

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Sr. No.247

CRM-M-8868-2020

Date of decision : 25.8.2022

Harinder Singh

.....Petitioner

VERSUS

Amrinder Singh and others

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Kewal Krishan, Advocate for
Mr.VB Aggarwal, Advocate for the petitioner

Mr.Maypreet Singh, DAG, Punjab

AMAN CHAUDHARY, J.

The present petition under Section 482 Cr.P.C. has been filed for quashing of impugned order dated 27.2.2017 passed by learned Additional Sessions Judge, SAS Nagar (Mohali), whereby the appeal filed by the petitioner was dismissed in default for want of prosecution and the order dated 13.11.2019, passed by learned Additional Sessions Judge, SAS Nagar whereby the application for restoration of the said appeal has been dismissed and to restore the appeal to its original number.

The brief facts of the case are that the complainant present petitioner on 22.11.2008, when he along with his brother after attending the court proceedings at District Courts, Mohali came out of the court premises and reached in the parking then at about 1.30 pm, one Amrinder Singh, his brother Gurvinder Singh along with seven other persons intercepted and

started beatings them. Amrinder Singh gave fist blows on the left side of the head of the complainant, and his brother Gurvinder Singh also pulled his hair and gave leg blows on his back. They slapped on the mouth of his brother Manjit Singh and also gave leg blows on his back. When the complainant and his brother raised alarm, the passerby gathered at the spot and the accused –respondents fled away and threatened them with dire consequences. On the basis of the statement of the complainant, FIR No.450 dated 22.11.2008 was registered under Sections 323, 341, 506, 34 IPC at Police Station Phase-I, Mohali.

After investigation, the challan was presented and the accused-respondents were charge sheeted under Sections 323, 341, 506, 34 IPC, to which they pleaded not guilty and claimed trial.

After analyzing the evidence led by the prosecution, the learned trial Court acquitted of the charge framed against Ranjit Singh whereas accused –respondent No.1 Amrinder Singh and Parminder Singh were held guilty and convicted under Section 323 IPC. However, they were released on probation under Section 4(1) of the Probation of Offenders Act on their furnishing personal bond in the sum of Rs.20,000/- each with one surety each of like amount thereby undertaking to be of good conduct and to appear to receive the sentence as and when called by the Court during the period of six month.

Being dissatisfied with the aforesaid judgment, the complainant- petitioner filed an appeal before the learned Additional Sessions Judge, SAS Nagar Mohali. However, vide order dated 27.2.2017, the said appeal was dismissed in default for want of prosecution on account

of the fact that despite the case having been called several times since the morning, neither the appellant nor anyone on his behalf had come present. The application filed for restoration of the said appeal was also dismissed by the learned Additional Sessions Judge, SAS Nagar vide order dated 13.11.2019. Hence, the present petition.

Learned counsel for the petitioner has referred to the order dated 13.11.2019, whereby the aforesaid application for restoration of the appeal was dismissed by the Court of Additional Sessions Judge, SAS Nagar on the ground that there is no provision in the Cr.P.C. to restore the criminal appeal and the Court was not empowered to restore the criminal appeal, which was dismissed in default by the learned predecessor of the Court. He further submits that grave prejudice has been caused to the petitioner on account of non-decision of his case on merit, in view of the dismissal of the same for want of prosecution. He next argues that it is only on account of the reasons mentioned in the application for restoration that neither the appellant nor anyone else on his behalf had come present before the Court on 27.2.2017. However, he submits that he had otherwise not defaulted previously in this regard. He prays that the impugned order be set aside and the appeal be restored to its original number subject to payment of any costs.

Notice of motion to respondent No.3 only.

On asking of the Court, Mr.Mavpreet Singh, DAG, Punjab accepts notice on behalf respondent No.3.

No notice in this case is being issued to the respondent Nos. 1 and 2 as no order prejudicial to them is proposed to be passed in the case,

the petitioner being the complainant in the case, whose appeal challenging the release of respondent Nos. 1 and 2 on probation has been dismissed in default by the learned Trial Court.

Heard learned counsel for the parties.

Order dated 27.2.2017 passed by learned Additional Sessions Judge reads as follows:-

“Present: None for the appellant
Sh.Gurinder Singh, Advocate, counsel for
respondents No.1,2
Sh.Manjit Singh, Addl.PP for State/
respondent no.3.

Case called several times since morning but neither appellant nor anyone on his behalf has come present. It is already 4.00 PM. Accordingly, the present appeal is dismissed in default for want of prosecution. Lower court record be returned. File be consigned to the record room.”

From perusal of the above order of the appellate court, it is clear that the appeal has been simply dismissed in default on account of the non-appearance of the appellant and his counsel.

