
(2012) 11 BOM CK 0034

In the Bombay High Court

Case No : Criminal Writ Petition No. 2903 of 2011

Kumar J. Sujan and Others

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Procedure Code, 1973 (CrPC) — Section 15, 16, 19, 260, 281
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Workmens Compensation Act, 1923 — Section 30

Citation : (2013) 1 ABR 363 : (2013) ALLMR(Cri) 590 : (2013) 2 BomCR(Cri) 431 : (2012) 114 BOMLR 4042

Hon'ble Judges : Sadhana S. Jadhav, J;A.S. Oka, J

Bench : Division Bench

Advocate : A.A. Kumbhakoni along with Mr. Ravi Gurnani and Mr. Shardul Singh instructed by Mr. Sudhan Y. Amare and Ms. Deepali Prabhukhanolkar, for the Appellant; A.S. Pai, APP for the Respondent No. 1-State, Shri R. Satyanarayanan for the Respondent No. 2, Shri Kevic Setalwad, A.S.G. along with Ms. Sushma Nagraj and Shri Anupam Surve instructed by y Shri Sandeep K. Shinde, for the Respondent

Judgement

A.S. Oka, J.—The Petitioners were arraigned as Accused in a complaint filed by the second Respondent for the offence punishable u/s 138 read with Section 141 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. The first and the second Petitioners (second and third Accused) were sentenced to suffer simple imprisonment till rising of the Court. The Petitioners (first to third Accused) were jointly and severally directed to pay compensation of Rs. 15,00,000/- to the Complainant u/s 357(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") within a period of three months from the date of judgment. In case of the default of payment of compensation, the first and the second Petitioners were sentenced to suffer simple imprisonment for six months. A criminal Appeal was preferred by

the Petitioners before the Sessions Court. By order dated 24th August, 2011, the learned Additional Sessions Judge dismissed the Appeal in limine in view of Clause (b) of Section 376 of the said Code. The learned Judge held that the Appeal was not maintainable in view of Clause (b) of Section 376 of the said Code. Prayer (b) of this Petition reads thus:-

(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.

Prayer (b1) of this Petition is for quashing and setting aside the order dated 24th August, 2011 passed by the learned Additional Sessions Judge and for a direction to restore the Appeal to be heard in accordance with law. We must record here that the learned counsel appearing for the Petitioners, the learned counsel appearing for the second Respondent and the learned Additional Solicitor General of India have made submissions only as regards the prayer clause (b) of this Petition and, therefore, we are passing order confined to the prayer clause (b) of the Petition.

The learned counsel appearing for the Petitioners has made detailed submissions. The learned counsel appearing for the Petitioners submitted that the right to appeal against an order of conviction is conferred by Section 374 of the said Code. He, however, submitted that by virtue of Section 376, the said right is curtailed and by the said provision, unreasonable, arbitrary and discriminative conditions have been imposed based only on territorial jurisdiction of a Court. He submitted that the right to appeal is made restricted or conditional on whether the Magistrate who passed the order of conviction was presiding over a Court in a metropolitan city or not. It is submitted by the learned counsel appearing for the Petitioners that such distinction made for taking away right of appeal in case of certain orders of conviction passed by the learned Metropolitan Magistrate is unconstitutional and unsustainable.

2. The learned counsel appearing for the Petitioners submitted that by virtue of sub-clause (b) of section 376, the right of an Appeal against orders passed by the Metropolitan Magistrate of imposing a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees or both such imprisonment and fine has been taken away. He urged that such discrimination and restriction brought about by the impugned provision is violative of the Petitioners' fundamental rights under Articles 14 and 21 of the Constitution of India. The learned counsel submitted that if a right to appeal is available to a citizen convicted in a non-metropolitan area, then same right by law, must be made available to a citizen in a metropolitan area as well.

