

SHRI SHANKAR PRASAD GHOSH (DEAD)

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v

THE STATE OF BIHAR & ANR.  
(Criminal Appeal No.473 of 1998)

JUNE 13, 2008

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[DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.]

*Code of Criminal Procedure, 1973:*

*s.394, proviso – Appeal – Abatement of, on death of appellant – Leave to continue the appeal by relative – Delay in – Effect of – On facts, Conviction of appellant under Penal Code and Prevention of Corruption Act challenged before Supreme Court – Death of appellant during pendency of appeal – Application for substitution filed after five years – No sufficient cause shown for delayed presentation – Held: Appeal shall abate.*

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*s.394 – Applicability of, to appeal before Supreme Court – Held: Applicable.*

**The appellant-accused was held guilty of offence punishable under the Penal Code, 1860 and Prevention of Corruption Act. Various custodial sentences and fine were imposed. The High Court upheld the conviction but altered the sentences to the period already undergone. The fine amount was, however, maintained alongwith default stipulation.**

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**Appellant filed leave to appeal which was granted on 20.4.1998 but no stay was granted. During the pendency of the appeal, appellant died on 15.5.2000. After about 5 years applications were filed purportedly in terms of s.394 (2) Cr.P.C. to bring on record the legal heirs of the deceased appellant for the purpose of continuance of the appeal.**

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A Respondent-State submitted that s.394 has no application to the appeal before the Supreme Court; that in any event, time statutorily prescribed is 30 days; that in the instant case, applications were filed nearly 5 years after the date of the death of the appellant and that no explanation was offered as to why the applications were filed after such a long time and that there was no scope for condoning any delay beyond the fixed period of 30 days.

Disposing of the appeal, the Court

C HELD : 1. S.394 of the Cr.P.C. reads that every appeal shall finally abate on the death of the appellant. The proviso to that section says that where the appeal is against a conviction and sentence of death or of imprisonment and the appellant dies during the pendency of the appeal, any of his relatives, which expression is defined by the explanation appended to this proviso may within 30 days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate. [Para 5] [1167-G, 1168-A,B]

E *S.V. Kameswar Rao and Anr. v. State A.C.B. Police, Karnool District, Andhra Pradesh (1991) Supp 1 SCC 377 – relied on*

F *State of A.P. v. S. Narasimha Kumar and Ors. (2006) 5 SCC 683; Harnam Singh v. The State of Himachal Pradesh (1975) 3 SCC 343 –referred to.*

G 2. The principles embodied in s. 394 of the Cr.P.C. can be pressed into service in appeals before this Court. It is true that the period of 30 days has been statutorily fixed for making an application by the legal heirs. In the instant case, the applications were filed after about 5 years. No explanation has been offered for delayed presentation. The appeal has abated on the death of the appellant. [Para 7] [1169-G,H, 1170-A,B]

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SHRI SHANKAR PRASAD GHOSH (DEAD) v. THE 1165  
STATE OF BIHAR & ANR. [DR. ARIJIT PASAYAT, J.]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A  
No. 473 of 1998

From the Judgment and final Order dated 26.11.1997 of  
the High Court of Judicature at Patna in Crl. Appeal No. 25 of  
1984

Ranjan Mukherjee for the Appellant. B

Gopal Singh and Manish Kumar for the Respondents.

The Judgment of the Court was delivered by

**Dr. ARIJIT PASAYAT, J.** 1. One Shankar Prasad Ghosh C  
had filed the present appeal before this Court questioning cor-  
rectness of the judgment rendered by a learned Single Judge  
of the Patna High Court. By a common judgment the learned  
Special Judge (CBI), South Bihar, Patna had found each of the D  
accused persons guilty of offence punishable under Sections  
409, 477A read with Section 34, 467 and 471 of the Indian Penal  
Code, 1860 (in short the 'IPC'). It also found the accused guilty  
of offence punishable under Section 5(2) read with Section  
4(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act,  
1947 (in short the 'Act'). Various custodial sentences and fine E  
were imposed. The judgment of the Special Judge was assailed  
in appeal before the High Court which dismissed the appeal.  
The High Court upheld the conviction but altered the sentences  
to the period already undergone. The fine amount was, how-  
ever, maintained alongwith default stipulation. F

2. In this case leave was granted on 20.4.1998 but no stay  
was granted. During the pendency of the appeal, appellant-  
Shankar Prasad Ghosh died on 15.5.2000. After about 5 years  
applications have been filed purportedly in terms of Section 394  
(2) of the Code of Criminal Procedure, 1973 (in short the 'Code') G  
to bring on record the legal heirs of the deceased appellant for  
the purpose of continuance of the appeal. On 15.3.2007 it was  
directed that the applications shall be considered when the  
appeal will be taken up for hearing.

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A 3. Learned counsel for the respondent-State submitted that  
there is no scope for accepting the applications. Section 394  
has no application to the appeal before the Supreme Court. In  
any event, time statutorily prescribed is 30 days. In the instant  
B case, applications have been filed nearly 5 years after the date  
of the death of the appellant-Shankar Prasad Ghosh. Even no  
explanation has been offered as to why the applications were  
filed after such a long time. Accordingly, he submitted that there  
is no scope for condoning any delay beyond the fixed period of  
30 days.

C 4. In *State of A.P. v. S. Narasimha Kumar and Ors.* (2006  
(5) SCC 683), it was noted as follows:

D "6. In *Bondada Gajapathi Rao v. State of Andhra Pradesh*  
(AIR 1964 SC 1645) three-judge Bench of this Court was  
dealing with the situation as to whether appeal by special  
leave against sentence of imprisonment abates on the  
death of the accused/appellant. Three separate judgments  
were rendered by the Hon'ble Judges. The principles as  
can be culled out from the said decision are as follows:  
E (though rendered in the context of the Old Code are equally  
applicable under the Cr.P.C.).