While dismissing the application of the petitioner for restoration of the appeal, the learned Additional Sessions Judge, SAS Nagar in its order dated 13.11.2019 has observed as under:-

“5. After hearing the learned counsel for the applicant and learned APP for the State and having gone through the record carefully, this Court is of the considered view that the application deserves to be dismissed. Perusal of the record reveals that the applicant has filed the criminal

appeal against the judgment and order of acquittal dated 15.01.2016 passed by the Court of Sh. Aashish Saldi, the learned JMIC, SAS Nagar, (Mohali) in FIR No.450 dated 22.11.2008, Police Station Phase-I, SAS Nagar, (Mohali) vide which the respondents no.1 and 2 has been acquitted by the said court. Notice of the appeal was issued to the respondents. After completion of the services of the respondents, the appeal was fixed for 27.02.2017 by the learned Predecessor of this Court for arguments. On 27.02.2017, case was called several times since morning but neither appellant nor anyone else on his behalf has come present. Accordingly, the appeal has been dismissed in default for want of prosecution by the learned Predecessor of this Court.

The learned counsel for the applicant has argued that in view of the reasons mentioned in the application the appeal is liable to be restored to its original number and is to be decided on merits. He has further argued that even otherwise, the criminal appeal once admitted for hearing cannot be dismissed in default. In support of his contentions, the learned counsel for the applicant has placed reliance on case titled as Jawahar Lal alias Jawahar Lal Jalaj Vs. The State of U.P. Decided on 05.08.2015 (Allahabad). There is no dispute regarding the said proposition of law, but with due deference, the

said law is not applicable to the facts of the present case as in the said case appeal has been restored by the Hon'ble High Court by exercising the powers under Section 482 Cr.P.C. There is no provision in the Code of Criminal Procedure to restore a criminal appeal which was dismissed in default by the same court hence, I am of the considered view that this Court is not empowered to restore the appeal which was dismissed in default by the learned Predecessor of this Court. Keeping in view of the facts and circumstances, no case for restoration of the appeal by this court is made out and the application in hand stands dismissed accordingly. Papers be attached with the main file and file be consigned to the record room.”

From the perusal of the aforesaid order, it reveals that the learned Additional Sessions Judge, SAS Nagar has dismissed the application of the petitioner by observing that there is no provision in the Code of Criminal Procedure to restore a criminal appeal, which was dismissed in default by the same Court.”

The petitioner in para No.2 to 4 of the application for restoration of appeal had given the reasons of his non-appearance. The said paras reproduced as under:-

“2. That on the given date, the appellant had come present in person to attend the said case. However, since the Ld. Presiding Officer was not in seat, it was given to learn by the reader of the Court that Ld. Presiding

Officer is on leave for the pre-lunch session. The applicant believed the same in good faith.

3. That the applicant, thereafter, in order to put in his personal appearance before the Court started from his residence at about 2.15 PM. However, as ill luck would have it, while being on road and coming towards the Court, the vehicle (scooter) being ridden by the applicant at that time skidded off the road. The vehicle was extensively damaged and was rendered unable to move. However, the applicant escaped with some bruises on his body.

4. That despite the given condition and circumstances, the applicant still managed to reach the court at about 3.30 PM and straight went to the Court to inquire about his case. However, he was shocked to learn that said appeal has already been dismissed in default, on account of non appearance.”

It is the case of the petitioner that he had given sufficient reasons for being not able to appear before the Court on 27.2.2017. It may be noticed that the learned Court in the impugned order dated 27.2.2017 had also observed that even the learned counsel for the petitioner had not appeared. It is on account of none of them appearing, that the appeal was ordered to be dismissed in default. In so far as the reasons given by the petitioner for his non-appearance, they seem apparently genuine. However, on account of non-appearance of the learned counsel for the petitioner or for his default, it has been held by Hon'ble the Supreme Court in the case of **Rafiq and another vs. Munshilal and another** reported as AIR 1981 SC 140, which reads as under:

“What is the fault of the party who having done

everything in his power expected of him, would suffer because of his advocate... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent... We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted.”

The appellate Court in the present case has dismissed the appeal in default rather than hearing it on merit. The Hon'ble Supreme Court in the case of **Bani Singh and others v. State of U.P.**, reported as AIR 1996 SC 2439 had held as under:-

“13. What then is the area of conflict between the two decisions of this Court? In Shyam Deo's case, this Court ruled that once the Appellate Court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non- prosecution for non-appearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the Appellate Court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record. In Ram Naresh Yadav's case, the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo's case but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for non-prosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.

14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo's case appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. 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. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution."

Thus, in view of the peculiar facts and circumstances of the case and in view of the law laid down by the Apex Court in the cases of **Rafiq** and **Bani Singh (supra)**, in case of absence of petitioner or his

counsel, the Appellant Court was required to decide the appeal on merit and not dismiss the same in default. As such, the order of the Appellate Court dated 27.2.2017 passed by Additional Sessions Judge is set aside subject to deposit of Rs.5000/- as costs to be deposited with the Poor Patient Welfare Fund, PGIMER, Chandigarh.

The petitioner is directed to appear before the Appellate Court on or before 15.9.2022.

25.8.2022
gsv

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No