IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

****

CWP-3719-2023
Date of decision : 05.05.2023

Shamsher Singh ... Petitioner

Versus

State of Punjab and others ... Respondents

CORAM: HON'BLE MR.JUSTICE VIKAS BAHL

Present: Mr.Ajaivir Singh, Advocate for the petitioner.

Mr.Karan Puggal, DAG, Punjab for respondents no.1 to 5.

<u>VIKAS BAHL, J.(ORAL)</u>

1. This is a civil writ petition filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of certiorari for quashing of order dated 09.12.2022 (Annexure P-4) passed by the Financial Commissioner, Punjab, whereby the revision petition under Section 16 of the Punjab Revenue Act against the orders passed by the Collector, Gurdaspur and the Assistant Collector II Grade, Gurdaspur has been dismissed on merits in the absence of the counsel.

2. Learned counsel for the petitioner has submitted that the petitioner had filed ROR no.143 of 2022 against the orders dated 13.12.2021, 20.08.2015 and 01.10.2014 and the case was listed on 02.09.2022 and on the said date, the matter could not be taken up and the case was adjourned to 09.12.2022. It is submitted that on 02.09.2022, learned counsel for the petitioner was present but on account of heavy Board, the matter could not be taken up. It is further submitted that on 09.12.2022 learned counsel for the petitioner could not appear before the Financial Commissioner on account of personal difficulty and the Financial

Commissioner instead of either adjourning the matter or dismissing the same for non-prosecution, has dismissed the case on merits. It is stated that as per provisions of Order 41 Rule 17 (1) of CPC, it has been provided that in the absence of counsel for the appellant, the Court has power to pass an order of dismissal but the explanation specifically provides that the said power would not empower the Court to dismiss the appeal on merits. Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in case titled as ***"Abdur Rahman and others vs. Athifa Begum and others"*** reported as ***(1996) 6 SCC 62*** to contend that at best, in case of non-appearance of the counsel, the appellate Court can dismiss the same for non-prosecution and should not decide the case on merits. It is argued that the proposition of law as propounded by the above said judgment would also apply to the cases pending before the revenue authorities including the Financial Commissioner. It is submitted that since the counsel was not present when the matter was dismissed, thus, the case of the petitioner could not be fully put forth before the Financial Commissioner and has prayed that the impugned order dated 09.12.2022 be set aside and ROR no.143 of 2022 be heard afresh.

3. Notices were issued to respondents no.6 and 7 on three occasions and as per the report of the Registry, on the third occasion, the same were received back with the report that respondents no.6 and 7 were not available at the time of service and notices have been affixed on their house gate. It is submitted that inspite of the same, no one has appeared on behalf of respondents no.6 and 7. Learned counsel for the petitioner has pointed out that the revision petition has been dismissed in limine without notice to respondents no.6 and 7 and thus, prayed that the matter be remanded to the Financial Commissioner for reconsideration.

4. Learned counsel for the State has submitted that in the present case, the dispute is between privates parties and the State is not a contesting party.

5. This Court has heard learned counsel for the parties and perused the paper book.

6. Order 41 Rule 17(1) of the CPC reads as under:-

> "*17. Dismissal of appeal for appellant's default.--*
> *(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.*
> *[Explanation.--Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]"*

A perusal of the said Rule would show that in case the appellant is not appearing then the Court is empowered to pass an order of dismissal. The explanation provides that nothing in this sub-rule could be construed as empowering the Court to dismiss the appeal on merits. The Hon'ble Supreme Court of India in ***Abdur Rahman's*** case (supra) has held as under:-

> *"2. The qualified notice issued to the respondents indicated that this Court proposed to grant leave against the impugned judgment and order of the High Court and on allowing the appeal, was expecting to remit the matter back, to the file of the High Court for disposal of the matter on its merits. The respondents' learned counsel has been confronted with the proposition that though the High Court. could have dismissed the appeal in default in the absence of the appellants' counsel, it could not have adverted to the merits of the case. Here, the High Court has recorded that all relevant aspects of the matter have been taken into account in order to hold that there was no available ground for interference with the decision of the Trial Court. This was an exercise with which the High Court should have been well-advised not to indulge in at the stage of Order 41 Rule 17 CPC. The Explanation to Order 41 Rule 17(1) CPC says that nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits. The High Court having transgressed that limit, we have therefore no option but to allow the appeal, set aside the impugned judgment and order of the High Court and put the matter back to its file*

for fresh disposal in accordance with law. Ordered accordingly. No costs. Allowed"

The above principle would also apply to proceedings before the Revenue Officers including the Financial Commissioner. In case of non-appearance of the petitioner or his counsel, or both, it was open to the Financial Commissioner either to dismiss the case in default or to adjourn the case for some other date but instead, the Financial Commissioner has dismissed the same on merits. On account of the absence of the counsel for the petitioner, the case of the petitioner could not be fully put forth before the Financial Commissioner. It is pointed out that the case was first listed on 02.09.2022 on which date, the case could not be taken up on account of paucity of time although counsel for the petitioner was present in the Court of the Financial Commissioner. On 09.12.2022, the counsel for the petitioner could not appear on account of personal difficulty and the petitioner should not suffer on the said count. It would be in the interest of justice to set aside the order dated 09.12.2022 and direct the Financial Commissioner to redecide the ROR no.143 of 2022 after hearing learned counsel for the petitioner.

6. Keeping in view the above said facts and circumstances, the present petition is allowed and the impugned order dated 09.12.2022 is set aside and the Financial Commissioner (Appeal), Punjab is directed to redecide the ROR no.143 of 2022 after hearing learned counsel for the petitioner. The petitioner through his counsel would appear before the Financial Commissioner on 24.05.2023.

(VIKAS BAHL)
JUDGE

May 05, 2023
Davinder Kumar

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