

HIGH COURT OF PUNJAB AND HARYANA
CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI
Date of Decision: 20th March 2024

Case No: CRR-2561-2023

LAKHWINDER SINGH ...PETITIONER

VERSUS

M/S SEW AND STITCH ...RESPONDENT

Legislation:

Section 138 of the Negotiable Instruments Act.

Subject: Challenging conviction under Section 138 of the Negotiable Instruments Act for failure to comply with financial obligations under a cheque amounting to ₹40 lacs.

Headnotes:

Negotiable Instruments Act – Dishonour of Cheque – Conviction and Sentencing – The petitioner, convicted under Section 138 of the Negotiable Instruments Act for cheque dishonour, challenged the trial court's verdict, sentencing him to six months' imprisonment and ordering payment of ₹40 lakhs as compensation. The First Appellate Court dismissed the petitioner's appeal for non-compliance with its direction to deposit 20% of the compensation amount and conducted the proceedings ex parte. [Para 1-2]

Right to Adequate Representation – The petitioner contended the appellate hearing was conducted ex parte, without proper representation or consideration of his grounds of appeal, citing the Supreme Court's judgment in “K. Muruganandam & ors Vs. State rep. by the Deputy Superintendent of Police & Anr.”, which emphasizes the necessity of adequate representation for the accused. [Para 4, 7-8]

Appellate Court's Obligation – The respondent-opposed granting further opportunities to the petitioner, referencing the Supreme Court's decision in “Bani Singh Vs. State of U.P.”, which mandates an appellate court to dispose of appeals on merits rather than for non-prosecution. [Para 5]

Decision – Remand for Fresh Decision by Appellate Court – The High Court found the Appellate Court's decision to be ex parte, lacking adequate representation for the petitioner. It set aside the appellate judgment, emphasizing the right to appeal and the necessity for effective legal representation. The case was remanded to the Appellate Court for a fresh decision, conditional on the petitioner depositing 20% of the compensation amount and appearing on the specified date. [Para 8-9]

Referred Cases:

- K. Muruganandam & Ors Vs. State rep. by the Deputy Superintendent of Police & Anr.', Criminal Appeal No.809/2021.
- Bani Singh Vs. State of U.P., 1996 AIR (Supreme Court) 2439.

Representing Advocates:

Mr. Varun Katyal for petitioner.

Mr. Vivek Singla for respondent.

KULDEEP TIWARI, J. (Oral)

¹ Through the instant petition, challenge is thrown to the judgment dated 28.3.2023, whereby, the learned trial Court concerned has convicted the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, vide judgment dated 28.3.2023 and sentenced him to undergo imprisonment for a period of six months and further directed him to pay the cheque amount i.e. total ₹40 lacs to the complainant so as to compensate the complainant vide order dated 31.3.2023 and in default of payment of compensation amount, to further undergo imprisonment for a period of one month.

Having aggrieved with the judgment of conviction (supra), the petitioner preferred statutory appeal before the First Appellate Court

concerned and vide order dated 27.4.2023, the learned Appellate Court concerned directed the petitioner to deposit 20% of the total of compensation amount. The petitioner failed to comply with the directions of the learned Appellate Court concerned, thereupon, it proceeded to decide the appeal and the same was dismissed vide judgment dated 21.8.2023. The perusal of the judgment dated 21.8.2023, makes revelations that the petitioner was absent on the date fixed for final arguments.

