

Viswanathan Vs. State of Kerala

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Court : Kerala

Decided On : Jun-07-2006

Reported in : II(2007)BC359; 2006CriLJ3864; 2006(3)KLT539

Judge : K.S. Radhakrishnan, J.

Acts : Negotiable Instruments Act - Sections 138; [Code of Criminal Procedure \(CrPC\)](#) , 1898 - Sections 377, 378, 394, 394(2), 397, 401, 423, 426, 427, 428 and 439

Appeal No. : Crl. R.P. No. 267 of 1998

Appellant : Viswanathan

Respondent : State of Kerala

Advocate for Def. : K. Gopalakrishna Kurup and; M.A. Khaderkunju, Public Prosecutor

Advocate for Pet/Ap. : George Thomas (Kalarickal) and; Annie M. Lovely Thomas, Advs.

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. Accused in S.T. No 1723 of 1990 on the file of the Judicial Magistrate of the First Class, Pala is the revision petitioner. He was convicted for offence under Section 138 of the Negotiable Instruments Act and was sentenced to undergo simple imprisonment for six months and to pay a fine of Rs. 56,000/- in default of which to undergo simple imprisonment for another three months. On appeal Sessions Court reduced the sentence to simple imprisonment for three months and fine of Rs. 35,000/- in default of which to undergo simple imprisonment for three months more. Aggrieved by the said order accused preferred this revision petition under Sections 397 and 401 of the Code of Criminal Procedure.

2. Accused died during the pendency of this revision petition. Hence it is pointed out that the revision petition is abated and be dismissed as abated.

3. Sri K. Gopalakrishna Kurup, counsel appearing for the complainant submitted that since sentence of fine was also imposed appeal will not abate and inspite of the death of the accused this Court has got jurisdiction to decide as to whether imposition of fine was legal so that complainant could legally recover the same. In support of this contention counsel placed reliance on the decision of the Apex Court in State of Kerala v. Narayani Amma Kamala Devi : AIR 1962 SC1530).

4. In Narayani Amma Kamala Devi's case the court was dealing with Section 439 of the Code of Criminal Procedure 1898. Present revision is filed under Section 397 Cr. PC. Section 394 of the Cr. P.C. deals with abatement of appeals. The said provision is extracted below for easy reference.

394. 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.

Sub-section(2) of Section 394 states that every other appeal except an appeal from sentence of fine, shall finally abate on the death of the appellant. So far as the revisional jurisdiction of the High Court is concerned, there is no provision similar to Section 394. Nowhere in the provision it is stated that a revision petition can be or cannot be made in respect of an order of conviction when convicted person is dead. This legal position was considered by the Apex Court while dealing with the old Code. Same principle can be applied while examining the above mentioned provision in the new Code.

5. Apex Court in Narayani Amma Kamala Devi's case, *supra*, has held as follows:

The conditions for the exercise of the power of revision are laid down in the opening clauses of Section 439 which has just been set out above, while the next clause that the High Court may exercise any of the powers conferred on a court of appeal under Section 423, Section 426, Section 427 and Section 428...define the extent of the power. The fact that the extent of the power of a court in revision does not extend - except as regards the power of the courts by Section 439 to enhancement of the sentence to more than what the appellate courts power, does not affect the position that while the condition for the exercise of the powers of courts of appeal is that an appeal must be preferred by the convicted person, that condition is conspicuous by its absence where the conditions of the exercise of the powers of revision are laid down in Section 439.

The above principle would indicate that in a proper case High Court can exercise the power even after the death of the accused. Therefore even after the death of the accused who is the revision petitioner the revision petition would survive and the court can pass appropriate orders with regard to the sentence of fine.

6. I therefore find no illegality in the conviction and sentence imposed by the courts below. The only question to be decided is how the fine of Rs. 35,000/- imposed could be recovered. Sessions Court held that if the fine amount of Rs. 35,000/- is deposited as directed by the Sessions Court the said amount would be released to the complainant on production of this order in the trial court. The said direction would stand. If the fine amount is not deposited the court will take steps to recover the amount by proceeding against the estate of the deceased accused. Revision petition is disposed of with the above direction.

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