

Criminal Revision

PRESENT: The Hon'ble Justice Ashim Kumar Roy

Judgment On: 01-02-2010.

C.R.R. No. 3570 of 2009

With

CRAN No. 3344 of 2009

Krishnendu Bandopadhyay

versus

Kausik Das & Anr.

Point:

Dismissed for default: Appeal dismissed for default on the ground of absence of the lawyer of the appellant whether proper- Code of Criminal Procedure, 1973-Ss. 385,386.

Fact: The petitioner was convicted under Section 138 of the Negotiable Instruments Act. The appeal preferred by him was dismissed by the Ld. Sessions Judge ex parte. Setting aside the order of the Ld. Sessions Judge and remanding back the appeal to the appellate Court below for disposal of the same on merit in accordance with law, the High Court,

Held: No appeal should be dismissed for default on the ground of absence of the lawyer of the appellant. (Paragraph – 5)

The approach of the appellate Court is clearly erroneous and not in accordance with law. It has now been crystallized into settled law by the catena of decisions of the Hon'ble Apex Court that no criminal appeal can be dismissed in default but should be decided on merit. (Paragraph – 6)

It is the duty of the appellate Court to dispose of the appeal 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 materials on record. (Paragraph – 7)

Cases cited:

1. Sukhdev Singh Vs. State of Haryana, reported in (2008) 1 C Cr LR (SC) 58
2. Rishi Nandan Pandit & Ors. Vs. State of Bihar, reported in 2000 SCC (Cri) 21
3. Bani Singh Vs. State of U.P., reported in 1996 SCC (Cri) 848.

For Petitioner: Mr. Sanjay Kumar Ghosh, Ms. Soma Kar Ghosh

For State: Mr. Kasem Ali Ahmed

The Court:

1. The petitioner being convicted under Section 138 of the Negotiable Instruments Act in a trial held before the Learned Judicial Magistrate, 2nd Court, Paschim Medinipur and sentenced to suffer simple imprisonment for 15 days and to pay a compensation of Rs. 1,65,000/- preferred an appeal before the Sessions Court. The said appeal was registered as Criminal Appeal No. 4 of 2009.

However, the Learned Sessions Judge, Paschim Medinipur dismissed the said appeal ex parte making the following orders; “At the very outset, it is to be mentioned here that 17.6.09 was fixed for hearing of the appeal. On that date, the appellant did not take any step. Ld. Lawyer for the respondent no. 1 and the Id. P.P. appearing on behalf of the respondent no. 2 were heard on that date and the appellant was given opportunity to make submission on 22.6.09. On 22.6.09, the appellant as usual did not take any step. I have carefully gone through the impugned judgement and the evidence on record. From the evidence of P.W. 1 and

the exts. 1 to 6 it appears that the cheque was issued by the appellant and the mandatory provisions of Sec. 138 and 142 of the N. I. Act have been complied with. Ext. 1 shows the amount of the cheque and ext. 2 shows that the cheque was returned with the observation 'insufficient fund'. The evidence of P.W. – 1 could not be shaken by way of cross-examination from the side of the appellant. I find no reason to disbelieve all these evidence. From all the same it appears that the Id. Court below has rightly come to a conclusion that the appellant is found guilty of the alleged offence and the ordering portion of the judgement requires no interference. As a result, the criminal appeal fails. Hence, O r d e r e d that the criminal appeal be and the same is dismissed on contest.” Hence, this criminal revision.

2. Heard the learned advocates appearing on behalf of the parties. Perused the impugned Judgement and Order.

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3. Now, having gone through the impugned judgement, I find the Learned Judge assigned following reasons for dismissal of the appeal;

(a) Two dates were fixed for hearing of the appeal but no step was taken by the learned advocate of the appellant.

(b) From perusal of the evidence of the witnesses and exhibits, the Learned Judge found the cheque was returned unpaid with the observation 'insufficient fund'.

(c) In cross-examination the evidence of P.W. 1 could not be shaken and the Learned Judge found no reason to disbelieve such evidence.

(d) The Learned Judge found that the Trial Court rightly arrived at the conclusion as to the guilt of the accused.

4. It was the case of the petitioner that he entrusted one Biswanath Ghosh, a lawyer practicing in Sessions Court at Paschim Medinipur and after admission of the appeal his learned lawyer always assured him that he shall take all necessary steps to defend the petitioner in the appeal. However, after

obtaining the certified copy of the judgement the petitioner find that no step was taken by his learned lawyer when the appeal was taken up for hearing and he was not present in Court. It is the further case of the petitioner when his lawyer was not found present on two consecutive dates, the Learned Appellate Court, however issued no notice to him and disposed of the appeal ex parte.

