
(1994) 06 BOM CK 0041

In the Bombay High Court

Case No : Criminal Appeal No's. 577 of 1961 and 773, 877, 878, 900 of 1981

Mahendrakumar Shantilal Shah and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-06-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 384, 385, 386, 482

Citation : (1994) 4 BomCR 428 : (1994) CriLJ 2667 : (1994) 2 MhLj 1371 : (1994) 3 RCR(Criminal) 535

Hon'ble Judges : A.M. Bhattacharjee, C.J;V.P. Tipnis, J

Bench : Division Bench

Advocate : S.V. Shah, Sandeep J. Ghogare, P.B.C. Warrior, K.C. Baxi and M.N. Vepari, for the Appellant; S.D. Rupawate and S.J. Pingulkar, Public Prosecutors and L.R. Chari, instructed by Chitnis Vaithy and Co. and D.A. Nalavade, Addl. P.P., for the Respondent

Judgement

Bhattacharjee, C.J.—No one is present on behalf of the appellant in any of these appeals. Can these appeals be dismissed for default with Section 386 of the Code of Criminal Procedure staring at the face ?

2. A civil appeal, if not dismissed summarily under the provisions of Rule 11 of Order 41 of the Code of Civil Procedure, is to be listed for hearing with notice to the respondent and if the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. The cleavage of opinion as to whether such dismissal can be for default of appearance only, or on the merits also, has now been sealed by the Explanation added to Rule 17(1) of Order 41 by the Amendment of 1976, providing categorically that "nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

3. The law in the Criminal Jurisdiction is however different, as would appear from the provisions of Section 423 of the preceding Code of Criminal Procedure of 1898, now replaced by Section 386 of the New Code of 1973, which is in pari

materia with its predecessor in the old Code of 1898. Section 386 of the present Code of Criminal Procedure provides that if a criminal appeal is not dismissed summarily u/s 384, the same is to be heard u/s 385, with notice to the parties and after sending for the record of the case, unless the same is already there and then the appellate Court, after perusing such record, and hearing the appellant or his pleader, if he appears may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may allow the same by passing appropriate orders.

4. The words "after perusing the record" etc. in Section 386 have all the weight of a categorical mandate and while construing those words in the corresponding Section 423 in the preceding Code, the Supreme Court was never in doubt that, to quote from the three Judge Bench decision of the Supreme Court in *Sankatha Singh Vs. State of U.P.*, a criminal appeal cannot be dismissed for the default of appearance of the appellants or their Counsel" and "the Court has either to adjourn the hearing of the appeal to enable them to appear, or should consider the appeal on merits and pass the final order." To the same effect is the decision of a later two Judge Bench of the Supreme Court in *Shyam Deo Pandey and Others Vs. The State of Bihar*, where it has been similarly ruled that "a reading of Section 423 makes it clear that a criminal appeal cannot be dismissed for default of appearance of the appellate or their counsel," and "the Court has either to adjourn the appeal in order to enable them to appear or it should consider the appeal on merits and pass final orders." The requirement regarding the perusal of record before disposing of the appeal, even where the appellant does not appear, cannot be treated as an empty formality. Perusal of the record of the particular case and giving indication of such perusal in the order is must before dismissing the appeal, even though the appellant or his counsel does not appear to press the appeal.

5. The position in the law is so well settled because of the clear letters of the law in Section 423 of the old Code and Section 386 of the new Code, and also the gloss put in the former by the Supreme Court in a catena of decisions that any further citation would be a mere useless idle parade. But a rather recent decision of the Supreme Court in *Ram Naresh Yadav* AIR 1987 SC 1500 : 1987 Cri LJ 1856, may ex facie appear to strike a different note and to have ruled that "the Court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view," "but the matter can be disposed of on merits only after hearing the appellant or his Counsel" and "the Court might as well appoint a Counsel at State cost to argue on behalf of the appellants."

6. The reason behind the law providing for different courses to be adopted in appeals by the Civil Courts and the Criminal Courts is not far to seek. Criminal appeals are, more, often than not, preferred by convicted persons, whose lives or personal liberties have been put in peril by the sentence of imprisonment or even of fine, if not paid. And what is more, the society as a whole is, as it ought

to be, vitally interested in the prevention of improper convictions as also unmerited acquittals. The Legislature, therefore, in enacting the provisions relating to disposal of criminal appeals, has taken care to provide that once a criminal appeal is admitted for hearing, implying thereby that the order of, say, conviction and sentence, warrants reconsideration, the Court cannot and shall not dispose of the same except on the merits and after examining the record on its own, whether or not the appellant appears to prosecute the appeal. As already noted, the Supreme Court in *Sankatha Singh* 1962 (2) Cri LJ 288 (supra) and in *Shyam Deo Pandey and Others Vs. The State of Bihar*, and in various other earlier and later decisions has ruled out dismissal of criminal appeals for default and mandated disposal, including dismissal, on the merits only after examination of the records. The dictum in *Ram Naresh Yadav* 1987 Cri LJ 1856 (supra), therefore, to the effect that "the Court can dismiss the appeal for non-prosecution" may appear at the first blush to be contrary to the long catena of decisions of the Supreme Court, referred to hereinabove.

