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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 334/2001**

SANTOSH KUMAR Appellant

Through: Mr. Sumeet Verma, Advocate
(Amicus Curiae)

versus

STATE Respondent

Through: Mr. Ravi Nayak, Additional Public
Prosecutor for respondent-State
with SI Premvir Singh, P.S.
Sultanpuri

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

% **09.01.2014**

Impugned judgment of 5th March, 2001 convicts appellant, who is husband of deceased, for the offence under Section 304-B of *IPC* as well as for the offence under Section 498-A of *IPC* and vide impugned order of 16th March, 2001, appellant has been sentenced to undergo Rigorous Imprisonment for seven years with fine for committing the offence of dowry death and to the period already undergone by appellant for the offence of under Section 498-A of *IPC*.

Prosecution case, as noticed in the impugned judgment, is as under:-

“The case of prosecution as made out in the challan is that on getting information from R.M.L. Hospital, S.I. Binay Singh reached R.M.L. Hospital and collected the MLC of Saroja who was fit for statement

and she made a statement that she was living with her family and had been married about 3 years back and her husband was doing the job of cooker kit assembling at Subhash Nagar and on 15th July, 1999 she was cooking food on the stove and all the family members were down stairs and all of a sudden while cooking the food, stove went off and when she was lighting the match there were fire around and she caught fire and burnt. All this happened by accident and her husband got her admitted in R.M.L. hospital and she stated that in this accident no one was responsible and did not want any legal action. It is seen that Saroja expired of burn injuries on 17.7.1999 as she suffered more than 70% burn injuries. S.I. informed the SDM about the death of Saroja and the SDM conducted the proceedings u/s 176 Cr.P.C. and the challan states that during these proceedings, the father of the deceased Saroja who had in the meanwhile come to Delhi, made a statement to him on 19th July, 1999 that in-laws of Saroja Devi used to demand Banarsi Saree, motor-cycle, colour T.V. and suits and when she had come first time after the marriage to his house she was happy and when she came again after year, she told that Santosh Kumar and his mother Sukhmani used to beat her. Then these people came from Delhi and she went with them and he had made inquiry that they should not behave with his daughter in this manner. He made allegations that husband Santosh Kumar, and his father Chhedi Lal used to harass her for dowry and on inquiry from the neighbourhood he learnt that his daughter had been burnt by these persons. On this statement, the S.D.M. on 1.9.1999 directed the S.H.O. to register a case. The FIR was registered on the statement of father of the deceased, though the deceased Saroja before her dying

had clearly stated that she had burnt by accident while cooking food. Police investigated the case and filed the challan for the offences u/s 498A/304-B IPC in the court of concerned Magistrate and the case was committed to this court.”

Prosecution case rests upon deposition of fifteen witnesses. Material deposition is of *Ashok Kumar (PW-1)*, father of the deceased; and three neighbours of appellant i.e. *Kamlesh (PW-2)*; *Meena (PW-3)*; *Inder Pal (PW-6)* and *Ravi Karan (PW-7)*. *Dr. Kalyani (PW-8)* had medically examined *Saroja* vide MLC (*Ex.PW-8/A*), who had sustained 75% burn injuries and upon her death, post-mortem was conducted by *Dr. Komal Singh (PW-5)*. *SI Binay Singh (PW-13)* is the Investigating Officer of this case.

Appellant in his statement under Section 313 of Cr.P.C had claimed to be innocent and had submitted that his neighbourers have falsely implicated him in this case as he does not have good relations with them. However, no evidence was led by appellant in his defence before trial court. Trial of this case was concluded with conviction of appellant, which is assailed in this appeal.

At the hearing, it was vehemently argued by learned Amicus Curiae that dying declaration (*Ex.PW-13/A*) of deceased recorded by *SI Binay Singh (PW-13)*, the Investigating Officer of this case, goes to prove that death of deceased was accidental and father (*PW-1*) of the deceased as well as his neighbourers have falsely implicated him in this case.

It was urged by learned Amicus Curiae that trial court has gravely erred in preferring oral testimony over and above the dying declaration

(*Ex.PW-13/A*), which ought to have been relied upon. It was emphatically submitted that from the medical evidence on record, it does not stand proved that deceased had committed suicide.

Attention of this Court was drawn to the MLC of the deceased to show that appellant had taken her to hospital which rules out the homicidal death of the deceased. It was submitted that trial court on conjectures has concluded that death of deceased was suicidal. Reliance was placed upon Apex Court's decision in *Bakshish Ram & Another v. State of Punjab* 2013 (3) SCALE 370 to contend that evidence of the neighbourers cannot be made the basis to convict appellant for the offence of dowry death and in the face of dying declaration (*Ex.PW-13/A*) of deceased exonerating appellant, conviction of appellant is rendered unsustainable and is liable to be set aside. Thus, acquittal of appellant was sought by appellant's counsel.

Learned Additional Public Prosecutor for respondent-State submits that the so-called dying declaration (*Ex.PW-13/A*) is undated and unsigned and is tutored version given by appellant and so, it has been rightly discarded. It was submitted that there is no substance in this appeal as deposition of father (*PW-1*) of the deceased and neighbourers of appellant substantiate prosecution case. Thus, dismissal of this appeal is sought by respondent-State.

