

Pranab Kumar Mitra

Vs

The State of West Bengal and Another

Criminal Appeal No. 116 of 1956

(CJI S. R. Dass, N. H. Bhagwati, B. P. Sinha, K. Subha Rao, K. N. Wanchoo JJ)

03.10.1958

JUDGMENT

SINHA J. -

The simple question for determination in this appeal on a certificate of fitness granted by the High Court of Judicature at Calcutta, is whether a pending application in revision made under section 439 of the Code of Criminal Procedure (to be referred to hereinafter as the Code), finally abates on the death of the petitioner in the High Court, and if so, to what extent.

It is not necessary to set out, in detail, the facts of the prosecution case and the evidence upon which the findings of the courts of fact were based, except to state that the appellant's father, Sailendra Sundar Mitra, was tried and convicted by a Magistrate of the first class, at Alipore. The Appellate Court has set out the case against the accused in these words : "The charge against the accused was that on the 2nd December, 1946, at Garden Reach, the accused, being an employee as Establishment Clerk of B.C. II Section in the Traffic Accounts Officer of B. N. Railway (now Eastern Railway), cheated the said B. N. Railway Administration by dishonestly inducing it by means of false representation in the pay bill of the non-gazetted staff for November, 1946, to deliver to him Rs. 205-13-0 and to one Satish Chandra Das Gupta, a clerk in the said B.C. II Section, Rs. 33-4-0 in excess of legitimate dues and thereby committed an offence punishable under section 420, I.P.C." The learned trial Magistrate convicted the accused person for cheating in respect of Rs. 205-13-0, but gave him the benefit of the doubt in respect of the sum of Rs. 33-4-0 claimed on behalf of another person, named Satish Chandra Das Gupta. He sentenced the accused to suffer one day's imprisonment (really, detention till the rising of the court, on the day the order was pronounced), and to pay a fine of Rs. 500/-, and in default, to rigorous imprisonment for six months more. He also directed that out of the fine, if realised, Rs. 333/- shall be paid to the B. N. Railway Administration (now, the South Eastern Railway) as compensation, by his order dated February 11, 1955. On appeal, the learned Additional Sessions Judge at Alipore (24, Parganas), after hearing the parties, dismissed the appeal, and confirmed the orders of conviction and sentence passed by the learned trial Magistrate, by his judgment dated May 9, 1955.

Being aggrieved by the judgment and orders of the courts below, the accused aforesaid moved the High Court in its revisional jurisdiction, under section 439 of the Code. The High Court issued a Rule which was registered as Criminal Revision Case No. 714 of 1955, and stayed the realization of the fine pending the hearing of the Rule. During the pendency of the case in the High Court, the accused person died on July 8, 1955, leaving him surviving his widow and five children, all of whom were minors except the appellant. The appellant made an application on December 6, 1955, stating that he was one of the heirs of the deceased accused (petitioner in the High Court), and that

he was interested in proceeding with the criminal revision case, and challenging the order of conviction and sentence, passed against his deceased father. He, therefore, prayed that he might be added as a party to the Criminal Revision Case No. 714 of 1955, so as to enable him to challenge the order of conviction and sentence aforesaid. This "application for substitution", as the Division Bench of the High Court has characterized it, was heard, and the Bench passed its order on the application on December 22, 1955, holding that the principle of section 431 of the Code, applied to a criminal revisional application even when there was a composite sentence but only in so far as the sentence of fine was concerned. The application for substitution was, therefore, allowed. The High Court also ruled that the conviction could not be challenged inasmuch as the sentence was a composite one of imprisonment as also fine, and that, therefore, the revisional application would survive only to the limited extent whether the sentence of fine was proper or unduly severe. The High Court, therefore, refused to go into the merits of the conviction, and confined itself to the question whether, in the circumstances of the case, the sentence of fine of Rs. 500/- was unduly severe. In view of the fact that the defence of the accused person was that he had over-charged on account of a mistake, and that he was prepared to refund the excess amount, the High Court directed that the sentence of fine be reduced to the sum charged in excess, namely, Rs. 205/13/-. It also directed that the whole of the amount of fine, if realized, shall be paid to the B. N. Railway Administration (now South Eastern Railway). Being dissatisfied with the aforesaid order of the High Court, the appellant moved the High Court and obtained the necessary certificate of fitness from the High Court. Hence, this appeal on a certificate under article 134(1)(c) of the Constitution, granted by the High Court.

There is no relevant provision in the Code, except section 431 which is the last section in Chapter XXXI of the Code, dealing with appeals, and is in these terms :-

"431. Every appeal under section 411A, sub-section (2), or section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."