3. The learned counsel for the Petitioner submitted that the right to prefer an appeal in cases of conviction is to be adjudged on a different touchstone than a right to appeal in cases of decrees and orders of civil courts. He submitted that several other consequences follow from a conviction. Not only that the person's

liberty taken away, but the conviction renders a stigma on the convict. He submitted that the right to life under Article 21 of the Constitution of India is wide enough to cover the right of a convict to file an Appeal against an order of conviction. He submitted that the right to file an appeal against an order of conviction is a fundamental right guaranteed under Part III of the Constitution of India, and more specifically under Article 21.

4. The learned counsel appearing for the Petitioners submitted that an order of conviction takes away personal liberty and consequentially takes away aspects of his life, like adding a stigma upon him, disqualifying him from public posts, assignments, vocations and employments. The learned counsel submitted that such an order by law is appealable in the light of the wide amplitude of Article 21 of the Constitution of India and that the said right cannot be interfered with or made conditional by the impugned provisions.

5. The learned counsel appearing for the Petitioners submitted that not only in view of Article 21 of the Constitution of India, but also in view of several other international treaties and based on the basic principles of justice, equity and fairness, a convict has an inherent and fundamental right to at least one challenge to his conviction on facts, by way of filing an appeal and that the same is the most minimum safeguard which can be provided in a civilized and fair society. He submitted that the right is inherent in Article 21 and cannot be taken away or conditioned or in any manner scuttled or impaired by any provision of law.

6. Learned counsel appearing for the Petitioners invited our attention to Section 3 as well as Section 6 of the said Code. He submitted that the Judicial Magistrates of First Class are on par with the Metropolitan Magistrates. He submitted that in the hierarchy of Criminal Courts specified in Section 6, they form a part of the same class. He submitted that the duties and functions discharged by a Judicial Magistrate, First Class elsewhere are being discharged by a Metropolitan Magistrate in metropolitan areas. He also invited our attention to the provisions regarding subordination of the Judges. He invited our attention to the Sections 15, 16 and 19 of the said Code. He, therefore, submitted that the Judicial Magistrates, First Class and the Metropolitan Magistrates exercise the same judicial powers but in different areas. His submission is that thus the Courts of Judicial Magistrates, First Class and the Court of the Metropolitan Magistrates form one class. He invited our attention to Section 376 of the said Code. He pointed out that in case of an order of conviction passed by a Judicial Magistrate, First Class of imprisonment for a term not exceeding three months, Section 374 provides for an Appeal against the order of conviction. However if the same sentence is imposed by a Metropolitan Magistrate, Clause (b) of Section 376 of the said Code takes away the right of the Accused to prefer an Appeal against the order of conviction. He pointed out Clause (c) of Section 376 and submitted that if the accused is sentenced by a Metropolitan Magistrate and he is ordered only to pay a fine of Rs. 200/, there is no right of an Appeal against

the order of conviction. However, if the same sentence is imposed by a Judicial Magistrate, First Class, the right of Appeal is available to the Accused. He, therefore, submitted that two equals are being treated as unequals. He submitted that the Clause (b) of Section 376 applies to the Appeals against the orders of conviction passed by both the Court of Sessions and the Court of Metropolitan Magistrates. He submitted the Courts are of different ranks and classes and therefore, they cannot be clubbed together.

7. He submitted that all the decisions of the Apex Court in relation to a right of Appeal being a statutory right are in the matters arising out of civil law. He submitted that in the present case, the issue of deprivation of right of Appeal against certain orders of conviction passed by the learned Metropolitan Magistrate will have to be considered in the context of fundamental rights guaranteed under Article 21 of the Constitution of India. He, therefore, submitted that Sub-clauses (b) and (c) of Section 376 of the said Code are unconstitutional and ultra vires Part III of the Constitution of India.

8. Learned counsel appearing for the original Complainant invited our attention to several provisions of the said Code which show that the Legislature has treated the Judicial Magistrates, First Class differently from the Metropolitan Magistrates. He invited our attention to section 281 of the said Code. He also invited our attention to Section 355 of the said Code which makes a separate provision as regards the judgments of the learned Metropolitan Magistrates. He, therefore, submitted that the Metropolitan Magistrates form a separate class which is distinct from the class of Judicial Magistrates, First Class.

