018 in M.C. No.37/2014 on the files of the Judicial First Class Magistrate Court, Taliparamba. The revision petitioner herein is the respondent and 1st respondent herein is the petitioner in the M.C.

2. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor, in detail. Though, notice was served to the 1st respondent, she did not appear. Perused the impugned order and relevant materials available.

3. The parties in this revision petition will be referred as ‘petitioner’ and ‘respondent’ relegating their status before



the trial court.

4. Going by the impugned verdicts, the learned Sessions Judge dismissed CrL.M.P. No.2721/2019 in CrL.Appeal No.102/2019 seeking condonation of delay in filing the appeal merely on the ground the petitioner/appellant had not complied the direction as per the order dated 27.08.2019 to deposit some amount.

5. The learned counsel for the respondent/revision petitioner would submit that the appeal has been filed challenging the order dated 11.09.2018, whereby the learned Magistrate granted Rs.1,00,000/- as compensation to the applicant/1st respondent herein and granted maintenance at the rate of Rs.3,000/- per month to the applicant/1st respondent herein and Rs.1,500/- to her child from the date of the order. He also would submit that, there is another M.C. No.20/2016, filed at the instance of the petitioner/1st respondent before the Family Court claiming maintenance and there was payment of maintenance to the petitioner/1st respondent. According to the learned counsel for the respondent/revision petitioner, the payment ordered by the



Magistrate in the proceedings under the Protection of Women from Domestic Violence Act has been substantially paid in the said M.C. But, the said aspect failed to be submitted before the First Appellate Court. Therefore, the impugned verdicts are liable to be set aside.

6. The learned Public Prosecutor not seriously opposed the relief sought for.

7. On perusal of the order impugned, CrL.M.P. No.2721/2019 in CrL.A. No.102/2019, the delay condonation petition was dismissed mainly for non compliance of the order dated 27.08.2019 directing payment of arrears of maintenance. Consequent to dismissal of the delay petition, appeal also was dismissed. The judgment in CrL.Appeal No.102/2019, would show that the learned Sessions Judge dismissed the appeal as under:

“CrL.M.P.2721/19 filed for condonation of delay dismissed due to non compliance of direction of the order dated 27.08.2019. Hence this Criminal Appeal not maintainable. Therefore Criminal Appeal dismissed.”

8. In this fatal background, the point arose for



consideration is:

(1) Can a court impose a condition to deposit part of the amount covered by the verdict impugned, as a prerequisite to condone delay in filing an appeal?

9. When an appeal has been filed before the First Appellate Court, the procedure to be followed is well settled. This Court in the decision reported in ***Sajan V. v. State of Kerala [2023 KHC 723]***, held in paragraph No.16 as under:

16. Thus the legal position emerges is that when an appeal is not summarily dismissed under Section 384 of Cr.P.C and the appellate court admits the appeal, the same cannot be dismissed for non-representation or non-prosecution without adverting to the merits of the appeal. Further the appellate court is not bound to adjourn the appeal if both the appellant and his counsel are absent, but the appellate court can adjourn the matter to provide opportunity to the appellant or his counsel to argue the matter though the appellate court is not bound to do so. Even in the absence of appellant or his counsel, the appellate court can dispose of the appeal on merits after perusing the records, evidence and



the judgment of the trial court by a reasoned order detailing the manner in which re-appreciation of evidence has been done. The appellate court can also appoint a State Brief or Amicus Curiae to assist the court in disposing the appeal on merits, as an alternative. If the case would be decided on merits on perusal of the records and on re-appreciation of the evidence available in the absence of the appellant's counsel or without the aid of State Brief or Amicus Curiae, the Higher Court would remedy the situation to avoid failure of justice, if any.

10. In the said decision, this Court discussed the legal position in paragraph Nos.8 to 14 as under:

*8. In this connection it is relevant to refer a decision of the Apex Court in [AIR 1987 SC 1500], **Ram Naresh Yadav v. State of Bihar**, wherein the Apex Court held as under:*

"It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court



and create a serious problem for the court. And if this happens often the working of the court would become wellnigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants.”

9. *But the ratio in **Ram Naresh Yadav’s** case (supra) was rendered without noting an earlier decision in [AIR 1971 SC 1606], **Shyam Deo Pandey v. State of Bihar**, where the Apex Court held that once the appellate court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for nonappearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the appellate court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record.*



10. In **Ram Naresh Yadav's** case (*supra*), the Apex Court did not analyse the relevant provisions of the Code nor did it notice the view taken in **Shyam Deo** case but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for non-prosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.