It is manifest that the section, in terms, applies only to appeals, and lays down that an appeal against an order of acquittal passed by the High Court in exercise of its original criminal jurisdiction (section 411-A(2)), or an appeal to the High Court from an order of acquittal passed by any court other than the High Court, shall finally abate upon the death of the accused, and all appeals under Chapter XXXI, except an appeal from a sentence of fine, shall finally abate on the death of the appellant. The first part of the section dealing, as it does, with appeals against orders of acquittal, naturally, provides that such appeals must, necessarily, abate because the accused person has passed beyond the jurisdiction of the Court. The second part of the section deals with appeals by convicted persons or by a person who has been deprived of any property, or who has been ordered to furnish security, etc., and lays down that such appeals shall finally abate on the death of the appellant except appeals from a sentence of fine. As in the instant case, we are not directly concerned with the legal position as it may emerge on the death of the appellant or of an accused person as respondent, we need not go into the question whether an appeal would abate if it is from a conviction and sentence not only of fine but also of imprisonment though it may be till the rising of the court. We are here concerned with a case in which the convicted person had served out his nominal sentence of imprisonment (assuming that it was a legal sentence of imprisonment), and his application in revision was pending and was mainly concerned with challenging the order of conviction and sentence of fine, when the petitioner in the High Court died. As already indicated, section 431, in terms does not apply to such a case.

The case has, therefore, to be determined on first principles. It appears that the Criminal Procedure Code of 1882 (Act 10 of 1882), for the first time, introduced section 431. That section came up for consideration before a Division Bench of the Bombay High Court in its criminal revisional jurisdiction in the case of *In re Nabishah* ((1894) I.L.R. 19 Bom. 714). Shortly stated, the facts in that case were that two persons had been convicted of criminal breach of trust, and each one was sentenced to one year's rigorous imprisonment and a fine of Rs. 1,000. Both the convicted persons appealed to the High Court. One of them died during the pendency of the appeal. The appeal of the surviving appellant was allowed by the High Court, and his conviction and sentence were set aside. Thereupon, one of the relatives of the deceased appellant applied to the High Court in its revisional jurisdiction to set aside the conviction and sentence passed against the dead man, and for a refund of the fine (which appears to have been paid). It was held by the High Court without discussing the terms of the section and without giving any reasons for that conclusion, that the appeal in respect of the dead man had abated under section 431 of the Code. The High Court refused to deal with the case in its revisional jurisdiction on the ground that the case depended upon appreciation of evidence. It may be that the High Court came to that conclusion presumably on the ground that the appeal was not only against a sentence of fine but also against a substantive sentence of imprisonment. Where a sentence both of fine and of imprisonment, is passed, and an appeal or an application in revision is filed, the superior court may grant bail or may not. It may be that in a case where bail has not been granted, the convicted person may have served out his substantive sentence of imprisonment, and by the time his appeal or application in revision comes up for hearing, the substantial question to be determined by the High Court (or the Court of Session where the appeal may be pending), is the legality, correctness or propriety of the order of conviction and the outstanding sentence of fine. In such a case, it may be a debatable question whether the appeal or the application in revision has abated. Such a situation arose in the case of *Imperatrix v. Dongaji Andaji* ((1878) I.L.R. 2 Bom. 564). In that case, the accused person was sentenced, on a charge of forgery, to four years' rigorous imprisonment and a fine of Rs. 1,000 by the Court of Session. During the pendency of the appeal in the High Court, the appellant, who had not been released on bail, died in jail. The matter was placed before a Division Bench of Melvill and Kemball, JJ. Melvill, J., held that the appeal had abated on the death of the appellant, and the functions of the High Court as an Appellate Court, ceased. He also held that as there was no error of law in the order of conviction, nor had it been shown that the sentence was too severe, the High Court could not exercise its powers as a Court of Revision. In the course of his judgment, he pointed out that the legal representative of the deceased convicted person is, no doubt, interested in procuring a reversal of a sentence of fine or of forfeiture of property, but as the Code of Criminal Procedure, 1872 (Act X of 1872), did not confer any right of appeal on the legal representative after the death of convict, the appeal could not be heard and determined on merits. Kemball, J., agreed with Melvill, J., that the legal representative of the deceased convict could not prosecute the appeal, but he did not agree with him in the view that the appeal had abated, and that the functions of the High Court as the Appellate Court, came to an end on the death of the appellant. He took the view that as the record was before the Court, the Court could pass such orders in the appeal as it thought proper. His view appears to have been that with the death of the convicted person, the question of serving out the whole or a portion of the sentence of imprisonment, no more survived, but as the property of the deceased convict, in the hands of the legal representative, continued to be liable for the payment of the fine, if unpaid during the period provided by law, it was the interest of the legal representative to have the case considered on merits. Ultimately, he came to the conclusion that there was no doubt that the High Court could dispose of the case as a Court of Revision, but he also thought that the Court was bound to decide the case as a Court of Appeal. On this difference of opinion between the two learned Judges, the matter was placed before Westropp, C.J. The learned Chief Justice agreed

with Melvill, J., that the Code had not made any provision for the continuance of an appeal by the legal representative of a deceased convict, nor did the High Court have the power to deal with the appeal on the death of the convicted person. He based his conclusion substantially on the ground that the right to appeal or to continue an appeal already pending, is given by Statute expressly or by necessary implication. This view now finds statutory recognition in section 431. He also held that though the appeal had abated, the High Court had the power to call for the record and exercise its revisional jurisdiction suo motu, but he did not express any opinion whether in the case before the Court, such a power could be exercised.