9. The learned Additional Solicitor General of India has made detailed submissions. His basic submission is that there is no vested right of an Appeal and a right of Appeal is always created by a statute. He submitted that it is for the Legislature to decide whether right to Appeal should be conditional or unconditional. He has invited our attention to the various decisions of the Apex Court. He has also invited our attention to the 14th Report on Law Commission and submitted that the historical background shows that traditionally the Metropolitan Magistrates (earlier Presidency Magistrates) were always being treated as a separate class of judicial officers as distinguished from Judicial Magistrates, First Class. Inviting our attention to the Section 8(1) of the said Code, he submitted that there is a clear and intelligible differentia between a Metropolitan area and a District area including in respect of population, commerce, size of territory, economic structures, affluence etc. He submitted that while making the classification, even propensity towards the economic offences has been considered.

10. Learned counsel appearing for the Petitioner relied upon certain observations made by the Apex Court in the case of Babu Rajirao Shinde Vs. The State of Maharashtra, He also relied upon a decision of Division Bench of this Court in the case of Narendra Keshrichand Fuladi & Another v. State of Maharashtra (1985 Mh.L.J. 1). He also relied upon certain observations made by the Apex Court in

the case of Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Another, The learned Additional Solicitor General placed reliance on a decision of the Apex Court in the case of Competition Commission of India Vs. Steel Authority of India Ltd. and Another,

11. We have carefully considered the submissions. In the facts of the case, the conviction of the first and second Petitioners is till the rising of the Court and there is no fine imposed. We must make it clear that we are making these observations only for a limited purposes of considering the prayer Clause (b) and we are not dealing with the submission of the Petitioners about nature of the direction issued to pay compensation. It will be necessary to make a reference to the provisions of Sections 374 and 376 of the said Code. The said Sections read thus:

374. Appeals from convictions.-- (1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years [has been passed against him or against any other person convicted at the same trial], may appeal to the High Court.

(3) Save as otherwise provided in sub-section (2), any person,--

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or

(b) sentenced u/s 325, or

(c) in respect of whom an order has been made or a sentence has been passed u/s 360 by any Magistrate, may appeal to the Court of Session.

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.

Section 376 carves out an exception to the general rule in Section 374 which provides for an Appeal against the orders of conviction.

12. As far as the nature of right of Appeal is concerned, a reference will have to be made to a decision of the Apex Court in the Competition Commission of India (*supra*). In Paragraphs 50 and 51 of the said decision, the Apex Court has observed thus:-

50. The principle of "appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure" is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being a creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law. Reference may be made to *M. Ramnarain Private Limited and Another Vs. State Trading Corporation of India Limited*, and *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others Etc. Etc.*,

51. Right of appeal is neither a natural nor an inherent right vested in a party. It is a substantive statutory right regulated by the statute creating it. *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, and *Kashmir Singh Vs. Harnam Singh and Another*, may be referred to on this point. Thus, it is evidence that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party.

(Emphasis added)

13. Learned counsel appearing for the Petitioners has fairly invited our attention to the decision of the Apex Court in the case of *Om Parkash Batish Vs. Ranjit @ Ranbir Kaur and Others*, This was a case where the Apex Court dealt with a limited right of appeal conferred by Section 30 of the Workmen's Compensation Act, 1923. In Paragraph 15 of the said decision, the Apex Court held thus:-

15. The right to file an appeal is a statutory right. Parliament may not provide such a right at all. The right to file an appeal can be hedged with conditions. A limited right can also be conferred.

In the case of Kondiba Dagadu Kadam vs. Savitribai Gopal Gujar [(1999) 3 SCC 796], the Apex Court in Paragraph 4 held thus:

It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time.

(Emphasis added)

14. Thus, the law seems to be that there is no inherent right of an Appeal and the same has to be conferred by a statute. The Legislature can confer the said right or can make available the said right conditionally. The Legislature may withdraw the said right by amending the Statute which confers the right of Appeal. Normally such amendment does not affect pending proceedings.

