

(1995) 05 MAD CK 0002

In the Madras High Court

Case No : Criminal Revision Case No. 446 of 1992

Hooli Devi

APPELLANT

Vs

Asst. Collector of Customs (P), Madras

RESPONDENT

Date of Decision : 03-05-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 394, 431

Customs Act, 1962 — Section 135A

Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (1995) 2 CTC 85 : (1996) 53 ECC 35 : (1995) 78 ELT 669 : (1995) 2 LW(Cri) 687

Hon'ble Judges : Rangasamy, J

Bench : Single Bench

Advocate : Shri A. Raghunathan, for the Appellant; Shri P. Rajamanickam, Special Public Prosecutor, for the Respondent

Judgement

1. This revision is against the order of the learned Principal Sessions Judge, Madras in CrI.M.P. No. 4104/92 in C.A. No. 111/91 dismissing the

petition filed u/s 5 of the Limitation Act for condonation of the delay.

2. The petitioner is the widow of one Lachimal, who was the appellant in C.A. No. 111/91 convicted for the offence u/s 135A of the Customs Act

by the Additional Chief Metropolitan Magistrate (E.O.I.) Madras, in C.C. No. 134/89, to undergo rigorous imprisonment for 7 months and also to

pay a fine of Rs. 10,000/- in default rigorous imprisonment for six months. As against this conviction, she filed the appeal in C.A. No. 111/91 on

the file of the Sessions Court, Madras, and while the appeal was pending, he died. The revision petitioner, as legal representative of the deceased

appellant, filed the petition u/s 394 Code of Criminal Procedure along with the petition u/s 5 of the Limitation Act to condone the delay of 195

days in filing the petition to continue the appeal stating that after the death of her husband, she had been to her native State Rajasthan and she was

able to return only after six months and therefore the delay has occurred.

3. The respondent opposed the petition u/s 5 of the Limitation Act on the ground that Section 5 is not applicable as the period of time namely 30

days, is fixed under the proviso to Section 394(2) Code of Criminal Procedure as when the special enactment has fixed the period of limitation,

Section 5 of the Limitation Act cannot be invoked for condonation, The learned Sessions Judge, analysing the position of law on the subject, has

agreed with the respondent Customs Department holding that Section 5 of the Limitation Act is inapplicable for bringing the wife to record as legal

representative of the deceased beyond the time fixed by the statute. Hence, this revision.

4. Though in Mangu Ram Vs. Municipal Corporation of Delhi, the Supreme Court has held that Section 5 of the Limitation Act is made applicable

by Section 29, sub-section (2) of the Act for the purpose of extending the period of limitation prescribed by a special or local law and the time

fixed under the Code of Criminal Procedure can also be extended applying Section 5 of the Limitation Act, the learned Sessions Judge has not

acted on this decision, but has preferred to follow the decision in Lala Ram v. Hari Ram AIR 1970 SC 1098 which held that Section 5 of the

Limitation Act is not applicable for extending the time fixed under the Code of Criminal Procedure. The learned Sessions Judge, following the

dictum in Mattulal Vs. Radhe Lal, has preferred to follow the decision in Lala Ram v. Hari Ram (referred supra).

5. The learned counsel appearing for the revision petitioner contended that in Manguram v. Delhi Municipality the Apex Court has considered its

previous decision in Lala Ram v. Hari Ram, but thoroughly viewing the scope of Section 29(2) of the Limitation Act it has accepted the

applicability of Sections 4 to 24 of the Limitation Act and therefore, this view alone has to be followed. As Mattulal v. Radhe Lal gives the

guidelines to follow the decisions of the Supreme Court whenever there were contradictory decisions and in such cases to follow the decisions of

the larger Bench, the learned Sessions Judge was right in following the earlier decisions of the Apex Court in Lala Ram v. Hari Ram. But this case

is distinguishable on another factor namely the conviction of the appellant is for imprisonment and also fine. When such a composite sentence of imprisonment and fine is imposed, the question would be whether the entire appeal would abate or it abates only so far as the conviction of the imprisonment alone because u/s 394(2) Code of Criminal Procedure, the appeal cannot abate when the sentence is fine. This aspect has been considered in *Harnam v. State of Haryana* (1975 Criminal Law Journal 276). That was also a case of composite sentence of imprisonment and fine and when the appeal was pending, appellant died and the appellant's wife impleaded herself as the appellant. The question arose whether the appeal had to be considered only in so far as the fine is concerned because the appeal had not abated so far as the sentence of fine was concerned and whether the appeal would abate so far as the sentence of imprisonment was concerned. The Supreme Court considering all the aspects, observes as follows :-

10. The plain meaning of Section 431 is that every criminal appeal abates on the death of the accused "except an appeal from a sentence of fine". The section for its application requires that the appeal must be directed to the sentence of fine and not that it must be directed to that sentence only. If by the judgment under appeal, a sentence of fine is imposed either singularly or in conjunction with a sentence of imprisonment, the appeal against conviction would be an appeal from a sentence of fine within the meaning of Section 431. All that is necessary is that a sentence of fine should have been imposed on the accused and the appeal filed by him should involve the consideration of the validity of that sentence.

11.

12. The appeal filed by the accused Harnam Singh in this Court was thus an appeal from a sentence of fine, involving as it did the consideration as regards the legality or propriety of that sentence. The deceased appellant's widow, who has been brought on the record as his legal representative is accordingly entitled to prosecute the appeal.

13. ... In an appeal from a judgment imposing a sentence of fine either by itself or along with a sentence of imprisonment, the legality or propriety of the sentence of fine necessarily involves an examination of the validity of the order of conviction. The sentence follows upon the conviction and the

validity of the two is inter-connected. The appellate court, while dealing with the validity of the sentence of fine, has to determine the primary

question whether the conviction itself is sustainable. If it holds that the conviction is unsustainable, it must set aside the conviction and the sentence

or sentences following upon the order of conviction; it cannot merely set aside the sentence of fine and permit the conviction and the substantive

sentence to remain. The sentence of fine becomes illegal if the conviction is wrong. If the conviction is wrong, no sentence at all can be imposed on

the accused. Therefore, once the appellate court reaches the conclusion that the conviction is unwarranted, that finding must be given its full effect

by acting aside the conviction and all such sentences as are founded on the order of conviction. We find it impossible to agree with the submission

of the State Government that even after finding that the conviction is illegal, the court must only set aside the sentence of fine permitting the illegal

conviction and the substantive sentence founded upon it to remain. That would be truly unjust and anomalous.

As mentioned above, when there is conviction and the appeal arises from the sentence of fine, it will not abate on the death of the appellant u/s

394(2) Code of Criminal Procedure. In this case as the appeal is against the sentence of imprisonment and also fine, naturally, the revision

petitioner, who is the widow of the deceased appellant, is entitled to continue the appeal in so far as the fine is concerned. But as the Supreme

Court in *Harnam Singh v. State of Haryana* (referred supra) has found that when the legality of the conviction as to the fine was considered and if

the same was found to be wrong, the entire conviction, for the imprisonment also, has to be set aside, on the ratio of this decision, the revision

petitioner herein will have to be allowed to continue the appeal not only against the sentence of fine but also for the substantive sentence.

Therefore, necessarily, she has to be permitted to continue the appeal against the entire conviction irrespective of the delay in filing the petition, the

revision petitioner has to be allowed to continue the appeal.

6. In the result, setting aside the order of the court below, the delay is condoned, the revision petitioner is permitted to continue the appeal. The

revision is allowed.