PETITIONER:
BANI SINGH & ORS.

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 09/07/1996

BENCH:
AHMADI A.M. (CJ)
BENCH:
AHMADI A.M. (CJ)
SINGH N.P. (J)
MANOHAR SUJATA V. (J)

CITATION:
1996 SCC (4) 720 JT 1996 (6) 287
1996 SCALE (5)126

ACT:

HEADNOTE:

JUDGMENT:
THE 9TH DAY OF JULY,1996
Present:
Hon'ble the Chief Justice
Hon'ble Mr.Justice N.P.Singh
Hon'ble Mrs.Justice Sujata V.Manohar
N.P.Midha and K.K.Gupta, Advs. for the appellants
A.S.Pundir, Adv. for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:
Bani Singh & Others
V.
State of U.P.

J U D G M E N T

Ahmadi,CJI.

The short question that we are called upon to decide in this appeal is whether the High Court at Allahabad was Justified in dismissing the appeal filed by the accused-appellants against the order of conviction and sentence issued by the trial court, for non-prosecution.

The facts relevant for our consideration can be briefly stated. On 13.6.1979, the VII Addl. Sessions Judge, Bulandshahar, recorded an order convicting the appellants under Sections 366 and 368 of the Indian Penal Code and sentenced them to rigorous imprisonment for three years with a fine of Rs.100/- each. The appellants filed an appeal against this order in the High Court of Allahabad. On 18.6.1979, the appeal was admitted by the High Court and notice was issued. The High Court also issued an interim stay on the execution of the sentence and the realization of fine while granting bail to the appellants. On 28.11.1990, the matter came up for hearing before the High Court. While dismissing the appeal for non-prosecution, the Court recorded the following order :

"The List has been revised. No one

> present to argue the case on behalf of the appellant, Sri T.B. Islam A.C.A. is present on behalf of the State. In view of the law laid down in the case of Ram Naresh Yadav & Ors. Vs. State of Bihar, reported in AIR (SC) 1987, Page 1500, the appeal is dismissed for non-prosecution without going into the merits of the case"

The appellants preferred an appeal before this Court. On 19.1.1995, a Division Bench of this Court, while hearing the matter, examined the judgment in Ram Naresh Yadav & Ors. Vs. State of Bihar (supra) and came to the conclusion that it was in conflict with the earlier ruling of this Court in Shyam Deo Pandey & Ors. Vs. State of Bihar (AIR 1971 SC 1606). It, therefore, directed that the matter be heard by a larger bench. Subsequently, the matter was posted before this Bench.

At this juncture, it would be pertinent to make a brief reference to the relevant provisions of law having a bearing on this case. Chapter XXIX of the Code of Criminal Procedure, 1973 (hereinafter called 'Code') comprising Sections 372-394 deals with 'Appeals'. For the purpose of our examination, the relevant provisions are Sections 384-386. Section 384, which deals with summary dismissal of appeals, enables the Appellate Court to summarily dismiss an appeal "if upon examining the petition of appeal and copy of the judgment received", it "considers that there is no sufficient ground for interfering". Section 385 provides that "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" to the parties involved. It further provides that thereafter, the Appellate Court shall "send for the record of the case if such record is not already in Court" and "hear the parties". The relevant part of Section 386 provides that "after perusing such record and hearing the appellants or his pleader, if he appears, and the Public Prosecutor, if he appears", the Appellate Court "may, if it considers that there is no sufficient ground for interference, dismiss the appeal".

From the facts of the present case, it is clear that when the matter came up before the High Court, it admitted the appeal and, following the procedure laid down in Section 385 of the Code, issued notice to the State. In the circumstances, it is clear that Section 384 of the Code, which enables the High Court to summarily dismiss an appeal, is not applicable to the present case. Since the High Court proceeded to dismiss the appeal when it was next listed for hearing, it is clear that the provision applicable to these facts is Section 386 of the Code, though the order of the High Court does not mention the provision. From the order of the High Court, it is clear that upon finding the appellants and their pleader absent, it dismissed the appeal for non-prosecution without going into the merits of the case.

The law relating to the central issue in this case has been authoritatively laid down by a Division Bench of this Court in Shyam Deo's case. Though the case was decided in the context of Section 423 of the Code of Criminal Procedure, 1898, (hereinafter called the Old Code) since that provision materially corresponds to the present Section 386, the interpretation laid down in that case continues to be sound. The facts of that case were similar, in that, while hearing an appeal against a conviction, the concerned High Court, finding the appellants' pleader absent, perused

the judgment under appeal, and, finding no merit in the case, dismissed the appeal. This Court took the view that once the appeal was admitted, it was the duty of the Court to peruse the record of the case before dismissing it. The Court considered this to be a mandatory requirement and, since, in its view, the record of a case is not confined only to the judgment under appeal, it held that the order of the High Court was not in conformity with the requirement of the provision and ordered it to be set aside.

In Ram Naresh Yadav's case, a Division Bench of this Court was faced with a case where the High Court had confirmed an order for conviction and sentence without hearing the appellants. Against these facts, the Court took the view that, in criminal matters, convicts must be heard before their matters are decided on merits. It, therefore, set aside the order of the High Court and remanded the matter to it for "passing an appropriate order in accordance law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf".

The Division Bench of this Court which referred this matter to us was of the view that these decisions, rendered by separate two-judge benches of this Court, are in conflict with each other. Before we decide on this issue, we must closely examine the scheme envisaged by the Code in this regard. The relevant portions of Sections 385 and 386 of the Code are extracted as under:

> 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 -
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> (i) to the appellant or his pleader;
>
> (ii) ....
>
> (iii) ....
>
> (iv) ....
>
> (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) ....
>
> 386. Powers 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 --
>
> xxxx xxxx xxxx "

Section 385(2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it 'shall',

after issuing notice as required by subsection (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously, the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that 'after perusing such record' the court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard.

The question is, where the accused is the appellant and is represented by a pleader, and the latter fails to appear when the appeal is called on for hearing, is the Appellate Court empowered to dispose of the appeal after perusing the record on its own or, must it adjourn the appeal to a future date and intimate the accused to be present on the next date of hearing?

In Shyam Deo's case, this Court ruled that the Appellate Court must peruse the record before disposing of the appeal; the appeal has to be disposed of on merits even if it is being disposed of in the absence of the appellant or his pleader. Interpreting Section 423 of the Old Code (the corresponding provisions are Sections 385-386 of the present Code), this Court in paragraph 19 of the judgment held as under:

> "The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are before the court and the appeal is set down for hearing, it is essential that the Appellate Court should (a) peruse such record, (b) hear the appellant or his pleader, if he appears, and (c) hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section. It is to be noted that if the appellant or his pleader is not present or if the public prosecutor is not present, it is not

> obligatory on the Appellate Court to postpone the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the Appeal; but that disposal must he after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the fact whether tne appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits."
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> (Emphasis added)

In our view, the above-stated position is in consonance with the spirit and language of Section 386 and, being a correct interpretation of the law, must be followed.

In Ram Naresh Yadav's case, this Court, without making a specific reference to Section 386 or any other provision of the Code and without noticing the ratio of Shyam Deo's case concluded thus:

> "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 conunsel 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 well nigh 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."
>
> (Emphasis added)

What then is the area of conftict between the two decisions of this Court? In Shyam Deo's case, this Court ruled that once the Appellate Court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for non-appearance 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. In Ram Naresh Yadav's case, the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo's case but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for nonprosecution 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.

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 satisfyiny 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.

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.

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 highrer court can remedy the situation is 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.

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 simplicitor 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.