

Crl.R.C.(MD).No.519 of 2024

'BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 19.09.2024

PRONOUNCED ON : 04.10.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.R.C.(MD)No.519 of 2024

and

Crl.MP(MD)No.5503 of 2024

P.Sethu

... Petitioner/Appellant/Accused

Vs.

R.Selvakumaran

... Respondent/Respondent/Complainant

PRAYER: Criminal Revision Petition has been filed under Section 397 r/w 401 Cr.P.C., to call for the records pertaining to the order in the case in C.A.No.89 of 2021, on the file of V Additional District and Sessions Court, Madurai, dated 05.10.2023 filed against the sentence imposed in the judgment in S.T.C.No.237 of 2017, by the learned Judicial Magistrate No.I, (FTC), Madurai, dated 03.07.2021 and set aside the same.



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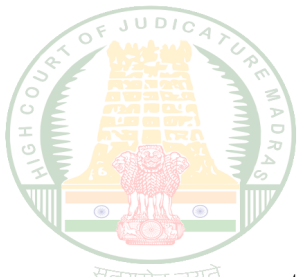
For Petitioner : Mr.R.Karunanithi

For Respondent : Mr.R.Anand

ORDER

This Criminal Revision is directed against the order passed in Crl.A.No. 89 of 2021, on the file of V Additional District Court, Madurai, dismissing the appeal for default.

2. The respondent / complainant has filed a private complaint under Section 200 Cr.P.C., against the appellant for the offence under Section 138 of the Negotiable Instruments Act. The learned Judicial Magistrate, after full trial, has passed the judgment dated 03.07.2021, finding the appellant guilty for the offence under Section 138 of the Negotiable Instruments Act and convicted and sentenced him to undergo six months Simple Imprisonment and to pay compensation of Rs.10,00,000/-(Rupees Ten Lakhs only) to the complainant and in default to undergo two months Simple Imprisonment. Aggrieved by the judgment of conviction, the accused has preferred an appeal in Crl.A.No.89 of 2021 and was pending on the file of V Additional District Judge, Madurai. When the appeal was taken up for hearing on 05.10.2023, as there was no



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representation for the appellant and by recording the presence of the respondent's Counsel and by observing that there was no progress in the appeal, despite granting sufficient time, dismissed the appeal for default. Challenging the dismissal of the appeal for default, the present Criminal Revision Case came to be filed.

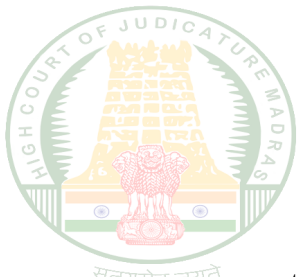
3. The learned Counsel for the petitioner would submit that the first appellate Court has dismissed the appeal only on the ground of non-appearance, that the revision petitioner's non-appearance was neither wilful nor wanton and he is aged about 72 years and battling with age old illness, that since there was no liability, the question of invoking Section 138 N.I., Act, does not arise and that even on merits, the revision petitioner is having a good case in the appeal. But the learned Counsel would mainly contend that the Criminal Appeal cannot be dismissed for default and in the absence of the Counsel, to argue the appeal, the course open to the first Appellate Court is to engage an *amicus curiae* or Legal Aid Counsel to argue the appeal on behalf of the appellant and that therefore, the impugned judgment is legally unsustainable and the same is liable to be set aside.



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4. The learned Counsel appearing for the respondent would fairly concede that the Criminal Appeal cannot be dismissed for non-prosecution, but would submit that the appellant has been protracting the proceedings from 2017 onwards and after filing the appeal in 2021, he was never ready for proceeding with the appeal and despite granting sufficient opportunities and as there was no representation for the appellant, the first appellate Court has chosen to dismiss the appeal. In case of allowing the revision, the first appellate Court may be directed to hear the appeal and dispose of the same within a short time to be stipulated by this Court.