7. The wave of consistent earlier decisions, even if emanating from co-equal Benches, would have been good enough to relieve us from the obligation to follow a solitary contrary decision if *Ram Naresh Yadav* 1987 Cri LJ 1856 (supra) is such a one, particularly when the latter has not, even remotely, taken note of the earlier decisions. But since one such earlier decision in *Sankatha Singh Vs. State of U.P.*, has emanated from a larger three Judge Bench, we, as already noted, cannot but govern ourselves by the same and hold that u/s 386 of the Code, corresponding to Section 423 of the earlier Code, which contained the law at the relevant time, a criminal appeal cannot be dismissed for the default of appearance of the appellant, but has got to be disposed of on the merits on perusal of the record, whether or not the appellant or his Counsel appears to pursue the appeal.

8. But even though *Ram Naresh Yadav* 1987 Cri LJ 1856 (supra) may appear at the first blush to lay down some thing contrary to the earlier decisions and even contrary to the clear provisions of Section 386 of the Code of Criminal Procedure, it has nevertheless a special message which will be apparent on a closer scrutiny. We think that a matter of judicial propriety, decency and decorum, the decisions of the apex tribunal of the land, even though appearing to be contrary to or inconsistent with each other or one another must be sought to be reconciled and explained by assuming, wherever possible, that they applied to different sets of circumstances. This is the course which was recommended by our ancient Joists - "SRUTIRDWAIDHE SMRITIRDUAI DHE STHALAVEDA PRAKALPATE" - i.e. in case there be two contrary precepts of the Sruties or the Smrities, different cases or sets or circumstances are to be assumed for their application. As Jurist Jaimini said, contradiction or inconsistencies are not to be readily assumed, as they very often be not real, but only apparent, resulting from the application of the same or similar principle to different sets of facts - "PRAYOGE HI VIROTHA SYAT." We would proceed accordingly.

9. If a criminal appeal is dismissed, though for default of appearance only, the order of dismissal cannot be set aside and the appeal restored to file by any appellate Court subordinate to the High Court, even on proof of sufficient and satisfactory grounds for non-appearance. The reason is that the Code of Criminal Procedure, unlike the Code of Civil Procedure, does not expressly provide for such a course and, as now ruled by the Supreme Court in *Bindeshwari Prasad Singh Vs. Kali Singh*, and in *Maj. Genl. A.S. Gauraya and Another Vs. S.N. Thakur and Another*, the Courts subordinate to the High Court have no inherent powers. Since the appellant in such a case would be without any remedy against the ex parte dismissal by way of restoration and may thus have to submit to an order of conviction without any opportunity of having the same re-examined by the appellate Court, such appellate Court must not and cannot be allowed to go outside the provisions of the Section 386 and to dismiss an appeal for default of appearance, but must examine the correctness, propriety or legality of the impugned order on perusal of the records on its own, even though none has appeared to press the appeal. The law laid down by the Supreme Court in *Sankatha Singh (supra)* AIR 1961 SC 1208 : 1962 (2) Cri LJ 288 and in *Shyam Deo Pandey and Others Vs. The State of Bihar*, and other decisions holding the same view would govern such appeal, which cannot be dismissed for default of appearance, but must be disposed of on the merits on examination of the record under the mandate of Section 386.

10. But when a criminal appeal is pending before the High Court, which, notwithstanding Section 386, has all the inherent powers to make any order for the ends of justice or to prevent the abuse of process or other indiscipline, as expressly provided in Section 482, the provisions of Section 386 do not and cannot have any exclusion application to the exclusion of those inherent powers. The appeal *Ram Naresh Yadav* 1987 Cri LJ 1856 (supra) was pending before the High Court having the entire gamut of inherent powers available to it. The Supreme Court has expressly demonstrated its awareness of the enormity of the problems resulting in dislocation and hampering of the working of the High Court, "if Counsel do not appear when criminal appeals are called out" and has then observed in that context that "the Court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view." The reaction of the Supreme Court to the unfortunate states of affairs resulting from the Advocates not appearing when criminal appeals are called out generated the above quoted observations and with Section 482 staring at the face, no one would doubt the powers of the High Court to pass such orders of dismissal for default. And such dismissal for default on merits on perusal of the records only without hearing the appellant would also secure to be appellant the opportunity to have the ex parte dismissal set aside by the High Court, obviously in the exercise of inherent powers, on proof of sufficient ground for non-appearance. But, to repeat, the right to dismiss criminal appeal for default for appearance and then to restore the same are not at all available to the criminal appellate courts subordinate to the High Court, which are solely

governed by Section 386 and are devoid of all inherent powers.

11. We are thus inclined to hold that while a High Court may dismiss a criminal appeal for default of appearance, as held in Ram Naresh Yadav 1987 Cri LJ 1856 (supra) and may also restore the same to file on sufficient grounds, the criminal appellate courts subordinate to the High Court, exclusively governed by Section 386 and having no inherent powers, cannot, in view of the mandate in the section, do so, but must dispose of the appeal on the merits on perusal of the records, even when the appellant or his Counsel does not appear to press or prosecute the appeal.

12. Since these four appeals are before us in this Court, which has all its inherent powers in all its amplitude, plenitude and magnitude, we can obviously dismiss these appeals, as pointed out in Ram Naresh Yadav 1987 Cri LJ 1856 (supra).

13. The above appeals are accordingly dismissed but for default only and not on merits.

14. Appeal dismissed.