

Johnson Vs. Sebastian

Johnson Vs. Sebastian

SooperKanoon Citation : sooperkanoon.com/903150

Court : Kerala

Decided On : Jan-22-2010

Reported in : 2010(1)KLT498

Judge : S.R. Bannurmath, C.J. and; A.K. Basheer, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 114; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 378, 378(1) to 378(3), 378(4), 378(5), 385 and 478(3); ;High Court Rules, 1971 - Rules 9 and 172

Appeal No. : Crl. A. No. 2158 of 2009

Appellant : Johnson

Respondent : Sebastian

Advocate for Pet/Ap. : Anil Kumar, Adv.; M.K. Damodaran, Sr. Adv. and; Gilbert

Judgement :

ORDER

A.K. Basheer, J.

1. This case has come up for consideration before us on a reference made by a learned single Judge who doubted the correctness of the decision in Raveendran v. State of Kerala and Ors. (2008 (3) KLT 650.

2. In Raveendran (supra) a learned single Judge of this Court held that all Special Leave Petitions filed under Section 378(4) of the Code of Criminal Procedure 'must be accompanied by the appeal which is proposed to be filed against the impugned judgment of acquittal. The grounds of appeal must be stated clearly in such proposed appeal and the application for leave can incorporate the contentions by reference and it is not essential or necessary that such grounds must be repeated in the application for leave'.

3. The learned Judge directed the Registry that henceforth viz., starting from September 1, 2008 grant of leave by the court 'shall be reckoned as equivalent to admission of appeal if filed, and if such appeal is otherwise proper'. Registry was further directed to assign a number to such appeals and issue notice to the respondents and to call for the records without posting such appeal for admission before the Bench 'unless there be defects which need be considered by the Court'.

4. In the reference order another learned single Judge while considering a Special Leave Petition took note of the 'general grievance' of the members of the Bar about the propriety and correctness of the new procedure prescribed in Raveendran and expressed the view that the direction issued by the learned single Judge to the Registry may not be legally sustainable.

5. Section 378 of the Code of Criminal Procedure deals with appeals in case of acquittal. Sub-sections (4) and (5) of Section 378 which are relevant for our purpose read thus:

(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) No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

6. On a conjoint reading of the above provisions it is clear that a complainant will be entitled to prefer an appeal in the High Court against the order of acquittal passed by the trial court after obtaining special leave to appeal within 60 days computed from the date of order of acquittal. Sub-section (4) makes it abundantly clear that the appellant-complainant can present an appeal only after obtaining special leave from the High Court. An application for grant of special leave has to be submitted within 60 days from the date of order. The right to present the appeal will accrue to the complainant only after such grant. To put it differently, if the Court refuses to grant special leave, the complainant will not be entitled to prefer the appeal. Thus it is abundantly clear that right of the complainant to prefer an appeal against an order of acquittal is entirely dependant on the order to be passed by the High Court 'on an application made by the complainant in this behalf as postulated in Sub-section (4) of Section 378. Therefore the complainant has to necessarily cross the first hurdle and then only he will be entitled to 'present' his appeal.

7. In Raveendran (supra) the learned Judge held that the complainant has to file the memorandum of appeal also along with the application for special leave whatever be the order that may be passed by the High Court on the application for special leave. If the applicant complainant crosses the first hurdle the Registry will take care of the appeal. The Registry shall assign a number to the appeal, issue notice to the respondent and call for the records without posting the appeal for admission before the Bench.

8. Sri. M.K. Damodaran, learned senior counsel who appeared on behalf of the High Court Advocates' Association points out that the above 'procedure' ordered by the learned single Judge is wholly impermissible and will militate against the provisions contained in the Code.

9. It may at once be noticed that Article 114(b) of the Limitation Act 1963 prescribes a period of 30 days from the date of grant of special leave within which the complainant can present an appeal. The complainant may or may not, for his own reasons, choose to prefer an appeal even after obtaining special leave from the High Court.' The learned single Judge after noticing the above contingency

observed that it may not be proper to insist that the appellant must pay the requisite court fee on the appeal before leave is granted. But nevertheless the learned Judge directed by way of a consolation that 'the proposed appeal complete in all particulars can be formally filed within the stipulated time after the grant of leave or in the alternative a memo can be filed requesting that the appeal already filed along with the leave application may be treated as the appeal.

