
(1982) 04 BOM CK 0032

In the Bombay High Court

Case No : Criminal Revision Application No. 645 of 1981

Madhusudan Palshetkar

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 01-04-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 377, 378, 394, 394(2)
Limitation Act, 1963 — Section 3

Citation : (1982) MhLj 752

Hon'ble Judges : S.J. Deshpande, J

Bench : Single Bench

Advocate : M.G. Karmali with J.R. Madan, for the Appellant; M.R. Survanshi, Public Prosecutor for State, for the Respondent

Judgement

S.J. Deshpande, J.—Petitioner's father Mukund Palshetkar was the original appellant in Criminal Appeal No. 262 of 1978 before the Sessions Judge, Greater Bombay.

2. The petitioner is the son of the deceased appellant named Mukund, who was the original appellant in the Sessions Court in Criminal Appeal No. 262 of 1978, who was convicted and sentenced for six months Rigorous Imprisonment and a fine of Rs. 10,000/- for the offences under sections 8 (1)(i) read with 85 (1)(ii) (b), 8(2)(a)(i) read with 85 (i) read with Section 55 (2) read with sections 87 and 91 and also Rule 13 (1) of the Gold Control Act, 1968 by the learned Metropolitan Magistrate 5th Court, Dadar, Bombay.

The original appellant Mukund Palshetkar had preferred an appeal in the Court of Sessions Judge, Greater Bombay against this conviction challenging the order of conviction and sentence passed by the learned Magistrate against him. This appeal was filed by the deceased appellant on or about June 1981. During the pendency of this appeal in the Sessions Court on July 24, 1981 original appellant Mukund died. On his death, the present petitioner being his legal representative of the deceased appellant as son made an application for leave to continue the

said appeal. This application was made on September 8, 1981. The said application was admittedly beyond time and there was delay of 14 days.

4. The petitioner explained the delay on the ground that there were two deaths in his family, the first of original appellant who was his father on July 24, 1981 and the second death was of his uncle which took place on August 30, 1981. On account of these unforeseen events, the family was under great severe strain, and therefore the petitioner could not make an application within time. The delay in making application was only 14 days.

5. This application was heard by the learned Sessions Judge on September 11, 1981 and the learned Sessions Judge, Greater Bombay was pleased to dismiss this application as barred by time by his order, dated September 11, 1981.

6. It is this order, which is challenged in this revision by the petitioner. The learned Advocate for the petitioner Mr. Karmali has first of all submitted that the appeal which was filed by the original deceased Mukund cannot abate and there is no question of any delay in making application by the heir of the deceased with a prayer to continue the appeal and this view of the learned Sessions Judge in regard to delay is based on wrong view of the provisions of section 394 of the Code of Criminal Procedure as well as the ratio laid down in the decision of the Supreme Court reported in Harnam Singh Vs. The State of Himachal Pradesh, . It was also urged by the learned Advocate Mr. Karmali that even if this contention is not acceptable, the delay is only of 14 days and the learned Sessions Judge was in error in not condoning the delay although it was sufficiently explained.

7. In my opinion, both the contentions raised by the learned Advocate for the petitioner have sufficient force. I will take up the first contention. The narrow question which requires to be considered would be whether the appeal before the learned sessions Judge was an appeal against both the sentence and conviction or not. Original appellant was convicted and sentence was passed against him. Every sentence which is passed by the criminal Court is based on the conviction which is recorded by the Court. Code of Criminal Procedure permits appeals against conviction. The present criminal appeal which was filed by the appellant Mukund was an appeal against his conviction" and sentence also. It was composite appeal; it was filed before the Sessions Court challenging the sentence of imprisonment as well as fine. If the appeal against the conviction was pending then it is difficult to see how it cannot affect the passing of the sentence. If we look to the provisions of section 394 of the Code of Criminal Procedure, which are relevant in this connection, they are as under:

394. Abatement of appeals :-

(1) Every appeal u/s 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.

Then there is proviso to the said section with which we are not concerned.

