

Nageshwar Vs. State of U.P.

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Court : Allahabad

Decided On : Feb-03-2011

Judge : Shri Kant Tripathi,J.

Acts : Code of Criminal Procedure (CrPC) (Cr.P.C) - Section 161, 313; Indian Penal Code (IPC) - Sections 306, 34, 498A; Dowry Prohibition Act. - section 3 of 4; Evidence Act - section 113A ;

Appeal No. : CRIMINAL APPEAL No. - 99 of 1999

Appellant : Nageshwar

Respondent : State of U.P.

Advocate for Def. : Government Advocate

Advocate for Pet/Ap. : Vijay Shukla; A.P.Misra; Nagendra Mohan, Advs

Judgement :

1. By this appeal the appellant Nageshwar has impugned the judgment and order dated 15.3.1999 rendered by Mr. Dilip Kumar, the then XIII Additional Sessions Judge, Lucknow, in S.T. No. 73 of 1995, State v. Nageshwar, whereby the appellant has been convicted and sentenced under section 306 read with section 34 I.P.C. to undergo rigorous imprisonment of five years and to pay a fine of Rs. five thousand and in default of payment of fine to undergo additional simple imprisonment of six months. He has been further convicted and sentenced under

section 498-A I.P.C. to undergo rigorous imprisonment of two years and to pay a fine of Rs. one thousand and in default of payment of fine to undergo additional simple imprisonment of three months.

2. The prosecution story leading to this appeal is that the appellant Nageshwar is the husband of the deceased Smt. Mohana Devi. Their marriage had taken place about two years before the occurrence. It is alleged that on 8.5.2008 the deceased consumed a poisonous substance and thereby committed suicide. The complainant Raja Ram Dixit, the father of the deceased, was informed by one Neeru regarding the incident, who further informed that there was a quarrel in the house of the deceased one day before the occurrence. It is alleged that the deceased was treated to cruelty which compelled her to commit suicide, therefore, the appellant committed the offences of sections 306 and 498A IPC.

3. The learned trial court charged the appellant Nageshwar and his parents Babu Ram and Smt. Ram Rati under sections 498A, 304-B IPC and section 3/4 of Dowry Prohibition Act. Alternatively the charge under section 306 IPC was also levelled.

4. The appellant Nageshwar and his parents denied the charges.

5. Co-accused Babu Ram and Smt. Ram Rati died during the pendency of the trial, therefore, the trial abated against them.

6. The prosecution examined seven witnesses in support of its case. PW-1 Smt. Sanno Tiwari is the elder sister of the deceased. PW-2 Smt. Bisan @ Bitto is the mother of the deceased and PW-3 Ishwar Din is an independent witness. These three witnesses have supported the prosecution story. PW-4 Anand Mangal Pandey did not support the prosecution story, consequently he was declared hostile and was subjected to cross-examination by the prosecution. PW-5 Dr. Mukund Murari Gupta did the postmortem examination on the dead body of the deceased and found the following ante mortem injuries on the dead body:

(i) Abrasion 0.4 cm x 0.4 cm on back of right arm in the mid line 4 cm about wrist.

(ii) Contusion 3 cm x 2 cm on back of left fore arm 3 cm from elbow tip.

7. Dr. Mukund Murari Gupta could not ascertain the cause of death, therefore, he preserved VISCERA, in which poison (sulphas) was found. PW-6 Head Constable Shiv Shankar Lal Srivastava proved the chik report, G.D. and other formal papers. PW-7 R.B. Ram, the investigating officer, proved the inquest report and other formal papers prepared by him during the investigation as also the statement of the complainant Late Raja Ram Dikshit, which was recorded under section 161 of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

8. The appellant Nageshwar stated under section 313 Cr PC that his father informed that the deceased consumed poison so he gave information of the incident to the father of the deceased. The appellant further stated that his wife was an irritable woman. Before the occurrence, a quarrel took place between his sister and the deceased, consequently the deceased consumed poison. Medicines were also provided to save the life of the deceased but she could not be saved.

