IN THE HIGH COURT OF SIKKIM
GANGTOK

Criminal Revision Petition No.7 of 2007

1. Ram Bahadur Gurung
S/O Shri Karka Bdr Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

2. Ms. Kalpana Gurung,
D/O Shri Kharkaraj Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

3. Ms. Padma Gurung,
D/O Shri Kharkaraj Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

4. Ms. Neeta Gurung,
D/O Shri Man Prasad Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

5. Smt. Pabira Gurung,
W/O Shri Man Prasad Gurung
R/O Thekabong Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

6. Mr. Dhan Bdr. Gurung,
S/O Shri Padam Bahadur Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

7. Mr. Padam Lal Gurung,
S/O Shri Dhan Bdr. Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

8. Mr. Sujan Gurung,
S/O Govardhan Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim.

9. Mr. Basant Gurung,
S/O Shri Bhuvan Singh Gurung,
R/O Parkha Busty,
P.O. Parka, P.S. Pakyong,
East Sikkim. ..... ***Petitioners***

VERSUS

The State of Sikkim ..... ***Respondent***

For the Applicants/ Petitioners : Mr. Tempo Gyatso Bhutia, Advocate

For the Respondent : Mr. J. B. Pradhan, Public Prosecutor with Mr. Karma Thinlay, Additional Public Prosecutor.

PRESENT : THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE

Last date of hearing : 27th June, 2008

DATE OF JUDGMENT : 7th August, 2008

J U D G M E N T

A. P. SUBBA, J.

This is a Revision Petition, jointly filed by the Petitioners numbering 9 in all, under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973.

2. The relevant facts leading to the filing of the present Revision Petition may briefly be stated as follows:-

All the 9 Revision Petitioners herein, were put on trial for alleged commission of several offences under the Indian Penal Code, in the Court of the learned Chief Judicial Magistrate, (East and North) at Gangtok. Having come to the conclusion that the case against the accused persons stood proved beyond reasonable doubt, the learned trial Court convicted and sentenced all the 9 accused persons under different sections of law, namely,

under Sections 143/148/325/149, 323/149, 427/149 IPC. Being aggrieved by such order of conviction and sentence, the Petitioners preferred an appeal in the Court of the learned Sessions Judge, (East and North) at Gangtok. After several adjournments which were allowed both at the request of the learned Public Prosecutor as well as the accused persons, the matter came up for hearing on 29.10.2007. However, the appellants having remained absent on this date, the learned appellate Court heard and disposed of the matter on merits in the absence of the appellants. It is against this order that the appellants have come up in the present Revision Petition before this Court.

3. I have heard Mr. Tempo Gyatso Bhutia, learned Advocate appearing on behalf of the Applicants/Petitioners and Mr. J. B. Pradhan, learned Public Prosecutor appearing on behalf of the State – Respondent.

4. The question for consideration is, whether the course adopted by the learned first appellate court in disposing of the appeal on merits in the absence of the appellants is in conformity with the law.

5. A perusal of the Revision Petition goes to show that one of the grounds taken is that, the impugned order is bad in law inasmuch as, the learned Court below ought to have dismissed the appeal in default instead of disposing of the appeal on merits when the appellants failed to appear on the date of hearing of the appeal. It was thus contended that the approach adopted by the learned Court was contrary to the law. In support of his contention, the learned Counsel cited the following decisions :-

1. **1991 Cr.L.J. 2641-2642 (Karn): Mohammed Salim Husen Sab Savantanavar vs. Health Inspector, HDMC Hubli,**
2. **1990 Cr.L.J., 286, (Karn) : M. D. Farooq vs. State of Karnataka.**
3. **AIR 1990 SC 1224 - Dr. Jainendrakumar Vijaykumar Badjate vs. State of Maharastra**

6. There is no doubt that the above three decisions, following the ratio in ***Ram Naresh Yadav*** vs. ***State of Bihar AIR 1987 SC 1500,*** wherein a two Judge Bench of the Apex Court had held that an appeal can be disposed of on merits only after hearing the appellant or his Counsel, lay down in clear terms that an Appellate Court should not dispose of an appeal on merits on default of the appellants. It is however to be noted that the law laid down in the above Ram Naresh Yadav's case is no longer the good law after the larger Bench decisions in ***(1996) 4 SCC 720 - Bani Singh & Others*** vs. ***State of U.P.*** and ***Kishan Singh*** vs. ***State of U.P. (1996) 9 SCC 372.*** Dissenting from the view taken by the earlier Division Bench in Ram Naresh Yadav's case, the three judge Bench in Bani Singh's case observed in paragraph 15 of the judgment as follows :-

