

(2013) 07 BOM CK 0037

In the Bombay High Court

Case No : Criminal Writ Petition No. 2903 of 2011

Kumar J. Sujan and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2013) 4 BC 301 : (2014) 1 BomCR(Cri) 569 : (2014) 1 MhLj 516

Hon'ble Judges : S.C. Dharmadhikari, J;S.B. Shukre, J

Bench : Division Bench

Advocate : A.A. Kumbhakoni, Mr. Ravi Gurnani, Mr. Shardul Singh and Mr. Abhay Anturkar instructed by Mr. Sudhan Y. Amare, for the Appellant; A.S. Pai, App., Mr. Farhan Khan instructed by y Mr. R. Satyanarayanan, Advocates for the Respondent No. 2 and Mr. Chetan S. Damre instructed by y Mr. S.K. Shinde, Advocates for the Respondent No. 3, for the Respondent

Judgement

S.C. Dharmadhikari, J.—In this Writ Petition, a Division Bench of this Court extensively heard the parties and delivered a judgment on 5.11.2012 holding that the prayer Clause (b) of the Writ Petition cannot be granted. The prayer Clause (b) reads as under:

(b) that this Hon"ble Court be pleased to declare that Sub-sections (b) and (c) of Section 376 of the Code of Criminal Procedure, 1973 are unconstitutional and/or ultra vires Part III of the Constitution of India.

The Division Bench clarified that as far as other prayers are concerned, the Petition may be placed for hearing. Hence, Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2. We have heard Mr. Kumbhakoni, learned Counsel appearing for the petitioners and Mr. Farhan Khan, learned Counsel appearing for the respondent No. 2/ original complainant.

3. The petitioners were arraigned as accused in a complaint filed by the respondent No. 2 alleging offences punishable u/s 138 r/w Section 141 of the

Negotiable Instruments Act, 1881. The complaint was based on dishonour of two cheques of the aggregate amount of Rs. 14,35,000/-. The learned Metropolitan Magistrate convicted the petitioners by order dated 26.7.2011. The order of conviction and sentence reads as under:

(i) Accused are hereby convicted for the offence punishable u/s 138 r/w Section 141 of the Negotiable Instruments Act.

(ii) Accused No. 2 Kumar J. Sujan, aged about 66 years and accused No. 3 Anil Mehrotra, aged about 65 years, both R/o Andheri, Mumbai shall have sentence to suffer S.I. till rising of the Court by each and accused shall jointly and severally have to pay compensation of Rs. 15,00,000/- (Rupees fifteen lakh only) to the complainant u/s 357(3) of Cr.P.C. within three (3) months from today, in default to suffer S.I. for six (6) months.

(iii) Accused shall surrender their bail bonds.

(iv) Copy of judgment be supplied free of cost to the accused, after transcription of judgment be ready.

(v) Judgment dictated and pronounced in open Court.

4. Against this judgment and order dated 26.7.2011, Criminal Appeal No. 136/2011 was filed by the petitioners in the Court of Session for Greater Mumbai at Sewree. Before the Appeal could be set down for hearing on merits, the respondent No. 2 (original complainant) preferred an application for dismissal of the Appeal on the ground that an appeal against the above sentence was not maintainable by virtue of the bar created by Section 376 of the Code of Criminal Procedure, 1973.

5. The argument was that Section 376(b) lays down that no appeal shall lie before the Court of Session where the Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or fine not exceeding Rs. 200/- or of both such imprisonment and fine. Therefore, when the sentence awarded in the present case included no fine, so also, imprisonment was not for a period exceeding three months, the Appeal preferred by the petitioners was incompetent and not maintainable by virtue of the bar created by Section 376(b) of the Code of Criminal Procedure, 1973.

6. Upon this position being brought to the Sessions Court's notice, the Appeal was dismissed holding that it was barred by Section 376 of the Code of Criminal Procedure, 1973. Challenging this order dated 24.8.2011 the instant Writ Petition was filed and the issue of constitutional validity of Section 376(b) and (c) was raised. That challenge was negated by a detailed judgment of the Division Bench dated 5.11.2012. However, we have heard the matter for the other relief pressed and as noted above.

