

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.01.2011

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CRL.A. 793/2010

JAGMOHAN BHOLA

..... Appellant

versus

DILBAGH RAI BHOLA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr B.K. Sharma

For the Respondents : Mr Pawan Sharma, Standing Counsel with Mr Sanjay Lao, Addl.
Standing Counsel for the State.
Mr Dinesh Garg for Respondents 1-5.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

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| 1. Whether Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. To be referred to the Reporter or not ? | Yes |
| 3. Whether the judgment should be reported in Digest ? | Yes |

BADAR DURREZ AHMED, J (ORAL)

1. This is an appeal filed by the brother of Rashmi who died in the alleged incident. The present appeal has been filed invoking the proviso to Section 372 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "said Code") claiming himself to be a person covered by the definition of victim under Section 2 (wa) of the said Code.

2. Respondents 1 to 5 were charged with having committed the offences under Sections 498A/34 IPC and the respondent No.3 was additionally charged with having committed the offence under Section 304 IPC. The said respondents were acquitted of all charges by virtue of the

impugned judgment and order dated 25.05.2010 passed by the learned Additional Sessions Judge.

3. At the threshold, the learned counsel appearing for the respondents 1 to 5 has raised an argument with regard to the maintainability of the present appeal. His objections are two-fold. The first objection is that the appellant does not fall within the definition of victim under Section 2(wa) of the said Code. The second objection is that the present appeal which is purportedly filed under the proviso to Section 372 of the said Code is not maintainable unless and until leave of this Court is taken for filing such an appeal.

4. We have heard the learned counsel for the parties only on the issue of maintainability. So far as the first objection is concerned, that issue is no longer open for debate in view of our decision in the case of **Kareemul Hajazi v. State of NCT of Delhi & Ors.** in Crl. M.A. No.13541/2010 in Crl. A. No.940/2010, decided on 07.01.2010 and the present appellant being the brother of the deceased Rashmi would fall within the definition of victim under Section 2(wa) of the said Code. This is so because even Rashmi's parents are no longer alive and her daughter, Sweeti, who is a minor, is living with her father, Dilbagh Rai Bhola, who was an accused and is the respondent No.1 and, therefore, cannot be expected to bring any action on her own.

5. As regards the second objection with regard to the requirement of the appellant seeking leave of this Court, the learned counsel for the respondents 1 to 5 submitted that in cases of appeals by convicts against

conviction no leave of the Court is required but in cases where appeals against acquittals are provided, both in police cases as well as in complaint cases, leave of the High Court is necessary. Since the present appeal is also one which is against acquittal, similar logic should apply and, therefore, the appellant ought to have taken leave of this Court before filing the present appeal. Since no such leave has been taken, the appeal ought to be dismissed. The learned counsel for the respondents placed reliance on the decision of the High Court of Punjab and Haryana in the case of **Smt. Ram Kaur @ Jaswinder Kaur v. Jagbir Singh alias Jabi and others** in Crl.Appeal No.205/2010 decided on 01.04.2010 by a Division Bench of the said Court. Reliance was also placed on a Division Bench decision of the Gujarat High Court in the case of **Bhikhabhai Motibhai Chavda v. State of Gujarat & Ors.**: 2010 Crl. L.J. 3325.

6. The Punjab and Haryana High Court in the case of **Smt. Ram Kaur** (*supra*) was of the view that Section 372 of the said Code provides that no appeal shall lie from any judgment or order of a criminal court except as provided by the Court or by any other law for the time being in force. Section 378 of the Code dealt with appeals in cases of acquittal. The said High Court observed that Section 378(3) provided that no appeal to the High Court under sub-section (1) or sub-section (2) would be entertained except with the leave of the High Court. It was further pointed out that even against an order of acquittal passed in a case instituted upon a complaint, the complainant has been provided with the right to appeal but he could file such an appeal along with an application for grant of special leave to appeal

against the order of acquittal. The said Court concluded that under the Code, the appeal against acquittal could have been preferred only with the permission of the High Court on an application filed for grant of leave to appeal against the order in appeal and that by the addition of the proviso to Section 372 of the Code, although a right had been conferred upon the victim to prefer an appeal against the order of acquittal it would also be subject to the condition of obtaining leave of the High Court. It was held that the main provision of Section 372 stipulated that no appeal shall lie from the order of acquittal except as provided for by the Court or by any other law for the time being in force. Consequently, the said Court was of the view that by the said proviso, a right to file an appeal has been conferred on the victim against the order of acquittal but “*the procedure for filing such appeal will be the same as provided under Section 378 of the Code*”. It was, therefore, held that even if the victim had a right to prefer an appeal against the order of acquittal, he has to seek the leave of the High Court to prefer such an appeal and he cannot directly file the appeal against the order of acquittal as of right. Consequently, the said High Court observed that the appeal filed before it was not maintainable without any application for grant of leave to appeal.