8. Now, this section 394 corresponds to section 431 of the Old Criminal Procedure Code; Section 397 of the Code referred to the above section provided appeals by the State Government against sentence and section 378 provides appeals in case of acquittal by the State. Sub-section (2) of section 394 refers every other appeals under this Chapter i.e. Chapter No. XXIX which is under the heading of "Appeals", Sections 374 provides appeals from convictions. The contention of the learned Advocate for the petitioner is that in view of sub-section (2) of section 394 every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant. It was contended that in view of sub-section (2) of section 394 the appeals in which sentence of fine is challenged cannot abate, because exception is made in regard to such appeals against sentence as provided by sub-section (2). In my opinion, on the plain reading of sub-section (2) of section 394 if an appeal is filed against the conviction by an accused, the appeal must be stated to be a composite appeal directed against the conviction as well as the sentence. Once it is held that this is an appeal against the sentence, the provisions of sub-section (2) of section 394 are attracted and it is taken out from the bar of abatement by reason of death of the appellant.

9. It is true, that appeal against conviction abates on the death of the appellant, but, an appeal against conviction in which a sentence of fine has been awarded does not abate on the death of the appellant, since it affects the estate of the appellant. In this connection it is notable that the levy of fine is provided by section-421 of the Code of Criminal Procedure. This fine can be recovered as provided by section 421 of the Code, which provides that the amount of fine can be recovered by issue of warrant by attachment " and sale of any movable property belonging to the offender and also by issue of warrant to the Collector of the district authorising him to realise the amount as arrears of land revenue from the movable or immovable property or both, of the defaulter. In this connection under sub-section (2) of section 421 of the Code, the State Government is empowered to make rules regulating the manner in which warrants under clause (a) of section (1) are to be executed and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant. It is dear from these provisions that the levy of fine affects the estate of the appellant.

10. In this case, the fine which was imposed by the trial court was in the sum of Rs. 10,000/-. The appellant was entitled to challenge his conviction as well as sentence of fine and in view of sub-section (2) of section 394 of the Code if the appeal is against the sentence of fine no abatement occurs.

11. Mr. Karmali, the learned Advocate for the petitioner, therefore is right in saying that there is no abatement of appeal. He derived support from the judgment of the Supreme Court reported in Harnam Singh v. The State of Himachal Pradesh (supra), paragraph 10 of the said judgment of the Supreme

Court was dealing with the provisions of old section 421 (present section 394). It is observed by the Supreme Court as under:

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.

In paragraph 11 of the judgment, the Supreme Court further observed as follows:

It is difficult to discern any principle behind the contrary view. The reason of the rule contained in the exception is that a sentence of fine operates directly against the estate of the deceased and therefore the legal representatives are entitled to clear the estate from that liability or not the sentence of fine is combined With any other sentence can make no difference to the application of that principle.

12. In view of the clear pronouncement of the Supreme Court and the provisions of section 394 (2) of the Code of Criminal Procedure, the contention of the learned Advocate for the petitioner is well founded. I accept the same and the learned Sessions Judge was in error in holding that the appeal abated.

13. Second contention of Mr. Karmali, the learned Advocate for the petitioner, need not be examined, but such occurrence of filing of appeals by the convicts before the appellate Courts may be a common feature and therefore it is necessary to clarify the position in regard to the delay in filing of such matters. Assuming that the petitioner filed an application in question for leave to continue the appeal and it was delayed for 14 days, in this case, I have no doubt in my mind that the appellate Judge has ample powers to condone the delay, if it is properly explained. In this case, the petitioner stated that his father died on July 24. 1981 and his uncle died on August 30. 1981 and application which was made to the appellate Court asking for leave to continue the appeal was made on September 8, 1981, which was beyond 30 days as provided by the Limitation Act. A good and sufficient explanation has been given by the petitioner and the learned Sessions Judge ought to have accepted the same in the circumstances of this case. The power of the Court to condone the delay is not taken away by section 3 of the Limitation Act and therefore, in my opinion, even if the application is treated as being delayed for 14 days, the appellate Court has every power to condone the delay after giving notice to the other side and if circumstances are made out by the petitioner to explain the delay the appellate Court is bound to consider the same and if he is satisfied with the explanation given by the applicant it should condone the delay. Therefore, in this case, even if the application for bringing legal representative on record is held to be barred

by time, the delay is properly explained by the petitioner and deserves to be condoned for the ends of justice.

14. Both the contentions of the learned Advocate Mr. Karmali are well founded and therefore the order of the learned Sessions Judge is liable to be set aside.

In the result, the order of the learned Sessions Judge, dated September 11, 1981 is set aside. Rule is made absolute. Criminal Application No. 205 of 1981 be restored on the file of the Board of the learned Sessions Judge. The petitioner be substituted as legal representative in the place of the appellant and the appeal be heard and disposed of in accordance with law.