9. The accused examined two witnesses, namely DW-1 Parashu Ram Mishra and DW-2 Kishan Kishor in support of the defence version. These two witnesses have stated that the deceased consumed poison on account of a quarrel that had taken place in the morning in the house of the appellant. These two witnesses denied that the deceased was being treated with cruelty by the appellant or his family members.

10. The learned Additional Sessions Judge held that the death of the deceased occurred within seven years of her marriage in an unnatural manner due to consumption of poison and further held that there was no demand of dowry nor there was any harassment to the deceased during her life time for procuring the dowry. This finding was recorded on the ground that there was no allegation in the FIR regarding demand of dowry and harassment to the deceased during her life time and neither the complainant nor his family members stated anything in this regard under section 161 of the Code, therefore, the statements of the prosecution witnesses regarding the demand of dowry and harassment to the deceased for dowry was held unbelievable. This finding of the learned Additional Sessions Judge seems to be based on proper appraisal of evidence on record and requires

no interference. However, the learned Additional Sessions Judge looking into the aforesaid ante mortem injuries arrived at the conclusion that the deceased was subjected to cruelty before her death and accordingly the learned Additional Sessions Judge raised a presumption against the appellant under section 113-A of the Evidence Act and held that the appellant abetted the suicide committed by the deceased and accordingly held that the charges under section 306 and 498-A IPC were proved beyond all reasonable doubts against the appellant. However, the learned Additional Sessions Judge found that the charges under section 304-B IPC and sections 3/4 of Dowry Prohibition Act were not proved and accordingly acquitted the appellant under section 304-B IPC and sections 3/4 of the Dowry Prohibition Act.

11. Heard Mr. Nagendra Mohan for the appellant and the learned AGA for the State and perused the record.

12. Mr. Nagendra Mohan submitted that when the learned Additional Sessions Judge arrived at the conclusion that there was no demand of dowry nor any harassment to the deceased during her life time and found the prosecution case to that extent not proved and acquitted the appellant of the charges under section 304-B and sections 3/4 of the Dowry Prohibition Act, he was not justified in convicting and sentencing the appellant under section 306 IPC only on the ground that one abrasion and one contusion, as ante mortem injuries, were found on the dead body of the deceased. Mr. Nagendra Mohan further submitted that there is no evidence to support that the said two ante mortem injuries were caused by the appellant or he had subjected the deceased to cruelty before her death. The cause of death occurred on account of consumption of poison by the deceased, therefore, it can not be ruled out that the deceased sustained abrasion and contusion on falling to the ground. Mr. Nagendra Mohan lastly submitted that there is no evidence to prove that there was any abetment on the part of the appellant for the suicide committed by the deceased. If the deceased committed suicide it can not be inferred that there was an abetment for the suicide.

13. The conclusion of the learned Additional Sessions Judge is based on the presumption drawn by him with the aid of section 113-A of the Evidence Act.

Section 113-A of the Evidence Act provides:

"113-A. When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.-For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)."

14. The aforesaid provision, therefore, provides that a presumption under section 113-A of the Evidence Act can be raised only when it is shown, firstly, that the deceased committed suicide within a period of seven years from the date of her marriage and, secondly, that the husband or any relative of the husband had subjected her to cruelty. If these two requirements are established, the court may presume that suicide has been abetted by her husband or by such relative of her husband. The term "cruelty" referred to in section 113-A of the Evidence Act has the same meaning as is assigned to it in section 498-A of the Indian Penal Code, which means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

15. The learned Additional Sessions Judge has very categorically held that the requirements of clause (b) of the Explanation to section 498-A IPC have not been established in this case, accordingly, the learned Additional Sessions Judge disbelieved the story that the deceased was subjected to cruelty or harassment with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or on account of failure of her or any person related to her to meet such requirement. However, the learned Additional Sessions Judge was of the view that clause (a) of the Explanation to section 498-A IPC was fully proved in view of the fact that the deceased had sustained one contusion and one abrasion as ante mortem injuries. In my opinion, the mere fact that a woman committed suicide within seven years of her marriage and she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or by a relative of the husband. The court is required to consider something more keeping in view the facts and circumstances of the case and one of the circumstances, which has to be considered by the court is whether the cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. Therefore, merely because the deceased had sustained one contusion and one abrasion as ante mortem injuries, the learned trial court was not justified in drawing the presumption that the deceased had been subjected to cruelty within the meaning of explanation (a) to section 498-A of the Indian Penal Code.