7. Mr. Kumbhakoni, learned Counsel appearing for the petitioners, submits that the impugned order can be challenged by him on other grounds. In other words,

assuming that the provision is constitutionally valid, he submits that the Court of Session at Greater Mumbai could not have passed the order of dismissal of Appeal. The impugned order is vitiated by total non-application of mind. The learned Judge proceeded on the footing that the order passed in the present case is not appealable at all. However, that finding is based on an incorrect reading of a legal provision. Mr. Kumbhakoni submits that for the time being, the petitioners assume that the provisions of Section 376 of the Code of Criminal Procedure, 1973 are constitutionally valid, but they have to be interpreted in such a way that parties like the petitioners are not deprived of a right of appeal. They could not have been deprived of a right of appeal if at all there was doubt in the mind of the learned Judge about maintainability thereof. When two views are possible, one which upholds the right of appeal of the accused should be placed on the legal provision. A rigid and strict construction may curtail or take away the right of appeal which is otherwise available in law. Therefore, Mr. Kumbhakoni submits that this Writ Petition still survives as he wishes to place before the Court an interpretation of the provision in question which will preserve and protect the right of appeal.

8. On the other hand, Mr. Khan, learned Counsel appearing for the respondent No. 2/ original complainant, submits that the impugned order does not call for any interference. There is absolutely no merit in this Writ Petition and it should be dismissed as infructuous. The petitioners are not remediless inasmuch as they could have challenged the Magistrate's order by way of a Revision Application. Further, the law is well settled that an Appeal is creature of the statute. It is not a vested or inherent right. Once an Appeal is not specifically provided by a provision of law, then, by implication, the same cannot be read into it. There has to be a clear provision creating a right of appeal. In this case, there is no specific provision, but on the other hand, the provision in question is excluding an appeal. When the words of a Statute are plain and clear and there is no scope for interpretation, then, this Court cannot, by an interpretative process, confer right of appeal. Mr. Khan relies upon the wording of Section 376 of the Code of Criminal Procedure, 1973 and submits that wherever the Legislature intended to confer a right of appeal in this very provision, it has provided the same. When it is not conferred, that exclusion must be construed strictly and, hence, there is no merit in the Writ Petition and it must be dismissed.

9. With the assistance of the learned Counsel appearing for the parties, we have perused the Writ Petition and annexures thereto and the provisions of the Code of Criminal Procedure, 1973 brought to our notice.

10. What is apparent from the record is that one application was made by the respondent No. 2 (M/s. Saraf Enterprises) urging that the criminal appeal filed by the present petitioners (original appellants) is not maintainable. The argument was that an Appeal has not been provided against the order of the present nature. Merely because the petitioners are directed to undergo sentence of imprisonment of six months in default of payment of compensation of Rs. 15

lacs, the bar of filing an appeal is not lifted. Therefore, the Appeal is not maintainable in law.

11. The petitioners contended that the order passed by the Trial Magistrate is clearly appealable because compensation of Rs. 15 lacs and default punishment provided therefor is beyond the clauses of Section 376 of the Code of Criminal Procedure, 1973. Therefore, the Appeal is maintainable. It is also maintainable because the award of compensation is akin to fine.

12. The learned Additional Sessions Judge heard both sides and held in Paragraphs 7 and 8 as under:

7. Section 376 of Cr.P.C. particularly, the proviso states that an appeal may be brought if "any other punishment" is combined with non-appealable sentence in cases under Clauses (a), (b), (c) and (d). The expression "any other punishment" means any other kind of sentence and that is ruled in *Kunj Behari Vs. Emperor*. In the present case, the accused was sentenced to SI till rising of the Court and no fine was inflicted. Compensation was awarded. Compensation even though is akin to fine as is laid down in case of *Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Another*, but that is as far as recovery is concern. That cannot independently fall within the ambit and scope of fine. Therefore, such a compensation or order directing the compensation cannot be combined with SI till rising of the Court, so as to brand such a sentence as an appealable order. When there is specific bar, then such exercise cannot be done. When there is specific bar, then literal meaning of the sentences used by the Legislature has to be considered. The "Golden Rule of Interpretation of Statute" has to be applied i.e. literal meaning has to be gathered. Applying that rule, if the bar is considered coupled even with proviso, then, it is crystal clear that order of compensation cannot be combined with, nor can be considered as a combination, so as to hold that such order is appealable.