(1) Section 431 of the Old Code does not apply proprio  
vigore to a case of appeal filed with the special leave of  
the Supreme Court granted under Article 136 of the  
F Constitution of India, 1950 (in short the 'Constitution') when  
the appellant-accused dies pending the appeal.

(2) But where the appeal is against sentence of fine, the  
appeal may be permitted to be continued by the legal  
representatives of the deceased appellant accused. There  
G is no provision making such appeals abate. If they can be  
continued when arising under the Old Code, there is no  
reason why they should not be continued when arising  
under the Constitution. If revision petitions may be allowed  
to be continued after the death of the accused so should  
H appeals, for between them no distinction in principle is

possible for the purpose of continuance.

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(3) The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allowed to continue it.

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(4) But where the sentence is not one of fine but of imprisonment, which on the death of the accused becomes infructuous, the sentence does not affect the property of the deceased-accused in the hands of his legal representatives, and therefore, the appeal, in such a case, would abate, upon the death of the accused.

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(5) In fact that the accused was a government servant and was under suspension during the trial and the fact that if the conviction and sentence were set aside, his estate would be entitled to receive full pay for the period of suspension, cannot be said to affect his estate, because, the setting aside of the sentence would not automatically entitle the legal representatives to the salary. It would be extending the principle applied to the case of a sentence of fine, if on the basis of it appeal against imprisonment is allowed to be continued by the legal representatives after the death of the appellant and for such an extension there is no warrant. Reference was made to *Pranab Kumar Mitra vs. State of West Bengal and Anr.* (AIR 1959 SC 144).

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5. In *S.V. Kameswar Rao and Anr. v. State (A.C.B. Police, Karnool District, Andhra Pradesh)* (1991 Supp (1) SCC 377), it was inter-alia observed as follows:

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“5. Section 394 of the Code of Criminal Procedure reads that every appeal shall finally abate on the death of the appellant. The proviso to that section says that where the

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A appeal is against a conviction and sentence of death or  
of imprisonment and the appellant dies during the pendency  
of the appeal, any of his relatives, which expression is  
B defined by the explanation appended to this proviso may  
within 30 days of the death of the appellant, apply to the  
appellate court for leave to continue the appeal; and if  
leave is granted, the appeal shall not abate. In the present  
case, none of the relatives of the deceased within the  
term of the explanation to the proviso has approached  
C this Court within 30 days for leave to continue the appeal.  
This present application is filed nearly after a period of 10  
years. No explanation is given in this application for not  
approaching the court within that prescribed period and  
no sufficient cause is shown for condonation of such undue  
and inordinate delay of 10 years. A decision of this Court  
D in *P.S.R. Sadhanantham v. Arunachalam* is relied on in  
the petition wherein it has been held thus: (SCC p. 145,  
para 7)

E "Article 136 is a special jurisdiction. It is residuary  
power; it is extraordinary in its amplitude, its limit,  
when it chases injustice, is the sky itself."

6. In *Harnam Singh v. The State of Himachal Pradesh*  
(1975 (3) SCC 343 at paras 7, 14 and 15) it was observed as  
follows:

F "7. The appeal before us was filed by special leave granted  
under Article 136 of the Constitution and is neither under  
Section 411-A(2) nor under Section 417 nor under any  
other provision of Chapter XXXI of the Code. Plainly  
therefore, Section 431 has no application and the question  
G whether the appeal abated on the death of the appellant  
is not governed strictly by the terms of that section. But, in  
the interests of uniformity, there is no valid reason for  
applying to appeals under Article 136 a set of rules different  
from those which govern appeals under the Code in the  
H matter of abatement. It is therefore necessary to find the

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true meaning and scope of the provision contained in A  
Section 431.

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14. If this be the true interpretation of Section 431, there B  
is no reason why the same principle ought not to be  
extended to criminal appeals filed in this Court under Article  
136 of the Constitution. Accordingly the widow of the  
deceased appellant who has been brought on the record  
of the appeal as his legal representative is entitled to  
continue the appeal as the sentence of fine directly affects C  
the property which would devolve on her on the death of  
her husband.

15. In *Bondada Gajapathy Rao v. State of A.P.* the appellant D  
was convicted by the High Court under Section 302 of the  
Penal Code and was sentenced to imprisonment for life.  
He filed an appeal in this Court by special leave but died  
during the pendency of the appeal. His sons and daughter  
applied for substitution as his legal representatives  
contending that the conviction of their father had resulted  
in his removal from Government service and if the E  
conviction were set aside the estate will be able to claim  
the arrears of salary from the date of conviction till the  
date of his death. This Court declined to permit the legal  
representatives to continue the appeal on the ground that  
the claim on the strength of which they sought permission F  
to continue the appeal was too remote. This decision is  
distinguishable as the appeal was not from a sentence of  
fine and as the interest of the legal representatives was  
held to be contingent and not direct. Even if the conviction  
were set aside, the legal representatives would not have G  
automatically got the arrears of salary due to their father."

7. In view of what has been stated by this Court in the afore-  
noted cases the principles embodied in Section 394 of the Code  
can be pressed into service in appeals before this Court. It is  
true that the period of 30 days has been statutorily fixed for H

- A making an application by the legal heirs. In the instant case, the applications were filed after about 5 years. We need not go into the question as to whether there is scope for condonation of delay as no explanation has been offered for the delayed presentation. In that view of the matter, the observations of this
- B Court in *Kameswar Rao's* case (*supra*) are clearly applicable. The appeal has abated on the death of the appellant-Shankar Prasad Ghosh and is disposed of accordingly.

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Appeal Disposed of