What was said in the so called dying declaration (*Ex.PW-13/A*) on record, needs to be noticed. Its official translation reads as under: -

*“Saroj W/o Santosh, Age 18 years, R/o F-146,
Prem Nagar 1, Near 70 feet road, Delhi made her
statement as under: -*

I reside at the aforesaid address alongwith my family and do the house chores. The third year of my marriage is going on. My husband does a cooker kit assemble work at Subhash Nagar. Last night i.e. on 16.07.99 at about 9 o'clock while I was preparing meal and all the members of the family were sitting at the lower floor that the stove stopped working out of a sudden during the preparation of meal and when I tried to light the match stick, it inflamed and I got burnt. All of this happened out of a sudden and when I shouted (for help), my husband who had been sitting at the lower floor came and got me admitted in RML hospital. This incident is a coincidental one and nobody is at fault. I do not want any legal action.

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Both the sides have been heard and with the able assistance of Mr. Sumeet Verma, learned Amicus Curiae and Mr. Ravi Nayak, learned Additional Public Prosecutor for respondent-State, the evidence on record has been carefully perused. Thereafter, it emerges that so-called dying declaration (*Ex.PW-13/A*) is an irresponsibly recorded statement which is undated and unsigned. It does not bear name of the author of the statement. A bare perusal of this statement i.e. dying declaration (*Ex.PW-13/A*) reveals that it has been carelessly recorded as it does not indicate that whose right thumb impression it bears nor the safeguards for recording the dying declaration have been followed. It is not recorded in the question-answer form nor does it note that if fitness of deceased to make the statement was taken before recording of this statement. Infact, one does not know when and what time this statement was recorded and

by whom and under whose signatures. Trial court has rightly discarded it as even the MLC (PW-8/A) reveals that "*Fit for Statement*" has been written on this MLC in a different ink, but by whom and when, is not known.

So far as ocular testimony is concerned, I find that although statement of father (PW-1) of deceased has been recorded by SDM on 19th July, 1999, but said an SDM has not been cited as witness. Still, the statement (PW-1/A) of father (PW-1) of the deceased (*purportedly made before concerned SDM*) can be treated as First Information Report of this incident. When deposition of father (PW-1/A) of the deceased is read as a whole, it becomes evident that deceased was being harassed by appellant for not bringing motorcycle, colour T.V. and his deposition inspires confidence. This witness (PW-1) is illiterate, whose statement (*Ex. PW-1/A*) was recorded on 19th July, 1999. Merely because this witness (PW-1) has stated in his evidence for the first time in March, 2000 that he had reached Delhi on 20th July, 1999, it would not render his deposition unreliable as what this witness has stated in substance in the statement (*Ex. PW-1/A*) is reiterated by him in his deposition before trial court and there is no worthwhile cross-examination of this witness (PW-1), which can demolish his version. However, it is worthwhile to note that from the deposition of this witness (PW-1), it cannot be inferred that deceased was subjected to cruelty for dowry "*soon before her death*".

Smt. Kamlesh (PW-2), neighbour of the appellant, has deposed that she had seen appellant beating deceased on one or two occasions, but she has not stated in her evidence that the quarrel was on account of not bringing dowry and "*soon before her death*". Even other neighbourers

i.e. *Meena* (PW-3) and *Inder Pal* (PW-6) have not deposed that deceased was subjected to cruelty for not bringing sufficient dowry soon before her death. Infact, another neighbourer (PW-7) has not deposed anything against appellant, but his hostility to the prosecution case does not demolish the cogent evidence of appellant's three neighbourers i.e. PWs-2, 3 & 6.

Apex Court in its recent decision in *Surinder Singh v. State of Haryana* 2013 (13) SCALE 691, has reiterated that before statutory presumption under Section 113-B of *the Evidence Act* can be raised against an accused, it is essential for the prosecution to prove that “soon before the death”, deceased was subjected to cruelty. In this regard, the pertinent observations made by Apex Court in *Surinder Singh (supra)* are as under:-

“Section 113B of the Indian Evidence Act, 1872 states that when the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death. Section 304B of the IPC states that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called ‘dowry death’, and such husband or relative shall be deemed to have

caused her death. Thus, the words 'soon before' appear in Section 113B of the Indian Evidence Act, 1872 and also in Section 304B of the IPC. For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words 'soon before' is, therefore, important. The question is how 'soon before'? This would obviously depend on facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death."

From the deposition of afore-referred witnesses, it becomes amply clear that due to harassment for not bringing sufficient dowry, deceased

had died unnatural death. However, the necessary ingredients to constitute the offence of dowry death are lacking i.e. of subjecting deceased to cruelty “*soon before her death*” in relation to dowry. Therefore, appellant’s conviction for the offence under dowry death punishable under Section 304-B of *IPC* is rendered unsustainable and is set aside. But, on the basis of evidence on record, appellant deserves to be convicted for the offence under Section 306 of *IPC* as death of deceased being homicidal is apparently ruled out from the fact the deceased was taken to hospital by appellant. Statement (*Ex. PW-13/A*) purportedly made by deceased cannot be treated as dying declaration and is found to be not worthy of reliance. Deceased dying accidental death is ruled out in the face of testimonies of father (*PW-1*) of the deceased and of appellant’s neighbourers (*PWs 2, 3 & 6*), which inspires confidence.

Upon conviction of appellant being altered from the offence under Section 304-B of *IPC* to Section 306 of *IPC*, the substantive sentence also stands altered from rigorous imprisonment of seven years to the period already undergone i.e. *three years, nine months and eleven days*, as per the Nominal Roll of appellant on record. However, sentence of fine remains unaltered.

To the aforesaid extent, this appeal is allowed.

(SUNIL GAUR)
JUDGE

JANUARY 09, 2014

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