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IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL
ON THE 16th OF AUGUST, 2022

MISC. CRIMINAL CASE No. 39389 of 2022

Between:-

**BILLA @ SUNIL KUMAR S/O SHRI BANAFAR
ADIVASI, AGED ABOUT 34 YEARS,
OCCUPATION: NILL VILLAGE BANDHI STATION
P.S. SLEEMNABAD, DISTT. KATNI, M.P.
(MADHYA PRADESH)**

.....PETITIONER

(BY SHRI MONESH SAHU-ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH THROUGH
POLKICE STATION SLEEMNABAD DISTRICT-
KATNI, MADHYA PRADESH (MADHYA
PRADESH)**

.....RESPONDENTS

(BY SHRI AMIT KUMAR PANDEY-PANEL LAWYER)

.....
*This application coming on for hearing this day, the court passed the
following:*

ORDER

This petition under Section 482 of the Code of Criminal Procedure has been filed against the order dated 13.11.2019 passed by Ist ASJ, Katni in Criminal Appeal No. 1198/2019 whereby criminal appeal filed by the present petitioner has been dismissed for want of prosecution on 13.11.2019 as neither the petitioner nor his counsel had turned up before the Court of Ist ASJ for arguing the matter. Later an application was filed to restore the appeal and it was prayed that same be decided on merit, but that application was also dismissed

vide order dated 22.06.2022 mentioning that Criminal Court has no power to review its earlier order.

2. Learned counsel for the petitioner has submitted that petitioner herein was convicted for commission of offence under Section 354 and 323 of IPC. He was sentenced to one year R.I. and fine of Rs.1000/- for commission of offence under Section 354 of IPC and under Section 323 of IPC he was sentenced to R.I. for 3 months and fine of Rs.250/- with default stipulation vide judgment dated 13.01.2018 passed by JMFC Katni in Criminal Case No.388/2015 (State of M.P. vs. Billa @ Sunil). It is submitted that petitioner had filed Criminal Appeal No.1198/2019 before the Sessions Judge, Katni along with an application under Section 5 of the Limitation Act challenging the trial Court judgment of conviction and sentence. Learned ASJ by order dated 17.10.2019 allowed application under Section 5 of the Limitation Act and the appeal was fixed for preliminary argument on the point of admission and the case was fixed for 23.10.2019 and 13.11.2019. On 13.11.2019, learned counsel for the petitioner could not appear before the Court due to which learned Ist ASJ dismissed the criminal appeal in absence of counsel for the petitioner. It is submitted by learned counsel for the petitioner that it is settled position of law that a criminal appeal cannot be dismissed in absence of advocate or the appellant. Hence, it ought to have been decided either on merit or some *amicus curiae* should have been appointed for deciding the appeal on merit. Therefore, it has been prayed that the impugned order being bad in law and illegal be set aside and learned lower appellate Court be directed to decide the same on merit.

3. On the other hand, learned counsel for the State though has opposed the prayer made by learned counsel for the petitioner but fairly conceded that a criminal appeal cannot be dismissed in absence of petitioner or his counsel and

it has to be decided on merit.

4. I have heard rival submissions of the learned counsel for the parties and perused the material filed by learned counsel for the petitioner.

5. It is undisputed that Criminal Appeal No.1198/2019 (Billa @ Sunil Vs. State of M.P.) was filed by the appellant and the same was pending before Ist ASJ, Katni and was fixed for preliminary argument on 13.11.2019 but the same was dismissed in absence of appellant and his advocate.

6. It is a settled position of law that a criminal appeal can be decided on merit by appointing *amicus curiae* in absence of appellant and his advocate. In the case of *Kishan Singh vs. State of M.P.-1996(9) SCC 372, Bani Singh and others vs State Of U.P.-AIR 1996 SC 2539, Dharampal and others vs. State of U.P. JT 2008(1) SC 172 and in K. Muruganandam vs. State (represented by its Deputy Superintendent of police) and another arising out of SLP (Crl.) No.5690/2021 vide judgment dated 12.08.2021*, it has been consistent view of the Apex Court that a criminal appeal cannot be dismissed for non-prosecution or because of non-appearance of the counsel for the appellant or the appellant. In such a situation, the Appellate Court was expected to nominate an *amicus curiae*, and after taking assistance of *amicus curiae* had to proceed with the hearing of the matter. In the case of Bani Singh (supra) in paragraph no.16 Supreme Court has observed as under:

16. 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. In the light of the well settled position of law that a criminal appeal cannot be dismissed in default, impugned orders dated 13.11.2019 and 22.06.2022 passed by Courts below being erroneous and against settled position of law are set aside. Court of Ist Additional Sessions Judge, Katni which was earlier seized with the matter is directed to restore Appeal No.1198/2019 (*Billa @ Sunil Kumar vs. State of M.P.*) on its original number and to decide it on merit by appointing *amicus curiae* in absence of counsel for the appellant.

8. Petition stands disposed off accordingly.

(DINESH KUMAR PALIWAL)
JUDGE