

(2005) 02 GAU CK 0035

In the Gauhati High Court

Case No : Criminal L.P. No. 10 of 2004 (in Crl A. No. 50 of 2004)

Headmaster

APPELLANT

Vs

Sandhya Das and Others

RESPONDENT

Date of Decision : 28-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377, 378, 378(4), 394, 394(1)
Penal Code, 1860 (IPC) — Section 408

Citation : (2006) 3 GLR 14

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : A.K. Bhowmik, S.R. Dey, S. Ghose and A. Deb, for the Appellant; B. Das and S. Das, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Pal, J.—I have heard Mr. A.K. Bhowmik, learned senior counsel for the applicant and Mr. B. Das, learned senior counsel for the respondents at length.

2. This is an application under Sub-section (4) of Section 378 of the Code of Criminal Procedure seeking special leave to file appeal against acquittal ordered on 24.6.2004 by Additional Sessions Judge, West, Tripura, Agartala in Criminal Appeal No. 47 of 1 993.

3. Succinctly stated, the factual matrix leading to the present application is that the applicant herein being the Headmaster of Netaji Subhas Vidyaniketan, Agartala lodged a complaint against Sukumar Ranjan Das, who was clerk-cum-cashier in that institution alleging that he had misappropriated Rs. 20.402.89P from the school fund during the period from 12.9.1986 to 21.11.1986. The complaint was registered as CR 60 of 1987 in the court of Chief Judicial Magistrate, West Tripura, Agartala u/s 408 I.P.C. and after trial, said Sukumar Ranjan Das was convicted u/s 408 I.P.C. and sentenced to suffer R.I. for three years and also to pay a fine of Rs. 25,000, in default another period of two years" R.I. The accused preferred an appeal. During pendency of the appeal he

died and his legal heirs with permission continued the appeal, which was disposed of by the Additional Sessions Judge by the impugned judgment on 24.6.2004 acquitting the deceased appellant. It may be mentioned here that after his conviction by the trial court, he was also dismissed from service, which was affirmed in a departmental appeal. A Money Suit was also filed against him for recovery of the defalcated amount, which was partly decreed and was affirmed by the first appellate court. A second appeal against the said decree is pending in this Court. However, the present application is confined to seeking a permission to present appeal against the aforesaid Order of acquittal.

4. Mr. Bhowmik submits that though the accused died during pendency of the appeal before the appellate court, the legal heirs having been allowed to continue the appeal, which ended in acquittal, there is no bar for the complainant-petitioner to file appeal u/s 378 Cr.P.C. and the provision of Section 394 Cr.P.C. regarding abatement shall not apply. His further submission is that as the appeal before the a Additional Sessions Judge did not abate because of the proviso to Sub-section (2) of Section 394 Cr.P.C. under which the legal heirs were allowed to continue the appeal, the question of abatement for presenting an appeal before the High Court against the Order of acquittal by the appellate court cannot be a ground to refuse special leave to appeal. Mr. Das, on the other hand, submits that the special leave being for the purpose of presenting an appeal u/s 378 Cr.P.C, it automatically comes within the mischief of Section 394 Cr.P.C, which clearly provides that every appeal u/s 377 or Section 378 Cr.P.C shall finally abate on the death of the accused.

5. Admittedly, the accused died during pendency of the appeal filed by him against the conviction and sentence imposed on him by the trial court and as per the provision of Section 394(1) Cr.P.C, the appeal should have abated, but the proviso permits only the near relatives to continue the appeal with leave of the appellate court. Section 394 Cr.P.C. and the relevant proviso read as under ; -

394. Abatement of appeals. - (1) Every appeal u/s 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

The word "appeal" has not been qualified to be an appeal only before a particular court. Appeal u/s 378 Cr.P.C. may be presented to the High Court from an original or appellate Order of acquittal. In the present case, the appeal sought to be presented is against the appellate Order of acquittal and this appeal is also one falling within Section 378 Cr.P.C. As it is a complaint case, Sub-section (4) of

Section 378 provides such an appeal against appellate Order of acquittal can be filed only with the special leave to appeal. There is, therefore, no doubt that the appeal sought to be filed is an appeal within the meaning of Sub-section (4) of Section 378 Cr.P.C. This being the nature of the appeal, it cannot escape the overriding effect of Sub-section (1) of Section 394 Cr.P.C, which specifically provides that every appeal u/s 377 or Section 378 shall finally abate on the death of the accused. Mr. Bhowmik is not correct when he submits that the appeal before the Additional Sessions Judge having not been allowed to abate, Sub-section (1) of Section 394 Cr.P.C. cannot operate in an appeal against appellate Order of acquittal. This distinction seems to be artificial as it cannot be held that the appeal sought to be presented before this Court is an appeal other than u/s 378(4) Cr.P.C. Mr. Bhowmik also cannot disagree that the proposed appeal is under Sub-section (4) of Section 378 Cr.P.C. only and as such in my considered view, Sub-section (1) of Section 394 Cr.P.C. shall squarely apply and that the appeal before the Additional Sessions Judge was not allowed to abate, cannot have any bearing on the legal position with regard to the appeal against the appellate Order of acquittal. If an appeal abates on the death of the accused, there cannot be any reason at all to grant special leave to file appeal against the accused, who is no more.

6. In view of the above discussion, this application is found to be devoid of any merit and, therefore, the prayer for special leave to appeal is hereby refused.