

Shaban Guru and Abdullah Guru Vs. State

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Court : Jammu and Kashmir

Decided On : Feb-04-2005

Reported in : 2005(2)JKJ409

Judge : Mansoor Ahmad Mir, J.

Acts : Code of Criminal Procedure (CrPC) , 1989 - Sections 385, 386, 417, 421 and 423

Appeal No. : Cr. Rev 22/01 and 25/02

Appellant : Shaban Guru and Abdullah Guru

Respondent : State

Advocate for Def. : M.A. Rathore, AAG

Advocate for Pet/Ap. : G.Q. Bhat, Adv.

Disposition : Petition allowed

Judgement :

Mansoor Ahmad Mir, J.

1. These are two revision petitions against the judgment passed by the Id. Additional Sessions Judge, Srinagar on file Nos. 24/1 & 24/B dated 19.05.2001 and the order and judgment of conviction dated 9th of May, 1985 passed by the

Judicial Magistrate Ist. Class, Kulgam on file Nos. 97/1 & 97/B for setting aside the same.

The main grievance of Mr. Bhat is that the appellants have not been heard by the Appellate Court in terms of Section 423 Cr.P.C. He has referred apex court judgment reported in AIR 1987 SC 1500 wherein the apex court has held that the appellant must be heard before matters are decided on merits.

Mr. Rathore, AAG frankly conceded this proposition of law.

Considered. It is profitable to give brief facts of the case herein.

The appellants stand convicted and sentenced by learned Judicial Magistrate Ist. Class Kulgam. Feeling aggrieved by the judgment, the appellants assailed the same by medium of the appeal before Pr. District & Sessions Judge Anantnag. On the request of the learned Sessions Judge Anantnag, the file was transferred to Additional District and Sessions Judge, Srinagar.

Learned Additional District and Sessions Judge, Srinagar decided the appeal on merits at the back of the appellants.

Perusal of the lower court file reveals that the appeal file(s) came up before the Appellate Court on various dates. Only one appellant Mohd Subhan Guru caused appearance on some dates and later on right from 09.05.2000 has not caused appearance.

Learned Appellate Court has vide order dated 18.11.2000 directed Additional Public Prosecutor to get the summons served on appellants. The file has not come up before the Appellate Court right from 31.12.2000 to 7.2.2001.

Vide interim order dated 7.2.2001, the file has not come up till that date due to curfew imposed. Then the appeal has been decided vide impugned order without giving notice of appearance to the appellants.

Now meat of the matter is, whether the impugned judgment is correct or otherwise.

It is profitable to reproduce Section 423 Cr.P.C herein, which reads as under:-

'423(1) Powers of Appellate Court in disposing of appeal. The Appellate Court shall then send for the record of the case, if such record is not already in 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 417, the accused, if he appears, the court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may.'

While reading this provision of law one comes to the conclusion that in case the appellant(s) fails to cause appearance after giving notice of appearance of being heard then the court is within its jurisdiction and powers to decide the appeal on merits. The Appellate Court cannot dismiss the appeal for non-prosecution.

This view is fortified by apex court judgment reported in : 1996 CriLJ3491 'Bani Singh and Ors. v. State of U.P'. It is profitable to reproduce the relevant portion of the said judgment which reads as under:-

'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. The law does not enjoying that the court shall adjourn the case if both the appellant and his lawyer are sent. 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 off the appeal after persuing the record and the judgment of the trial court. The plain language of Sections 385-386 does not contemplate after perusal and scrutiny of the record. The law clearly expects the Appellate Court to dispose of the appeal on merits not merely by persuing the responding with the evidence on record with a view to satisfy itself that the reasoning and findings recorded by the trial court are consistent with material on record.'

This view is also fortified by our own Hon'ble High Court in the judgment reported in KLJ 1997 107 'Manga Ram v. State'. It is profitable to reproduce the operative portion of the said judgment which reads as under:-

'This authority findings of the Supreme Court, read in the light of the provisions of Section 421 and 423 of the code, makes it sufficiently clear that the order impugned in the petition is against the spirits of law and erroneous. Therefore, the

same is quashed and the matter remanded back to learned Sessions Judge, Udhampur for passing fresh order on merits of the case.'

The learned counsel for the appellants has relied on judgment of the apex court reported in AIR 1987 SC 1500 'Ram Naresh Yadav and Ors v. State of Bihar' (supra). The said judgment stands since over ruled by the apex court in the judgment reported in : 1996 CriLJ3491 (supra). The learned counsel should take note of this fact and desist from referring the judgments which are over ruled.

Keeping in view the above said facts, one comes to inescapable conclusion that appeal cannot be decided on merits without notice of appearance and without hearing the appellants. The situation is different if the appellants after notice chose to remain absent then in that situation the appeal is to be decided on merits. The Appellate Court has no jurisdiction to dismiss the appeal for non-prosecution simpliciter.

Applying the test to the instant case, I am of the considered opinion that the appellants have not been heard and it was duty of the appellate court to issue notice to the appellants before deciding the appeal on merits in terms of the interim orders referred hereinabove.

Having glance of the above said discussion the revision petitions merit to be allowed. Accordingly revision petitions are allowed. Impugned judgment of appellate court is set aside. The case is remanded back to the appellate Court. The appeal be decided within a period of two months from the date When the appeal come up before the appellate court.

At this stage, Mr. Rathore, AAG submits that the file be sent to Court of Pr. District and Sessions Judge, Anantnag instead of Additional Sessions Judge, Srinagar. Mr. Bhat has no objection. The prayer is granted. Parties are directed to cause their appearance before the court of Pr. District and Sessions Judge, Anantnag on 5th of March, 2005.

Mr. Rathore, AAG, is directed to inform the PP concerned. Registry is also directed to send down the file along with copy of this order and record of the case

to the Court of Pr. District and Sessions Judge, Anantnag. Copy of this order be also sent to Additional Sessions Judge, Srinagar.

Disposed of accordingly.

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