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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION No. 131 OF 2012

Smt. Parveen Shabbir Momin & Anr. ... Applicants
Vs.
Smt. Maimuna Asrar Ahmed Shaikh & Anr. ... Respondents

Mr. Suraj Naik I/b R. D. Suryawanshi, for the Applicants.

None for the Respondent No. 1.

Mr. Ajay Patil, APP for the Respondent No. 2.

CORAM : PRITHVIRAJ K. CHAVAN, J.
DATE : AUGUST 7, 2018

ORAL JUDGMENT :-

1. Rule. Rule is made returnable forthwith. Learned Additional Public Prosecutor waives notice for Respondent No.2.

None appears for Respondent No. 1. By consent of parties, revision application is heard finally at the stage of admission.

2. The short question to be decided in this application is whether the Additional Sessions Judge, Thane was justified in dismissing the appeal filed by the Applicants against the order of

conviction and sentence passed by the trial court, for non-prosecution.

3. A few facts can be briefly stated as follows. Respondent No. 1 who is the original complainant, filed a Criminal Case No. 2535 of 2002 in the Court of J.M.F.C. Bhivandi against the Applicants under S. 323, 504, 506 read with 34 of the Indian Penal Code, alleging that on 21.10.2002 at about 9.00 a.m. minor son of Respondent No. 1, who was standing near a public water tap at Shanti Nagar, Bhivandi was dashed by a bicycle, driven by the son of the Petitioner a minor. Respondent No. 1 witnessed the incident and therefore, she enquired with son of the Applicants. There was an exchange of abuses and thereafter, it is alleged that, the Applicants abused the Respondent No. 1 and assaulted her by fist blows. The Respondent approached Shanti Nagar Police Station and narrated the incident. She was referred to Indira Gandhi Memorial Hospital, Bhivandi for treatment by the police. After obtaining the medical certificate, when she approached the

police, no cognizance was taken and therefore, the Respondent filed a private complaint against the Applicants.

4. The learned Magistrate after perusing the complaint and recording the verification, issued process only against the Applicants as their son was minor and therefore, his name came to be deleted.

5. After recording the evidence and hearing the parties, the learned trial court by its judgment and order dated 10th February, 2006 convicted the Applicants under S. 323 read with 34 of I.P.C. by sentencing them to suffer simple imprisonment of 15 days and pay a fine of Rs. 500/- each, in default they were directed to undergo further simple imprisonment for 8 days each. The applicants were acquitted of the offences punishable under S. 504, 506 of I.P.C.

6. Being dissatisfied with the said judgment and order of conviction and sentence, an appeal being Criminal Appeal No. 39 of 2006 was preferred by the Applicants herein in the Court of Sessions at Thane on 28th February, 2006. The appeal was

admitted by the Sessions Court on 5th April, 2006 and notice was issued to Respondent No. 1. The Applicants contend that they have been diligently attending the court alongwith their advocate.

7. On 5.3.2012, learned Additional Sessions Judge dismissed the appeal owing to absence of advocate and the Applicants. It is contended that on 5.3.2012, the Applicants' advocate was busy in Bhivandi court in a part heard suit, and therefore, he instructed his junior to attend the court of Additional Sessions Judge, Thane. The Applicants could not attend the Additional Sessions Judge, as they were constrained to go at Nashik for their personal work and they had, in fact, informed their advocate for making necessary arrangement to attend the matter. It is further contended that the junior advocate could not reach in time when the appeal was called out for hearing, and therefore, the learned Additional Sessions Judge dismissed the appeal by confirming the judgment of the trial court.

8. From the perusal of record and facts of the present case, it is apparent that the Additional Sessions Judge, had summarily dismissed the appeal by recording that the appellants and their advocate remained absent and that there was nothing before the court to conclude that the judgment of conviction and sentence passed by the learned trial court is perverse and illegal.

9. It is apparent from the record that the learned Additional Sessions Judge did not follow the procedure, as laid down in Section 385 of the Code. The learned counsel for the Applicants rightly placed a useful reliance on a judgment of the Supreme Court in the case of *Bani Singh & Ors., Appellants Vs. State of U.P., Respondent*¹. Paragraphs 3, 7 and 8 of the judgment can be extracted to make the legal position clear, which reads thus:

“3. At this Juncture, it would be pertinent to make a brief reference to the relevant provisions of law having a bearing on this case. Chapter XXIX of the Criminal Procedure Code, 1973 (hereinafter called 'Code') comprising Sections 372-394 deals with 'Appeals'. For the purpose of our examination, the relevant provisions are Sections 384-386. Section 384, which

1 (1996) 4 Supreme Court Cases 720

deals with summary dismissal of appeals, enables the Appellate Court to summarily dismiss an appeal "if upon examining the petition of appeal and copy of the judgment received", it "considers that there is no sufficient ground for interfering". Section 385 provides that "if the Appellate Court does not dismiss the appeal summarily", it "shall cause notice of the time and place at which such appeal will be heard to be given to the parties involved. It further provides that thereafter, the Appellate Court shall "sent for the record of the case, if such record is not already in Court" and "hear the parties". The relevant part of Section 386 provides that "after perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears", the Appellate Court "may, if it considers that there is no sufficient ground for interfering, dismiss the appeal.

7. The Division Bench of this Court which referred this matter to us was of the view that these decisions, rendered by separate two-judge benches of this Court, are in conflict with each other. Before we decide on this issue, we must closely examine the scheme envisaged by the Code in this regard. The relevant portions of Sections 385 and 386 of the Code are extracted as under :

“385. Procedure for hearing appeals not dismissed summarily - (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given

(i) to the appellant or his pleader;

(ii) – (iv) * * *

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties :

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) * * *

386. *Powers of the Appellate 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 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

* * *

8. Section 385(2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it 'shall', after issuing notice as required by Sub-section (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously,

the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that “after perusing such record” the court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard.”

10. It can, thus, be concluded that after reading plain language of Sections 385 - 386, the appeal cannot be dismissed for non-prosecution *simpliciter*. On the contrary, the law envisages disposal of the appeal on merits after perusal and scrutiny of material on record. The intent of the legislature is clear which contemplates disposal of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but after cross-checking the reasoning with 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. In view of the aforesaid legal position, the matter needs to be remanded back to the Sessions Court at Thane for disposal of the appeal on merits, in the light of observations made hereinabove. In the circumstances, the following order is expedient:

ORDER

- (i) The impugned judgment and order dated 5.3.2012 passed by the Additional Sessions Judge, Thane in Criminal Appeal No. 39 of 2006 is quashed and set aside;
- (ii) The matter is remanded to the Sessions Court at Thane;
- (iii) The learned Sessions Judge shall hear the Applicants herein and the State by giving due opportunities and dispose of the appeal on merits in accordance with law. Needless to state that this Court has not gone into merits of the case;
- (iv) The Applicants shall appear before the Sessions

Court at Thane on 3rd September, 2018;

- (v) Rule is made absolute in the above terms and the criminal revision application stands disposed of accordingly.

Sd/-
[PRITHVIRAJ K. CHAVAN, J.]

Vinayak Halemath