

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 22ND DAY OF JANUARY 2015/2ND MAGHA, 1936

Crl.Rev.Pet.No. 100 of 2015 ()

AGAINST THE JUDGMENT IN CRA 360/2013 of THE COURT OF ADDITIONAL
SESSIONS JUDGE-I, KOLLAM DATED 11-11-2014

AGAINST THE JUDGMENT IN CC 1480/2009 of THE COURT OF JUDICIAL FIRST
CLASS MAGISTRATE-I, PUNALUR DATED 26-11-2013

REVISION PETITIONER/APPELLANT/ACCUSED:

VISWANATHAN, SON OF KOLAPPAN ACHARY,
RESIDING AT KRISHNAVILASOM
VILAKKUPARA MURI, AYIRANALLOOR VILLAGE
PATHANAPURAM TALUK, KOLLAM DISTRICT.

BY ADVS.SRI.JOHNSON GOMEZ
SRI.S.BIJU (KIZHAKKANELA)

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 22-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.R.P.No.100 of 2015

Dated 22nd January, 2015

ORDER

The revisionist is a convict in an Abkari offence. This revision petition is directed against the judgment in Crl.A.No.360 of 2013 dated 11.11.2014 on the file of the Court of Additional Sessions Judge-I, Kollam confirming the conviction entered against the revision petitioner in C.C.No.1480 of 2009 of the Court of Judicial First Class Magistrate-I, Punalur. The revision petitioner was tried for an offence under Section 15(c) of the Abkari Act and on being convicted thereunder he was sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.5000/-. In default of payment of fine he was directed to undergo simple imprisonment for a further period of 15 days. It is aggrieved by the said judgment that Crl.A.No.360 of 2013 was filed by the revision petitioner and the impugned judgment was passed against him, without going into its merits, obviously, owing to his consecutive absence especially on 11.11.2014, when the appeal was taken up for consideration. The judgment of the appellate court is so condensed that it is extractable in three lines as hereunder:-

"Appellant called absent. No representation. Appellant has been consecutively absent. Hence the appeal dismissed. Order of conviction confirmed."

2. I have heard the learned counsel for the revision petitioner and also the learned Public Prosecutor.

3. Contextually, it will not be malapropos to refer to the relevant provisions of law. The procedures to be followed while considering an appeal has been provided under Sections 384 and 385 of the Code of Criminal Procedure. Section 384 Cr.P.C. provides the procedures for summary dismissal of appeal and it reads thus:-

"384. Summary dismissal of appeal.- (1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that-

- (a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;
- (b) no appeal presented under section 383 shall be dismissed except after giving the appellant a

reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

- (c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law."

(emphasis added)

Section 385 Cr.P.C. enjoins issuance of notice to the appellant or his pleader indicating the time and place where and when the appeal has been scheduled to be heard in cases where appeals are not dismissed summarily. Thus, a careful perusal of Sections 384 and 385 of Cr.P.C.

would reveal that under the former section the appellate court has the option to call for the records of the case at the stage of initial hearing of an appeal and this is explicit from the expression 'may' employed therein whilst under Section 385 Cr.P.C. it is mandatory for the appellate court to do so at the time of final hearing. Section 386, Cr.P.C. deals with the powers of the Appellate Court. At this juncture, it is relevant to refer to the impugned judgment. It would reveal that the said appeal came up for hearing and the learned Sessions Judge perused the memorandum of appeal as also the records of the evidence and the recital relating the same in the judgment is as hereunder:-

"This appeal coming on for hearing before me upon perusing the memorandum of appeal and the records of evidence and proceedings and upon duly considering the same after hearing the appellant Advocate Sri.S.Sivaraj and public prosecutor for the State I do adjudge and passed the following:-"
(emphasis added)

4. I may hasten to add that though the aforequoted portion would suggest that the counsel for the appellant was also heard in view of the specific statement in the impugned judgment that the appellant was absent and there was no representation it could only be taken that the appeal was dismissed as per the impugned judgment without hearing

the appellant as also his pleader. At the same time, there is no reason to discredit the statement that the memorandum of appeal and the records of evidence were perused before passing the judgment. The impugned judgment would reveal that even after perusing the records of evidence the appellate court has not cross-checked the reasoning and finding recorded by the trial court to satisfy itself whether they are consistent with the evidence on record. It was without making such an exercise, as is required under law, that the conviction of the revision petitioner was confirmed as per the impugned judgment stating that the appellant had been consecutively absent. However, nothing has been stated therein about the sentence. In the contextual situation it is relevant to refer to Section 387 Cr.P.C. which reads as follows:-

"387. Judgments of subordinate Appellate Court:- The rules contained in Chapter XXVII as to the judgment of a Criminal court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Session or Chief Judicial Magistrate:

Provided that unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered."

