

A HARI PRASAD CHHAPOLIA (DEAD)

v.

UNION OF INDIA

(Criminal Appeal No.82 of 2002)

JUNE 20, 2008

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[DR. ARIJIT PASAYAT AND G.S. SINGHVI, JJ.]

Code of Criminal Procedure, 1973:

C 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 the Gold Act challenged before Supreme Court – Death of appellant during pendency of appeal – Matter adjourned several times at request of counsel for allowing substitution of relative – Application for substitution filed after one year – No sufficient cause shown for delayed presentation – Held: Appeal shall abate – Gold (Control) Act, 1968.

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

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The appellant was convicted for offences punishable under Customs Act, 1962 and under Gold (Control) Act, 1968 by the trial Court. The High Court set aside the conviction for the offence punishable under Customs Act and upheld the conviction for the offence punishable under Gold Act.

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Appellant filed leave to appeal which was granted by this Court by order dated 17.1.2002. The matter was adjourned to 12.6.2007 when it was mentioned that the appellant has died.

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The matter was again adjourned and on 25.10.2007 six weeks' time was granted to the counsel to file vakalatnama and memo of appearance on behalf of legal

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heirs of the deceased appellant. No application was filed for bringing on record the legal heirs of the deceased appellant. On 4.1.2008, application was filed for substitution for bringing legal heirs of the appellant on record along with the application for condonation of delay. The only ground indicated in the application seeking condonation was that the legal heirs of the appellant were not aware that the death of their father had to be intimated to the counsel for preparing and filing the application for substitution and when they came to know about this requirement they contacted their counsel and filed the application.

The respondent submitted that there is no scope for accepting the application; that s.394 Cr.P.C. has no application to an appeal before the Supreme Court; that in any event, time statutorily prescribed is 30 days and application has been filed nearly after one year of the death of the appellant and also no explanation was offered for delayed application and therefore there was no scope for condoning delay beyond the period of 30 days.

Disposing of the appeal, the Court

HELD: 1. S.394 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] [68- B & C]

2. The principles embodied in s.394 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

A case, the application was filed nearly after one year. Several times the matter was adjourned at the request of counsel who appeared for the original appellant. The plea that the legal heirs did not know the requirement is clearly without any substance. The appeal has abated on the death of the appellant. [Paras 7, 8] [70-B, C & D]

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

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

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 82 of 2002

D From the final Judgment and Order dated 10.9.2001 of the High Court of Orissa at Cuttack in Crl. Revision No. 470 of 1994

V.K. Monga for the Appellant.

E P.P. Malhotra, A.S.G., Vikas Sharma, B.V. Balaram Das and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by

F Dr. **ARIJIT PASAYAT, J.** 1. This appeal was filed challenging the correctness of the judgment of a learned Single Judge of the Orissa High Court. The appellant-Hari Prasad Chhopolia was convicted for offences punishable under Sections 135(b)(1) of the Customs Act, 1962 (in short the 'Customs Act') and Section 85 (ii), (iii), (viii) and (ix) of the Gold (Control) Act, 1968 (in short the 'Gold Act') by the trial Court. G The High Court by the impugned order set aside the conviction and sentence for the offence punishable under Section 135(b)(1) of the Customs Act while upholding the conviction for the offence punishable under Section 85 of the Gold Act. Leave was H granted by this Court by order dated 17.1.2002. The matter was

listed for hearing on 7.6.2007 when none appeared for the appellant. The matter was adjourned to 12.6.2007 when it was mentioned that the appellant-Hari Prasad Chhapolia has died. Learned counsel for the appellant wanted to take instructions and, therefore, the matter was directed to be listed after three weeks. The matter was listed on 17.7.2007 when on the prayer made by the learned counsel for the appellant the matter was adjourned by four weeks. On 29.8.2007 the following order was passed:

“Learned counsel for the appellant prays for time. From the order sheet, it is clear that on June 12, 2007 the matter was called for final hearing before the vacation Bench. At that time, it was stated that the appellant has expired. The learned counsel for the appellant sought time to get instructions. Accordingly, the matter was adjourned. Again the matter was placed on July 17, 2007 and on that day also order was passed to list the matter after four weeks.

Even today, learned counsel for the appellant prays for time. As a last chance, list the matter after two weeks.”

2. On 25.10.2007 six weeks' time was granted to the counsel to file vakalatnama and memo of appearance on behalf of legal heirs of the deceased appellant. It is to be noted that by that time no application for bringing on record the legal heirs of the deceased appellant had been filed. Again on 11.12.2007, at the request of learned counsel who appeared for the deceased appellant, the matter was directed to be listed after one week. On 11.6.2008, on request the matter was directed to be listed today. It appears that an application has been filed on 4.1.2008 for substitution for bringing legal representatives of the appellant on record along with the application for condonation of delay. The only ground indicated in the application seeking condonation was that the legal heirs of the appellant were not aware that the death of their father has to be intimated to the counsel at Delhi for preparing and filing the application for substitution. The moment they knew about this requirement they

A contacted their counsel and application has been filed on 4.1.2008.

B 3. Learned Additional Solicitor General appearing for the respondent submitted that there is no scope for accepting the application. Section 394 of the Code of Criminal Procedure, 1973 (in short the 'Code') has no application to an appeal before the Supreme Court. In any event, time statutorily prescribed is 30 days. In the instant case, application has been filed nearly after one year of the death of the appellant-Hari Prasad Chhapolia. Therein also no explanation has been offered as to why the application was filed after such a long time. Accordingly, he submitted that there is no scope for condoning delay beyond the period of 30 days.

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

E "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: (though rendered in the context of the Old Code are equally applicable under the Cr.P.C.).

F (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 Constitution of India, 1950 (in short the 'Constitution') when the appellant-accused dies pending the appeal.

G (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.

H There 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 appeals, for between them no distinction in principle is possible for the purpose of continuance.

- (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.
- (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.
- (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*

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A *and Anr.* (AIR 1959 SC 144).

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:

B “5. Section 394 of the Code of Criminal Procedure reads
C that every appeal shall finally abate on the death of the
D appellant. The proviso to that section says that where the
E appeal is against a conviction and sentence of death or
F 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. In the present
case, none of the relatives of the deceased within the
term of the explanation to the proviso has approached
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
in *P.S.R. Sadhanantham v. Arunachalam* is relied on in
the petition wherein it has been held thus: (SCC p. 145,
para 7)

“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.”

G 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:

H “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 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 matter of abatement. It is therefore necessary to find the true meaning and scope of the provision contained in Section 431.

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14. If this be the true interpretation of Section 431, there 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 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 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 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 to continue the appeal was too remote. This decision is distinguishable as the appeal was not from a sentence of

A 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 automatically got the arrears of salary due to their father.”

B 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
making an application by the legal heirs. In the instant case, the
application was filed nearly after one year. We need not go into
C the question as to whether there is scope for condonation of
delay as no acceptable explanation has been offered for the
delayed presentation.

D 8. Several times the matter was adjourned at the request
of learned counsel who appeared for the original appellant. The
plea that the legal heirs did not know the requirement is clearly
without any substance. The appeal has abated on the death of
the appellant and is disposed of accordingly.

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Appeal disposed of.