

(2017) 03 CAL CK 0128

In the Calcutta High Court

Case No : C.R.R. No. 4264 of 2015 with C.R.A.N. No. 1885 of 2016 with C.R.R. No. 4265 of 2015 with C.R.A.N. No. 1886 of 2016

P.S. Mitra @ Partha Sarathi Mitra

APPELLANT

Vs

Manor Travels Private Limited

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 357(3), Section 372, Section 374
Penal Code, 1860 (IPC) — Section 64

Citation : (2017) 2 AICLR 606 : (2017) 2 CalCriLR 178 : (2017) 2 RCRCriminal 762

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Swapan Kumar Mallick, Ms. Manasi Roy, Ms. Sudhesna Das, Advocates, for the Petitioners; Ayan Bhattacharyya, Anjan Datta, Cedric Fernandez, Advocates, for the Opposite Parties

Final Decision : Disposed Off

Judgement

Joymalya Bagchi, J.—The short question which falls for decision in this case is whether a judgment and order of conviction and sentence of imprisonment till the rising of the Court and an order of compensation imposed under Section 357(3) of the Code of Criminal Procedure with a direction to undergo imprisonment in default of payment of such compensation is appealable or not.

2. The petitioner was convicted for commission of offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as N.I. Act) and sentenced to suffer imprisonment till the rising of the Court and directed to pay compensation to the tune of Rs. 4 lakhs within one month in default to suffer simple imprisonment for two years. Initially, the petitioner preferred a revision petition before the Additional Sessions Judge, Fast Track Court, Calcutta and thereafter made an application for converting such revision into an appeal on the premise that the imprisonment for two years prescribed in

default of payment of compensation is appealable under Section 374(3) read with Section 376 of the Code of Criminal Procedure. Such prayer being turned down the petitioner is before this Court.

3. Learned advocate appearing on behalf of the petitioner has strenuously relied upon Mr. Kumar J. Sujana v. State of Maharashtra, 2013 (2) DCR 625 in support of his contention. On the other hand, learned lawyer for the opposite party no.2 submitted that Mr. Kumar J. Sujana (supra) does not lay down correct law as any direction for imprisonment in default of payment of fine or compensation cannot render the sentence appealable in view of proviso to Section 376 of the Code of Criminal Procedure. He strenuously argued that right of appeal is a creature of statute and cannot be inferred until and unless expressly provided therein. He relied on various authorities in support of his contention.

4. The trial Court upon conviction of an accused may direct payment of compensation in terms of Sub-section (1) or (3) of Section 357 Cr.P.C.

5. Section 431 Cr.P.C., inter alia, provides that the compensation so awarded may be recovered as a fine. Section 431 Cr.P.C. reads as under:-

"431. Money ordered to be paid recoverable as fine.--Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section 421, after the words and figures" under section 357", the words and figures" or an order for payment of costs under section 359" had been inserted."

The manner of recovery of sentence of fine is provided in Section 421 Cr.P.C. which empowers the Court to issue a warrant for attachment and sale of moveable property of offender either by issuance of warrant to the Collector authorizing him to realize such amount as arrears of land revenue from the moveable and immovable property of the defaulter in addition to the imprisonment undergone in default of payment of such fine as provided in Section 64 of the Indian Penal Code.

6. Interpreting the aforesaid provisions in a purposive and harmonious manner, the Apex Court in Vijaya v. Sadanandan K. & Anr., (2009) 6 SCC 652 held that the Court while awarding compensation under Section 357 Cr.P.C. may direct the defaulter to undergo imprisonment in terms of Section 64 of the Indian Penal Code as if such compensation was a fine for the purpose of such section. Similar view was reiterated in R. Mohan v. A.K. Vijaya Kumar, 2012(3) R.C.R.(Civil) 744 : (2012) 8 SCC 721. Hence, it is no longer res integra that imprisonment in default of payment of compensation may be awarded by a Court upon conviction of an accused of an offence including one punishable under Section 138 of the N.I. Act.

7. The quantum of compensation which may be awarded to the victim by way of

restitutive justice is dependent on various factors, namely, nature of the offence, loss suffered by the complainant, the capacity of the convict to pay the compensation and other relevant matters [see Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551 (Para-11) and Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770] It has also been held in Mangilal v. State of Madhya Pradesh, (2004) 2 SCC 447 that an accused must be given an opportunity of hearing before an order of compensation is passed against him. Inadequacy of quantum of compensation has been made appealable at the behest of victim in terms of proviso to Section 372 Cr.P.C.

8. In this backdrop, let me examine whether a direction to undergo imprisonment in default to pay compensation in terms of Section 64 I.P.C. shall render the order of compensation appealable or not.

9. For a better appreciation of the aforesaid issue, sections 357, 372, 374, 376 Cr.P.C. and section 64 of I.P.C. are set out hereunder:-

"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."

"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.]

Amendment Act, 2008.---Clause 29 amends section 372 of the Code relating to appeals from judgment or order of a Criminal Court. It gives to the victim the right to prefer an appeal against any adverse order passed by the trial Court. (Notes on Clauses).

"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 under section 325, or

(c) in respect of whom an order has been made or a sentence has been passed under section 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 under section 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."