8. Had it been the fact that some fine was imposed, then in that eventuality, the appeal would lie, but when no fine is imposed, then order directing the payment of compensation cannot be considered as a fine, so as to hold that it is an appealable order and that too for taking the case out of teeth of Section 376 of Cr.P.C. Under the circumstances, therefore, in my considered view, because of specific bar, no appeal would lie against such order. The revision definitely would lie. The learned Advocate for the appellant has requested that reasoned order may be passed, as they want to assail that order in the Hon'ble High Court. Because of that request, I am required to pass the detail order.

13. The correctness of this view is questioned before us.

14. Sections 357 and 376 of the Code of Criminal Procedure, 1973 read as under:

357. Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment,

order the whole or any part of the fine recovered to be applied-

- (a) in defraying the expenses properly incurred in the prosecution;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
- (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
- (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

376. No appeal in petty cases.

Notwithstanding anything contained in Section 374, there shall be no appeal by a convicted person in any of the following cases, namely--

- (a) where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine;
- (b) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine;

(c) where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees; or

(d) where, in a case tried summarily, a Magistrate empowered to act u/s 260 passes only a sentence of fine not exceeding two hundred rupees:

Provided that an appeal may be brought against any such sentence if any other punishment is combined with it, but such sentence shall not be appealable merely on the ground-

(i) that the person convicted is ordered to furnish security to keep the peace; or

(ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or

(iii) that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.

15. A perusal of Section 357 reveals that Sub-section (1) of Section 357 enables the Court to pass a further order in terms of Clauses (a) to (d) thereof. Sub-section (2) thereof provides that if fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the Appeal has elapsed or if an Appeal is presented, before the decision of the Appeal. Sub-section (3) enacts a salutary provision which empowers the Court to make an order of compensation. That order can be made when the Court imposes sentence of which fine does not form a part. The Court, therefore, can award compensation to a person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

16. This provision fell for interpretation of the Hon"ble Supreme Court in the case of R. Vijayan Vs. Baby and Another, (Criminal Appeal No. 1902/2011 arising out of SLP (Criminal) No. 2586/2007 dated 11.10.2011). The Hon"ble Supreme Court has held as under:

7. Sub-section (3) of Section 357, is categorical that the compensation can be awarded only where fine does not form part of the sentence. Section 357(3) has been the subject-matter of judicial interpretation by this Court in several decisions. In State of Punjab Vs. Gurmej Singh , , this Court held--

A reading of Sub-section (3) of Section 357 would show that the question of award of compensation would arise where the Court imposes a sentence of which fine does not form a part.

This Court also held that Section 357(3) will not apply where a sentence of fine has been imposed.

8. In Sivasuriyan Vs. Thangavelu , this Court held--

In view of the submissions made, the only question that arises for consideration is whether the Court can direct payment of compensation in exercise of power

under Sub-section (3) of Section 357 in a case where fine already forms a part of the sentence. Apart from Sub-section (3) of Section 357 there is no other provision under the Code whereunder the Court can exercise such power"

After extracting Section 357(3) of the Code, the Court proceeded to hold thus--

On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the Court imposes sentence by which fine does not form a part. In the case in hand, a Court having sentenced to imprisonment, as also fine, the power under Sub-section (3) of Section 357 could not have been exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs. one lakh by the appellant is set aside.

9. It is evident from Sub-section (3) of Section 357 of the Code, that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the Court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The reason for this is obvious. Sub-section (1) of Section 357 provides that where the Court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the Court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation under compensation u/s 357(3).

17. Mr. Kumbhakoni has relied upon later judgment of the Hon'ble Supreme Court reported in III (2012) CCR 85 (SC)=V(2012) SLT 102=111 (2012) DLT (Cri.) 10 (SC) = R. Mohan Vs. A.K. Vijaya Kumar, and particularly Paragraphs 29 and 30, which read thus--

29. The idea behind directing the accused to pay compensation to the complainant is to give him immediate relief so as to alleviate his grievance. In terms of Section 357(3) compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced. If merely an order directing compensation is passed, it would be totally ineffective. It could be an order without any deterrence or apprehension of immediate adverse consequences in case of its non-observance. The whole purpose of giving relief to the complainant u/s 357(3) of the Code would be frustrated if he is driven to take recourse to Section 421 of the Code. Order u/s 357(3) must have potentiality to secure its observance. Deterrence can only be infused into the order by providing for a default sentence. If Section 421 of the Code puts

compensation ordered to be paid by the Court on a par with fine so far as mode of recovery is concerned, then there is no reason why the Court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine u/s 64 IPC. It is obvious that in view of this, in *Vijayan Vs. Sadanandan K. and Another*, this Court stated that the above mentioned provisions enabled the Court to impose a sentence in default of payment of compensation and rejected the submission that the recourse can only be had to Section 421 of the Code for enforcing the order of compensation. Pertinently, it was made clear that observations made by this Court in *Hari Kishan Vs. Sukhbir Singh and Others*, are as important today as they were when they were made. The conclusion, therefore, is that the order to pay compensation may be enforced by awarding sentence in default.

