

# SUPREME COURT OF INDIA

Jugal Kishore Khetawat

Vs.

State of W.B.

Crl.A.No.168 of 2007

(B.Sudershan Reddy and Surinder Singh Nijjar,JJ.,)

25.02.2011

## ORDER

1. The sole appellant in this appeal Smt. Bimala Devi Khetawat has been convicted for the offence punishable under Section 120B/302 IPC on the allegation that she was a party to a conspiracy to commit murder of two of her neighbours and sentenced life imprisonment by the learned Additional Sessions Judge, 6th Court, Alipore. The Criminal Appeal preferred by her in the High Court of Calcutta was dismissed. She preferred a special leave petition under Article 136 of the Constitution of India against the said judgment and order dated 25.9.2006 passed by the High Court at Calcutta. This Court vide its order dated 5.2.2007 granted leave. That on 16.6.2008 the appellant died. The husband of the deceased appellant Jugal Kishore Khetawat filed an application seeking leave of the court to continue the appeal. In the said application it is averred that "even though the appellant has died, the name of the appellant has not been cleared of the charges and of the conviction. It is further submitted that it is in the interest of justice that the stigma attached to the name of the appellant is cleared which is also adversely affecting the near family and relatives of the appellant. It is under these circumstances, the applicant who is the husband of the deceased appellant has filed the present application seeking leave to continue with the appeal." The Registrar of this Court vide order dated 7.8.2008 passed the following order: "Crl. M.P. No. 11889/2009 is allowed. Amend the cause title accordingly. Thereafter, office to process for listing."

2. A short question that arises for our consideration in this appeal is whether the husband of the deceased appellant is entitled to continue the appeal and, if so, whether leave to continue the appeal could have been granted by the Registrar of this Court. Section 394 of the Code of Criminal Procedure, 1973 which is relevant for our present purpose reads as under: "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."

3. A plain reading of sub-section (2) of Section 394 suggests that every appeal preferred under Chapter XXIX except an appeal from a sentence of fine shall finally abate on the death of the appellant. However, a provision is made 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; 'near relative' means a parent, spouse, lineal descendant, brother or sister.

4. Such a proviso has been added in the following circumstances: An amendment to Section 431 was suggested in the Bill introduced in the Parliament by a private Member, Shri K.V. Raghunatha Reddy. The main object of the amendment was to provide a machinery whereby the children or the members of the family of a convicted person who dies during the appeal could challenge the conviction and get rid of the odium attaching to the family as a result of the conviction. The Law Commission of India by its Forty-First Report (September 1969, Vol. I, pp. 279-81) found the proposed amendment "eminently sound" and recommended that the amendment be made with certain modifications. Accordingly Section 394 of the Code of Criminal Procedure, 1973 has made the said proviso. It is thus clear that every appeal under Chapter XXIX of the Code except an appeal from a sentence of fine shall finally abate on the death of the appellant but a near relative of the deceased appellant 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.

5. It is thus clear that no near relative of the deceased appellant is automatically entitled to come on record as a legal representative of the deceased appellant and continue the appeal unless leave is granted by the appellate court to continue the appeal. Once the leave is granted by the appellate court, the appeal shall not abate. It is true the present appeal is not the one preferred under Chapter XXIX but by way of Special Leave Petition under Article 136 of the Constitution of India. While dealing with the nature, width and amplitude of jurisdiction of this Court under Article 136 of the Constitution this Court in *P.S.R. Sadhanantham vs. Arunachalam* [ (1980) 3 SCC 141] observed: "In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. It is residuary power and is extraordinary in its amplitude. But the Constitution makers intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Article 136 has a composite structure of power-cum- procedure inasmuch as there is an in-built prescription of exercise of judicial discretion and mode of hearing. It is fair to assume that while considering the petition under Article 136 the court will pay attention to the question of liberty, the person who seeks such leave from the court, his motive and his locus standi and the weighty factors which persuade the court to grant special leave. When this conspectus of processual circumstances and criteria play upon the jurisdiction of the court under Article 136, it is reasonable to conclude that the desideratum of fair procedure implied

in Article 21 is adequately answered. Though parties promiscuously 'provoke' this jurisdiction, the court parsimoniously invokes the power. Moreover, the court may not, save in special situations, grant leave to one who is not eo nomine a party on the record. Thus, procedural limitations exist and are governed by well-worn rules of guidance.

6. This Court in exercise of its powers under Article 136 may grant leave in appropriate cases on an application by a near relative of the deceased appellant; and if leave is granted, the appeal shall not abate. In our opinion, the principle embodied in Section 394 of the Code can be pressed into service in appeals before this Court so preferred under Article 136 of the Constitution of India. This Court in *Hari Prasad Chhapolia vs. Union of India*<sup>1</sup> observed:

"In view of what has been stated by this Court in the aforementioned cases the principles embodied in Section 394 of the Code can be pressed into service in appeals before this Court. It is true that the period of 30 days has been statutorily fixed for making an application by the legal heirs. In the instant case, the application was filed nearly after one year. We need not go into the question as to whether there is scope for condonation of delay as no acceptable explanation has been offered for the delayed presentation."

7. In the present appeal the spouse of the deceased appellant filed application seeking leave of the court to continue the appeal. The Registrar of this Court allowed the application and directed the cause title to be amended accordingly. No leave to continue the appeal has been granted by the Registrar. The Registrar of this Court in our considered opinion could not have granted leave to continue the appeal. Order VI of the Supreme Court Rules, 1966 confers the powers of the Court in relation to the matters mentioned therein to be exercised by the Registrar which includes application for substitution, except where the substitution would involve setting aside an abatement. The application filed in the instant case by the spouse of the deceased appellant is not one for substitution but an application seeking the leave of the court to continue the appeal. The Registrar of this Court is not conferred with any such power to grant leave to continue the appeal. That power can be exercised only by the Court and by none else. For the aforesaid reasons, we are of the opinion that:

“(a) 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;

(b) the power to grant leave to continue the appeal is conferred on the court and not on the Registrar under Order VI of the Supreme Court Rules, 1966. For the aforesaid reasons, the order passed by the Registrar on 7.8.2008 is set aside. The Criminal Miscellaneous Petition No. 11889 of 2009 filed by the husband of the deceased appellant is allowed and leave is accordingly granted to continue the appeal List the appeal for hearing.

