

Mst. Dhani Vs. State and anr.

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Court : Rajasthan

Decided On : Aug-18-1964

Reported in : AIR1965Raj70; 1965CriLJ338

Judge : L.N. Chhangani, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 417(3) and 417(4);
Limitation Act, 1908 - Sections 5 and 29(2)

Appeal No. : Criminal Appeal No. 295 of 1963

Appellant : Mst. Dhani

Respondent : State and anr.

Advocate for Def. : S.R. Singhi, Adv. and; Sardar Singh, Adv. for Respondent
(Smt. Gopi)

Advocate for Pet/Ap. : Rana Mal, Adv.

Disposition : Appeal dismissed

Judgement :

L.N. Chhangani, J.

1. This is an appeal by Mst. Dhani on leave granted under Section 417 Sub-section (3), Criminal P. C. by this Court, against the order of the First Class

Magistrate No. 1, Jodhpur, acquitting the respondent Mst. Gopi of an offence under Section 323, Indian Penal Code.

2. The respondent has raised a preliminary objection that the appellant was not entitled to the grant of special leave under Section 417 Sub-section (3), Criminal P. C. and consequently, she urges that the leave should be revoked and the appeal be dismissed.

3. In appreciating the preliminary objection it is necessary to set out the following facts:--

Appellant filed a complaint against the respondent under Section 325, Indian Penal Code. The case was, however, registered under Section. 323 Indian penal Code, On 28th May, 1962 the appellant remained absent and the Magistrate acting under Section 247, Criminal P. C. acquitted the respondent. The appellant applied for a copy of the order of the Magistrate acquitting the respondent on 27-7-1962 and obtained it on 28-7-1962. There-after, he submitted a revision application in this Court on 1-9-1962 challenging the order of acquittal. It was however, reported by office that the revision did not lie. Thereupon, the appellant submitted an application on 14-9-1962 praying that the revision application be treated as petition for special leave to appeal. It will be noted that the revision application was filed after a period of 96 days. The appellant could have filed an application for leave to appeal within a period of 92 days; 60 days the prescribed period of limitation plus 32 days being the period occupied in taking copy of the order under challenge. Now, even if the application for special leave to appeal be treated to have been presented on 1-9-1962 when the revision application was filed still it was late by 4 days. On the other hand, if the application for leave to appeal be treated to have been filed on 14-9-1962 when a prayer for converting the revision application into an application for special leave to appeal was made, it was late by 18 days. Faced with this situation the appellant submitted an application for condonation, of the delay under Section 5 of the Limitation Act and a learned Judge of this Court by his order dated 4-4-1963 condoned the delay and further allowed the revision application to be treated as a miscellaneous application for leave to appeal.

4. The counsel for the respondent contends that Section 417 Sub-sections (3) and (4) Criminal P. C. which provide, 60 days period of limitation for filing an application, for leave to appeal is a special law and that Section 5 of the Limitation Act cannot be applicable to applications for special, leave to appeal which are governed by the special law.

5. The contention of the learned counsel for the respondent appears to be well founded. It may be mentioned here that the various High, Courts in this country had expressed conflicting views on the question of the applicability of Section 5 of the Limitation Act to applications for special leave to appeal under Section 417 Criminal P. C. but the law has now been settled by a decision of the Supreme Court reported in *Kaushalya Rani v. Gopal Singh*, AIR 1964 SC 260. After examining the provisions of Section 417, Criminal P. C. their Lordships summed up their conclusion, in the following words: --

'But in so far as appeal by a private prosecutor is concerned, the legislature was astute to specifically lay down that the foundation for such an appeal should be laid within 60 days from the date of the order of acquittal. In that sense, this rule of 60 days bar is a special law, that is to say a rule of limitation which is specially provided for, in the Code itself, which does not ordinarily provide for a period of limitation for appeals or applications.'

Their Lordships further held,

'The provisions of the Code supplemented by, the provisions of Section 29(2) of the Limitation Act, make it clear that Section 5 of the Limitation Act would not apply to an application for special leave? to appeal under Section 417 (3) of the Code.'

Their Lordships also considered the conflicting decisions of the various High Courts and approved the view taken by the Full Bench of Bombay' High Court in *Anjanabai v. Yeshwantrao Daulatrao*, AIR 1961 Bom 154 (FB). In view of the above pronouncement of their Lordships of the Supreme Court it is clear that the application, of the appellant for special leave to appeal being after the expiry of 60 days was not entertainable and the appellant was not entitled to invoke Section 5 of the Limitation Act. It follows that the delay was condoned under a mistaken view

of law.

6. Even so, Mr. Ranamal appearing for the appellant contends that the decision of the court granting leave is a final one and it is not open to this Court to reconsider the matter and to invoke the leave already granted. He also submitted that the view taken by the Supreme Court in *Kaushalya Rani v. Gopal Singh*, AIR 1964 SC 260 should not be given a retrospective effect so as to invalidate the leave granted by this Court.

7. Taking up the first submission, will be useful to point out that the leave was granted by this Court in the absence of the respondent and without giving him opportunity to contest the application for leave. It is elementary that nobody should be bound by an order passed in his absence. Consequently there should be no difficulty in holding that the respondent should be competent to raise a preliminary objection that the leave could not have been granted. A . support for this conclusion is available from the observations of their Lordships of the Supreme Court in *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh*, AIR 1964 SC 1140. On a similar preliminary objection in connection with leave granted under Article 136 of the Constitution, their Lord-ships made the following observations:--

'It is true that special leave has been granted to the appellant by this Court, but there can be little doubt that even in cases where special leave has been granted at the ex parte hearing of the matter on the petition of the appellant for special leave, the respondent can at the final hearing, raise a preliminary contention that special leave should not have been granted, since the decision, judg-ment or order appealed against, has not been pronounced either by a Court or Tribunal within the. meaning o Art. 136(1).'

No doubt, their Lordships of the Supreme Court made observations pertaining to an objection of a specific nature but the principle behind the observations can be easily extended to a case of the present type. In my considered opinion, there is nothing to prevent a respondent from raising a preliminary objection that the appellant could not have been granted leave to appeal on account of the application having been filed after the expiry of 60 days and the appellant being unable to invoke Section 5 of the Limitation Act. The first contention of Mr.

Kanamal cannot, therefore, be accepted.

8. The second submission of Mr. Kanamal is entirely misconceived. Evidently, the decisions of the Supreme Court or High Courts do not support to enact fresh laws. They merely declare the existing laws and, therefore, there can be no contention that those decisions should have prospective effect and cannot be given retrospective effect. The argument of the learned counsel has been stated merely to be rejected.

9. For the foregoing reasons, I am clearly of the opinion that the appellant was not entitled to special leave to appeal to this Court and that the leave granted under an erroneous application of Section 5 of the Limitation Act cannot be availed of by him. The leave has therefore to be revoked.

10. Consequently, the leave is revoked and the appeal is dismissed.

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