30. In view of the above, we find no illegality in the order passed by the learned Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. The High Court was in error in setting aside the sentence imposed in default of payment of compensation.

18. Thus, the law is that if fine is imposed by the Magistrate for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881, then, it is not permissible to resort to Section 357(3) of the Code of Criminal Procedure, 1973 and award any compensation. But, it is not as if the compensation is awarded u/s 357 that the amount can be recovered only by taking recourse to Section 421. In the event the amount of compensation is not paid, the accused can be directed to undergo sentence of imprisonment in default of payment of compensation. Therefore, the punishment in default of payment of compensation can be awarded and the recovery by other measures as provided in Section 421 of the Code of Criminal Procedure, 1973 is not the only power to ensure payment or recovery of compensation. If the above is legislative mandate, then, one will have to see whether the order passed by the Trial Magistrate in the present case is of a nature incapable of being questioned by way of an Appeal u/s 376 of the Code of Criminal Procedure, 1973.

19. Section 376 has been reproduced by us above. That is entitled "No appeal in petty cases". Therefore, even if Section 374 of the Code of Criminal Procedure, 1973 provides for an appeal, in terms of Sub-section (2) thereof, that is subject to Sections 375 and 376.

20. Therefore, an Appeal in petty cases is not provided. What is a petty case must, therefore, be construed in terms of the language of Section 376 of the Code of Criminal Procedure, 1973. Therein, if this High Court passes only a sentence of imprisonment for a term not exceeding six months or fine not exceeding Rs. 1,000/- or both such imprisonment and fine and where in terms of Clause (b), the Court of Session or a Metropolitan Magistrate passes a sentence of imprisonment for a term not exceeding 3 months or fine not exceeding Rs. 200/- or where the fine itself is not exceeding Rs. 100/- as provided in Clause (c), then, there cannot be any appeal by a convicted person. However. Mr.

Kumbhakoni relies upon the proviso in Section 376 and urges that an Appeal may be brought against any such sentence "if any other punishment is combined with it". Mr. Khan, learned Counsel appearing for the original complainant, on the other hand, would urge that assuming the proviso is attracted, still the case is not covered by that proviso because of the wording of Clause (ii) below the proviso.

21. To our mind, if one peruses the order passed by the Trial Court in this case, that will have to be read in its entirety and so read, the sentence is not only restricted to suffer simple imprisonment till rising of the Court by each, but there is a direction to jointly and severally pay compensation of Rs. 15 lacs to the original complainant u/s 357(3) of the Code of Criminal Procedure, 1973 within three months. In default, the sentence of simple imprisonment of six months has been imposed. In such circumstances if one peruses Clause (b) of Section 376, this order cannot be seen as restricted to only imposing punishment of simple imprisonment till rising of the Court or fine not exceeding Rs. 200/-. Assuming that the compensation is akin to fine as is urged, still the term of six months in default thereof would go to show that the matter is not covered by Section 376(b). In any event, the learned Additional Sessions Judge was in error in holding that the said order is not covered by the proviso also.

22. In this case, the learned Judge has relied upon a judgment of the Allahabad High Court reported in Kunj Behari Vs. Emperor . That judgment has been carefully perused by us. In that judgment, the facts were that there was conviction on two counts u/s 379 of the Indian Penal Code. There was fine of Rs. 25/- on each count. Against this order the appellant approached the Sessions Court and filed an application and submitted that it should be treated as an Appeal or Revision. That application was rejected. The appellant (Kunj Behari) approached the Allahabad High Court and the Division Bench found that in view of the amendment that was made to the provision then existing, namely, Section 415 of Cr.P.C., an appeal would be allowed. Relevant part of the judgment reads thus:

