

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

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CRM-M-46647-2022(O&M)
Date of decision: 20.12.2022

RAJESH SHAH ALIAS RAJESH SHOW

....Petitioner(s)

Versus

STATE OF PUNJAB

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Lupil Gupta, Advocate
for the petitioner.

Mr. Kamalpreet Bawa, AAG Punjab.

AMAN CHAUDHARY. J.

Present petition has been filed under Section 482 CrPC for quashing the impugned orders dated 31.08.2022 and 09.12.2021(Annexure P-5 and Annexure P-3) passed by learned Additional Sessions Judge, Tarn Taran whereby the application for restoration was dismissed and appeal filed by the petitioner against the judgment and order dated 19.09.2016 was dismissed in default due to non-appearance of the petitioner.

Learned counsel contends that the petitioner, who was serving as a Constable in the BSF posted at Bhikihind, District Tarantaran, who is otherwise a resident of Calcutta, West Bengal has been falsely involved in the FIR wherein he was convicted vide judgment dated 19.09.2016 and sentenced to undergo two years, Annexure P-1. Feeling aggrieved, the petitioner filed appeal on 09.12.2021.

He further states that on 09.12.2021, the petitioner being on duty in the BSF could not come present before the Court on which date unfortunately even his counsel did not appear, leading to the dismissal of the appeal in default vide order dated 09.12.2021, Annexure P-3. He thereafter, filed an application for restoration of the appeal, which was dismissed on 31.08.2022, Annexure P-5 on the ground that the same was barred under Section 362 Cr. P.C. Vide the said order, intimation was sent to the trial Court to procure the presence of the accused-petitioner to serve the sentence, consequently he submits that the petitioner was arrested and since then he is custody. It is his further submission that non-appearance of the petitioner was on account of the aforesaid fact and that his appeal ought to not have been dismissed in default but should have been heard on merits by granting him and his counsel one opportunity to appear, keeping in view the reasons assigned, on account of which the petitioner and his counsel had absented. He further submits that due to fault of the counsel the petitioner should not suffer.

Learned counsel relies on a judgment passed by this Court in CRM-M-8868 of 2020 titled "Harinder Singh Vs. Amrinder Singh and others".

Notice of motion in this case had been issued on 30.11.2022, pursuant thereto learned State counsel has filed short reply dated 20.12.2022 by way of affidavit of Preetinder Singh, PPS, Deputy Superintendent of Police, Sub Division Valtoha, Camp at Bhikhiwind, District Tarn Taran. He makes a reference to para 5 thereof to submit that the Police has verified from the Commandant, Border Security Force by email as to whether the petitioner was present in his Unit being on duty as had been stated by him. In response whereof, the Commandant for 41 Corps BSF vide their letter dated 13.12.2022 through email had intimated the SHO Police Station Bhikhiwind that the petitioner was in fact deployed at

Alamganj, District Dhubri, Assam on 09.12.2022.

Heard.

It is apposite make a reference to the judgment of Hon'ble The Supreme Court in the case of **Bani Singh and others v. State of U.P.**, AIR 1996 SC 2439 wherein it was 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 nonprosecution 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 nonprosecution."

Adverting to the facts of the present case inasmuch as that the petitioner, who was working as a Constable in the BSF was on duty on the said date, as has also been confirmed by the Commandant, for 41 Corps BSF vide their letter dated 13.12.2022 through email as sent to SHO Police Station Bhikhiwind stating therein that the petitioner was in fact deployed at Alamganj, District Dhubri, Assam on 09.12.2022, thus he could not appear before the Court, which seems to be justified explanation of his absence. Insofar as non-appearance of the counsel for the petitioner before the Court on the said date is concerned, the petitioner in para 2 of his application filed for restoration of the appeal, had given the reason thereof that the learned counsel was busy in another Court on that date.'

Insofar as the non-appearance of the counsel for the accused-petitioner is concerned Hon'ble The Supreme Court of India in the case of '**Rafiq and another vs Munshilal and another** reported as AIR 1981 SC 140, held, "What is the fault of the party who having done everything in his power expected of him, would 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." Reiterating the aforesaid view, Hon'ble The Supreme Court in the case of **Shaikh Mukthar and another vs. State of Andhra Pradesh**, (2020) 19 SCC 178, has observed that "we find from the judgment of the High Court that the appellants were not heard in the High Court. The appellants' advocate remained absent on the date of hearing. The

appellants should not have been penalised for the same.”

In the case of **K. Muruganandam and others Vs. State Rep. by the Deputy Superintendent of Police and another** SLP(Criminal) 8150 of 2021 decided on 12.08.2021, Hon’ble The Supreme Court of India held that, “It is well settled that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case only after appointing an amicus curiae, but cannot dismiss the appeal merely because of non-representation or default of the advocate for the accused (see Kabira vs. State of Uttar Pradesh 1981 (Supp) SCC 76 and Mohd. Sukur Ali vs. State of Assam (2011) 4 SCC 729),” noted the Division Bench.

The Appellate Court ought not to have dismissed the appeal for non-prosecution but should have rather proceeded as per the law laid down, as referred to above. At times, the accused or his counsel can be prevented by sufficient reasons to put an appearance before the Court on a given date and every such absence cannot necessarily be construed as deliberate and willful. Further, the fact that the petitioner who stood convicted would have gained nothing by not appearing before the Court in the appeal filed by him, more so in the present case sufficient reason for non-appearance has been furnished, inasmuch as that the petitioner who was serving the BSF as a Constable was on duty on the said date, as affirmed by the Commandant, for 41 Corps BSF.

In view of the peculiarity of facts and circumstances of this case, judgments referred to hereinabove and to strike a balance so that no prejudice is caused to any of the parties, this Court finds that ends of justice would be adequately met, in case the Appellate Court is directed to decide the appeal on

merits by granting an effective opportunity to the present petitioner to advance submissions.

Consequently, the present petition is allowed. The orders dated 31.08.2022 and 09.12.2021, Annexure P-5 and Annexure P-3 passed by learned Additional Sessions Judge, Tarn Taran are hereby set aside. The appeal be restored at its original number and the Appellate Court is directed to decide the appeal on merits, after hearing the parties in accordance with law.

(AMAN CHAUDHARY)
JUDGE

December 20, 2022

S.Sharma(syr)

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