7. The decision of the Gujarat High Court in the case of **Bhikhabhai Motibhai Chavd** (*supra*) also considered the issue with regard to the right of appeal by a victim. The Court specifically dealt with the question as to whether the victim has an absolute right to prefer an appeal or whether such right to prefer an appeal would be available to the victim only in case the State has not preferred any appeal against the order of acquittal or against

conviction for a lesser offence or against imposition of inadequate compensation. This fact situation, of course, does not arise in the present case inasmuch as the State has not preferred any appeal. However, the observations and discussions of the Gujarat High Court need to be considered. The said Court was of the view that it is only if the State was not pursuing the matter with a proper spirit that the victim may validly raise a grievance and thereafter, may file an appeal. The said Court was of the view that a victim cannot claim to place his case on a higher pedestal than that of the State whose basic duty was to ensure that the offenders were booked. The Court of the view that upon a purposive interpretation of the proviso to Section 372 of the Code, it would appear that the essential purpose for bringing about the amendment was to see that if the State did not prefer an appeal against the order of acquittal, the victim should not be left in a helpless position. The Gujarat High Court took the view that the right of appeal should be equally made available to the victim but only if the State had not preferred an appeal.

8. We may straightaway and with all humility point out that we are not in agreement with the aforesaid views of the Punjab and Haryana High Court and the Gujarat High Court. It is apparent that various provisions have been provided for appeals under the said Code. Prior to the introduction of the proviso to Section 372, a victim did not have a right of appeal. At that point of time, the appeals could be filed either by the convict against an order of conviction under Section 374 or by the State for enhancement of sentence under Section 377 or by the State or the complainant, as the case may be,

against acquittals under Section 378 of the Code. We may point out that in so far as the appeal by a convict under Section 374 is concerned, there is no requirement for seeking leave to appeal. Similar is the case with the State's appeal for enhancement of sentence under Section 377 of the Code. Prior to the introduction of the proviso to Section 372, it was only section 378 which dealt with appeals against acquittals. In police cases, the State had the right to file appeals against acquittals under Section 378(1) and (2) but such right was subject to the provisions of Section 378(3) which required that leave of the High Court be taken before an appeal is preferred. We may note that this requirement of taking leave of the High Court was not there in the Criminal Procedure Code of 1989 but had been specifically introduced in the present Code. If a case had been instituted upon a complaint, the complainant could also file an appeal by virtue of the provisions of Section 378(4) but, he would have to seek special leave from the High Court to file such an appeal.

9. All these provisions were existing when the proviso to Section 372 was introduced with effect from 31.12.2009. It is apparent that in some appeals i.e., in the case of convicts' appeals against conviction and the State's appeals seeking enhancement of sentence, no leave to appeal was necessary whereas in other appeals i.e., appeals by the State against acquittals and appeals by the complainant against acquittals, leave and special leave from the High Court was necessary. The legislature was aware of this position. We cannot assume that the legislature was ignorant of the fact that in some appeals leave was necessary while in others it was not. Keeping this in mind, upon a plain reading of the proviso to Section 372, we cannot discern any

limitation in respect of the requirement to take leave of the High Court before an appeal is presented by a victim. The proviso to Section 372 is a special provision and it deals with three different situations, namely, appeals against acquittal, conviction for a lesser offence and inadequacy of compensation. The proviso to Section 372 is not limited to appeals against acquittals. All the appeals, whether they are against acquittal or conviction for a lesser offence or inadequate compensation, have been placed on the same footing. So, while a parallel is sought to be drawn by the learned counsel for the respondents between an appeal under the proviso to Section 372 with an appeal against acquittal under Section 378, it cannot be forgotten that the appeal under the proviso to Section 372 is not limited to appeals against acquittals but also concerns itself with appeals against conviction for lesser offence which is akin to the State's appeals for enhancement of sentence under Section 377 which, in turn, does not require any leave of the High Court to be taken. Similarly, there is no requirement under the statute for leave to be taken in respect of an appeal in respect of inadequate compensation. All these three circumstances have been placed on the same footing under the proviso to Section 372 and, therefore, no limitation with regard to the requirement of taking leave or special leave of the High Court before an appeal is presented to it by a victim can be read into the proviso to Section 372.

10. This being the position, the present appeal would be clearly maintainable, inasmuch as there is no requirement for first obtaining leave of this Court. We, however, agree with the submission made by the learned

counsel for the respondents 1 to 5 that the victim's appeal against acquittal under the proviso to Section 372 does not stand on the same footing as that of a convict's appeal against conviction. The victim must demonstrate prima facie that there is some serious error in the judgment of the trial court which the High Court must look into and for this purpose, admit the appeal for an in-depth examination. All that we are saying is that while in the case of an appeal by a convict, admission is more or less a formality and a matter of course, in the case of an appeal by a victim against an order of acquittal something more has to be shown before the appeal is admitted. The issue of maintainability stands decided accordingly.

11. The counsel for the parties request for time to advance arguments on admission of the appeal. Renotify on 28.02.2011.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

JANUARY 24, 2011

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