

Court No. - 43

WWW.LIVELAW.IN

Case :- CRIMINAL MISC. APPLICATION DEFECTIVE U/S 372 CR.P.C (LEAVE TO APPEAL) No. - 14 of 2016

Applicant :- Toofani

Opposite Party :- State Of U.P. And 13 Others

Counsel for Applicant :- Baijant Kumar Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Vivek Kumar Birla,J.

Hon'ble Mohd. Aslam,J.

1. Heard Sri Baijant Kumar Mishra, learned counsel for the appellant and learned A.G.A. Sri Ratan Singh through video conferencing.

2. The present appeal has been filed against the acquittal order dated 11.01.2002 passed by Additional Sessions Judge, Court No.7, Deoria in Sessions Trial No.94 of 1992 (State vs. Yogendra and others) arising out of Case Crime No.150 of 1991, under Sections 147, 148, 302, 302/149 IPC P.S. Vishunpura District Doeria now Kushinagar.

3. The present appeal has been filed along with delay condonation application filed under Section 5 of Limitation Act as well as along with a Misc. Application for granting leave to appeal under Section 372 CrPC.

4. The Stamp Reporter has reported this appeal beyond time by 5172 days and on the date of presenting this appeal before this Court which was beyond time by 5173 days.

5. Learned counsel for the appellant has submitted that appeal filed at the instance of the informant would be maintainable under Section 372 CrPC in view of the amendment inserted by Act No.5 of 2009 w.e.f. 31.12.2009. Learned counsel for the appellant has drawn the attention of this Court towards Section 372 CrPC which is quoted as under:-

"372. No appeal to lie unless otherwise provided.—No appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court."

6. Learned counsel for the appellant has submitted that the delay was for the reason that in the year 2002 the appellant was suffering from poor health and he could not approach his local counsel, when he was feeling quite well he approached his counsel, then he got information that a State appeal will be filed by the State. Thereafter, the appellant went outside of house for earning livelihood and when he came to Allahabad in the march, 2016 for his personal work, then he got information that State appeal was not filed and therefore, there is a delay in filing the present appeal.

7. We have asked the learned counsel for the appellant as to how this appeal would be maintainable as the judgment is of the year 2002 i.e. 11.01.2002, when the proviso to Section 372 CrPC, quoted above, was not in force which was enforced w.e.f. 31.12.2009. It is submitted by learned counsel for the appellant that the appellant is the informant and therefore, he could have challenged the aforesaid judgment in view of the aforesaid proviso.

8. Before proceeding further it would be relevant to take note of the judgment of Supreme Court in **Mallikarjun Kodagali vs. State of Karnataka and others, (2019) 2 SCC 752 (3 Judges)**, paragraphs 9, 24, 26, 27, 45, 46, 47, 48, 50, 51 and 72 whereof are quoted as under:-

"9. With this background, we need to consider the questions that arise before us consequent to the introduction of the proviso to Section 372 CrPC with effect from 31-12-2009. The questions are somewhat limited: Whether a "victim" as defined in CrPC has a right of appeal in view of the proviso to Section 372 CrPC against an order of acquittal in a case where the alleged offence took place prior to 31-12-2009 but

the order of acquittal was passed by the Trial Court after 31-12-2009? Our answer to this question is in the affirmative. The next question is: Whether the "victim" must apply for leave to appeal against the order of acquittal? Our answer to this question is in the negative.

x x x x x

24. Feeling aggrieved by the decision of the High Court, the National Commission for Women preferred a petition for special leave to appeal admittedly invoking the inherent powers of this Court. In that context this Court held that in view of Section 372 CrPC no appeal shall lie from a judgment or order by a criminal court except as provided by CrPC or by any other law which authorises an appeal. The proviso to Section 372 CrPC gives a limited right to the victim to file an appeal in the High Court against any order of a criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. This Court then observed as follows: (National Commission for Women v. State (NCT of Delhi), (2010) 12 SCC 599 p.603, para 8)

"8. ...The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence."

x x x x x

26. The thrust of the decision of this Court, which appears to have been misunderstood by the High Court, is with regard to entertaining a petition under Article 136 of the Constitution by a third party. As far as criminal matters are concerned, this Court undoubtedly held that permitting a third party to prefer a petition under Article 136 of the Constitution would be dangerous and would cause confusion. The reasoning of this Court was not directed towards the proviso to Section 372 CrPC. It is only in passing that this Court observed that on the facts of the case, the proviso to Section 372 CrPC might not be applicable since it came into the statute book after the incident.

27. The decision of this Court in National Commission for Women is quite clearly distinguishable and reliance on this decision by the High Court is inapposite.

x x x x x

45. With regard to the second question, the High Court concluded that the right to appeal is a substantive right. Consequently, the inescapable conclusion would be that the right to appeal given to a victim would be prospective and enforceable with effect from 31-12-2009 only. This would be irrespective of the date of registration of the FIR or the date of the occurrence. The High Court held as follows:(Tata Steel v. Atma Tube Products Ltd., 2013 SCC OnLine P & H 5834 para 126)

"126. Since right to appeal is a substantive right and it cannot be inferred by implication unless the Statute expressly provides so, the only inescapable conclusion would be to hold that the

right to appeal given to a "victim" under proviso to Section 372 of the Code is prospective and has become enforceable w.e.f. 31-12-2009 only. A "victim" is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after 31-12-2009 irrespective of the date of registration of FIR or the date of occurrence etc. To be more specific, it is clarified that it is the date of passing of the order to be appealed from and not any other fact situation, which shall determine the right to appeal of a "victim". As a corollary thereto, it is held that the remedy availed by a "victim" including revision petition against acquittal of the accused by an order passed before 31-12-2009, cannot be converted into an appeal under proviso to Section 372 and it shall have to be dealt with in accordance with the parameters settled for exercising revisional jurisdiction by a superior court.”