"64. Sentence of imprisonment for non-payment of fine. --- In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

A conjoint reading of aforesaid provisions would show that a sentence of fine imposed by the High Court, Court of Sessions or Metropolitan Magistrate or any Magistrate of the First Class is appealable under section 374 Cr.P.C. provided such fine exceeds a sum of Rs. 1000/-, Rs. 200/- and Rs. 100/- respectively as provided in section 376 thereof. It is also laid down in the proviso to section 376 Cr.P.C. that sentence of fine not exceeding the minimum limit shall not become appealable merely on the score imprisonment is prescribed in default of payment of such fine. Compensation per se is not appealable at the behest of the convict under the aforesaid provision unless it forms a part of the fine under Section 357(1) Cr.P.C. and is appealable as such. However, inadequacy of compensation has been made appealable at the behest of the victim under the proviso to Section 372 Cr.P.C.

10. In view of the aforesaid statutory scheme, it has been argued relying on *Durga Shankar Mehta v. Raghuraj Singh & Ors.* AIR 1954 S.C. 520, Competition

Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744, Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement & Anr. 2010(3) R.C.R.(Civil) 483 : (2010) 4 SCC 772, State of Haryana v. Maruti Udyog Ltd. & Ors. (2000) 7 SCC 348 and National Insurance Co. Ltd., Chandigarh v. Nicolledda Rohtagi & Ors. 2002(4) R.C.R.(Civil) 464 : (2002) 7 SCC 456 that the right of appeal being a creature of statute, there cannot be any inherent right of appeal against an order of compensation unless it is expressly provided by law itself. There is no quarrel with such proposition that right of appeal is a creature of statute and not an inherent one. That apart, Criminal Courts except the High Court do not possess any inherent power and no appeal shall lie against any judgment or order passed by the Criminal Court except as provided by the Code or any other law for the time being in force.

11. It is strenuously argued that the reasoning in Mr. Kumar J. Sujan (Supra) is fallacious as imprisonment in default of payment of compensation cannot be treated as a sentence which is appealable in law. In this regard, reference has been made to Smt. Kuldip Kaur v. Surinder Singh & Anr., (1989) 1 SCC 405 and Shantilal v. State of M.P., (2007) 11 SCC 243. It is true that proviso to Section 376 Cr.P.C., inter alia, provides that a sentence of fine which is otherwise not appealable in view of the embargo engrafted in the said provision shall not become appealable due to a direction for imprisonment in default of payment of fine. In Shantilal (Supra) the Apex Court drew a distinction between substantive sentence and a direction for imprisonment in default of payment of fine, as follows:-

"31. ...The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount..."

Hence, there appears to be considerable force in the submission that a direction for imprisonment in default of payment of compensation cannot be treated as punishment or a substantive sentence which would render the order of compensation appealable in law.

12. However, the issue may be viewed from another angle. It is by way of purposive interpretation that the Apex Court in Vijayan (Supra) and R. Mohan (Supra) held that 'compensation' shall be deemed to be a 'fine' for the purposes of Section 64 of I.P.C. and in default of payment of such compensation the Court shall have the power to impose imprisonment upon the defaulter. Such purposive interpretation, therefore, creates a legal fiction and treats 'compensation' as 'fine' for the purposes of Section 64 of I.P.C. and thereby

prescribes a procedure established by law to deprive a defaulter of his liberty in case of failure to pay such compensation. It is trite law that a procedure established by law depriving liberty of an individual must be just, reasonable and fair so as to survive the test of constitutionality on the touchstone of Article 14 and 21 of the Constitution. Judged from this angle, any interpretative exercise which deems an `award of compensation" as `sentence of fine" for the purposes of Section 64 of I.P.C. and empowers the Court to impose imprisonment in default of payment of such compensation must also bring within the sweep of such legal fiction the appellate remedy available under Section 374 read with Section 376 of the Code of Criminal Procedure against the `sentence of fine" and hold that `compensation" in default of payment of which imprisonment may be imposed shall be deemed to be a `sentence of fine" for the purposes of such appellate remedy. In other words, if by judicial interpretation a procedure to impose imprisonment in default of payment of compensation is acknowledged by treating `compensation" as `fine", the remedy of appeal available against such `sentence of fine" must also be extended to `orders of compensation". To interpret otherwise would create an inequitable and unfair situation to the prejudice of an accused by permitting the Court to impose imprisonment in default of payment of compensation by treating it as a fine on the one hand but not permitting him to appeal against such order of compensation, on the other hand, since it is not a `sentence of fine".

13. Hence, I am of the view that the legal fiction equating `compensation" with `fine" for the purposes of Section 64 of the I.P.C. and permitting the Court to pass direction for imprisonment in default of payment of such compensation would be unjust, unfair and unconstitutional if such legal fiction is not extended to the appellate remedy engrafted in Section 374 read with Section 376 of the Cr.P.C. and compensations which are coupled with a direction for imprisonment as a default clause are not made appealable under the aforesaid provision of law as if it were a `sentence of fine".

14. Accordingly, I am of the opinion that a compensation which is treated as a fine in terms of Section 64 of I.P.C. and a direction for imprisonment is given in default of payment of such compensation is appealable under Section 374 read with Section 376 Cr.P.C. as if it was a `sentence of fine" for the purposes of such appellate remedy.

15. The impugned order passed by the trial Court is thus set aside. The Court below is directed to convert the revision proceeding into an appellate proceeding and to dispose of the same in accordance with law and at an early date.

16. I make it clear that I have not expressed any opinion as to the merits of the case which shall be decided independently by the lower appellate Court in accordance with law.

17. Urgent Photostat certified copy of this order, if applied for, be supplied to the learned Advocate for the parties, upon compliance with all requisite formalities.