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Court : Delhi

Decided On : Apr-10-2012

Judge : Suresh Kait

Appeal No. : CRL. APPEAL No. 786 OF 2009

Appellant : Shiv Kumar

Respondent : State

Judgement :

SURESH KAIT, J:

1. Vide instant appeal, the appellant has challenged the impugned judgment dated 29.05.2009 passed by learned Additional Sessions Judge (East) FTC, Karkardooma Courts, Delhi whereby he was held guilty and convicted for the offence punishable under Sections 498A and 304B Indian Penal Code, 1860.

2. Also challenged the order on sentence dated 30.05.2009 whereby he has been sentenced to rigorous imprisonment for a term of three years and fine of Rs. 5,000/- for the offence punishable under Section 498A Indian Penal Code, 1860 and in default of payment of fine, simple imprisonment for three months. He is further sentenced to rigorous imprisonment for ten years for the offence punishable under Section 304B Indian Penal Code, 1860. Both the sentences were ordered to run concurrently. Benefit of Section 428 Cr. P.C. was also extended to him.

3. Learned counsel for appellant submitted that the present appellant had already deposited the fine amount of Rs. 5,000/- imposed upon him vide receipt No.0392275.

4. The facts of the case in brief are that the deceased Smt.Nirmal was married to the appellant on 29.06.2001 and was residing at her matrimonial house at D-339, Gali No.12, Laxmi Nagar, Delhi with her husband i.e. appellant and other in-laws. The accused persons in furtherance of their common intention subjected her to cruelty and harassed her for their unlawful demand of dowry. She died on 16.08.2003 in Irwin Hospital, Delhi under unnatural circumstances.

5. Shri Hori Lal Gupta, father of the deceased made his statement to the SDM which culminated into FIR No.363/2003 under Section 498A Indian Penal Code, 1860 at police station Shakarpur, Delhi. After investigation, police filed the charge-sheet for the offence punishable under Section 498A/304B/34 Indian Penal Code, 1860 against appellant, Anand Gupta, brother-in-law (Dever), and Krishan Murari, brother-in-law (elder Jeth). Thereafter, supplementary charge-sheet was also filed against accused Pawan Kumar brother-in-law (younger Jeth), Smt.Kiran Devi, mother-in-law of the deceased, Ms.Sarvesh @ Chanchal, sister-in-law (Nand), Smt.Rekha, sister-in-law (Nand), Manoj Kumar, (Nandoi) husband of above mentioned Rekha, and Lala Ram Gupta, father-in-law of deceased, for the aforesaid offences being committed.

6. After considering the submissions of accused persons, and on perusal of the record, prima facie case punishable under Section 498A/304B/34 Indian Penal Code, 1860 was revealed. Thereafter, vide order dated 12.04.2004, charges under aforesaid Sections were framed against all the accused persons mentioned above, including the appellant. They pleaded not guilty but claimed trial.

7. The prosecution to substantiate the guilt of accused persons examined, as many as 14 witnesses and thereafter, statement under Section 313 Cr. P.C. of the accused persons were also recorded. Accused persons also examined nine witnesses in their defence.

8. Learned Trial Judge has recorded in the impugned judgment that instant case was very ably conducted and the submissions were supported by cogent, credible and reliable evidence and they have forcefully militated against the certitude of guilt of the appellant and Smt.Kiran Devi, mother-in-law of deceased. The appellant failed to rebut the presumption under Section 113B of the Indian Evidence Act, 1872. However, sufficient evidence did not come on record against other accused persons. On the basis of the clinching evidence, Smt.Kiran Devi and present appellant were found guilty for the offences punishable under Section 498A Indian Penal Code, 1860 and the appellant was also held guilty and convicted for the offence punishable under Section 304B Indian Penal Code, 1860.

9. Learned Trial Judge has recorded that the scales of justice have heavily tilted in favour of the prosecution and against the appellant and co-convict Smt.Kiran Devi. Since, the prosecution could not prove its case against other accused persons, namely Anand Gupta, Krishan Murari, Pawan Kumar, Ms.Chanchal, Smt.Rekha and Manoj Kumar - as mentioned above, hence they were acquitted.

10. On the quantum of sentence, considering the age of Smt.Kiran Devi, a lenient view was taken against her and the benefit as per the provision of Section 4 of the Probation of Offenders Act, 1958 was extended to her.