2. This revision was referred to a Bench on account of difference between this Court and the Oudh Chief Court on the question whether, in such circumstances, an appeal lay to the Sessions Judge or a revision lay. The reasons for the views of the two Courts are to be found in AIR 1937 524 (Oudh) . The Allahabad view that no appeal lay when a person is sentenced to two different punishments of the same kind for two offences unless the aggregate of the punishments justified an appeal was reported in Lalji and Others Vs. Emperor, . It is not necessary to go into those reasons again in view of the amendment made in Section 415. The difference in the two views arose on account of the non-amendment of Section 415, Criminal P.C., simultaneously with the amendments of Sections 413 and 414, Criminal P.C. As a result of the amendment made in Section 415, Criminal P.C., this section now reads as follows--

An Appeal may be brought against any sentence referred to in Section 413 or

Section 414 by which any punishment therein mentioned is combined with any other punishment but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

It is clear now that an appeal is allowed u/s 415 if any punishment mentioned in either Section 413 or Section 414 is combined with any other punishment. In other words, in cases which would come u/s 413, Criminal P.C., an appeal would be allowed u/s 415 in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. In cases which come u/s 414, an appeal would be allowed u/s 415 if the sentence of fine is combined with any other sentence. No appeal would be allowed u/s 415 in cases which otherwise come u/s 413 unless the aggregate sentence of imprisonment exceeds one month in the case of a sentence passed by a Court of Session or a sentence of fine exceeding Rs. 50, is passed in case of such fine being imposed by the Court of Session or the District Magistrate or other Magistrate of the first class. An appeal would be allowed u/s 415 against orders passed in a summary trial if the aggregate sentence of fine exceeds Rs. 200. This was the view about Section 415 prior to the amendment in 1923 and is the view which was taken by this Court in its earlier cases. Any other view would, in some cases, go against the provisions of Section 35(3), Criminal P.C. If two sentences of imprisonment totalling less than a month are passed by a Court of Session an appeal would not be allowable in view of the provisions of Section 35(3), Criminal P.C., as it provides that for purposes of appeal consecutive sentences will be deemed to be one sentence. According to the contrary view urged before us an appeal in such cases would be allowable u/s 415, Criminal P.C. We, therefore, hold that the order passed on the applicant by the Magistrate, first class, is not appealable as he was sentenced to two separate sentences of fine of Rs. 25 each.

23. A perusal of the same would reveal that firstly the wording of Section 415 of the old Code of Criminal Procedure and the present provision, namely, Section 376 of the Code of Criminal Procedure, 1973 is not identical. In any event, what was held by the Division Bench is that an appeal would be allowed under the provision in question against an order in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. Therefore, we do not think that the observations of the Division Bench of the Allahabad High Court would enable us to uphold the view taken by the learned Additional Sessions Judge in the present case.

24. In fact, the learned Judge erroneously concluded that the sentence imposed is only simple imprisonment till rising of the Court and no fine was imposed. A complete reading of the order would reveal that the learned Trial Judge has imposed sentence of simple imprisonment after the conviction. That simple imprisonment was till rising of the Court and it is not disputed before us that it is a sentence. However, the order does not end there. The learned Judge proceeds to direct payment of compensation and if the payment is not made within three

months, the default sentence of six months has been imposed. Therefore, if the compensation is equivalent to fine, then, that far exceeds the figure stipulated in Section 376(b). By proviso it has been clarified that if there is sentence and any other punishment is combined with it, then, that is appealable because what has been done in this case is that a direction for imprisonment in default in payment of fine, is not included in the sentence. The sentence imposed is of simple imprisonment till rising of the Court and other punishment is combined with it.

25. Our above view finds support in the later judgment of the same Allahabad High Court reported in Chhote Vs. Emperor . There, what happened was that the applicant was convicted by the First Class Magistrate in summary trial for an offence under Rule 81(4) of the Defence of India Rules for having contravened certain provisions of an order made by the District Magistrate on 8.9.1945 relating to Khandsari Sugar. The conviction and sentence after the trial ended in imposition of fine of Rs. 100/- and it was further ordered that all items of the property referred in Paragraphs 1 and 2 of the judgment shall be forfeited and their sale proceeds shall be deposited in the Treasury. The Appeal of the Applicant was summarily dismissed and what the Allahabad High Court held reads thus:

4. It is obvious that it would not be necessary for me to pass any order upon the reference made by the Additional Sessions Judge if it is found that the application in revision is well founded and must prevail. I have considered that application very carefully and have heard learned Counsel for the Crown and I find that the learned Additional Sessions Judge has erred in law in holding that the appeal made to him by the applicant from his conviction in the summary trial held by a First Class Magistrate was not competent in view of Section 414, Cr.P.C. Section 414, Criminal P.C. runs as follows;

Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act u/s 260 passes a sentence of fine not exceeding two hundred rupees only.

