KISHAN SINGH

v.

STATE OF UTTAR PRADESH

NOVEMBER 2, 1992

[LALIT MOHAN SHARMA, K. RAMASWAMY AND N. VENKATACHALA, JJ.]

Code of Criminal Procedure, 1973 : Sections 374, 382, 383, 384.

Criminal appeal—Non-prosecution—Power of Court to dismiss—Held a criminal appeal cannot be dismissed for non-prosecution—Appellate court should examine the petition of appeal and judgment under challenge and consider the merits of the case before dismissing the appeal summarily—Distinction between criminal and civil appeal discussed.

Civil Procedure Code, 1908 : Order 47 Rule 11, 17 and 19.

The appellant was convicted under Section 5(2) of the Prevention of Corruption Act and was sentenced to two years rigorous imprisonment and a fine of Rs. 200. He filed an appeal under Section 374 of the Criminal Procedure Code before the Allahabad High Court which was dismissed for default of the appearance of the appellant and his counsel. An application for restoration of the appeal made thereafter was also dismissed. In appeal to this Court it was contended on behalf of the appellant that the appeal could not have been dismissed for default on the ground of absence of the appellant or his counsel to appear and press the appeal.

Allowing the appeal and setting aside the orders of the High Court, this Court,

HELD: 1. The High Court was not right in dismissing the appeal on the ground of non-appearance of the appellant or his counsel and it should have allowed the prayer of restoration of the criminal appeal under its inherent power. [310-C]

2. Under Section 384 of the Criminal Procedure Code it is the duty of the appellant 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. The said duty is not dependent on the appellant or

A 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. Therefore, the High Court should have either examined the B 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. [308-G, H; 309-A, C]

3. The position of a criminal appeal is not be same as that of a civil C appeal. A comparison of the provisions of Section 384 of the Criminal Procedure Code with those of Order 41, Rules 11 and 17 of the Civil Procedure Code clearly brings out the difference. Rule 17, Order 41 of 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 D offering sufficient cause for his non-appearance. However, 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. [309-D, E]

E

Ram Naresh Yadav & Ors. v. *State of Bihar,* A.I.R. 1987 S.C. 1500, dissented form.

Shyam Deo Pandey & Ors. v. *State of Bihar,* [1971] Suppl. S.C.R. 133, relied on.

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Emperor v. *Balumal Hotchand and Ors.*, 39 Criminal Law Journal 890 and *Ramesh Nanu* v. *State of Gujarat,* 17 Gujarat Law Reporter 350, referred to.

G CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 183 of 1993.

From the Judgment and Order dated 11.5.1992 of the Allahabad High Court in Criminal Appeal No. 1791 of the 1979.

H Bahar U. Bargi and Anis Suhrawardy for the Appellant.

The following Order of the Court was delivered: A

The petitioner was convicted by the Special Judge, Mathura under Section 5(2) of the Prevention of Corruption Act and was sentenced to two years' rigorous imprisonment and a fine of Rs. 200. He filed an appeal before the Allahabad High Court which was dismissed for default of the appearance of the petitioner and his counsel, when the appeal was called out for preliminary hearing. An application for restoration of the appeal made thereafter has also dismissed by the order which has been challenged before this Court in the present special leave petition. B

2. The question which arises in this case is whether an appeal filed under Section 374 of the Criminal Procedure Code by an accused against his conviction and sentence could be dismissed for the default of the appellant in prosecuting the appeal either in person or through counsel. C

3. Notice was issued in the special leave petition indicating that the matter would be finally disposed of at the notice stage itself. The office report indicates that notice has been served, but there is no appearance on behalf of the respondent State. Special leave is granted. D

4. The High Court in its order dated 14th November, 1990 dismissing the appeal for non-prosecution, relied upon the observations of this Court in *Ram Naresh Yadav and others* v. *State of Bihar,* AIR 1987 SC 1500 to the following effect: E

> "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." F

5. The learned counsel for the appellant has contended that the appeal could not have been dismissed for default on the ground of absence of the appellant or his counsel to appear and press the appeal. The argument appears to be well founded. G

6. As enjoined by Section 382 of the Code of Criminal Procedure, the appeal has to be filed in the form of a petition. Section 384 (omitting sub-sections (3) and (4) which are not relevant in the present context) quoted below deals with summary disposal of appeal: H

A "384. Summary dismissal of appeal: (1) If upon examining the petition of appeal and copy of the judgment received under Sec. 382 or Sec. 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

B Provided that -

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

C

(b) no appeal presented under Sec. 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;

D

E (c) no appeal presented under Sec. 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."

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7. It will be seen that the very opening words of the Section require the Appellate Court to examine the petition of appeal and copy of the impugned judgment in considering whether there is any sufficient ground for interfering with the same. Sub-section (2) provides that the Court may call for the records of the case even at the preliminary stage. It is, thus G clear, 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 H 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, but that is altogether a different matter with which we are not concerned in the present case. Here, the appellant's advocate was not present to argue the appeal when the case was called out and in the restoration application filed subsequently, attempt was made to explain the default, which, of course, did not succeed. The question is, whether in the circumstances, the High Court could have dismissed the appeal for default, and if not, whether the prayer for restoration should have been allowed. As is manifest from the provisions of Criminal Procedure Code, referred to above, 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 dismissed 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 Civil Procedure Code in express terms provides that an appeal may be dismissed on the ground of absence of the appellate 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. The law was correctly laid down in *Shyam Deo Pandey & Ors.* v. *State of Bihar*, [1971] Suppl. SCR 133 a case governed by the old Criminal Procedure Code. The position in this regard remains the same under the new Code. Even earlier, the High Courts were following this very principle is clear from the observations in *Emperor* v. *Balumal Hotchand and Others*,39 Criminal Law Journal 890 and *Ramesh Nanu* v. *State of Gujarat*, 17 Gujarat Law Reporter 350. In *Emperor* v. *Balumal Hotchand and Others*, it was observed thus:

A B C D E F G H

A That the law requires that before an Appellate Court dismisses and appeal summarily, it shall read a copy of the judgment, and then, if there is no sufficient ground for interfering, it may dismiss the appeal summarily. It was emphasized that the dismissal of the appeal shall depend on the exercise by the Judge of his independent and impartial mind after he has
B read a copy of the judgment, and not upon the failure of the accused to press his appeal.

8. In view of the clear language of the Code of Criminal Procedure and the other reasons mentioned above we are constrained to hold that the observations of this Court in AIR 1987 Supreme Court page 1500 relied
C upon by the High Court in the case before us, cannot be treated as having laid down the law correctly. The High Court was, therefore, not right in dismissing the appeal on the ground of non-appearance of the appellant or his counsel and it should have, therefore, allowed the prayer of restoration of the criminal appeal under its inherent power. In the result, the present appeal is allowed, the orders of the High Court are set aside, the
D Criminal Appeal No. 1791 of 1979 before the High Court is restored and the matter is remitted to the High Court for consideration and decision on merits in accordance with law.

T.N.A. Appeal allowed.