11. Learned counsel for appellant submitted that deceased Nirmal married with appellant on 29.06.2001. This was her second marriage. After a few months of the marriage, she had a miscarriage and was admitted in the Lady Harding Hospital for about 08 days. After discharge from the hospital, she joined her husband and was living in her matrimonial home. On 10.07.2003 she fell from the second floor of the house and was admitted in Irwin Hospital in unconscious condition. She was under treatment till 07.08.2003 when the hospital discharged her due to shortage of bed. Nirmal was taken away by her parents. On 16.08.2003, when her condition deteriorated, she was again taken to the same hospital, where she died within one hour. Her post-mortem was conducted on 17.08.2003. The cause of the death was found to be 'cerebral damage'.

12. PW1 Shri Hori Lal Gupta father of the deceased complained that his daughter was subjected to cruelty and harassed for dowry by her in-laws and they were responsible for her death. Since deceased Nirmal died within seven years of her marriage at her matrimonial home under unnatural circumstances, case was registered against appellant and 09 other members of the family for the offences punishable under Section 498A and 304B/34 Indian Penal Code, 1860.

13. During trial, accused Lala Ram Gupta, father of appellant expired. Out of the remaining 08 accused persons, 06 were acquitted and only the appellant and his mother were convicted.

14. Learned counsel for appellant has submitted that PW1 Shri Hori Lal Gupta, PW2 Smt.Kamlesh; and PW3 Shri Pardeep found to be star witnesses in this case. The remaining witnesses were formal witnesses.

15. PW1 Shri Hori Lal Gupta, mentioned two instances of dowry demand. Firstly, Rs. 20,000/- soon after the marriage for purchasing a three wheeler scooter rickshaw; and secondly two years later a demand of Rs. 2,000/- to secure the release of appellant from police custody who was alleged to have been detained in the police station Shakarpur for stealing a mobile phone. He also claimed that his daughter was subjected to cruelty at her matrimonial home.

16. This witness in his testimony deposed that he was unemployed, his source of income was some rent and the earning made by his sons. He could not tell the exact date on which the demand of dowry was made by the accused persons from his daughter. He also could not tell the date when such demand was communicated to him by his daughter. He had not given any list of dowry to the police articles which were given in the marriage nor any bill thereof were produced. He admitted the factum regarding non-lodging of any complaint regarding harassment or dowry demand by in-laws to his daughter for the period from July, 2001 to July, 2003. He claimed that he arranged the amount of Rs. 20,000/- from a relative, but could not tell the name of said relative. He admitted that accused persons used to come to see his daughter in a normal manner when she was in his house for one year. He also admitted that when accused persons took his daughter to their home again, he did not give any dowry or cash.

17. PW2 Smt.Kamlesh, mother of the deceased also testified on the same lines with some contradictions.
18. PW3 Shri Pardeep, brother of deceased also testified that they had not given the amount of Rs. 2,000/- to the accused as they were not having that much money. He has also stated that on the date of the incident when he went to the house of deceased, to bring her for Namkaran ceremony of his nephew, he was told by one of the neighbours that his sister was beaten up by the accused persons and she was taken to hospital, but he could not tell the name of that person and by whom she was beaten.
19. PW8 ASI Shamshuddin was the IO of the case. He deposed that till 10.07.2003, no complaint from Nirmal of her parents was received by him. He stated that one Gudiya told him that after an altercation, Nirmal had gone to the roof top and made jump downside. However, this person was not examined by the prosecution as a witness.
20. DW7 Smt.Baikunth Dasi, testified that deceased Nirmal was suffering from fits and used to tear clothes herself.
21. On merits, learned counsel for appellant has submitted that there is no eye witness, no suicide note and no dying declaration. Learned Trial Judge relied solely on the evidence of PW1 Shri Hori Lal, father of deceased in convicting the accused persons.
22. Appellant was not present in the house when the incident took place. Co-convict, mother of appellant took Nirmal to the hospital. There is nothing in the evidence to show that the deceased had any quarrel before the incident either with the appellant or any of his family members.
23. He submitted that except the bald statements of the interested witnesses, no other evidence was adduced by the prosecution to prove that in actual fact, the accused persons treated the deceased cruelly or any dowry demand was made and given.

24. No complaint was ever made either by the deceased to her parents of cruelty or dowry demand during the period her marriage sustained. Neighbours were not examined to prove whether there was really any incidence of cruelty.

25. As for the nature of death, it was not conclusively proved as to whether it was a suicide or accident. Deceased was suffering from fits and she could have fallen from the roof during once such attacks. The deposition of DW7 regarding the fact that she was suffering from fits was rejected by learned Trial Judge on the ground that no medical evidence was produced, ignoring the reality that in many societies, fits is still believed to be a curse of God and the patient is never taken to a doctor but subjected only to certain religious rituals.