5. The learned Counsel for the petitioner would rely on the decision of the Hon'ble Supreme Court in the case of *K.Muruganandam and Others Vs. State represented by the Deputy Superintendent of Police and another* in Crl.A.No. 809 of 2021, dated 12.08.2021, wherein also the Criminal Appeal was dismissed for non-prosecution and the Hon'ble Apex Court has observed that it is well settled if the accused does not appear though Counsel appointed by him or her, the Court is obliged to proceed with the hearing of the case only after appointing an amicus curiae, but cannot dismiss the appeal merely because of non-



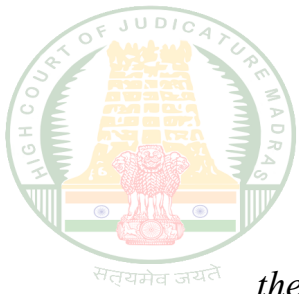
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representation or default of the Advocate for the accused and on that basis has set aside the impugned judgment and relegate the parties before the High Court for hearing the appeal afresh on its own merits and in accordance with law.

6. At this juncture, it is necessary to refer a judgment of the Full Bench of the Hon'ble Supreme Court in ***Bani Singh & Ors vs State Of U.P.***, reported in ***AIR 1996 SC 2439*** and the relevant passages are extracted hereunder:

“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



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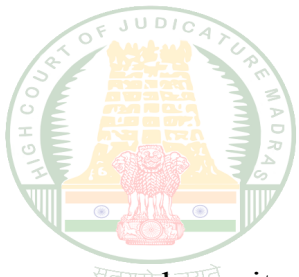
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the reasoning with the evidence on record with a view to satisfy itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record.

.....

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.”

7. Subsequently, a Division Bench of the Hon'ble Supreme Court, in the case of ***K.S.Panduranga vs State Of Karnataka*** reported in ***AIR 2013 SC 2164***

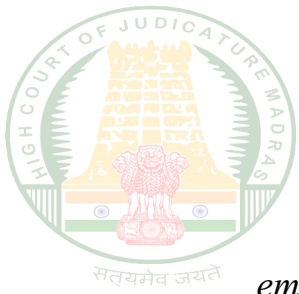


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has reiterated the position stated by the Hon'ble Supreme Court in ***Bani Singh's***
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case above referred and held as follows:

“22. From the aforesaid decision, the principles that can be culled out are (i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court; (v) 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 (vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

*23. In **Bapu Limbaju Kamble** (supra), and **Man Singh** (supra), this Court has not laid down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the appellant. We have already stated that the pronouncement in **A.S. Mohammed Rafi** (supra), dealt with a different situation altogether and, in fact,*

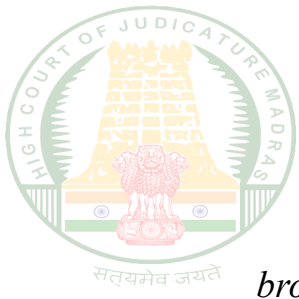


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emphasis was on the professional ethics, counsel's duty, a lawyer's obligation to accept the brief and the role of the Bar Associations. The principle laid down in Sham Deo Pandey (supra), relying on Siddanna Apparao Patil (supra), was slightly modified in Bani Singh (supra). The two-Judge Bench in Mohd. Sukur Ali(supra), had not noticed the binding precedent in Bani Singh(supra).

29. 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 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



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brought to the notice of the learned Judges, the view would have been different.

*36. 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.”*

8. Considering the legal position above referred, this Court has no hesitation to hold that the dismissal of the Criminal Appeal for default, cannot legally be sustained and as such, the same is liable to be set aside. Consequently,



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the learned first appellate Judge is directed to restore the appeal to its file and to proceed with the hearing of the appeal. In case, if the revision petitioner / appellant again is not represented by his Counsel, or is adopting dilatory tactics, the learned first Appellate Judge is directed to follow the dictum laid down by the Hon'ble Supreme Court in ***Bani Singh & Ors vs State Of U.P***, reported in ***AIR 1996 SC 2439*** above referred.

9. Considering the submissions made by the learned Counsel for the respondent and also the fact that the Criminal Appeal is pending from the year 2021, the learned first Appellate Judge is directed to hear the appeal and dispose of the same within a period of two months from the date of receipt of a copy of this order.

10. With the above directions, the Criminal Revision Case is disposed of.

04.10.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No

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To

1. V Additional District and Sessions Court, Madurai.
2. The Judicial Magistrate Court No.I, (FTC), Madurai.



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K.MURALI SHANKAR, J.

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Pre-Delivery order made in

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