

(2008) 02 GUJ CK 0108
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 5662 of 2007 in Cri. Appeal No. 77 of 1995

Shivshankar Harjivanrai Joshi (deceased by L.Rs.) APPELLANT
Vs

State of Gujarat RESPONDENT

Date of Decision : 19-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377, 378, 378(1)(3), 394, 394(2)
Penal Code, 1860 (IPC) — Section 161
Prevention of Corruption Act, 1988 — Section 5(2)

Citation : (2008) CriLJ 2908 : (2008) 3 GLR 2669

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : Thakkar Assoc, for the Appellant; Public Prosecutor, for the Respondent

Judgement

M.R. Shah, J.—Criminal Misc. Application No. 5662 of 2007 is filed by the applicants-heirs and legal representatives of the original accused-respondent in Criminal Appeal No. 77 of 1995-Shivshankar Harjivanrai Joshi for an appropriate order for abatement the proceedings of Criminal Appeal No. 77 of 1995 in view of the death of original respondent-Shivshankar Harjivanrai Joshi on 19-12-2006. Along with the application death certificate issued by the competent authority of Botad Nagarpalika is annexed. Thus, it appears that the original respondent in Criminal Appeal No. 77 of 1995 has expired during the pendency of criminal appeal.

2. Criminal Appeal No. 77 of 1995 is filed by the State of Gujarat u/s 378(1)(3) of the Criminal Procedure Code challenging the judgment and order of acquittal dated 27-10-1994 passed by the learned Special Judge, Bhavnagar in Special (ACB) Case No. 1 of 1998 acquitting the respondent-original accused for the offences punishable u/s 161 of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act.

3. Mr. Joshi, learned Advocate appearing on behalf of M/s. Thakkar Associates appearing on behalf of the applicants-heirs of the original accused has vehemently submitted that in view of Section 394 of the Criminal Procedure Code there is no other discretion with the Court but to pass an order of abatement of proceedings of Criminal Appeal No. 77 of 1995 on the death of the original accused.

4. On the other hand Mr. Sunit Shah, learned Public Prosecutor, has submitted that it may be true that considering Section 394 of the Cr.P.C., in an appeal u/s 378 of the Cr.P.C. on the death of the original accused, an appeal abates, but at the same time it might be that on abating the appeal and consequently confirming the judgment and order impugned in the appeal, the heirs of the original accused may claim all the benefits such as arrears of wages, other retiral benefits etc. Therefore, it is requested to clarify that the appeal is not dismissed on merits but is ordered to be abated and this Court has not gone into merits of the case and that such abatement would not amount to confirming the judgment and order passed by the learned trial Court on merits but the appeal is dismissed as having abated without entering into merits of the case.

5. Section 394 of the Cr.P.C. provides that every appeal u/s 377 or 378 shall finally abate on the death of the accused. As per Sub-section (2) of Section 394 "every other appeal under Chapter XXIX (except an appeal from a sentence of fine) shall finally abate on the death of the appellant." However, as per proviso to Section 394 where the appeal is against a conviction and sentence of death or of 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 be abated. Thus, right to continue the appeal has been provided to the near relatives of the accused who has been convicted and sentenced to death or of imprisonment. Such a situation is not in the present appeal. Present appeal is u/s 378 of the Cr.P.C. by the State against the judgment and order of acquittal. Considering Section 394 of the Cr.P.C. on death of the accused every appeal u/s 377 or 378 shall finally abate. Final abatement means there is no discretion with the Court and even there is no question of revival. It appears that the intention of the legislature is to put an end and there is no question or scope of revival as the appeal is to be disposed of as abated finally. However, at the same time, when an appeal results in abatement on account of death of the respondent/accused, there is no decision on merits confirming the judgment and order of acquittal. In an appeal against the order of acquittal, on the death of the accused considering Section 394 of the Cr.P.C., the Court has thereafter no jurisdiction to decide; consider the appeal and the judgment and order impugned in the appeal on merits. The Court has no other discretion but has to dismiss the appeal as abated on the death of the accused in an appeal u/s 378 of the Cr.P.C. against the judgment and order of acquittal.

6. Under the circumstances, as the respondent-original accused has expired on

19-12-2006 during the pendency of the present appeal, considering provisions of Section 394 of the Cr.P.C., this appeal is ordered to be abated.

However, at the same time it is also observed that while disposing of this appeal as having abated, this Court has not been able to consider the appeal and impugned judgment and order on merits in view of the provisions of Section 394 of the Cr.P.C., therefore, it may not be construed that the judgment and order passed by the learned trial Court acquitting the respondent-accused is confirmed on merits. The heirs of the deceased shall not be entitled to consequential other benefits, if any, automatically on disposal of the present appeal as having abated and consequently confirming the judgment and order passed by the learned trial Court (not on merits). The heirs of the deceased accused persons shall not be permitted to claim arrears of wages only on the ground that the appeal has been abated on account of death of accused respondent, automatically. At this stage, decision of the Hon"ble Supreme Court in the case of Union of India Vs. Harnam Singh, Para 81 is required to be referred to.

7. In the result, Criminal Misc. Application No. 5662 of 2007 is allowed to the aforesaid extent and Criminal Appeal No. 77 of 1995 is dismissed as having abated with above observations.