46. The Full Bench of the Delhi High Court also considered this issue in *Ram Phal v. State* 2015 SCC OnLine Del 9802. The question considered by the Delhi High Court was: SCC Online Del para 3)

“3.(b) Whether the appellate remedy under the proviso to Section 372 CrPC is available with respect to only such offences which were committed as on the date when the appellate right was conferred by law or the appellate right would be available with respect to the date of the decision or the appellate remedy is without any reference to the two points of time i.e. the date when the offence was committed or when the appellate right was conferred by law, (Act No.5 of 2009 with effect from 31.12.2009)?”

47. While answering the question, the Delhi High Court referred to *Tata Steel* decided by the Punjab & Haryana High Court. The Delhi High Court referred to the conclusion that: (*Ram Phal* case para 56)

"56. ...a "victim" is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after 31-12-2009 irrespective of the date of registration of FIR or the date of occurrence etc.”

48. Reference was also made to the Division Bench of the Patna High Court in *Parmeshwar Mandal v. State of Bihar*, 2013 SCC Online Pat 602 and parts of the following passages were referred to and relied upon. It was said in *Parmeshwar Mandal*:

“23. Proviso to Section 372 of the Code is in two parts. First clause of the said proviso begins with ‘provided that’ and ends with ‘Inadequate compensation’ and creates a right in the victim to prefer appeal against any order passed by a court either (i) acquitting the accused or (ii) convicting for a lesser offence or (iii) imposing inadequate compensation. Thereafter, by inserting conjunction ‘and’, another clause has been added in the same sentence by which forum for preferring such appeal has been identified, which relates to procedural part of law. Thus, the said

WWW.LIVELAW.IN

proviso contains both substantive part, creating right in the victim to prefer an appeal, and procedural part, by identifying the forum for filing such an appeal. It is not in dispute that the substantive part of law operates prospectively, unless made retrospective, and the procedural part is presumed to be retrospective within its defined limits.

x x x x x

25. ...The Central Government, by Notification No. S.O. 3313(E) dated 30-12-2009, appointed 31st day of December 2009, as the date for the Act. 5 of 2009 to come into force, which was published in Gazette of India, Ext., Pt.II, S.3(ii), dated 30-12-2009. Hence, in absence of any express intention notified by the Legislature to the contrary, it has to be concluded that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders were passed by any criminal court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of the date of occurrence, institution of the case, cognizance or commitment.”

50. *The Full Bench of the Rajasthan High Court in Baldev Sharma v. Gopal 2017 SCC Online Raj 3005 considered (amongst others) the following two questions:*

“1. (i) Whether the proviso to Section 372 as introduced by the amending Act No. 5 of 2009 which has been brought into effect on 31.12.2009 can be given effect to in cases where the offence occurred prior to 31.12.2009 and thereby given the right of appeal to the victim in the event; (a) whether the court below has acquitted the accused or (b) has convicted the accused for a lesser offence or (c) has imposed inadequate compensation. Though the judgment in such cases may have been passed by the court below after 31.12.2009.

(ii) Whether the appeal by the victim under proviso to Section 372 is also required to be dealt with in the same manner as an appeal filed by the State under Section 378 Cr.P.C. and the provisions of Section 378 are required to be read into the provisions of Section 372 Cr.P.C. with regard to appeals filed by the victims.”

51. *It was held, relying upon the same passages in Tata Steel and Parmeshwar Mandal that “judgments passed on or after the said date 31-12-2009 are the ones in respect whereto, irrespective of the date of the offence, the victim can avail the right to file an application seeking leave to appeal.”*

x x x x x

WWW.LIVELAW.IN

72. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of appeal under the proviso to Section 372 CrPC. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has no relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the Trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31.12.2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso."

9. It is not in dispute that the impugned judgment is of the year 2002. We are not satisfied with the argument of the learned counsel for the appellant as the amendment has brought into force and statutory right in favour of the victim was granted by way of amendment under Section 372 CrPC w.e.f. 31.12.2009 and prior to that amendment, in State case only the State Government could have filed the appeal that too along with an application for granting leave to appeal. The appellant at the time of passing of the impugned judgment could have at the most challenged the order by filing criminal revision which right was admittedly not exercised by the appellant. It is after 14 years of the impugned judgment and even after 7 years of the amendment having been enforced, he approached this Court by filing delay condonation application along with an application for granting to leave. It is not in dispute that in view of the judgment of the Hon'ble Apex Court in *Mallikarjun Kodagali (supra)*, the appeal can be filed in the light of proviso to Section 372 CrPC and there is no requirement to file an application to grant leave to appeal. However, this provision was not in force in the year 2002 as there is no specific provision that this amendment is retrospective in nature. Therefore, in the opinion of the Court, the present appeal

would not be maintainable and accordingly, the same is dismissed as not maintainable. We find that provision of Section 5 of Limitation Act is, therefore, not available to the appellant and in fact, this appears to be a meaningless attempt on the part of the appellant to file this appeal by invoking the provision of Section 5 of Limitation Act. As we find that the appeal itself is not maintainable and the grounds narrated in the affidavit filed in support of delay condonation application under Section 5 of Limitation Act need not be looked into, which, in any case, are not sufficient to condone such huge delay.

10. Accordingly, the appeal stands **dismissed** as not maintainable.

Order Date :- 4.2.2022

SP