(emphasis added)

Section 387 Cr.P.C. would reveal that the provisions contained in Chapter XXVII Cr.P.C. as to the judgment of a criminal court of original jurisdiction viz. Sections 353, 354, Cr.P.C. and such other provisions shall apply, so far as may be practicable to the judgment in appeal of a Court of Session or Chief Judicial Magistrate. In the circumstances, in the light of the aforesaid provisions the Court of the Additional Sessions Judge-I, Kollam being the appellate court was bound to specify whether it is maintaining the sentence following the confirmation of the conviction or not. In this case, evidently, even after perusing the records the appeal was dismissed for the consecutive absence of the appellant without going into the merits of the case, but confirming the conviction and without specifying anything about the sentence.

5. Now, I will refer to the contentions raised by the revision petitioner based on the decision of the Hon'ble Apex Court in **Shyam Deo Pandey and others v. The State of Bihar (AIR 1971 SC 1606 = ((1971) 1 SCC 855)**. The *ratio decidendi* of the said decision was referred to with agreement in the decision in **Surya Baksh Singh v. State of Uttar Pradesh ((2014) 14 SCC 222)**. In fact, in **Surya Baksh Singh's** case (supra) the Hon'ble Apex Court was considering the

powers of the appellate court to dismiss an appeal *ex parte* and also the course to be followed by High Courts while considering an appeal against conviction in the absence of convict or his pleader at hearing of appeal. A close scrutiny of the said judgment would reveal that taking note of wilful failure of convicts to prosecute the appeal after getting bail or exemption from surrender, with intent to circumvent consequences of their conviction the Hon'ble Apex Court held that while dealing with such species of appeals, in the interest of justice, High Courts have to invoke the inherent powers under Section 482 Cr.P.C. against the said abuse of judicial process by convicts. The Hon'ble Apex Court held that the appellate court confronted with absence of convict and his counsel in such a case should immediately proceed against persons who stood as surety in bail granted to convict, and thereby lead to discovery and production of convict in court and in case of failure to locate and bring forth the convict, the appellate court could dismiss the appeal exercising its inherent powers under Section 482 Cr.P.C. In paragraph 8 of the said judgment the Hon'ble Apex Court considered the *ratio decidendi* of the decision in **Shyam Deo Pandey's** case (supra). Evidently, the *ratio decidendi* of the decision in **Shyam Deo Pandey's** case (supra) is that the records of the lower court must be available with the appellate court

if the condition of "perusal" is to stand complied with. A careful consideration of the decision in **Surya Baksh Singh's** case (supra) would reveal that the Hon'ble Apex Court had virtually affirmed the decision in **Shyam Deo Pandey's** case(supra). The Hon'ble Apex Court in **Surya Baksh Singh's** case (supra) laid down the principles to be adopted by courts in appeals where the convict as also the counsel remaining absent at hearing of appeal and observed that such species of appeals could be dismissed in exercise of the inherent power under Section 482 Cr.P.C. after following the procedures required to be followed. Going by the said decision it can only be said that such a course could be resorted to only by High Courts and not by the Subordinate appellate courts as a perusal of Section 482 Cr.P.C. would reveal that it only saves inherent power of High Courts. Thus, it is evident that even after the decision in **Surya Baksh Singh's** case (supra) which was decided on 7.10.2013 the subordinate appellate courts have to follow scrupulously the procedures in terms of the decision in **Shyam Deo Pandey's** case (supra). Going by the decision in **Shyam Deo Pandey's case (supra)** the requirement regarding the perusal of the record which has been called for and received in the appellate court before disposing of an appeal could not be treated as an empty formality and indication of

such perusal should reflect in the order/judgment while dismissing an appeal which has been admitted and notice whereof has been issued, on the ground of non-appearance of the appellant or his pleader. Even in a case where parties have been heard no order of dismissal could be passed without a perusal of the record. A scanning of the impugned judgment in the light of the decision in **Shyam Deo Pandey's** case (supra) would make it absolutely unsustainable as there is absolute absence of any indication of 'perusal of records' therein. A mere mention in the judgment that the records of evidence were perused by itself would not be and could not be taken as something indicative of the perusal of the evidence on record by the appellate courts in its real sense. In this case, admittedly, apart from the mere recital that the records of evidence were perused a scanning of the impugned judgment would not reveal such perusal of the records in the real and meaningful manner. In the circumstances, the judgment of the appellate court certainly suffers from illegality inviting interference in exercise of revisional jurisdiction. In view of the provisions and also the decisions referred above the Court of the Additional Sessions Judge-I, Kollam being the first appellate court, in the instant case, could not have and should not have pronounced a judgment confirming the conviction without

application of mind and in a manner reflecting its perusal of the evidence on record and cross-checking the conclusions and findings of the trial court based on the evidence on record. I have no hesitation to hold that the judgment passed by the appellate court in this case, as extracted above, would not satisfy the requirement either under Section 384 or under Section 385 of Cr.P.C. In the light of the discussion as above, the impugned judgment is liable to be set aside and accordingly, it is set aside. Criminal Appeal No.360 of 2013 is restored into the file of the appellate court for disposal in accordance with law.

The revision petition is allowed as above.

Sd/-
C.T.RAVIKUMAR
Judge

TKS