15. The learned counsel appearing for the Petitioner relied upon the following observations made by the Apex Court in the case of Babu Rajirao Shinde vs. The State (Supra):

The right to have at least one appeal particular in serious cases is a substantial right and the same should not be denied except on substantial grounds. In our opinion this was a fit case for entertaining the appeal and disposing of the same after a regular hearing.

(Emphasis supplied)

By the order under challenge before the Apex Court, an Appeal against conviction was summarily dismissed by the High Court. The observations of the Apex Court are in the context of the facts of the case. Hence, the said decision will not help the Petitioners. The decision of the Division Bench of this Court in the case of Narendra (supra) lays down well settled principles as regards reasonable classification.

16. The learned counsel appearing for the Petitioner relied upon the observations made by the Apex Court in Paragraph 66 of the decision of Dilip S. Dahanukar (supra) which reads thus:-

66. The right to appeal from a judgment of conviction vis-?-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field.

The issue before the Apex Court was whether in the Appeal against the order of conviction, a very onerous condition of deposit of compensation amount can be imposed for suspension of sentence which will amount to depriving the accused

his right of Appeal. The Apex Court considered the issue in this context. In Paragraph 72, the Apex Court answered the issues which read thus:-

72. We, therefore, are of the opinion:

- (i) in a case of this nature, sub-section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when the appellant was directed to pay compensation;
- (ii) the appellate court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;
- (iii) the amount of compensation must be a reasonable sum;
- (iv) the court, while fixing such amount, must have regard to all relevant factors including the one referred to in subsection (5) of Section 357 of the code of Criminal Procedure;
- (v) no unreasonable amount of compensation can be directed to be paid.

Thus, the observations made by the Apex Court in Paragraph 66 of its decision in the case of Dilip S. Dahanukar (*supra*) are in the context of submission made before it that imposing an onerous condition while passing an order on Application u/s 389 of the said Code may virtually amount to depriving an Accused of his right to prefer an Appeal already conferred the Statute thereby infringing the right under Article 21 of the Constitution of India. When a right is conferred by a statute on an accused of preferring an Appeal against the order of conviction, the order of the Appellate Court of imposing a very stringent condition thereby virtually depriving the accused of his right of Appeal amounts to infringing the fundamental right under Article 21 of the Constitution. If the right of Appeal is taken away by the statute itself, it will not amount to infringement of Article 14 as held by the Apex Court in Paragraph 50 of the decision in the case of the Competition Commission of India (*supra*). If the Statute itself takes away the right of Appeal, violation of Article 21 cannot be alleged in as much as there is no inherent right of Appeal.

17. Perusal of the provisions of the said Code shows that there are four classes of Magistrates under the said Code. There are Metropolitan Magistrates, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class and the Executive Magistrates. It is true that u/s 6 of the said Code which provides for classes of criminal Courts, Judicial Magistrates of First Class and Metropolitan Magistrates in Metropolitan area are together placed in the second category. The Metropolitan areas have been defined u/s 8 of the said Code. Sub-section (2) thereof provides that the Presidency-towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be declared under Sub-section (1) to be a metropolitan areas. Sub-section (1) provides that the State Government may, by notification, declare that any area in the State comprising a city or town, the population of which exceeds one million to be a metropolitan area. Thus, a