11. The correctness of the above decisions was considered by a 3 Bench of the Apex Court in the decision reported in [(1996) 4 SCC 720 : AIR 1996 SC 2439], **Bani Singh & Ors. v. State of U.P** and the Apex Court overruled the decision in **Ram Naresh's** case (*supra*) while approving the ratio in **Shyam Deo Pandey's** case (*supra*) and in para.14 the Apex Court held as under:

"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 (AIR 1971 SC 1606) appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of S.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 S.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 Ss.385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. 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 satisfy 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 (AIR 1987 SC 1500) that if the appellant or his pleader is not present, the



proper course would be to dismiss an appeal for non-prosecution.”

12. *It was held further in para.15 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 of 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 subject that the Division Bench which decided **Ram Naresh Yadav**'s case (AIR 1987 SC 1500) did not apply the provision of Ss.385-386 of the Code correctly when it indicated that the Appellate Court was an obligation to adjourn the case to another date if the appellant or his lawyer*



remained absent.”

13. The decision in **Bani Singh's** case (*supra*) was rendered on 9th July, 1996. Prior to **Bani Singh's** case (*supra*), in the decision reported [(1996) 9 SCC 372], **Kishan Singh v. State of U.P.**, delivered on 2nd March, 1992, another 3 Bench of the Apex Court held that the duty of the appellate court to examine the petition of appeal and the judgment under challenge and to consider the merits of the case before dismissing the appeal summarily is not dependent on the appellant or his counsel appearing before the Court to press the appeal. As soon as a petition of appeal is presented under Section 382 or 383 it becomes the duty of the appellate court to consider the same on merits, even in the absence of the appellant and his counsel before dismissing the same summarily. In a case where the appellant has been sentenced to imprisonment and he is not in custody when the appeal is taken up for preliminary hearing, the appellate court can require him to surrender, and if the appellant fails to obey the direction, other considerations may arise, which may render the appeal liable to be dismissed without consideration of the merits. In the present case the High Court should have either examined the appellant's petition of appeal and the judgment under challenge itself or



appointed a counsel to assist the Court, but could not have proceeded to dismiss the same on the ground that the advocate for the appellant was not present. The position of a criminal appeal is not the same as in a civil appeal governed by the Civil Procedure Code. A comparison of the provisions of Section 384 with those of Order 41, Rules 11 and 17 of the Civil Procedure Code clearly brings out the difference. Rule 17, Order 41 of the Civil Procedure Code in express terms provides that an appeal may be dismissed on the ground of absence of the appellant when the appeal is called out, and Rule 19 provides for its restoration on the appellant offering sufficient cause for his non-appearance. In the case of a criminal appeal the corresponding provisions are not to be found in the Code of Criminal Procedure. On the other hand the Code in express terms requires the matter to be considered on merits. Thus a criminal appeal cannot be dismissed for non- prosecution, and this is the reason as to why the Criminal Procedure does not contain any special provision like Order 41, Rule 19.”

14. In **Kishan Singh v. State of U.P.**'s case (*supra*), the three Bench of the Apex Court overruled the decision in **Ram Naresh's** case (*supra*) and affirmed the decision in **Shyam Deo Pandey's** case (*supra*), even prior to *Bani Singh's* case (*supra*).



11. While considering a delay petition, a court is not expected to direct deposit of any amount covered by the verdict appealed and the duty of the court is to address whether sufficient cause shown to condone the delay, with a view to dispose of the delay petition. Imposing such a condition is not legally permissible. Therefore, while considering a delay petition the court cannot impose a condition to deposit part of the amount covered by the verdict impugned, as a prerequisite to condone delay in filing an appeal.

12. Therefore, dismissal of the delay petition and the appeal by the Appellate Court as per the judgment in CrL.A. No.102/2019 and order in CrL.M.P. No.2721/2019 dated 12.11.2019 are illegal and the same stand set aside. Accordingly, the delay condonation petition, CrL.M.P. No.2721/2019 and CrL.A. No.102/2019 stand restored back to the files of the Sessions Court, Thalassery, with direction to the Appellate Court to hear and dispose of the same on merits.

13. The parties are directed to appear before the First



Appellate Court at 11.00 am on 31.07.2024.

14. It is submitted by the learned counsel for the respondent/revision petitioner that, as on today, the entire arrears of maintenance covered by the order of the trial court already paid and arrears, if any, will be cleared soon. The said submission recorded.

Accordingly, the revision petition stands allowed as indicated above.

Sd/ -

A. BADHARUDEEN
JUDGE

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