It may be noted here that a general right of appeal is given by Section 408, Cr.P.C. to any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class. Now Section 414 places some restrictions on that general right. Being a provision of a restrictive character, it must be strictly construed as far as possible in favour of the subject as against the Crown. The bar laid down in Section 414 must be applied only to a case which comes clearly within its four corners, that is, to a case in which a Magistrate empowered to act u/s 260 passes a sentence of fine not exceeding two hundred rupees only. Any case in which a Magistrate empowered to act u/s 260 passes a sentence which is not merely one of fine not exceeding two hundred rupees only but also a sentence of some other character, the bar laid down by Section 414, Cr.P.C. cannot apply. The simple question in the present case, therefore, is whether the order of forfeiture of property passed by the trying Magistrate is or is not a part of the sentence imposed upon the applicant It

may be pointed out here that the property confiscated in the present case was much more than Rs. 1,000 in value and u/s 32, Cr.P.C. a Magistrate of the First Class cannot impose a fine exceeding one thousand rupees. The order of forfeiture, however, is justified by Rule 81(4) of the Defence of India Rules which runs as follows:--

If any person contravenes any order made under this Rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty.

Now, we find that the order of the District Magistrate of Muzaffarnagar dated 8.9.1945, contained the following provision at the end--

Any person contravening any of the provisions of this order shall be liable to punishment under Sub-rule (4) of Rule 81, Defence of India Rules with imprisonment for a term which may extend to 3 years or with fine or with both and without prejudice to any other punishments to which he may be liable, any Court trying the offence shall order that the material together with its packages, if any, in respect of which the Court is satisfied that the offence has been committed be forfeited to His Majesty unless for reasons to be recorded in writing the Court is of opinion that the direction should not be made in respect of the whole or a part of the property.

5. It is clear that the order made by the District Magistrate prescribes forfeiture as one of the modes of punishment and the same conclusion is clearly deducible from the language of Rule 81(4), Defence of India Rules. It must, therefore, be held that in the present case the trying Magistrate has imposed upon the applicant not merely a fine of Rs. 100 but a further punishment of forfeiture of certain property belonging to him. The case is, therefore, outside the ambit of Section 414, Criminal P.C. and I think it would be wrong in these circumstances to hold that the applicant had no right of appeal.

As a result of the above discussion, the Revision was allowed by holding that the Appeal was maintainable.

26. What we find is that this view has been followed in the judgment of Lal Chand Vs. Emperor, by the same High Court, namely, Allahabad High Court. In that, the learned Single Judge held that when forfeiture is added to the sentence of fine, an appeal would lie, even though the sentence of fine itself may not have been appealable. (See paragraph 4 at page 108). Thus, by referring to Section 53 of the Indian Penal Code and holding that forfeiture was punishment and which was added to the sentence of fine, the learned Single Judge held that the order was appealable.

27. The above view also finds support in the judgment of the Allahabad High Court reported in Aziz Khan Vs. State, .

28. Finally the learned Single Judge's judgment Executive Officer, Municipal Board Vs. Harka Ram, , would also show that in case of Section 415 of the old Code as well and on parity of the language of that provision and proviso to Section 376, the views referred by us hereinabove, have been reaffirmed. In that behalf, useful reference could be made to Paragraphs 6 and 7 of the judgment of the Rajasthan High Court, which read thus:

6. The first objection raised by learned Counsel for the appellant is, that the learned Additional Sessions Judge had no jurisdiction to hear the appeal, since the fine imposed by the Sub-Divisional Magistrate, First Class was only Rs. 25/- and therefore no appeal lay according to Section 413, Cr.P.C. In reply, it was urged by learned Counsel for the accused that the Magistrate had also imposed a recurring fine at the rate of Rs. 2/8/- per day and therefore, Section 413, Cr.P.C. did not bar the appeal.

It is contended by learned Counsel for the appellant that the accused had filed the appeal in the Court of the Additional Sessions Judge only seven days after the judgment of the trial Court and, therefore, even the recurring fine did not amount to more than Rs. 17/8/- and this added to the substantive fine of Rs. 25/- did not exceed Rs. 50/-. According to him, since the fine imposed by the Sub Divisional Magistrate, First Class did not exceed Rs. 50/- the only remedy which lay open to the accused was to present a revision application to this Court and that he had no right to file an appeal which was covered by Section 413, Cr.P.C.

