

Parvati Devi Vs. State and ors.

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Court : Delhi

Decided On : Nov-25-2004

Reported in : 2005CriLJ1615; 115(2004)DLT578; 2005(79)DRJ98

Judge : T.S. Thakur and; J.P. Singh, JJ.

Acts : Code of Civil Procedure (CPC) - Sections 394; Code of Criminal Procedure (CrPC) - Sections 2, 209, 225, 377, 378, 378(4), 394, 394(1), 394(2), 411A, 417, 431 and 482

Appeal No. : CRLM 14/2002 in CRLLP 49/2002

Appellant : Parvati Devi

Respondent : State and ors.

Advocate for Def. : R. Chadha, Adv. and ; K.B. Kalra, Adv. for R-2 and 3

Advocate for Pet/Ap. : R.N. Mittal and; P.K. Mittal, Advs

Judgement :

T.S. Thakur, J.

1. The appellant in this acquittal appeal having passed away, the question is whether the appeal can be said to have abated under Section 394 of Code of Civil Procedure. Crl. M. No. 14/2002 filed by Rakesh Kumar, the son of the deceased

appellant, under Section 482 of the Code of Criminal Procedure seeks an order directing his substitution in place of the deceased. The respondents have strenuously opposed that prayer inter alias on the ground that there is no provision for substitution of one complainant of appellant by another in criminal cases under the Code of Criminal Procedure. It is additionally contended that the appeal itself was not maintainable at the instance of the appellant as the case, out of which the same arose, was a Sessions case no matter the same was instituted on a private complaint. The application seeking special leave to appeal as also the accompanying appeal therefore deserve dismissal according to the respondents.

2. Appearing for the applicant Rakesh Kumar, Sh. R.N. Mittal fairly conceded that the prayer for substitution of the applicant in place of the deceased appellant was not supported by any enabling provision in the Code of Criminal Procedure. He, however, argued that the appeal arose out of a case instituted on a private complaint. Such an appeal could, under Section 394 of the Code, abate only on the death of the accused and not otherwise. So long as that contingency did not arise, the appeal had to be heard and disposed of on its merits for which purpose the court had ample powers to permit the applicant to prosecute the matter in this court even in the absence of a formal order of substitution in his favor. Reliance in support was placed by Mr. Mittal upon a single bench decision of this Court in *Dharam Yash Dev v. Late Sh. Sanjay Gandhi* The Punjab Law Reporter Vol. LXXXIII-1981 Page 80 and the decision of the Supreme Court in *Ashwin Nanubhai Vyas v. State of Maharashtra and Another* 1967 Criminal Law Journal 943 and *Khedu Mohton and Others v. State of Bihar* : 1971 CriLJ20 .

3. Mr. Kalra, counsel appearing for respondent No. 2 and 3, on the other hand, argued that even when the proceedings had initially come to be instituted on a private complaint, the case was eventually committed to the Sessions and the prosecution conducted by the Public Prosecutor. It was submitted that the provisions of Section 209 and 225 of the Cr.PC sufficiently indicated that in cases triable by the Sessions Court, the commitment of the case would signify that the same no longer remained a case instituted on a private complaint. An order of committal, according to Mr. Kalra, results in an automatic conversion of the case instituted on private complaint into a State case not only for purposes of conduct of

the prosecution before the Sessions Court out for all other purposes including the filing and maintainability of appeals against the judgment delivered by the court of Sessions. Viewed thus, the present application seeking grant of special leave as also the accompanying appeal were not maintainable at the instance of the deceased complainant. Her demise during the pendency of the appeal would, therefore, be legally inconsequential. The absence of a provision for substitution of any person in place of the deceased appellant was an additional reason why the appeal and the applications filed in the same ought to be dismissed.

4. We have given our anxious considerations to the submissions made at the bar. The case arose out of a private complaint instituted by the appellant alleging murder of her husband Radhey Shyam by three persons named in the complaint including respondents No. 2 and 3 herein. Since the case was triable exclusively by the court of Sessions, the same was committed to the Sessions eventually culminating in the impugned judgment of acquittal delivered by the Additional Sessions Judge. The said order of acquittal was appealable in this court in terms of Section 378 of the Code of Criminal Procedure which provides for an appeal in cases of acquittal. Sub-section (4) of Section 378 specifically provides for an acquittal appeal in cases instituted upon complaint and reads as under :-

APPEAL IN CASE OF ACQUITTAL

1. Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [or an order of acquittal passed by the Court of Sessions in revision].

2. XXX

3. XXX

4. If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may

present such an appeal to the High Court.