5. The Hon'ble Supreme Court deprecated the practice of dismissal of criminal appeal by the Appellate Court ex parte and in the case of Sukhdev Singh Vs. State of Haryana, reported in (2008) 1 C Cr LR (SC) 58, the Apex Court held as follows;

“Appeal before the High Court was disposed of in the absence of learned Counsel for the appellant. The order itself noticed that with the assistance of learned Counsel for the State, learned Single Judge perused the records and delivered the judgment. (Para 2)

From the order of the High Court it appears that notice was issued to the appellant for engaging another Counsel as the High Court noticed that he was not represented. It is noted in the order that there was no evidence to show that the notice was served on the appellant or not, yet the High Court disposed of the matter ex parte. (para 3)

In support of the appeal, learned Counsel for the appellant submitted that no notice was received by the appellant regarding non-appearance of his lawyer. In any event the lawyer who was earlier appearing had withdrawn from the case without any intimation to the appellant. (para 4)

Though several other points are raised in support of the appeal, it is not necessary to refer to them. Since the High Court itself was not sure whether notice was served or not, it should not have taken up the matter ex parte. The matter is

remitted to the High Court for fresh consideration on merits.

As the matter is pending since long before the High Court, let the parties appear before the High Court without further notice on 16th July, 2007. The Hon'ble Chief Justice is requested to list the matter before an appropriate Bench." (para 5)

In the case of Rishi Nandan Pandit & Ors. Vs. State of Bihar, reported in 2000 SCC (Cri) 21, the Apex Court laid down the guidelines to be followed by the Appellate Court if the lawyer of the appellant remain absent, when the appeal is taken up for hearing and held as follows;

"When the counsel engaged by the appellants in a criminal appeal does not turn up there is no obligation for the Court of appeal to wait for him or even to adjourn the case awaiting his presence. The earlier view of a two Judge Bench of this Court in Ram Naresh Yadav V. State of Bihar, AIR 1987 SC 1500 : (1987 Cri LJ 1856), that in such a situation the Court could only dismiss the appeal for default, has been held erroneous by a three Judge Bench of this Court in Bani Singh V. State of U.P. (1996) 4 SCC 720 : (1996 AIR SCW 2986 : AIR 1996 SC 2439 : 1996 Cri LJ 3491). A. M. Ahmadi, C.J., speaking for the Bench, has stated the legal position thus (para 14 of AIR) : '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 satisfying 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 case, AIR 1987 SC 1500 : 1987 Cri LJ 1856) that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.” (para 4) Nonetheless the learned Chief Justice hastened to add that if the counsel is absent there is nothing in law which precludes the Court of appeal from appointing another counsel as State’s expense to assist the Court. The following observations of the bench are pertinent :

‘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.’ (para 5)

The question before us is whether there was miscarriage of justice on the fact situation in this case as the learned single Judge of the High Court proceeded to decide the appeal unaided by the arguments of an advocate at least by appointing as Amicus Curiae to assist the Court. On a deeper analysis we feel that there was miscarriage of justice in this case. To substantiate it, we make a brief reference to the facts of the present case.” (para 6)

Thus, according to the aforesaid decisions of the Hon’ble Supreme Court as well as the decisions of this Court no appeal should be dismissed for default on the ground of absence of the lawyer of the appellant.

6. This is a case where I find the approach of the appellate Court is

clearly erroneous and not in accordance with law. It has now been crystallized into settled law by the catena of decisions of the Hon'ble Apex Court that no criminal appeal can be dismissed in default but should be decided on merit. In this connection it would be profitable to refer what have been held by a three Judges Bench of the Hon'ble Supreme Court in the case of Bani Singh Vs. State of U.P., reported in 1996 SCC (Cri) 848.

“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 satisfying 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. ... ” (Para 14)

7. However, in the case at hand, I find the appellate Court has dismissed the appeal by only recording that the Court has perused the evidence of the P.W. 1 and the exhibits and having perused the evidence of the P.W. 1, Court did not find any reason to disbelieve the evidence. In my opinion, the way the appeal has been disposed of is contrary to the law. The duty of the appellate

Court is not over, by mere perusal of the evidence and the reasoning of the trial Court and by recording that the appellate Court has neither any reason to disbelieve the witness and to differ from the conclusion arrived by the trial Court. On the other hand, it is the duty of the appellate Court to dispose of the appeal 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 materials on record. The appellate Court has not indicated any reason as to why it found that the order of trial Court as regards to the guilt of the petitioner was correct. It is the duty of the appellate Court to re-appreciate the entire evidence on record independently and record its findings objectively as regards to guilt or otherwise of the accused. It is apparent from the face of the record when the learned advocate of the appellant was not found present in Court, the appellate Court made no direction to issue notice upon the appellant. The impugned order of dismissal of appeal thus not in accordance with law and same is set aside and the appeal is remanded back to the appellate Court below for disposal of the same on merit in accordance with law. The appellate Court is directed to dispose of the appeal within two months from the communication of this order with notice to the respondents. The petitioner is directed to appear before the appellate Court and make all necessary arrangements for pursuing the appeal otherwise the trial Court shall have the liberty to proceed with the appeal as per the guidelines laid down in the case of Rishi Nandan Pandit & Ors. Vs. State of Bihar (supra).

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In view of disposal of the main criminal revisional application, the application for extension of interim order being CRAN No. 3344 of 2009 has now become infructuous and accordingly stands disposed of.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

(**Ashim Kumar Roy, J.)**