26. To strengthen his contentions, learned counsel for appellant has relied upon **Durga Prasad and Anr v State of M.P. : 2010 Cri.LJ 3419** wherein it has been held as under:-

“..... in order to hold an accused guilty of an offence under Section 304-B IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned.”

27. Further in **Gurditta Singh v. The State of Rajasthan : 1992 Cri. L. J. 309** wherein it has been held as under:-

“34. The words "it is shown" occurring in Section 304B are of significance for the reason that the initial burden of proving that circumstances envisaged by Section 304B, IPC did exist is on the prosecution. This being shown or established, the question of presumption Under Section 113B of the Evidence Act would arise. In other words to draw a presumption Under Section 113B of the Evidence Act, the necessary ingredient that it is shown that soon before her death she was subjected to cruelty or harassment, in connection with the demand of dowry has to

be proved. Only when these facts are proved then by virtue of the deeming provision of Section 304B, the Court shall presume that the husband or any relative of the husband had caused dowry death. 34A. Whenever it is directed by the Evidence Act that the Court shall presume a fact, that fact shall be taken as proved unless and until it is disproved. Meaning thereby that the presumption is a rebuttable presumption. In this view of the matter, the prosecution has to prove the main factor of cruelty or harassment in connection with any demand of dowry.

35. Though cruelty at any time after the marriage may cause depression in the mind of the victim, the cruelty and harassment envisaged by Section 304B is to be seen before the death of a woman. The Courts are to scrutinise the evidence carefully because cases are not rare in which occasionally there is demand and then the atmosphere becomes Calm and quiet and then again there is demand. Where a wife dies in the house of the husband within the short span of seven years of her marriage, it is of considerable difficulty to assess the precise circumstances in which the incident occurred because ordinarily independent witnesses are not available as the torture and harassment is confined in the four walls of the house. However, the courts are to be vigilant to scrutinise the evidence regarding the harassment and torture carefully if the witnesses are relatives of the deceased and relations between them and her in-laws are strained for any reason whatsoever it might be.”

28. Learned counsel has also relied upon **G.K.Devarajula Naidu v. State of A.P. : 2004 CrI.L.J. 4571** wherein it has been observed as under:-

“..... It is no doubt true that in several cases it may not be practically possible to get direct evidence relating to harassment under Section 498A Indian Penal Code, 1860. The statements said to have been made either by the deceased or by one to another would definitely fall under hearsay evidence and such statements are not admissible.....”

29. Learned APP on the other hand, submits that PW1 Shri Hori Lal Gupta, deposed that all the accused persons used to taunt his daughter for bringing insufficient dowry. The appellant and accused persons namely Lala Ram Gupta, Manoj Kumar, Chanchal, Kiran Devi had demanded a sum of Rs. 20,000/- from his

daughter for purchasing a new three wheeler scooter rickshaw for appellant. He arranged the said amount and given the same to accused Lala Ram Gupta, who had come to his house after about 1 months of the said demand with accused Krishan Murari, Manoj Kumar and the appellant. However, the behaviour of the accused persons did not change and after about two months of the aforesaid payment, accused persons had beaten his daughter for dowry. The appellant had struck her head on the wall, due to which had fallen down. At that time, his daughter was pregnant for three months. Convict Kiran Devi, mother-in-law of deceased had given a kick blow on her stomach. Thereafter, accused persons had taken his daughter to Lady Harding Hospital where convict Kiran Devi got done abortion of the child of the deceased. Accused persons after getting his daughter admitted in the hospital did not come back and looked after her. She remained hospitalised about 08-10 days. She had taken her to his home after the abortion. She remained in the house for about a year. None of the accused persons came to meet her to inquire about her health during that period. After the period of one year, the appellant with accused persons came to his house and requested him to send his daughter. They promised that they will not ill treat her or harass her in future. On their assurances, he sent his daughter with them. On 30.06.2003 his daughter had made a phone call at his house, which was received by his younger daughter Ms.Rekha Rani stating that the appellant was detained by police on the allegations of committing theft of a mobile phone. Therefore, an amount of Rs. 2,000/- was required for getting him released from the police station. She told that accused Lala Ram was asking her (deceased) to arrange for the amount from him (father of deceased). On 07.07.2003, he had sent his son Pradeep to the house of deceased for inviting accused persons to his house for 10.07.2003 for attending the Naamkaran ceremony of his grandson. Convict Kiran Devi had promised that all of them will come with Niraml. But none came to his house in the said ceremony. He sent his son Pradeep and his son-in-law Mahesh Chand to bring his daughter Nirmal to his house. When they reached at the matrimonial house of deceased, one neighbour told to his son Pradeep that Nirmal was beaten by the accused persons to the extent that she had become unconscious and she was taken to the Irwin Hospital.