16. In the case of Ramesh Kumar vs. State of Chhattisgarh, AIR 2001 SC 3837, a three judge bench of the apex court held in para 12, as under:

"12.A bare reading of Section 113-A shows that to attract applicability of Section 113- A, it must be shown that (i) woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the Court may presume that such suicide had been

abetted by her husband or by such relatives of her husband. The Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the Court shall have to have regard to 'all the other circumstances of the case'. A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression - 'The other circumstances of the case' used in Section 113-A suggests the need to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least the presumption is not an irrebuttable one."

17. The aforesaid principles have been reiterated in the case of Rajbabu and another vs. State of M.P., AIR 2008 SC 3212. In that case, the Apex Court has held in para 15 as follows:

"15. In the instant case there is no direct evidence to establish that the appellant either aided or instigated the deceased to commit suicide or entered into any conspiracy to aid her in committing suicide. In the absence of direct evidence the prosecution has relied upon Section 113-A of the Evidence Act, under which the court may presume on proof of circumstances enumerated therein, and having regard to all the other circumstances of the case, that the suicide had been abetted by the accused. The explanation to Section 113-A further clarifies that cruelty shall have the same meaning as in Section 498-A of the IPC. Under Section 113-A of the Evidence Act, the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband or any relative of her

husband had subjected her to cruelty. Section 113-A gives a discretion to the court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word "cruelty" in Section 498-A IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband or any relative of her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or any relative of her husband. The court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman."

18. In the case of Hansraj vs. State of Hariyana, AIR 2004 SC 2790, the Apex Court observed in para 14 as follows:

"14.The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The Court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman."

19. In the above case, there were frequent quarrels between the husband and wife, sometimes resulting in physical assault, on account of the husband being addicted to consumption of Bhang.

20. The present case needs to be examined in the backdrop of the aforesaid principles. Admittedly the death of the deceased occurred within seven years of her marriage, therefore, the first ingredient that the deceased committed suicide within seven years of her marriage is established. The only question that is required to be considered is whether the appellant had subjected the deceased to cruelty before her death. If the answer is in negative, the question of any presumption under the aforesaid section does not arise. Therefore, the prosecution evidence needs to be examined in this perspective. PW-1 Smt. Shanno Tiwari (sister of the deceased) and PW-2 Smt. Bishan @ Bitto (the mother of the deceased) are not eye witnesses of the incident of any assault made by the appellant. They narrated the story that there was a demand of scooter, golden chain and golden ring and the deceased was subjected to cruelty and ill treatment by the appellant and his family members for the dowry but the learned Additional Sessions Judge disbelieved this story on the ground that the factum of demand of dowry and harassment was neither stated in the FIR nor disclosed by the aforesaid witnesses before the investigating officer, therefore, the statements of the aforesaid two prosecution witnesses, being a material development, were not believable. In view of this specific finding recorded by the learned Additional Sessions Judge, the statements of PW-1 Shanno Tiwari and PW-2 Bishan @ Bitto are of no help to the prosecution for proving the second requirement of section 113-A of the Evidence Act and also for proving the alleged abetment on the part of the appellant. So far as the question of assault, if any, to the deceased before her death is concerned, there is no direct evidence on this point. The aforesaid witnesses, namely, PW-1 Sanno Tiwari and PW-2 Bishan @ Bitto do not claim themselves as eye witnesses of the incident of any such assault on, or cruelty to, the deceased.