5. XXX

6. XXX

5. A careful reading of the above would show that in cases where the order of acquittal is passed in a case instituted upon complaint, an appeal is maintainable provided the High Court grants special leave to appeal from the order of acquittal on an application made to it by the complainant. The term "complaint" has been defined in section 2 sub-section (d) as under :-

"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

6. There is, in the light of the above, no difficulty in holding that the case, out of which the present appeal arises, was one that had been instituted upon a complaint filed by the deceased complainant, appellant herein. The fact that upon committal of the case to the Sessions, the prosecution was conducted by Public Prosecutor because of the provisions of Section 225 did not make any difference in so far as the institution of the case in the context of Section 378(4) was concerned. All that could be said was that even in a case instituted upon complaint, the Public Prosecutor shall have to conduct the prosecution if the offence is exclusively triable by the court of Sessions. That does not, however, detract from the preposition that the case instituted by the complainant was one on a private complaint as distinguished from a case instituted on a police report. Suffice it to say that the origin of the case remained rooted in the private complaint no matter the prosecution before the Sessions court as conducted by the Public Prosecutor. An appeal against the order of acquittal passed in any such case was,

therefore, maintainable only if this court granted special leave to the complainant as required under sub-section (4) to Section 378. The argument that the appeal itself was not maintainable as the case did not fall under sub-section (4) to Section 378 must, therefore, be rejected.

7. That leaves us with the question whether the present appeal under Section 378(4) would abate upon the death of the appellant. An answer to that question must come directly from Section 394 of the Code of Criminal Procedure which reads as under:-

Abatement of appeals. - (1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant;

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

8. A plain reading of the above would show that an appeal under Section 377 which provides for appeals by the State against sentence or Section 378 which provides for appeals in cases of acquittals, abate only on the death of the accused. The provisions of sub-section (2) to Section 394 deal with all other appeals except those under Section 377 and 378 of the Code of Criminal Procedure. Since, however, we are dealing with an appeal under Section 378 of the Code, the provisions of sub-section (2) and the proviso or the Explanation thereto do not bear any relevance. In so far as acquittal appeals under Section 378 are concerned, the provisions of sub-section (1) to Section 394 are much too clear to need any elucidation. Such appeals on a plain reading of the said

provision do not abate by reason of the death of the appellant.

9. Mr. Kalra submitted that Section 378 (4) of the Code must be so interpreted as to exclude cases instituted on private complaint involving commission of offences under the Indian Penal Code. It was submitted that sub-section (4) to Section 378 must, in the scheme of the Code be understood to provide for appeals only in cases arising under special enactments and not those involving offences under the Indian Penal Code. We have not been able to appreciate the logic behind such an interpretation. Section 378(4) does not make any distinction between offences punishable under the Indian Penal Code on the one hand and special enactments on the other. We, therefore, see no reason for introducing any such dichotomy into the scheme of the said provision of the interpretation suggested by the respondents is accepted, it would not only amount to doing violence to the language employed in the said provision but would even amount to re-writing the said provision in its entirety. There is no justification much less any compelling reason for us to adopt such a course. A reading of sub-section (2) to Section 378 in fact sufficiently shows that wherever the Parliament so intended, it made a provision to cater to special situations like appeals in cases investigated by the Delhi Special Police Establishment or cases investigated by other agencies involving commission of offences under any central enactments. So also if the Parliament intended to make any distinction between cases involving commission of offences under the IPC and others involving offences under any special enactment, it could have made a suitable provision to that effect which it has not. It, therefore, follows that sub-section (4) to Section 378 applies as much to cases instituted upon complaints for offences under the IPC as it does to complaints involving any other offence under any special enactment.

10. In *Khedu Mohton and Ors. v. State of Bihar* : 1971 CriLJ20 , one of the questions that fell for consideration was whether the death of the appellant in an acquittal appeal could result in abatement of the appeal. The court was, in that case, interpreting the provisions of Section 411-A, 417 and 431 of the old Criminal Procedure Code. Rejecting the contention that the demise of the appellant would result in abatement of the acquittal appeal preferred by him, the court observed :-

"From this section it is clear that an appeal under Section 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other. The argument that while introducing sub-section (3) to Section 417, Criminal P.C., the Parliament overlooked the provisions contained in Section 431, does not deserve consideration. The language of Section 431 is plain and unambiguous. therefore no question of interpretation of that provision arises."

11. We have, therefore, no difficulty in holding that the death of the appellant in the present case does not affect the maintainability of the appeal or the application seeking grant of special leave. The argument that the appeal must be deemed to have abated is accordingly rejected.

12. The next question then is whether, and if so, who should be allowed to prosecute the appeal. As fairly conceded by Mr. Mittal, there is no provision for the court to direct a substitution of the applicant Rakesh Kumar in case of the deceased complainant. That does not, however, mean that the court is powerless in allowing the appeal to be prosecuted on its merits by someone else like the son of the deceased complainant in the instant case. In the absence of any bar, we see no reason why the applicant Rakesh Kumar, who happens to be the son of the deceased complainant and the brother of the deceased victim should not be allowed to prosecute the application seeking special leave and the appeal if the leave prayed for is granted. We accordingly allow CrI. M. No. 14/2002 but only to the limited extent that Rakesh Kumar is permitted to prosecute the application for grant of leave to appeal and the appeal if leave prayed for is granted.

13. Post the application for grant of special leave to appeal for hearing now on 14.12.2004