30. PW2 Smt.Kamlesh, mother of deceased deposed that on the marriage of deceased they had spent about Rs. 2.00Lacs, but the accused persons not satisfied with the dowry given in the marriage. They used to demand dowry from deceased. Her daughter (deceased) had told her that when some sweets were sent to her through her daughter Ms.Rukmani, accused Anand had hit her daughter on her cheeks and convict Kiran Devi had kicked her and made her to spit out that sweet. At that time, her daughter was pregnant by three months and thereafter her daughter was admitted in Lady Harding Hospital and her abortion was got done against her wishes. Rest she supported the deposition made by her husband.

31. PW3 Shri Pardeep Kumar, brother of deceased also supported the version deposed by his parents.

32. PW10 Shri V. P. Singh, SDM deposed that on 16.08.2003 he had joined as SDM at Preet Vihar. On that day he had received the information through SHO Shkarpur, Delhi that one lady Nirmal was taken to LNJP Hospital where she was declared brought dead. He had asked the SHO/IO to get the dead body preserved in the mortuary of Maulana Azad Medical College and Hospital, Delhi. On 17.08.2003 he went to the mortuary of above college and hospital where father of deceased had met him. Statement of Pradeep Kumar and father were recorded in his presence regarding identification of dead body vide Ex.PW3/A and Ex.PW1/B respectively. From No.25.35 was filled up by the IO vide Ex.PW8/A. He sent request for post-mortem vide Ex.PW8/C. Statement of father of deceased was recorded vide Ex.PW1/A by one of his relatives in his presence. On 26.08.2003, parents of deceased with their son came to the office of witness and got the statement of mother of deceased was recorded vide Ex.PW2/A in his presence by one of the relatives of Smt.Kamlesh.

33. PW12 Ramashanker Mishra, who took the deceased to Walia Nursing Home deposed that he knew appellant and his family members. On 10.07.2003 at about 09:45AM he heard commotion and came out of his house and saw crowd in front of the house of appellant. He saw that wife of appellant was lying in the street in injured condition. He went inside the house. He arranged a three-wheeler scooter,

by which appellant brought his wife to Walia Nursing Home. He alongwith mother of appellant went to the shop of Anand where Anand and father of appellant were present. He sent them to the hospital. Appellant was residing at the second floor of the house. He had helped him in taking separate accommodation from his parents.

34. PW14 Dr.Mukta Rani, LBS Hospital, Khichripur, Delhi deposed that on 17.08.2003 she conducted post mortem on the body of the deceased, who was brought in the hospital with alleged history of fall on 10.07.2003 from the second floor. She was discharged from LNJP Hospital but was again brought there on 16.08.2003 at about 01:40PM. She was declared brought dead. She given her report vide Ex.PW14/A.

35. On 26.03.2004, CFSL report No.CFS/EE/2003 (DEL 836) dated 23.02.2004 was placed before her alongwith parcel of post-mortem report of this case for opinion. After perusal of the record, she opined that cause of the death of Nirmal was due to cerebral damage. Her opinion to this effect is Ex.PW14/B.

36. Learned APP further submitted that all the witnesses mentioned above, fully supported the prosecution case. The deceased died under suspicious circumstances within seven years of her marriage. The allegations of demand of dowry and cruelty are also proved against the appellant. Therefore, the impugned judgment and order on sentence are proper and there is no discrepancy in the same. Therefore, instant appeal deserves to be dismissed.

37. Heard learned counsel for parties.

38. The deceased fell from the second floor of the house on 10.07.2003; thereafter admitted in Irwin Hospital in unconscious condition. She remained under treatment till 07.08.2003, and discharged due to shortage of bed. On 16.08.2003, when her condition got deteriorated, she was again taken to the said hospital, where she died within one hour. In the present case, there is no statement or dying declaration of the deceased. Only PW1 Shri Hori Lal gupta, father of the deceased is star witness, relying whereupon the Trial Court convicted the appellant for the offences mentioned above.

39. During cross-examination, PW1 Shri Hori Lal Gupta, father of the deceased could not tell the date on which the demand of dowry was made by accused persons from his daughter. He also could not tell the date when such demand was communicated to him by his daughter. He failed to file any list of dowry articles to the police which were given in marriage nor any bills thereof were produced in Court.

