

(2016) 08 KAR CK 0049

In the Karnataka High Court

Case No : Criminal Appeal Nos. 815 of 2004 C/W 816 of 2004

State of Karnataka

APPELLANT

Vs

Swamygowda alias Subba

RESPONDENT

Date of Decision : 16-08-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, Section 394

Citation : (2016) 4 AirKarR 688 : (2016) ILRKarnataka 5013 : (2016) 4 KCCR 3290

Hon'ble Judges : H. G. Ramesh and Mrs. Rathnakala, JJ.

Bench : Division Bench

Advocate : K. S. Chandrakanth Gowda for Applicant in I.A. No. 1/2016 and I.A. No. 2/2016, for the Respondent; Vijaya Kumar Majage, ADDL. SPP, for the Appellant

Final Decision : Disposed Off

Judgement

H. G. Ramesh, J. - I.A.No. 1/2016 is filed by widow of deceased respondent No. I in Criminal Appeal Nos. 815 and 816/2004 for modification of the common judgment dated 28.07.2010 rendered by this Court in the said appeals on the ground that the appeals were disposed of without noticing the death of respondent No.I during the pendency of the appeals.

2. Cri.A No.815/2004 and Cri.A No.816/ 2004 were filed by State of Karnataka under Sections 377 and 378 of Cr.P.C respectively. Cri.A No.815/2004 was filed against the order dated 31.01.2004 passed by the Court of the Principal Sessions Judge, Mysore, in S.C.No.9 of 1999 sentencing respondent No.I to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for two years, and, sentencing respondent No.2 to pay a fine of Rs.3,000/-, in default, to undergo simple imprisonment for one year. Cri.A No.816/2004 was filed against the judgment dated 29.01.2004 passed in the aforesaid S.C.No.9 of 1999 whereby the respondents were acquitted of the offences punishable under Sections 341 & 307 read with 34 of I.P.C but were convicted for the offence punishable under

Section 326 read with Section 34 of I.P.C.

Both the aforesaid appeals were disposed of by this Court on 28.07.2010 by sentencing each of respondent Nos.1 & 2 to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.50,000/-, and in default of payment of fine, to undergo simple imprisonment for six months. This was in modification of the sentence imposed by the trial Court by its order dated 31.01.2004.

3. It is stated that respondent No. 1-Swam-ygowda, who was accused No.1 before the trial Court, died on 22.3.2008, during the pendency of the appeals and the appeals were disposed of by this Court on 28.07.2010 without noticing his death.

4. Learned counsel for the applicant submitted that the death of Swamygowda alias Subba was not brought to the notice of this Court at the time of disposal of these appeals. By relying on Section 394 of Cr.P.C, he submitted that the common judgment dated 28.07.2010 rendered against respondent No. 1 requires to be recalled and both the appeals will have to be disposed of as abated as against respondent No.1.

5. Learned Additional SPP appearing for the State, by relying on Section 362 of Cr.P.C, submitted that the Court has no power to alter or review the judgment or final order disposing of a case, after it is signed, except to correct a clerical or arithmetical error. Hence, he sought for dismissal of the application in I.A.No.1/2016.

6. To examine the rival contentions, it is necessary to refer to Sections 394 & 362 of Cr P.C; they read as follows:

394. Abatement of appeals. - (1) Every appeal under section 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 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 abate.

Explanation. - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

362. Court not to alter judgment. - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

7. A plain reading of Section 394 of Cr.P.C extracted above will show, that in an appeal under Section 377 or Section 378 of Cr.P.C, on the death of the accused, the Court will have no jurisdiction to consider the appeal on merits except to dispose of such an appeal as abated.

8. It is not in dispute that respondent No.1 died on 22.03.2008, during the pendency of the appeals. In view of death of respondent No. 1 during the pendency of the appeals and in view of Section 394 of Cr.P.C, this Court had no jurisdiction to proceed further in the appeals as against respondent No. 1 except to dispose of the appeals as abated as against respondent No.1. However, the death was not brought to the notice of this Court at the time of disposal of the appeals.

9. The question now is, in view of the bar under Section 362 of Cr.P.C to alter the judgment, after it is signed, whether it is permissible to recall the judgment dated 28.07.2010 rendered in the appeals as against respondent No. 1 in view of his death during the pendency of the appeals?

10. In our opinion, the bar under Section 362 of Cr.P.C will not operate, if the judgment or final order disposing of a case is a nullity in law. It is a settled position in law that a judgment or an order passed against a dead person is a nullity in law. As this Court had disposed of the appeals without noticing the death of respondent No.1-Swamygowda, the common judgment dated 28.07.2010 rendered in these appeals as against respondent No.1 is a nullity, and in view of Section 394 of Cr.P.C, it requires to be recalled. Accordingly, it is recalled. Both the appeals as against respondent No.1 stand disposed of as abated. As against respondent No.2, the common judgment dated 28.07.2010 passed in these appeals remains undisturbed. This order shall be treated as part of the aforesaid common judgment dated 28.07.2010. IA.No.1/2016 is accordingly disposed of. IA.No.2/2016 filed for interim stay does not survive for consideration; it stands disposed of accordingly.