2. Having aggrieved with the orders of the Courts below, the instant petition has been filed and on the motion hearing, this Court had directed the petitioner to surrender before the learned trial Court concerned, in pursuance of the sentence order passed by the learned trial Court concerned. The petitioner thereupon, surrendered before the learned trial Court and he was sent to prison for honouring the sentence as imposed upon him. This Court on 15.12.2023, considering the fact that the petitioner has undergone about one month out of the total sentence of six months, as imposed upon him, suspended the remaining sentence of the petitioner.
3. Learned counsel for the petitioner submits that infact the petitioner was not in a position to pay 20% of the compensation amount, as imposed upon him by the Court below and on the date of final hearing before the Appellate Court, an exemption application was moved through his counsel. He further submits that the Appellate Court not only declined to grant exemption, rather refused to hear his counsel on merits. He further submits that his application filed under Section 311 Cr.P.C. filed before the learned Appellate Court concerned was also not adjudicated. He further submits that infact the hearing before the Appellate Court concerned is an *ex parte* hearing and none of the grounds which he has taken in his memorandum of appeal, was considered by the Appellate Court concerned. He further placed reliance upon the judgment passed by the Hon'ble Supreme Court in case "**K. Muruganandam & ors Vs.State rep. by the Deputy Superintendent of Police & Anr.**", **Criminal Appeal No.809/2021**. He further submits that the petitioner is now ready and willing to deposit 20% of the compensation amount before the learned Appellate Court concerned in case one more opportunity is granted to him
4. Per contra, the learned counsel for the respondent- complainant has vociferously opposed the submissions made by the learned counsel for the petitioner and submits that the petitioner cannot take the benefit of his own wrong doings. He further submits that firstly the petitioner did not deposit the 20% of the compensation amount, as directed by the learned Appellate Court

concerned and thereupon, in order to pay the liability to pay the compensation amount, he adopted the evasive method and filed the exemption application on lame excuses and the learned Appellate Court concerned was right in its approach to decide the appeal on merits. To substantiate his arguments, he has relied upon the judgment passed by the Hon'ble Supreme Court in the case of “**Bani Singh Vs. State of U.P.**”, 1996 AIR (Supreme Court) 2439, wherein the following question was framed and it was answered in subsequent paras

No.14 and 15, which read as under:-

“The question is, where the accused is the appellant and is represented by a pleader, and the latter fails to appear when the appeal is called on for hearing, is the Appellate Court empowered to dispose of the appeal after perusing the record on its own or, must it adjourn the appeal to a future date and intimate the accused to be present on the next date of hearing?

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 simplicitor. 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 satisfy 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. Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public

prosecutor, if he is present, before disposal of the appeal on merits. [Section 385](#) posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. [Section 386](#) then provides that the Appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that [Section 385](#) provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also [Section 386](#) provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.”

6. This Court has considered the submissions made by both the learned counsel for the parties concerned and also examined the judgment passed by the Courts below.
7. Infact the case of the present petitioner is clearly covered by the judgment passed by the Hon'ble Supreme Court in **K.Muruganandam's case (supra)**, wherein, it was observed as under:-

“8. 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* and *Mohd. Sukur Ali vs. State of Assam*).”

8. In the instant matter, it is not the case that the learned Appellate Court concerned has decided the appeal on its own merits because none of the plea raised in the memorandum of appeal was considered by the learned Appellate Court, which led this Court to conclude that infact it is an *exparte* decision against the present petitioner. The best procedure which the learned Appellate Court could have adopted is to decide the appeal after appointing an *amicus curiae*, so that the petitioner could not have been remained unrepresented at the time of final decision. The appeal is a statutory right of a convict, which cannot be taken away in a cursory manner. The adequate protection granted under the Statute should be adhered to and that adequate protection also includes the adequate and effective representation of the appellant, either by a counsel appointed by him or through *amicus curiae* appointed by Court concerned. In failure to appoint *amicus curiae*, any subsequent decision made on the appeal would infact tantamount to take away the right of appeal from the convict. Therefore, this Court deems it fit and appropriate to set-aside the judgment passed by the First Appellate Court concerned and **remanded** the instant *lis* to the learned Appellate Court concerned for its decision a fresh, subject to the condition that the petitioner would cause an appearance before the learned Appellate Court concerned on 4.4.2024 and deposit 20% of the compensation amount, as directed by the learned Appellate Court concerned vide its order dated

9. The instant petition is **disposed of** accordingly.