

(2011) 02 OHC CK 0040
In the Orissa High Court
Case No : Criminal A. No. 22 of 2011

Sakila Majhi and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51
Constitution of India, 1950 — Article 11, 14, 19, 19(1), 21
Criminal Procedure Code, 1973 (CrPC) — Section 357(2), 357(5), 374, 374(2)
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 304(II), 34

Citation : (2011) 3 Crimes 205 : (2011) 1 OLR 980 : (2011) 4 RCR(Criminal) 381

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanju Panda, J.—Heard learned Counsel for the Petitioners and learned Additional Standing Counsel for the State.

2. This misc. case has been filed by the Appellant-Petitioners for condonation of delay of 133 days in filing the appeal.

3. The Appellant-Petitioners have filed the present Criminal Appeal challenging the judgment dated 2.7.2010 passed by the learned Addl. Sessions Judge, Rairangpur in C.T. Case No. 6 of 2009 convicting and sentencing them to undergo rigorous imprisonment for a period of seven years for the offence under Sections 304(II) read with Section 34 of the Indian Penal Code.

4. The Appellants are in custody since their arrest. They have preferred the appeal from the jail custody invoking the jurisdiction of this Court u/s 374(2) of the Code of Criminal Procedure which provides for a right of appeal. The right of appeal against a judgment of conviction is also considered as a fundamental right of an accused enshrined in Article 21 of the Constitution of India.

5. Learned Additional Standing Counsel for the State submitted that since there is delay of 133 days in filing the appeal, some cost may be imposed on the Appellants to be paid to the Welfare Fund of the Orissa High Court Bar Association as a condition for condonation of delay.

6. Having given consideration to the rival submissions of the parties, the question arises to determine as to whether a person who files an appeal against an order of conviction after expiry of period of limitation can ask to pay cost for condonation of delay before admission of the appeal or in other words can a condition be put for entertaining the appeal which is a constitutional and statutory right?

7. A right to appeal provides u/s 374 of the Code of Criminal Procedure against an order of conviction. The same is also the fundamental right of an accused as enshrined in Article 21 of the Constitution of India. The said Article 21 provides to a citizen for protection of life and personal liberty which reads that "no person shall be deprived of his life or personal liberty except according to procedure established by law" (emphasis supplied).

8. Procedure means, "Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself." (See *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*,)

9. A fair trial is the first imperative of the dispensation of justice. Further Article 22 of the Constitution of India gives protection against an arrest and detention in certain cases. Clauses I and II of the said Article 22 apply to a person arrested or detained under law otherwise than preventive detention. Article 21 supplement the various requirements laid down under Article 22 of the Constitution of India. Personal liberty is invaded by arrest and continues to be restrained during a period even if the person is on bail. Personal liberty cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a prisoner deprived of his freedom by Court sentence but entitles to an appeal against such verdict as part of his protection under Article 21 of the Constitution of India and as implied in his statutory right of appeal. It is a fact that a prisoner regardless means are particularly handicapped class. The morbid cell which confines them to walls cut off from the world outside. Legal remedies, Civil and Criminal, are obtained beyond their physical and even financial reach. Under the said circumstances in case cost imposed on them to condone the delay in filing the appeal will cause further hardship, inconvenience and the same will be prejudicial to their interest. A fundamental right at no stretch of imagination can be taken away by way of technicalities.

10. Keeping in view the above requirement of law, in my view, it is elementary that a person when arrested and produced first time before the Magistrate his personal liberty is at jeopardy so also a person who is inside the custody his

personal liberty is jeopardy. Therefore, imposing cost to condone the delay in filing the appeal by such convict will cause double jeopardy to his personal liberty, which is uncommon to criminal jurisprudence.

11. A litigant cannot take advantage of his laches while approaching the higher forum because after the decision of the Court passed against him, a valuable right accrues in favour of the winning side. However, Section 5 of the Limitation Act provides that in certain circumstances if an aggrieved person shows sufficient cause, the Court can entertain such appeal after condoning the delay to decide the case on merits. While condoning the delay in filing the appeal, the Court can award compensation to such person in whose favour the right has been accrued, for the inconvenience faced by him to entertain the appeal after the period of limitation. However, in case a person does not file any appeal against an order of conviction within the statutory period of limitation, no right is accrued in favour of the State because the State set in motion the process which deprives the personal liberty of the accused and prosecuted the prisoner. Ordinarily a litigant does not stand to benefit by lodging an appeal late. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

12. Considering the another aspect also since the right of appeal is a statutory right and constitutional right of a convict and in case he will not pay the cost as a condition to admit the appeal can his appeal be dismissed depriving him the constitutional right as enshrined in Article 21 of the Constitution of India ? The answer is "NO".

13. Law is well settled that no person should be permitted to take benefit of technical rule of limitation depriving the other side of its statutory right and constitutional right.

14. The apex Court in the case of Madhav Hayawadanrao Hoskot Vs. State of Maharashtra, declaring the legal position to put it beyond doubt held as follows:

1. Court shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;

2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgment thereof from him.

3. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the Jail Administration.

4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer.

5. That State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix.

6. These benign prescriptions operate by force of Article 21 (strengthened by Article 19(1)(d) read with sub-art.(5)) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril.

15. Further, in the case of Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Another, , the apex Court has held that Article 21 of the Constitution of India read with Section 374 Code of Criminal Procedure confers a right of appeal. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 as also the international covenants operating in the field, is also a fundamental right. Such a right is an absolute one. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

16. The apex Court in Dilip S. Dahanukar's case (supra) has further held as follows:

67. It is of some significance to notice that in Jolly George Varghese v. Bank of Cochin this Court opined:

10. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. Maneka Gandhi case as developed further in Sunil Batra v. Delhi Admn., Sita Ram v. State of U.P. and Sunil Batra (II) v. Delhi Admn. lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra narayana, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Section 51 Code of CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

11. The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree". This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of

Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution.

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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;

(Emphasis supplied)

(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 Sub-section (5) of Section 357 of the Code of Criminal Procedure;

(v) no unreasonable amount of compensation can be directed to be paid.

17. In view of the above position of law and when the accused, who has a right of appeal against the order of conviction, is inside the jail custody, it is the duty of the State to provide legal assistance. Even though Jail Welfare Officers are posted for the welfare of the prisoners, they are also not giving proper assistance to the prisoners. In such a situation, it cannot be expected from a prisoner that he will prefer an appeal against the order of conviction within the statutory period which is the fundamental right of the accused.

18. While considering the matter regarding condonation of delay in filing the appeal, a liberal view should be taken and imposition of cost in such a situation for condoning the delay will be very unreasonable, unfair and a burden on the accused which is not the fundamental principle of jurisprudence.

19. In the present case, since the Appellants are inside the jail custody and the State has not taken any step to provide legal assistance to them, this Court is of the view that no cost should be imposed on the Appellants to be paid to the Welfare Fund of the Orissa High Court Bar Association.

20. Accordingly, the delay in filing the appeal is condoned. No costs. Misc. Case is disposed of.