21. PW-3 Ishwar Din has stated that a quarrel had taken place in the house of the deceased one day before the incident but he failed to specify as to who were involved in the quarrel. This witness has nowhere stated that the appellant was also involved in the quarrel. PW-3 Ishwar Din further stated that when he himself went to the house of the appellant Nageshwar, his sister Shashi asked him not to intervene as it was her personal matter, then the witness replied the appellant's sister Shashi that in case the deceased commits suicide the matter would become

serious and all persons of her family would be implicated. On the next date, he got information that the deceased consumed poison and died. PW-3, Ishwar Din very clearly stated that the appellant's sister Shashi was an irritable woman and she used to quarrel with the deceased. The deceased was also a fast lady, therefore, a frequent quarrel used to take place between the deceased and appellant's sister Shashi. This witness further stated that the appellant had also told that he used to intervene between his sister and wife but they were not agreeable to his advice. PW-3 Ishwar Din further stated that the appellant Nageshwar was doing service in Lucknow, where he used to visit daily. In this way, PW-3 Ishwar Din has not made any statement against the appellant and whatever quarrel took place one day before, it was between the appellant's sister Shashi and the deceased and the appellant tried to intervene and resolve the dispute but failed to do so. If the statement of PW-3 Ishwar Din is taken into account in its entirety the prosecution case that the appellant subjected the deceased to cruelty before her death or any time during her life time is not proved. A mere quarrel does not fall within the category of cruelty, as defined in section 498-A IPC.

22. The defence version proved by DW-1 Parashuram Mishra and DW-2 Kishan Kishore that the appellant was not present in his house when the quarrel between appellant's sister Shashi and the deceased took place and also at the time of the incident, seems to have much substance, specially when their statements find corroboration from the statement of PW-3 Ishwar Din, who happens to be an independent witness.

23. In view of the aforesaid material discrepancies and loopholes in the prosecution case, the learned Additional Sessions Judge was not justified in holding the appellant guilty of the offences under section 306 IPC and 498-A IPC only on the ground that one abrasion and one contusion were found on the dead body of the deceased, specifically when there is no evidence to show that the said injuries were caused by the appellant or any quarrel had taken place between him and the deceased before the incident. When no cruelty is caused by the husband nor he plays any role in this regard, the question of raising a presumption under section 113-A of the Evidence Act against the husband does not arise. If a presumption under section 113-A of the Evidence Act can not be raised, keeping

in view the facts and circumstances of the case, the conviction and sentence of the accused must be based on some cogent and reliable evidence to prove that the husband had instigated the deceased to commit suicide. The mere fact that a woman commits suicide within seven years of her marriage does not automatically give rise to the presumption that the suicide had been abetted by her husband.

24. Section 107 IPC defines abetment, according to which a person abets the doing of a thing, who-

Firstly, instigates any person to do that thing; or

Secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly, intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

25. In order to attract the ingredients of abetment there must be some evidence regarding direct involvement of the accused to abet the commission of suicide. Abetment involves a mental process of instigating a person or intentional aiding that person in doing of a thing. There must be active role of the accused for instigating the deceased or aiding her to commit suicide, before he can be held guilty of the offence under section 306 IPC. There is no evidence in the present case to show that there has been any act of omission or commission on the part of the appellant before the death of the deceased to demonstrate that the appellant was responsible for the same. In absence of any direct evidence on this point and also due to lack of necessary evidence for raising the presumption under section

113-A of the Evidence Act, the husband or any relative of the husband cannot be convicted and sentenced only on account of the fact that the wife committed suicide within seven years of her marriage.

26. For the reasons disclosed above, I am of the view that the prosecution has failed to establish the charges under section 306 and 498-A IPC beyond all reasonable doubts against the appellant.

27. The appeal is therefore allowed. The impugned judgment and order dated 15.3.1999 is set aside and the appellant Nageshwar is acquitted of the charges under section 306 and 498-A IPC. The amount of fine, if any, already deposited shall be refunded to the appellant. The appellant is on bail and he need not to surrender.

28. Let a copy of this order be sent to the Sessions Judge, Lucknow for compliance within two months.

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