10. The learned Judge has taken the above view apparently and professedly to reduce the burden on the admission court. The procedure adopted earlier was to present the memorandum of appeal after obtaining special leave. In the memorandum of appeal, the number of the special leave petition and the date of the order thereon will be indicated. The appeal will be posted before the court for admission. Since the appeal is preferred after obtaining leave, admission may be generally automatic. But still notice will have to be necessarily issued and the records called for through an order to be passed on the judicial side, as is prescribed under Section 385. In this context it may also be noticed that Rule 172 of the High Court Rules, 1971 provides that all criminal appeals except those preferred from jail or in which the prisoner has been sentenced to death and all revision petitions shall be posted for admission soon after they are filed.

11. The learned Judge observed in the order that grant of special leave shall be reckoned as equivalent to admission of appeal itself and the Registry shall issue notice to the respondent and call for the records without posting the appeal before the Bench. According to the learned Judge this process will 'help to avoid waste of time for non productive work in court'. The learned Judge further observed that leave having already been granted separate hearing of the appeal for admission becomes an unnecessary and empty formality.

12. The short question is whether the complainant who files an application seeking special leave has to be saddled with the burden of filing the memorandum of appeal even before the application is considered by the Court. He will have to pay court fee, process fee etc. and produce notice form, covers etc. even before he knows the fate of his application for special leave. His counsel also will have to take up the additional responsibility of preparation of the appeal and other

connected papers to be filed along with the application for special leave.

13. Sri. Anil Kumar learned Counsel for the petitioner submits that this unnecessary difficulty or burden on the counsel can be obviated if the practice followed hitherto is continued. If the court refuses to grant special leave the matter ends there. The 'proposed appeal' will lie as worthless waste paper in the Registry. Preparation of the appeal and other connected records will become an exercise in futility. The time spent by the counsel and his office on such exercise will be sheer waste of energy and time. There is considerable force in this contention.

14. As has been noticed already Sub-section (4) of Section 378 does not admit of any ambiguity. The complainant has to file 'an application' seeking special leave. It is only after he obtains such special leave that he becomes entitled to file the appeal. Even after obtaining leave he has at his disposal a period of 30 days to contemplate. He may or may not present the appeal. The valuable right given to the complainant under Sub-sections (4) and (5) and also under Article 114(b) of the Limitation Act cannot be abrogated or whittled down on the ground of convenience of the court.

15. In this context we may also notice that the Legislature in its wisdom has drawn a clear distinction between the right available to the State and its organs/agencies under it like Delhi Police Establishment or such other agency to prefer appeal against the orders of acquittal and the right available to a complainant other than the State. Sub-sections (1) to (3) in Section 378 deal with the former class of cases. Sub-section (3) postulates that no appeal to the High Court under Sub-sections (1) or (2) shall be entertained except with the leave of the High Court.

16. In *State of Rajasthan v. Ramdeen and Ors.* : (1977) 2 SCC 630 it has been held by the Supreme Court that it is not necessary for the State to wait until the grant of leave by the High Court to present a memorandum of appeal under Section 478(3) of the Code. The language employed in Sub-sections (3) and (4) is clear and unambiguous. While Sub-section (4) postulates filing of a separate application seeking special leave to appeal, Sub-section (3) only provides that no appeal to the High Court at the instance of the State or the agencies under it shall be entertained except with the leave of the court. The State or its agencies can file

an appeal along with a petition for leave whereas a complainant other than a public officer cannot do so without obtaining special leave by filing an application for this purpose.

17. Learned Senior counsel has also contended that the direction issued by the learned single Judge to the Registry to formally pass an order admitting the appeal and to issue notice and call for the records may not be proper at all. As rightly pointed out by the learned Senior counsel, the judicial functions cannot be delegated by the Court to the Registry, even if posting of an appeal before the Bench after grant of special leave may turn out to be a formality as noticed by the learned Judge. The judicial practice and process will have to be given due weight and consideration. Therefore the Registrar whose powers and duties have been clearly delineated in the Rules cannot be assigned additional judicial functions by the Court unless it is permissible under law or procedure prescribed. More importantly, the Chief Justice being the Head of the Institution, it is only the Chief Justice who can issue such directions in matters relating to the administrative and judicial business of the Registry as circumscribed by the Rules. Rule 9 of the High Court Rules is pressed into service by the learned senior counsel in this context.

18. Having carefully considered the relevant provisions of the Code and the Rules referred to above, we are unable to agree with the view taken by the learned single Judge in Raveendran's case. The direction issued by the learned Judge to present the memorandum of appeal along with the application for leave filed under Section 378(4) of the Code cannot be sustained. It is held that the applicant who obtains special leave will be entitled to present the appeal separately within the period of limitation prescribed under the Act 1963. In this view of the matter, the decision reported in Raveendran v. State of Kerala and Ors. 2008 (3) KLT 650 is over ruled. Reference is answered accordingly.

We place on record our appreciation for the assistance rendered by Ms. Pinku Thaliath also in the matter.