7. I have given due consideration to these arguments and, in my opinion, the objection raised by learned Counsel for the appellant in this Court is without any force. Section 413, Cr.P.C. bars an appeal by a convicted person only in those cases in which a High Court passes sentence of imprisonment not exceeding six months or of fine not exceeding two hundred rupees, or in which a Court of Session passes a sentence of imprisonment not exceeding one month or in which a Court of Sessions or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

Now, it is true that the Sub-Divisional Magistrate had imposed a fine of Rs. 25/- only u/s 165 of the Act, but at the same time, he imposed a further fine of Rs. 2/8/- per day commencing from 30th April, 1960, to an indefinite period unless the accused were to comply with the order closing the door within a week. It may be observed that Section 413, Cr.P.C. contemplates the imposition of a lump sum fine and it does not envisage a case in which a recurring fine is imposed upon the accused. It may be pointed out that an appeal against the order of the Magistrate or the sentence awarded by him may be preferred to any Court other than a High Court within a period of thirty days from the date of the sentence or order which is sought to be impugned.

Now, if in a case like the present one, an accused prefers an appeal, say 25 days after the date of the judgment, the recurring fine by that time at the rate of Rs.

2/8/- per day would amount to Rs. 75/- and would thus certainly exceed the maximum limit of Rs. 50/-. In those circumstances, it cannot be urged with any justification that the total amount of fine did not exceed Rs. 50/- and therefore, an appeal cannot lie. It may be further pointed out that the Legislature does not contemplate a distinction between an appeal which is filed after seven days and an appeal which is filed after 10, 15 or 25 days. All the appeals stand on the same footing so long as they are preferred within the prescribed period of limitation. There is, therefore, no force in the contention raised by learned Counsel for the appellant to the effect that the present appeal having been filed by the accused within 7 days from the date of the Magistrate's order, an appeal did not lie. It is clear that Section 413, Cr.P.C. does not contemplate a case of recurring fine and therefore whenever a recurring fine is imposed by a Court, an appeal against such an order cannot be barred by this Section. The only sentence which was covered by Section 413, Cr.P.C. in the present case was the imposition of the fine of Rs. 25/- by the Magistrate, but even the order relating to this fine became appealable according to the provisions of Section 415, Cr.P.C., because that punishment was combined with another punishment by which a recurring fine was imposed. There is thus no force in the contention raised by learned Counsel for the appellant and it is hereby dismissed.

29. In the above circumstances what one finds, therefore, is that the learned Judge has taken an extremely narrow or restricted view which is not in accord with the legislative mandate. The legislative mandate is that a person should not be deprived of a right of appeal if there is combination of sentence and any other punishment. Pertinently, the direction to undergo imprisonment in default of payment of compensation is a punishment and that is not disputed. In that context we find that the reliance placed by Mr. Kumbhakoni on the judgment of the Hon'ble Supreme Court in the case of R. Mohan v. A.K. Vijaya Kumar (supra), is apposite. The Hon'ble Supreme Court has held that even a direction to pay compensation coupled with a default sentence of imprisonment, if that order of payment of compensation is not obeyed, cannot be said to be illegal. That such sentence can be imposed and if such sentence is imposed as in the present case in the same order and combining it as noted above, then, the appeal filed in the present case was clearly maintainable.

30. As a result of the above discussion, we are of the opinion that the order of the learned Additional Sessions Judge impugned in this Writ Petition cannot be sustained. It is, accordingly, quashed and set aside. The Criminal Appeal No. 1367 2011 is restored to the file of the Court of Sessions for Greater Mumbai at Sewree and it shall be decided in accordance with law as expeditiously as possible and within a period of four months from the date of receipt of a copy of this order. Rule made absolute accordingly. At this stage, Mr. Singh, learned Counsel appearing for the petitioners, prays that there is an interim order in the Writ Petition and which may be continued for a period of two weeks so as to enable the petitioners to apply for appropriate interim relief in the pending Criminal Appeal and which stands revived by this order. None is appearing on

behalf of the original complainant though the matter was notified on Board for Pronouncement of Judgment. Without prejudice to the rights and contentions of parties, the interim order passed in the Writ Petition to continue for a period of two weeks only.