

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 31ST DAY OF JULY 2024 / 9TH SRAVANA, 1946

OP(CRL.) NO. 379 OF 2024

(AGAINST THE ORDER DATED 19.12.2023 IN CRL.M.P.NO.468/2023
IN CRA NO.12 OF 2023 OF SESSIONS COURT, THODUPUZHA)

(S.T.NO.1183/2016 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,
ADIMALY)

PETITIONER/WIFE OF THE DECEASED APPELLANT:

DHANYA SAJITH, AGED 43 YEARS
W/O. LATE SAJITH S MENON, SUPRABHATHAM HOUSE ,
K.P.VALLON ROAD, KADAVANTHRA POST,
ERNAKULAM DISTRICT, PIN - 682020
BY ADVS.R.PREMCHAND
A.A.DILSHAH
M.VEENA

RESPONDENTS/1ST RESPONDENT AND STATE:

- 1 M R BINOY MATHEW, AGED 54 YEARS
S/O.MATHEW, MUTHANATTU HOUSE,
CHERUPURAM KARA, MAMMATTIKKANEM POST,
IDUKKI DISTRICT, PIN - 685566.
- 2 STATE OF KERALA
REPRESENTED THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031.
BY ADVS.GEORGE MATHEW KARAMAYIL
SUNIL KUMAR A.G(K/000741/2003)
MATHEW K.T.(K/001047/2018)
GEORGE K.V.(K/000060/2019)
STEPHY K REGI(K/001025/2020)
MEDHA B.S.(K/001625/2023)
R2 BY SR.P.P.SRI.C.N.PRABHAKARAN

THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD ON
31.07.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

“C.R.”

JUDGMENT

The challenge in this Original Petition is to the order dated 19.12.2023 in CrI.M.P.No.3281/2023 in CrI.A.No.12/2023 on the file of the Sessions Court, Thodupuzha.

2. The petitioner is the wife of the appellant. The original appellant was the accused in S.T.No.1183 of 2016 on the file of the Judicial First Class Magistrate Court, Adimaly. He was convicted by the trial Court under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment till rising of the Court and pay a fine of Rs.10,00,000/-. The learned Magistrate also directed that if the fine amount is realised, it shall be paid to the complainant as compensation under Section 357 of the Code of Criminal Procedure.

3. The original appellant challenged the judgment of conviction and sentence before the Sessions Court, Thodupuzha. The original appellant died on 11.10.2023. His wife filed an application under the proviso to Section 394 of the Cr.P.C. seeking leave to continue the appeal. The Sessions Judge dismissed the petition holding that the appeal had abated with the death of the original appellant.

4. I have heard the learned counsel for the petitioner, the

learned counsel appearing for the party respondent and the learned Public Prosecutor.

5. The learned counsel for the petitioner submitted that the order of the Sessions Court recording that the appeal stood abated is against the statutory mandate of Section 394 of the Cr.P.C. The learned counsel submitted that even if the near relatives of the original appellant did not come forward, and requested to continue the appeal, the Court below was bound to proceed with the appeal against the sentence of fine.

6. The learned counsel for the party respondent submitted that the petitioner had not explained the delay in making the application under the proviso to Section 394 Cr.P.C..

7. The learned Public Prosecutor submitted that the Sessions Judge committed illegality while recording that the appeal had abated when the challenge was on a composite sentence of fine and imprisonment.

8. The learned counsel for the petitioner relied on **Ramesan (dead) Through Lr.Girija A. v. State of Kerala [(2020) 3 SCC 45]**. in support of his contention. The learned counsel for the party respondent relied on **Hariprasad Chhapolia v. Union of India [(2008) 7 SCC 690]**.

9. The following facts are not in dispute:

- 1) The trial Court convicted the original appellant and sentenced him to undergo simple imprisonment till the rising of the Court and pay a fine of Rs.10,00,000/- under Section 138 of the N.I. Act.
- 2) The original appellant died on 11.10.2023.
- 3) The petitioner, the wife of the original appellant, filed an application under the proviso to Section 394 Cr.P.C. on 4.12.2023.
- 4) The trial Court had directed that if the fine amount is realised, it shall be paid to the complainant as compensation.

10. The learned Sessions Judge applied the following reasonings:

- a) As the trial Court directed to pay the fine amount, if realised, to the complainant as compensation, there is no component of the fine.
- b) The petitioner has not offered any explanation for condoning the delay in filing the petition under the proviso to Section 394 Cr.P.C.

11. The learned Sessions Judge rightly understood the statutory mandate of Section 394 Cr.P.C. The learned Sessions Judge recorded the following:-

“On a bare reading of section 394 of Cr.P.C. no appeal shall abate, if it involves a sentence of fine even on the death of the appellant. The principle is that on the death of an appellant, the appeal abates only if it is from a sentence of imprisonment, and it does not abate if it is

from a sentence of fine.”

12. The Sessions Court erroneously understood the import of Section 53 IPC and Section 357 Cr.P.C.

13. The learned Sessions Judge recorded the following finding:-

“In effect, the court below was ordered to pay a compensation equivalent to the cheque amount to the complainant. It is the general principle that fine is to the exchequer and the compensation to the party. Hence the order passed by the court below is only to be considered as payment of compensation to the complainant by the drawer of the cheque.”

14. The learned Sessions Judge came to the conclusion that since the trial Court directed that if the disbursement of the entire fine amount is towards compensation, the order or sentence is to be treated as payment of compensation. The sentence of fine imposed is fundamentally a punishment as defined under Section 53 of the IPC. Undoubtedly, the sentence imposed in the present case is a composite sentence of fine and imprisonment. Therefore, the appeal shall not abate on the death of the appellant and the court is bound to decide the appeal on merits after giving sufficient opportunity to the near relatives of the appellant to proceed with the appeal against the sentence of fine (Vide: **Ramesan (dead) Through Lr.Girija A. v. State of Kerala**

[(2020) 3 SCC 45]. Therefore, the finding of the Sessions Court that the appeal stood abated is only liable to be set aside.

15. The learned Sessions Judge further found that the petitioner failed to offer sufficient explanation to condone the delay in filing the petition. As per the proviso to Section 394 Cr.P.C., the near relatives ought to have applied for leave to continue the appeal within 30 days of the death of the appellant. In the present case, the petitioner, the wife of the original appellant, filed the petition after 50 days. There is a delay of 20 days in preferring the application seeking leave. The learned counsel for the petitioner explained the reasons for the delay as follows:-

- (1) The petitioner had no knowledge regarding the pendency of the appeal.
- (2) She could recover from the shock of the untimely death of her husband only late.

16. This is the case where a young lady of 43 years, after the untimely death of her husband, could only file the application seeking leave after a delay of 20 days. The reason for the delay is self-explanatory. The facts in **Hariprasad Chhapolia v. Union of India [(2008) 7 SCC 690]** relied on by the Sessions Court is different from the facts in the present case. In **Hariprasad Chhapolia**, the

application seeking leave was filed one year after the death of the appellant. Therefore, the ratio in **Hariprasad Chhapolia** is not applicable to the present facts. I am of the considered view that the petitioner has offered sufficient explanation for the delay.

17. In the result, Crl.A.No.12/2023 is restored to file. The learned Sessions Judge is directed to proceed with the appeal in the light of the principles declared by the Apex Court in **Ramesan** (supra).

The Original Petition is allowed as above.

Sd/-
K.BABU
Judge

TKS