> **"We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav 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."**

Analyzing the provision contained in Sections 385-386 Cr.P.C. and laying down the correct position of law, the Court further observed in the same paragraph as follows :-

> **"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."**

Similarly, the three judge Bench in Kishan Singh's case observed in paragraph 7 of the judgment as follows :-

> **".....It is, thus clear, that the duty of the appellate court to examine the petition of appeal and the judgment under challenge and to consider the merits of the case before dismissing the appeal summarily is not dependent on the appellant or his counsel appearing before the Court to press the appeal. As soon as a petition of appeal is presented under Section 382 or 383 it becomes the duty of the appellate court**

to consider the same on merits, even in the absence of the appellant and his counsel before dismissing the same summarily."

7. It is pertinent to note that the principle of law laid down in the above case presently hold the field and the same is being followed in subsequent decisions. One such later decision that can be referred to, is the decision rendered by a two Judge Bench of the Apex Court in ***G. Raj Mallaiah*** vs. ***State of A.P. (1998) 5 SCC 123.*** In this case, the Division Bench, quoting the above decision with approval, observed that it is open to the Court to dispose of an appeal on merits even in the absence of the counsel appearing for the parties, when the case is set down for hearing and the Advocate or party concerned does not appear. The only rider added to the law laid down in the judgment is that the principle stated in the above Bani Singh's case would not apply to a case where the appellant or his advocate remains absent being unaware of the date set down for hearing.

8. The above being the settled law on the point, there seems to be no irregularity or illegality in the procedure adopted and followed by the learned Sessions Judge, (East & North) in the matter. The question, however, is whether there is compliance with the requirement of law in the procedure followed by the learned appellate Court.

The relevant observation made by the learned appellate Court below occurring in paragraph 5 of the impugned judgment is as follows :-

"Heard the learned Public Prosecutor for the respondent State who referred to oral and documentary evidence adduced by the prosecution in support of his case".

In paragraph 6 it is further observed as follows :-

"I have gone through the case files including the oral and documentary evidence contained in the case referred and also considered the submission of the learned PP for the Respondent/State".

9. The above observations made by the learned trial Court, no doubt, indicates that the learned Court went through the case files including the oral and documentary evidence contained in the case record while disposing of the appeal. However, it is difficult to come to any conclusion from such mere recital that the learned appellate Court arrived at its conclusion after applying its judicial mind and after perusing the record. It is well settled that the requirement regarding the perusal of record before disposing of an appeal cannot be treated as an empty formality. Indicating the nature of the order that is expected of an appellate court in such matters, the Apex Court in ***Shyam Deo Pandey & Others*** vs. ***State of Bihar AIR 1971 SC 1606*** has observed as follows :-

> **"19. ..... The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case."**
>
> **"20. .....There must be a clear indication in the judgment or order of the Appellate Court that it has applied its judicial mind to the particular appeal with which it was dealing. Such an indication will be available when the Appellate Court has considered the material on record, which means not only the judgment and petition of appeal, but also the relevant materials. .....There will be other materials on record and they have to be perused by the Appellate Court....."**

In Bani Singh's case (supra) which affirmed the above Shyam Deo Pandey's case, it has been observed as follows :-

> **"..... 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. ....."**

It becomes clear from the above, that the expression 'disposal of an appeal on merits' signifies something more than merely hearing the parties and going through the case records. Thus, it goes without saying that the mere recitation by the appellate Court that it has gone through the case file

including the evidence and also considered the submission addressed without indicating as to what were the materials that were taken into consideration and also without indicating as to how the appellate Court was satisfied that the reasoning and finding recorded by the trail Court were found consistent with the material on record would not be sufficient compliance with the requirement of law. Such being the requirement of law, it is evident that there is no substantial compliance with the law as laid down by the Apex Court in the present case. Thus, it cannot be said that the impugned order is in conformity with the requirement of law and the procedure which the learned appellate Court ought to have followed and complied with.

In the result, this Revision Petition succeeds. Accordingly, the impugned order is set aside and the matter is remanded with direction to the learned appellate Court below to rehear the matter according to law and in the light of the observations made above.

Records of the Court below be sent back forthwith.

(A. P. Subba)
JUDGE
07.08.2008