Metropolitan Magistrate can be appointed in a metropolitan area which is a separate and distinct area from the other parts of the State. At this stage, it will be also necessary to look into the provisions of Chapter XXVII of the said Code which deal with the judgments. Sections 353 and 354 are general provisions dealing with the judgments by criminal Courts. However, Section 355 makes a special provision which carves out an exception to Sections 353 and 354 in case of Metropolitan Magistrates. The Section lays down what particulars shall be recorded in the judgment. It will be also necessary to make a reference to Section 395 of the said Code. Sub-section (1) lays down that if any Court is satisfied that a case involves the questions of the nature specified in Sub-section (1) thereof, the Court is empowered to make a reference to this Court. However, Sub-section (2) provides that even when the provisions of Sub-section (1) do not apply, a Metropolitan Magistrate or a Court of Sessions is entitled to refer a case for decision of this Court on any question of law arising in such a case. Section 404 of the said Code makes a special provision which applies when the High Court or the Court of Sessions calls for record of any trial held by a Metropolitan Magistrate. It provides that in such a case, the Metropolitan Magistrate will submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue and the Revisional Court shall consider the said statement before overruling or setting aside the said decision. This provision is required to be enacted because of the special provision regarding judgment contained in Section 355 of the said Code. Section 354 of the said Code specifically provides that every judgment shall contain points for determination, the decision thereon and the reasons for the decision. In view of Section 355 of the said Code, Section 354 will not apply to a judgment of the learned Metropolitan Magistrate. Clause (i) of Section 355 provides that in all cases in which an appeal lies from the final order either u/s 373 or under sub-section (3) of Section 374, a brief statement of the reasons for the decision shall be incorporated in the Judgment. Thus, Section 355 makes a major departure from the provisions relating to the judgment which apply to all the Courts including the Courts of Judicial Magistrates of First Class. Thus, it appears from the scheme of the said Code that the Metropolitan Magistrates in metropolitan area and the Judicial Magistrates of First Class in other parts of the State may be exercising the same jurisdiction or powers, but under different provisions of the said Code, the Metropolitan Magistrates have been treated separately and distinctly from the Judicial Magistrates of First Class.

18. The learned Additional Solicitor General has placed reliance on a decision of the Apex Court in the case of State of Nagaland Vs. Ratan Singh, etc., read thus:-

31. A similar attempt is made by comparing these Rules with the Criminal Procedure Code applicable in the rest of India. It is contended that this leads to discrimination. We think that the exigency of the situation clearly demands that the Criminal Procedure Code should not apply in this area. It is not discrimination to administer different laws in different areas. The Presidency towns have got special procedures which do not obtain in other areas. We have known of trial by

jury in one part of India for an offence which was not so triable in another. Similarly, what is an offence in one part of India is not an offence in another. Regional differences do not necessarily connote discrimination and laws may be designed for effective justice in different ways in different parts of India if people are not similarly circumstanced.

(Emphasis added)

19. Under the said Code, a special class of Magistrates, namely Metropolitan Magistrates are appointed in the metropolitan area. Classification of metropolitan area is essentially made on the basis of the large population. Perhaps, the Legislature was aware of the fact that in case of metropolitan area, the commercial activities, economic structures, tempo of life and influences will be totally different and distinct from other places. In Metropolitan area, there will be propensity towards economic offences. Therefore, there is an intrinsic evidence even in the said Code to show that the Courts of Metropolitan Magistrates are treated differently from the Court of Judicial Magistrates of First Class in the Districts. That is the reason why there is a separate provision regarding appeals against the order of conviction passed by the learned Metropolitan Magistrate. It is well settled that only on the ground that the Appeal is not provided in a particular statute, the same is not rendered constitutionally invalid. When there is an intrinsic material to show that the said Code itself treats the Metropolitan Magistrates differently from the Judicial Magistrates of First Class, the argument of discrimination made by the Petitioners does not hold good. A different law can be certainly applied to a Metropolitan area.

20. There is no inherent right of appeal. If statutes creates a right of appeal against the order of conviction, any act which prevents the accused from preferring an Appeal or availing the statutory remedy of appeal may be in violation of Article 21 of the Constitution of India. That is the ratio of the decision in case of Dilip Dahanukar (supra). But a legislation cannot be struck down on the ground that there is a violation of Article 21 of the Constitution of India as a result of failure to provide for an Appeal against a particular category of orders of conviction.

21. Thus, there is no merit in the prayer clause (b) and the same will have to be rejected by holding that clauses (b) and (c) of Section 376 of the Code of Criminal Procedure, 1973 are legal and valid. For consideration of other prayers, place this Petition on 11th December, 2012.