(2007) 09 AHC CK 0191

Allahabad High Court

Case No: None

Ram Sharan Singh		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision: Sept. 17, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 385, 386

Citation: (2008) 6 AWC 6125 : (2008) 1 UPLBEC 24

Hon'ble Judges: B.S. Chauhan, J; Arun Tandon, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

B.S. Chauhan, J.

This Special Appeal has been filed against the judgment and order of the learned Single Judge dated 14.08.2007, by which the application of the petitioner-appellant for restoration of the writ petition has been dismissed on the ground that there was no justification for condoning the delay of more than six years.

2. The facts and circumstances of the case are that the petitioner-appellant, while serving as a Soldier in E.M.E., was given a charge sheet on 22.11.1991 for remaining absent from duty without leave. After concluding the enquiry, he was awarded the punishment of dismissal from service vide order dated 24.11.1991. The petitioner-appellant filed Writ Petition No. 12853 of 1992, which was dismissed in default vide order dated 04.05.2001. An application for restoration with application for condonation of delay was filed in May, 2007. The said application was rejected by the learned Single Judge vide impugned judgment and order dated dated 14.08.2007 taking note of the fact that the matter was earlier listed on 12.04.2001 and adjournment was sought. The matter was adjourned on the condition that on the next date of listing, no adjournment would be granted on any ground, whatsoever. When the matter came up for hearing on 04.05.2001, none appeared to

press the petition and, therefore, petition was dismissed for want of prosecution.

3. Shri B.N. Singh, learned Counsel appearing for the petitioner-appellant has submitted that the petitioner-appellant had engaged a counsel, who executed a Vakalatnama in his favour and, therefore, he cannot suffer for inaction on his part. The learned Single Judge ought to have recalled the said order dismissing the writ petition in default restored the writ petition to its original number and heard the case on merit. Therefore, the appeal deserves to be allowed.

4. On the other hand, Shri C.K. Rai, learned Standing Counsel has opposed the appeal submitting that the application for restoration was filed after more six years of dismissal of the writ petition. The petitioner-appellant was not prosecuting his case with diligence and it was his solemn duty to find jut from his counsel or the Court as what was the status of his case. If he did not consider it proper to enquire about the status of his case for a period of more than six years, no interference is required and the appeal is liable to be dismissed.

5. We have considered the rival submissions made by learned Counsel for the parties, perused the record and examined the judgments relied upon by the counsel for the parties.

6. In Rafiq and Anr. v. Munshilal and Anr. AIR 1981 SC 140 ; and Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, , while dealing with a similar issue held that a litigant cannot suffer for the fault of his counsel. The Hon''ble Supreme Court in the former case observed as under:

What is the fault of the party who having done everything in his power expected of him, would suffer because of the default 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 his chosen advocate defaulted.

7. Similar view has been reiterated in Goswami Krishna Murarilal Sharma v. Dhan Prakash and Ors. (1981) 4 SCC 474, where the counsel had withdrawn his Vakalatnama without notice to his client. The Hon''ble Supreme Court following its earlier judgment in Rafiq (supra), held that the Court should not have proceeded to dismiss the appeal straight away on the ground that the appellant was not present in person when his counsel had withdrawn the Vakalatnama. At least a notice ought to have been given to such a litigant to make an alternative arrangement or appear in person.

8. Similar view has been reiterated in Tahil Ram Issardas Sadarangani and others Vs. Ramchand Issardas Sadarangani and another, ; and Malkiat Singh and Anr. v. Joginder Singh and Ors. AIR 1998 SC 258, observing that in case a litigant is neither negligent nor careless in prosecuting his case but his lawyer pleads no instruction, the Court should issue notice to him to make an alternative arrangement. Such a

course is required in the interest of justice and the Court may proceed from the stage the earlier counsel pleaded no instruction. If the litigant is not at fault, he should not suffer for such a conduct of his counsel.

9. In Sushila Narahari and Others Vs. Nandakumar and Another, , the case was dismissed in default and an application for restoration was dismissed on the ground that there was a delay of 40 days in filing the application for restoration The Hon''ble Apex Court held that the delay due to advocate''s dereliction in duty withdrawing his Vakalatnama without notice to his client warranted condonation.

10. In Bani Singh and ohters Vs. State of U.P., , a matter was referred to the larger Bench of the Hon''ble Supreme Court as there had been conflict of opinion between two Benches of the Hon''ble Supreme Court on the issue as what should be the course of action in case a lawyer does not appear in the High Court at the stage of hearing of a criminal appeal. The Court held that if the accused is in Jail and cannot, on his own, come to Court, it will 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 expenses to assist it, there is nothing in the law to preclude it from doing so. While interpreting the provisions of Sections 385 and 386 of the Code of Criminal Procedure, and considering its earlier judgments in Ram Naresh Yadav v. State of Bihar AIR 1987 SC 1500; and Shyam Deo Pandey v. State of Bihar AIR 1971 SC 1506, the Court held that the accused/appellant may be given a chance of appearance if his lawyer is not present and in certain circumstances, a lawyer may be appointed at State expenses to assist the Court. However, the case may also be decided on merit in absence of the appellant as the higher Court can remedy the situation if there has been a failure of justice. The Court observed as under:
The appellant and his lawyer can remain absent with impunity, not once, again and again, the Court issues a warrant for the appellant''s presence. A complaint to the Bar Council against the lawyer for nonappearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too, would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of appellant, the higher Court can remedy the situation if there has been a failure of justice.

11. In Salil Dutta Vs. T.M. and M.C. Private Ltd., , the Apex Court, after considering its earlier judgment in Rafiq (supra) observed that the said case was decided on the facts involved therein and, thus, it did not lay down any absolute proposition. The Court observed as under:

It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant

but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult.

12. Thus, in such a case the applicant has to establish that he was neither negligent nor careless in execution of the Court proceedings and, therefore, cannot be said to be at fault.

13. The petitioner-appellant was in service. He is an educated person and not a rustic villager. No explanation has been furnished as under what circumstances he could not make any attempt to find out status of his case. It was not the case where his counsel pleaded no instruction rather he appeared and sought adjournment. Court granted adjournment on the condition that the matter shall not \\ be adjourned further and as none appeared on the date when the matter was listed, it was dismissed in default. Petitioner-appellant could not furnish any explanation for approaching the Court after about six and half years. In such a fact situation, we do not find any cogent reason to interfere with the impugned judgment and order of the learned Single Judge. The appeal lacks merit and is accordingly dismissed.