

AFR**Court No. - 42****Case :-** CRIMINAL APPEAL DEFECTIVE U/S 372 CR.P.C. No. - 10 of 2022**Appellant :-** Triyugi Nath Tiwari**Respondent :-** State Of U.P. And 2 Others**Counsel for Appellant :-** Yogesh Dutta Mishra, Manjulesh Kumar Shukla**Counsel for Respondent :-** G.A., Shri Prakash Dwivedi**Hon'ble Vivek Kumar Birla, J.****Hon'ble Vikas Budhwar, J.****Re: Order on Criminal Appeal**

Heard Sri Yogesh Dutta Mishra, learned counsel for the appellant and Mr. Shri Prakash Dwivedi, learned counsel appearing for the accused-respondents.

This is an appeal u/s 372 of the Code of Criminal Procedure (CrPC) seeking to challenge the judgement and order dated 2.12.2004 passed by the Sessions Judge, Mirzapur in S.T. No. 157 of 2003 (State vs. Devi Shankar Chaubey and others) whereby the accused-respondents were acquitted from the offences under Section 302/34 IPC, P.S. Lalganj, District Mirzapur, arising out of Case Crime No. 118 of 203.

The Stamp Reporter has reported delay of 6228 days in filing the present appeal. Apart from such huge delay, we find that the appeal itself is not maintainable.

Present appeal has been filed by the appellant under the Proviso to Section 372 Cr.P.C. The judgement under challenge is dated 2.12.2004 passed in S.T. No. 157 of 2003 (State vs. Devi Shankar Chaubey and others) whereby the accused-respondents were acquitted from the offences under Section 302/34 IPC.

Significantly, the incident had allegedly taken place on 1.5.2003 and the impugned judgement and order was passed on 2.12.2004. Proviso to Section 372 Cr.P.C. was added by way of amendment inserted by Act 5 of 2019 with effect from 31.12.2009 on the appointed date as notified by the Central Government by Notification No. SO 3313 (E) dated 30.12.2009. The Proviso to Section 372 Cr.P.C. is quoted as under:

The Code of Criminal Procedure, 1973

"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.] (added by Act No. 5 of 2009)

Right to appeal has been considered by this Court in **Prithvi Singh vs. State of UP and others** passed in Criminal Misc. Application u/s 372 Cr.P.C. (Leave To Appeal) No. 329 of 2012 on 21.4.2022, paragraphs 23, 24, 27, 28 and 29 whereof are quoted as under:

*"23. Insofar as the statutes regulating appeal are concerned, the law is well established that the right to file an appeal is a statutory right and it can be circumscribed by the conditions of the statute granting it. As was observed in *Government of Andhra Pradesh vs. P. Laxmi Devi*, (2008) 4 SCC 720 and *Super Cassettes Industries Ltd. vs. State of U.P.*, (2009) 10 SCC 531, it is not a natural or inherent right and cannot be assumed to exist, unless provided by a statute.*

24. Therefore, the scheme of right of appeal under Chapter XXXIX of the Criminal Procedure Code, which provides the right to file appeals including abatement

of appeals, has to be understood on the basis of the above golden rules of statutory interpretation.

27. Now on a comparison between Section 404 of Cr.P.C. 1898 and Section 372 of Cr.P.C. 1973, it is clear that the main provision is intact, insofar it provides that no appeal shall lie from any judgment or order of a criminal court, except as provided by this Code or by any other law for the time being in force. The significant development that has taken place in this provision is that a "proviso" was added by the Amending Act No. 5 of 2009, which provides 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 passed by such Court".

28. Therefore, by the aforesaid provision a right has been created in favour of the victim, which was not existing earlier in the Code, that a victim shall have right to prefer an appeal against any order by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. If we have a glance over the statement of objects and reasons in paragraph 2, it is very much clear that while dealing with the right of the victims it has been noted that at present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain "rights" and compensation, so that there is no distortion of the criminal justice system. This, by itself, is clear that the object of adding this proviso is to create a right in favour of the victim to prefer an appeal as a matter of right. It not only extends to challenge the order of acquittal but such appeal can also be filed by the victim if the accused is convicted for a lesser offence or if the inadequate compensation has been imposed.

29. It is, therefore, clear that as per the golden rule of interpretation, this "proviso" is a substantive enactment and it is not merely excepting something out of, or qualifying what was excepting or goes before. Therefore, by adding the "proviso" in Section 372 of Cr.P.C. 1973 by this amendment, a right has been created in favour of the victim."

(Emphasis supplied)

The Hon'ble Apex Court in the case of **Mallikarjun**

Kodagali (Dead) represented through Legal Representatives vs. State of Karnataka and others,

(2019) 2 SCC 752, after discussing the judgements of Hon'ble Division Bench and Hon'ble Full Bench of various High Courts, in paragraph 72, observed as under:

“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 not 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.”

(Emphasis supplied)

In **Hitendra Vishnu Thakur and others vs. State of Maharashtra and others,** (1994) 4 SCC 602, the Hon'ble Supreme Court has considered the ambit and scope of an amending Act, paragraph 26 whereof is quoted as under:

“26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the Court. From the law settled by this Court in various cases the illustrative though not exhaustive principle which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as

follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

(Emphasis supplied)

In **Ramesh Kumar Soni vs. State of Madhya Pradesh**, (2013) 14 SCC 696, the Hon'ble Supreme Court reiterated the aforesaid principle with approval.

In view of the aforesaid, it is very much clear that the amendments so made in Section 372 CrPC by adding a proviso in the year 2009 creating substantive right of appeal is not retrospective in nature. It is, therefore, clear that in the year 2004 when the impugned judgement under challenge was passed, the appellant herein who claims to be the victim had no right to challenge the

impugned order dated 2.12.2004 by way of filing the appeal.

It is, therefore, held that the present appeal, which was filed after a delay of about more than 21 years challenging the impugned judgement dated 2.12.2004 passed much prior to the amendment (adding the proviso in the year 2009 with effect from 31.12.2009) is clearly not maintainable.

Present appeal is accordingly dismissed as not maintainable.

Re: Order on Delay Condonation Application

Since the appeal itself is not maintainable, the question of consideration of delay condonation application, which was filed with delay of 6228 days, does not arise.

Delay condonation application is accordingly rejected.

Resultantly, appeal stands dismissed as not maintainable.

Order Date :- 21.7.2022