In our opinion, in the absence of statutory provisions, in terms applying to an application in revision, as there are those in section 431 in respect of criminal appeals, the High Court has the power to pass such orders as to it may seem fit and proper, in exercise of its revisional jurisdiction vested in it by section 439 of the Code. Indeed, it is a discretionary power which has to be exercised in aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by section 439 of the Code, read with section 435, do not create any right in the litigat, but only conserve the power of the High Court to see that justice is done in accordance with the recognized rules of Criminal Jurisprudence, and that subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code. On the other hand, as already indicated, a right of appeal is a statutory right which has got to be recognized by the courts, and the right to appeal, where one exists cannot be denied in exercise of the discretionary power even of the High Court. The Legislature has, therefore, specifically provided, by section 431 of the Code, the rules governing the right of substitution in case of death of an appellat, but there is no corresponding provision in Chapter XXXII, dealing with the question of abatement and the right of substitution in a criminal revision. We may assume that the Legislature was aware of the decision of the Bombay High Court, referred to above, when it enacted section 431 for the first time in the Code of 1882. If the Legislature intended that an application in revision pending in a High Court, should be dealt with on the same footing as a pending appeal, it would have enacted accordingly. But in the absence of any such enactment, we may infer that the power of revision vested in the High Court under Chapter XXXII of the Code, was left untouched - to be exercised according to the exigencies of each case. The High Court is not bound to entertain an application in revision, or having entertained one, to order substitution in every case. It is not bound the other way, namely, to treat a pending application in revision as having abated by reason of the fact that there was a composite sentence of imprisonment and fine, as some of the single Judge decisions placed before us, would seem to indicate. The High Court has been left complete discretion to deal with a pending matter on the death of the petitioner in accordance with the requirements of justice. The petitioner in the High Court may have been an accused person who has been convicted and sentenced, or he may have been a complainant who may have been directed under section 250 of the Code to pay compensation to an accused person upon his discharge or acquittal. Whether it was an accused person or it was a complainant who has moved the High Court in its revisional jurisdiction, if the High Court has issued a Rule, that Rule has to be heard and determined in accordance with law, whether or not the petitioner in the High Court is alive or dead, or whether he is represented in court by a legal practitioner. In hearing and determining cases under section 439 of the Code, the High Court discharges its statutory function of supervising the administration of justice on the criminal side. Hence, the considerations applying to abatement of an appeal, may not apply to the case of revisional applications. In our opinion, therefore, the Bombay majority decision ((1878) I.L.R. 2 Bom. 564), in the absence of any statutory provisions in respect of criminal revisional cases, lays down the correct approach.

There are a number of decisions in the books, mostly of Judges sitting singly, that though section 431, in terms, does not apply to revisional applications, the principle of that section applied to such cases. It is not necessary to refer to those cases specifically. In view of the fact that even in the absence of any statutory provisions, we have held, in agreement with the decision aforesaid of the Bombay High Court, that the High Court has the power to determine the case even after the death of the convicted person, if there was a sentence of fine also imposed on him, because that sentence affects the property of the deceased in the hands of his legal representative, it now remains to consider whether the High Court was right in limiting its power of revision to the question of fine only - whether it was proper or excessive - without going into the merits of the order of conviction. Once it is held that the High Court's revisional jurisdiction is attracted to such a case, it is difficult to limit the exercise of such a power in the way the High Court has done. Under section 439 of the Code, the discretion is vested in the High Court to exercise such of the powers of an Appellate Court, as may be attracted to the case, and it has also the power to enhance a sentence subject to the proviso that no order to the prejudice of an accused person, shall be made unless he has had the opportunity of being heard. In the instant case, we are not concerned with the question of enhancement of sentence; we are concerned with the question whether there is any provision in the Code, which limits the discretionary power of the High Court to examine the "correctness, legality or propriety of any finding, sentence or order" - (section 435), passed by any inferior Court. On the death of the convicted person, the question of his serving the whole or a portion of his sentence of imprisonment, does not arise. But the sentence of fine still remains to be examined - whether it was well-founded in law. This question cannot be effectively gone into unless the order of conviction itself is examined on its merits. If the fact that the fine will have to be paid out of the estate of the deceased appellant or petitioner in revision, is the ground for giving the heir or legal representative a right to continue the appeal or a privilege of maintaining or continuing a revision, the same principle should entitle him to question the correctness of the conviction itself, for, if the conviction remains, at least some fine, however nominal, will have to be paid by the heir or the legal representative out of the estate of the deceased. In our opinion, therefore, where the High Court thinks it fit and proper to entertain an application in revision or calls for the record suo motu, it has the power to examine the whole question of the correctness, propriety or legality of the sentence of fine, which necessarily involves examining the order of conviction itself from that point of view.

For the reasons aforesaid, we allow the appeal, and remit the case to the High Court to be dealt with in accordance with law.

Appeal allowed.

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