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Tikan Bindhani Vs. State of Orissa

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Court : Orissa

Decided On : Dec-07-2009

Reported in : 2010(I)OLR190

Judge : S.K. Mishra, J.

Appellant : Tikan Bindhani

Respondent : State of Orissa

Disposition : Appeal allowed

Judgement :

S.K. Mishra, J.

1. Learned Addl. Standing Counsel receives notice on behalf of the State.

Heard.

Keeping in view the limited nature of the question involved, this Criminal Revision is disposed of at the stage of admission.

A short question arises in this Revision. Should the Sessions Judge dismiss a criminal appeal for default or for non-prosecution?

2. Petitioner was convicted for the offence under Section 47(a) of Bihar and Orissa Excise Act, 1915 and was sentenced to undergo simple imprisonment for two

years and to pay fine of Rs. 5,000/-, in default, to undergo further simple imprisonment for six months in G.R. Case No. 118 of 2001 of the court of J.M.F.C, Baripada. Against such judgment of conviction, the appellant preferred an appeal before the learned Sessions Judge, Mayurbhanj at baripada. The Appeal was transferred to the Court of Addl. Sessions Judge, Baripada and numbered as Criminal Appeal No. 7/65 of 2008-07. The case was called for hearing on 16.09.2009, but the appellant was absent and no step was taken on behalf of the appellant. Learned Addl. Sessions Judge recorded that no steps have been taken for the preceding four dates. He held that the appellant is not diligent in prosecution of his appeal. Hence, he dismissed the appeal for non-prosecution by the appellant.

3. In Bani Singh and Ors. v. State of Uttar Pradesh : 1996 (4) SCC 720 the apex Court has held that the ratio decided by the two Judges Bench in Ram Narayan Yadav and Ors. v. State of Bihar AIR 1987 SC 1500 that the Court could only dismiss the appeal for default is erroneous. The Three Judges Bench of the Apex Court in Bani Singh's case ruled that the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. Later the Apex Court in Rishi Nandan Pandit and Ors. v. State of Bihar (2000) 18 O.C.R. 114 followed the aforesaid principles and further held that it is a matter of prudence that the Court may, in an appropriate case, appoint a Counsel at the state's expense to argue for the cause of the accused. Of course it is for the court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could be disposed of unassisted by Counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range it is advisable to seek the assistance of a legal talent.

4. Similar view has been taken in the reported decision of Banchhanidhi Singh alias Nani Singh v. State of Orissa (1989) II OCR 448, wherein this Court has held that when the Advocate for the appellant do not appear to argue the criminal appeal, learned Sessions Judge should have appointed a counsel amicus curiae to argue on behalf of the appellant. The learned Sessions Judge having not done so, in that case, this Court set side the judgment dismissing the appeal.

5. G.R. & CO. (Criminal) Volume-I at Rule 65 sub-paragraph 4 Clause (b) provides,

If an appellant in a Criminal Appeal pending before the Sessions Judge/Additional Sessions Judge/Assistant Sessions Judge has no means to engage an advocate or if an advocate appearing for him does not attend the court and does not argue when called on for hearing or submits a Memo of 'no instruction', the Sessions Judge or the Additional Sessions Judge or the Assistant Sessions Judge, as the case may be, shall appoint an advocate amicus curiae to represent the appellant and dispose of the appeal after hearing him.

(Emphasissupplied)

In Clause (c) reads as follows:

The advocate amicus curiae so appointed shall be governed by the same terms and conditions which govern the State Defence Counsel appointed in a sessions case under these Rules

Thus, it is clear that the Hon'ble Court has directed in the G.R. & CO. that whenever a criminal appeal is filed and the appellant does not appear, then the course open to the appellate court is to appoint an Advocate amicus curiae.

6. Law clearly empowers the appellate court to dispose of the appeal on merit and not merely on perusal of the reasons recorded in the trial court judgment, but by cross-checking all the evidences on record, reasoning and findings recorded by the trial court to find out, if they are consistent with the materials on record. Law, therefore, does not envisage dismissal of an appeal for default or non-prosecution, but only contemplates disposal on merit after perusal of the records. Therefore, the order passed by the learned Addl. Sessions Judge that non-appearance of the learned Counsel for the appellant shows that the appellant is not diligent in prosecuting the Appeal entailing dismissal of the Criminal Appeal is clearly unsustainable in the eye of law.

7. Hence, the Criminal Revision succeeds. The order dated 16.09.2009 passed by the learned Addl. Sessions Judge, Baripada in Criminal Appeal No. 7/65 of

2008/2007 is hereby set aside. The Appeal be restored to file. The Addl. Sessions Judge is directed to hear the appeal on merit by hearing the counsel engaged by the appellant and if the counsel does not appear, then provide legal assistance as provided in Rule 65(4)(b) of the G.R. & CO. (Criminal) Volume-I. The petitioner is directed to appear before the learned Addl. Sessions Judge on or before 06.01.2009 either through his counsel or personally. On such appearance, the learned lower court shall fix another date for hearing of the appeal.

The Criminal Appeal is accordingly allowed.

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