40. I note that the incident took place on 10.07.2003 and the injured succumbed to her injuries on 16.08.2003. In between there is no complaint against the appellant and the same has been admitted by PW1 Shri Hori Lal Gupta, father of the deceased. Even for the alleged amount of Rs. 20,000/- given to the father of the appellant, after taking from a relative, he could not tell the name of said relative. Even admitted that when accused persons took his daughter again to their house, he did not given any dowry or cash.

41. PW3 Shri Pradeep, brother of deceased also testified that they had not given the amount of Rs. 2,000/- to the appellant as they were not having that much money. This witness deposed that on the date of the incident, when he went to the house of deceased, to bring her for Namkaran ceremony of his nephew, he was told by one of the neighbours that his sister was beaten up by the accused persons and she was taken to hospital; however, he could not tell the name of that person and by whom she was beaten, nor produced in the court.

42. PW8 ASI Shamshuddin, has admitted the factum that till 10.07.2003, no complaint from parents of deceased was received by him. This witness also deposed that one Gudiya told him that after an altercation, deceased had gone to the top of the roof and jumped downside. However, the prosecution has not produced said Gudiya in the witness box.

43. DW7 Smt.Benkuth Dasi, testified that deceased Nirmal was suffering from fits and used to tear clothes herself.

44. The appellant was not present in the house when the incident took place. There is nothing in evidence to show that the deceased had any quarrel before the incident either with the appellant or any of his family members. No complaint was

ever made either by the deceased to her parents for cruelty or dowry demand during the period of her marriage sustained. Not a single neighbour was examined to prove whether there was really any incident of cruelty. The Trial Judge did not rely upon the testimony of DW7 regarding the fact that deceased was suffering from fits, however, rejected her evidence on the ground that no medical evidence was produced.

45. To hold an accused guilty for the offence punishable under Section 304B Indian Penal Code, 1860, it has to be shown that apart from the fact that a woman died on account burn or bodily injury, otherwise than under normal circumstances, within seven years of her marriage, but it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any other relative of her husband. The question of presumption under Section 113 B of the Indian Evidence Act, 1872 would arise when the necessary ingredients show that soon before her death; she was subjected to cruelty or harassment in connection with the demand of dowry. This fact has to be proved. When these facts are proved only then, by virtue of the deeming provision of Section 304B Indian Penal Code, 1860 the Court shall presume that the husband or any relative of the husband has caused the dowry death. Meaning thereby, the presumption, is a rebuttable presumption. In this view of the matter, the prosecution has to prove the main factor of cruelty or harassment in connection with any demand of dowry. The courts are to be vigilant to scrutinise the evidence regarding the harassment and torture carefully if the witnesses are relatives of the deceased and relations between them and her in-laws are strained for any reason whatsoever it might be.

46. No doubt, it is true that in several cases it may not be practically possible to get direct evidence relating to harassment under Section 498A Indian Penal Code, 1860. The statements said to have been made either by the deceased or by one to another would definitely fall under hearsay evidence and such statements are not admissible.

47. As deposed by PW1 Shri Hori Lal Gupta, father of the deceased that the appellant had struck her head on the wall due to which she had fallen down. These facts have not been proved by PW14 Dr.Mukta Rani, who conducted the

post-mortem on the body of the deceased. Even otherwise, the cause of death has been opined as 'cerebral damage', which demolishes his deposition to this effect.

48. From the date of the incident, when the deceased fall from the second floor of the house till her death, she remained unconscious. If the deposition of PW1 to be believed, then he would have made the complaint against the appellant regarding the demand of dowry or cruelty being committed with the deceased, immediately on the day of incident. There was no necessity to wait till she died.

49. I find no connectivity with cruelty for the demand of dowry to the death of the deceased. There has to be some atrocities soon before the death, which is, missing in the present case.

50. Therefore, after considering the submissions of learned counsel appearing for the parties, I am of the considered view that the appellant has wrongly been convicted for the offence under Section 304B Indian Penal Code, 1860. At the best, he could have been convicted for the offence punishable under Section 498A Indian Penal Code, 1860.

51. Therefore, I modify the impugned judgment and order on sentence dated 29.05.2009 and 30.05.2009 respectively and held the appellant guilty and convicted for the offence punishable under Section 498A Indian Penal Code, 1860 only.

52. The appellant has already undergone more than four years' incarceration; whereas the maximum punishment provided for the offence punishable under Section 498A Indian Penal Code, 1860 is only three years.

53. Accordingly, jail authorities are directed to set the appellant free henceforth, if he not required in any other case.

54. Consequently, Criminal Appeal is partially allowed.

55. Copy of order be sent to the Jail Superintendent, for compliance.

56. Trial Court Record be remitted back immediately.

57. No order as to costs.

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