
(2010) 07 BOM CK 0164

In the Bombay High Court

Case No : Criminal Revision Application No. 99 of 2010

Fayyaz Khayyum Qureshi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-07-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 380, 385, 386, 457

Citation : (2010) 07 BOM CK 0164

Hon'ble Judges : A.V. Potdar, J

Bench : Single Bench

Advocate : R.V. Gore, for the Appellant; P.P. More, APP, for the Respondent

Judgement

A.V. Potdar, J.—By the present revision application, the applicant has assailed the order and judgment passed by the First Additional Sessions Judge, Aurangabad in Cri.Appeal No. 89/2006 which was dismissed for default on 02/08/2008.

2. Heard learned Counsel for applicant, learned APP for State.

3. Rule.

4. Rule made returnable forthwith.

5. Considering the small issue involved in this revision application, i.e. whether the First Appellate Court can dismiss the criminal appeal for default, filed against the order of conviction, by consent of the parties, heard finally at the stage of admission.

6. It appears that the revision applicant was tried for the offences punishable u/s 457, 380 of The IPC by the 5th J.M.F.C. Aurangabad in RCC No. 102/2006. It further appears that in connection with the said offence, revision applicant came to be arrested on 11/11/2005 and since then is in custody. After recording the statement of witnesses and after completing the requisite formalities, the 5th J.M.F.C. Court had convicted the revision applicant for the offence punishable u/s 457 of the IPC and was sentenced to suffer RI for 3 years and ordered to pay

fine in the sum of Rs. 500/- i.d. to suffer further SI for 1 month. It appears that the revision applicant was also convicted for the offence punishable u/s 380 of The IPC and was sentenced to suffer RI for 2 years and to pay fine in the sum of Rs. 300/- i.d. to suffer further SI for 15 days.

7. This judgment and order of conviction passed by the 5th J.M.F.C. Court, Aurangabad was challenged by the revision applicant, by preferring criminal appeal bearing No. 89/2006 before the Court of Additional Sessions Judge, Aurangabad. It appears that on 02/08/2008, this criminal appeal, preferred by the revision applicant was dismissed for default by the First Appellate Court.

8. The record and proceeding further shows that criminal application No. 1120/2010, preferred by the present revision applicant to condone the delay caused in preferring present revision application was allowed by this Bench and delay was condoned.

9. Heard learned Counsel for applicant, learned APP for State. In past also, this Court has dealt with similar situation whether the Appellate Court can dismiss the criminal appeal for default, which is preferred against the order of conviction. While deciding Cri.Appl. No. 1994/2010, vide judgment and order dated 28/06/2010, it is observed by this Bench in para No. 7 and 8, as follows:

This Court had an occasion to deal with such a situation in the matter of, Kisan @ Kanhyalal S/o. Harishankar v. The State of Maharashtra, through Police Station, Kannad in Cri. Appl. No. 3333/2006, decided on 14th November 2006. This Court, in para No. 5 of the said judgment has observed that,

now it is settled law, that the Criminal Appeal cannot be dismissed for default for want of prosecution. It is further settled that if the Advocate for the appellant does not appear or refuses to argue, the Court should appoint an Advocate as amicus curiae and then proceed to dispose of the appeal on merits. In this respect, a useful reference can be made to the judgments of the Apex Court in case of (i) Parsuram Patel v. State of Orissa, (1994) 4 SCC 664, and (ii) State Khalili v. State of Uttar Pradesh reported in 1982 SCC (Cri) 143. In that view of the matter, the impugned order passed by the lower appellate court is patently erroneous. The judgment and order of the lower appellate court, thereby dismissing the appeal in default, is passed in ignorance of the law laid down by the Apex Court.

Even the Full Bench of Apex Court, in the matter of Bani Singh and ohters Vs. State of U.P., has observed that-

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. 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 satisfying itself that the reasoning and findings recorded by the trial Court are consistent with the material on record.

Perusal of the impugned order discloses that on the date fixed for the hearing of criminal appeal before the First Appellate Court, the appellant was not produced before Court from custody. His Counsel also remain absent on that day and if his Counsel remain absent, as observed by the Apex Court in the above two paragraphs supra, it is the duty of the First Appellate Court to appoint another Counsel to defend the accused applicant, who was in custody, and has preferred an appeal against conviction. But, it appears that the First Appellate Court, without considering this legal procedure, which require to be followed erroneously, dismissed the appeal for default, which order deserves to be quashed and set aside.

10. Accordingly the impugned judgment of dismissal of Cri.Appeal. No. 89/2006 dated 02/08/2008 passed by the First Additional Sessions Judge, Aurangabad is hereby quashed and set aside. The matter is remanded back to the First Appellate Court with a direction to decide it within the period of 6 months from the date of receipt of writ of this order.

11. Rule is thus made absolute as indicated above.

12. Revision application stands disposed of accordingly.

13. Today. by separate order, bail application of the revision applicant bearing Criminal application No. 1121/2010 is allowed. In case the revision applicant is able to secure the bail, then the revision applicant to appear before the First Appellate Court with a certified copy of this order, or otherwise the revision applicant to be produced before the First Appellate Court within the period of 2 weeks from today. Thereafter the first Appellate Court to decide the Criminal Appeal No. 89/2006 in accordance with Law.