
(2013) 09 AHC CK 0173

In the Allahabad High Court

Case No : Application for Leave to Appeal No. 5 of 2012

Bhagwani Urf Bhanwati

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-09-2013

Acts Referred:

Citation : (2013) 3 ACR 3374 : (2013) 8 ADJ 511 : (2014) 4 ALJ 45 : (2013) 83 ALLCC 524

Hon'ble Judges : Pankaj Naqvi, J; Dharnidhar Jha, J

Bench : Division Bench

Advocate : Dinesh Kumar Yadav, for the Appellant; B.P. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

1. We had, by our order dated 29.7.2013, framed question regarding the maintainability of the petition filed by one Ajay Kumar claiming himself to be the daughter's son of complainant Bhagwani @ Bhanwati, who had initially preferred the appeal, to continue the appeal in the light of the reported death of the original appellant or the complainant. While framing the issue, we had very well referred to Sections 394 and 302 Cr.P.C. and we had required the learned counsel appearing for the said Ajay Kumar to enlighten us as to whether any legal heir of the complainant could be allowed to be impleaded in place of the appellant in an appeal against acquittal as the provisions of Section 394 Cr.P.C. permit the prosecution of the appeal only against conviction after the death of the appellant by any of his legal heirs after he had, within specified time, sought leave of the Court to prosecute the appeal.

Sri Dinesh Kumar Yadav, has placed before us unreported Judgment of Bombay High Court in Criminal Misc. Application No. 116 of 1998, Helen Pinheiro v. Kamaxi Steel Products, which is dated 15.1.1999 by which the learned Judge, who passed the Judgment, has referred to Section 256 Cr.P.C. and has observed that that particular provision by analogy permitted the impleadment of the heir

of the complainant in his place to prosecute the application seeking leave of the Court to appeal.

Section 256 of the Cr.P.C. reads as under:

256. Non-appearance or death of complainant.-

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

The first thing we want to point out is that Section 256 Cr.P.C. is a provision under Chapter XX of the Cr.P.C. which relates to procedures of trial of summon cases by a Magistrate and that provision by no stretch of imagination or construction could be said to be giving a right to a complainant's heir to be impleaded in place of the complainant in an appeal or the petition seeking the leave of the High Court for filing an appeal to challenge the order of acquittal. The learned Judge, in our opinion, had not considered the real import of provision of Section 256 Cr.P.C. and was passing a Judgment which was per incuriam the provision.

2. Even if we assume that the provision could be applicable or could be permitting a Court to entertain such a petition as was filed by Ajay Kumar before us, the same could not be applicable in as much as the trial was through a warrant trial proceedings as the charges in case were under Sections 419, 420, 467 I.P.C. which could never be tried by a Magistrate under Chapter XX of the Cr.P.C. In addition to the above, we want to point out the general principles of law that if there is a provision either in the Cr.P.C. or C.P.C. no provision, even the inherent power of the Court, could be used to grant a relief which could not be granted under that specific provision. The Cr.P.C. does not contain any provision for impleadment of a person in place of an appellant, who has preferred an appeal either u/s 372 or 378(4) Cr.P.C. The right to prosecute an appeal in the case of death of the appellant is created by Section 394 Cr.P.C. and that too in favour of the heirs of the deceased appellant, who had been convicted of committing an offence. The very proviso appended to Section 394(2) Cr.P.C. controls the whole scheme of creating the right in the heir of a deceased appellant and that is available to any of such heirs as are indicated by the

explanation appended to the Section. One could find that the right arises only when an appellant, who has been convicted and sentenced had died. The reason and rationale behind the formulation of Section 394 Cr.P.C. is that a person, who had been convicted has a basic human right to challenge the Judgment of conviction and to erase the stigma of being convicted and sentenced after challenging the views which could be expressed in support of such order of conviction and sentence passed against him. If the man dies the stigma remains at its place and it is more prominent after his death as his heirs may also feel stigmatized in society and in the eyes of general public of being heirs of a convicted person. Therefore, such a right has been created in favour of heirs of a convicted man. How could Section 256 Cr.P.C. could permit impleadment which could never be permitted by the whole scheme of Cr.P.C. In an appeal against acquittal, we have not been able to appreciate and we have also not been able to persuade ourselves in taking a view which was taken by the learned Judge of the Bombay High Court in the above noted case. We respectfully differ with the view of the Bombay High Court on the point and we hold that the petition filed by Ajay Kumar was not maintainable before this Court. While perusing the papers, we came across the Judgment, which is being impugned herein. It was rendered by the Chief Judicial Magistrate, Maharajganj and the appeal against a Judgment of acquittal could be filed as per Section 378(2) Cr.P.C. before the learned Sessions Judge to which Court ordinarily the appeals should lie against Judgments passed by the C.J.M. As such, the appeal also appears filed at a wrong forum which is, accordingly, dismissed.