

SUPREME COURT OF INDIA

J. J. Merchant

Vs.

S. N. Chaturvedi

CrI.A.No.1452 of 2004

(N. Santosh Hegde and S.B.Sinha JJ.)

09.12.2004

JUDGMENT

Santosh Hegde, J.

1. Heard learned counsel for the parties.
2. Leave granted.
3. In Criminal Appeal arising out of SLP(CrI.)No. 1276/04 the first appellant Dr. K.T. Dholakia has since died, hence, that appeal has abated, so far as he is concerned.
4. The appellants in these appeals were accused of having committed offences punishable under Sections 304-A, 201, 202, 203 of IPC by their act of medical negligence. The Additional Chief Metropolitan Magistrate, Mumbai acquitted the accused against which respondents herein sought for leave of the High Court to prefer an appeal under Section 378(4) of the IPC.
5. The learned Single Judge before whom the matter came for preliminary hearing on 24th of July, 2003 issued notice before grant of leave. He also permitted Dasti service. On 14.8.2003 the matter was adjourned without granting leave on the ground that the respondents were not served. On 28.8.2003 since all the parties were not served, again the matter was adjourned. On 4.9.2003 the court noticed that the matter was listed for hearing on grant of leave to appeal and respondent No. 1 in one of the cases was served through his wife which service was held to be not good service and respondent No.3 in one of the cases could not be served as he had gone out of India. It was also noticed that the appellant before the High Court had not taken any steps to serve respondent Nos. 1 and 3 in one of the petitions. In spite of noticing the same, the court proceeded to hear the petitioner before it and granted leave to appeal. It is the said order which is challenged before this Court.
6. Learned senior counsel appearing for the appellants in these appeals submitted that once the Court decides to hear the respondents before granting leave then it is not open to the

court to grant leave to appeal under Section 378(4) of IPC without hearing the respondents. In such a case a hearing at the stage of granting leave, according to the learned counsel is a mandatory requirement of law and in the instant case the same having not been done the impugned order granting leave cannot be sustained.

7. The learned counsel appearing for the State, however, contended that the granting of leave to file an appeal under Section 378(4) does not require hearing of the respondent- accused at that stage. The law only requires accused persons to be heard in the final hearing of the criminal appeal after leave is granted.

8. Therefore, even if the appellants were not heard by the High Court at the stage of granting of leave, the order of the court granting leave does not become invalid in law.

9. Having heard the learned counsel and perused the records, we do not think it is necessary to go into the legal question of requirement of law to hear the accused even at the stage of granting of leave to appeal under Section 378(4) of IPC. Since on facts of this case, these appeals can be disposed of without going into that question.

10. On the facts narrated herein above, it is clear that after the order of acquittal recorded by the Magistrate, appeals were filed by the aggrieved respondents herein before the High Court under Section 378(4) of IPC which requires the grant of leave to appeal by the High Court before entertaining the appeals.

11. When such an application for grant of leave came up before the court on 24.7.2003 the learned Judge who heard the petitioners before him considered it necessary to hear the respondents before granting leave, hence, issued notice in this regard to the respondents. It is an admitted fact and also proved from records before us the respondents before the High Court who are appellants herein were not actually served with the court notice and the court on 14.8.2003 adjourned the matter to take out fresh notice. On 4.9.2003 when the fact situation remained the same inasmuch as the respondents before the Court were not properly served, the Judge who heard the matter that day considered it unnecessary to hear the counsel for the petitioners before it and granted leave to appeal.

12. In our opinion, on facts of this case since at a preliminary stage the court considered it necessary to hear the respondents- accused before granting leave and directed the issuance of notice, judicial propriety required the court at a subsequent stage to see that the respondents were served with court notice and to hear them before granting leave. Had the Court not issued the notice earlier it might have been a different thing in law.

13. The Court once having thought it necessary to hear the respondents before granting leave, in our opinion, ought not to have granted leave ex parte more so in the background of the fact the notices earlier directed to be issued were not served because of lack of steps taken by the petitioners before it, hence, we think it appropriate that the impugned order granting leave should be set aside and the matter be remanded back to the High Court to hear the appellants herein on the question of grant of leave to appeal. Since all the respondents-accused are

appellants herein, service of fresh notice is not necessary and we direct that the said appellants to appear in Criminal Application No.847 of 2003 before the High Court of Bombay on 11.2.2005 either personally or through their advocates and on such appearance the court will dispose of the above application after hearing the parties in accordance with law.

The appeals are allowed.