(2023) 12 OHC CK 0042

In the Orissa High Court

Case No : I.A. No.2367 Of 2022

Ghanashyam Meher APPELLANT

Vs

State Of Odisha (Vig.) RESPONDENT

Date of Decision : 11-12-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 164, 389, 389(1)
Prevention of Corruption Act, 1988 — Section 7, 13(1)(d), 13(2)

Citation : (2023) 12 OHC CK 0042

Hon'ble Judges : S.K. Sahoo, J

Bench : Single Bench

Advocate : Devashis Panda, Sanjaya Kumar Das

Final Decision : Disposed Of

Judgement

S.K. Sahoo, J

1. The appellant/petitioner Ghanashyam Meher who was working as the Senior Clerk in the Junagarh Tahasil office has filed this I.A. under section 389 of Cr.P.C. for stay of order of conviction imposed on him by the impugned judgment dated 14.12.2022 passed by the learned Additional Sessions Judge -cum- Special Judge (Vigilance), Bhawanipatna in G.R. (Vigilance) Case No.22 of 2015/T.R. No.14 of 2016 in convicting him under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sentencing him to undergo rigorous imprisonment for six months and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further R.I. for one month for the offence under section 7 of the 1988 Act and R.I. for one year and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo R.I. for a further period of three months for the offence under section 13(2) of the 1988 Act and directing both the substantive sentences to run concurrently.

2. The prosecution case, in short, is that P.W.5 Kulamani Meher lodged a written report before the Deputy Superintendent of Police (Vigilance), Bhawanipatna Unit

on 10.09.2015 stating therein that on 18.08.2015, he submitted a written report before the Inspector in-charge of Junagarh police station against one Nimain Dalpati and Gobinda Meher as they forcibly possessed some land under Khata No.88 in Mouza-Brahmaniguda, which stood recorded in the R.O.R. in the name of his grandfather and the said fact was entered in the Station Diary vide No.346 dated 18.08.2015. According to P.W.5, the Inspector in-charge of Junagarh police station by a letter requested the Tahasildar, Junagarh for demarcation of the said land who in turn directed the R.I., Kulihari to demarcate. The file of the demarcation case was with the petitioner. According to P.W.5, on 23.08.2015 he met the petitioner and asked him to send the order of the Tahasildar to the R.I., but the petitioner expressed that the said work could not be done immediately and it would take some eight to ten days time and a sum of Rs.500/-(rupees five hundred) would be required for the same. It is further stated that on 10.09.2015 at 12.50 p.m., P.W.5 again met the petitioner and expressed that he was unable to pay such amount, but the petitioner insisted that unless P.W.5 paid Rs.500/-(rupees five hundred), he would not send the demarcation order to the R.I. and therefore, P.W.5 agreed to pay the amount. The petitioner asked P.W.5 to bring cash of Rs.500/- (rupees five hundred) on the next day for which P.W.5 approached the Vigilance Officer.

The written report being received by the D.S.P. (Vigilance), Bhawanipatna Unit, was sent to the Superintendent of Police (Vigilance), Koraput Division, Jeypore, who directed for registration of the case. The Superintendent of Police (Vigilance) also directed the Inspector of Police (Vigilance) Shri Narendra Kumar Behera (P.W.6) to lay a trap and directed the D.S.P. (Vigilance) Shri Ananta Kumar Majhi (P.W.7) to take up investigation of the case after detection. Accordingly, Koraput Vigilance P.S. Case No.48 dated 10.09.2015 was registered under section 7 of the 1988 Act.

P.W.6 after receiving the copy of F.I.R. on 10.09.2015, formed a team, procured two public servants to be the witnesses to the trap proceeding, made a preparation for laying a trap on 11.09.2015 and on the same day, proceeded to Junagarh Tahasil Office. P.W.5 and the accompanying witness, namely, Sri Samir Kumar Pattnaik (P.W.1) went inside the Tahasil Office and others remained outside. At about 11.10 a.m., P.W.1 gave pre-arranged signal after amount of Rs.500/-(rupees five hundred) was given by P.W.5 to the petitioner on demand and then the Vigilance team along with other independent witness entered into the Tahasil Office. The petitioner on being confronted by P.W.6 denied to have received any money as bribe. P.W.6 took the hand wash and shirt pocket wash of the petitioner in sodium carbonate solution which turned pink and he preserved the same in bottles and seized. There was recovery of tainted notes of Rs.500/-(rupees five hundred) from the exclusive possession of the petitioner and the numbers of the notes were verified and it got tallied with the numbers noted down during trap preparation in the preparation report. The tainted currency notes and other articles were seized by P.W.6, who prepared a detection report and produced all the documents along with the petitioner before P.W.7, who on examining P.W.5 and the witnesses and on being satisfied about the commission of the offence by the petitioner, forwarded the petitioner to the Court.

As per the prayer made by the Investigating Officer (P.W.7), the statement of P.W.5 and the accompanying witness were recorded by a Judicial Magistrate under section 164 Cr.P.C. P.W.7 also sent the collected hand wash in bottles for chemical examination, obtained sanction for prosecution of the petitioner from the appropriate authority and on completion of investigation, submitted charge sheet against the petitioner under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act to stand his trial in the Court of law.

3. The learned trial Court in its impugned judgment has been pleased to hold that it is crystal clear that the petitioner though received the letter of the Inspector in-charge of Junagarh police station dated 22.08.2015 and the application of the complainant (P.W.5) with endorsement of Tahasildar directing the R.I. to make measurement of the land of P.W.5, he sat over the matter for long time and only when P.W.5 approached and assured him to pay Rs.500/- (rupees five hundred) on 11.09.2015, he started registering the case and such deliberate conduct of the petitioner indicates that he wanted illegal gratification/ remuneration/reward from the complainant to process his application and send it to concerned R.I. and the evidence of P.W.5 is clear enough that on more than one occasion, he visited the Tahasil Office, Junagarh to get his genuine work to be done but the petitioner caused delay in the matter and ultimately, being displeased with the conduct of the petitioner, P.W.5 approached the vigilance authorities. It is further held that P.W.5 deliberately gave false statement in the Court under the influence of the petitioner and the facts stated in the F.I.R. and his earlier statement recorded under sections 161 and 164 Cr.P.C. implicating the petitioner are correct and the submission that earlier F.I.R. of P.W.5 was suppressed and substituted by Ext.12 is an embroidered hypothesis, which is not believable. It is further held that the prosecution has been able to clearly establish the fact of demand of bribe of Rs.500/-(rupees five hundred) by the petitioner from P.W.5 and the petitioner received the same from P.W.5 on 11.09.2015 in presence of P.W.1. It is further held that the prosecution has complied with the requirement of sanction order under section 19 of the 1988 Act by proving Ext.21. Learned trial Court further held that the defence has not been able to show by probabilities of any kind that he was falsely implicated by the vigilance authorities who have neither any personal interest in the matter nor it is shown that they had any grudge against the petitioner to grind him in a false case and the defence plea accordingly failed. The learned trial Court came to the conclusion that the offences under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act has been committed by the petitioner and the petitioner was found guilty of such charges.

4. Mr. Devashis Panda, learned counsel appearing for the petitioner contended that the learned trial Court has illegally convicted the petitioner under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act. He further argued

that the learned trial Court in the impugned judgment has picked and chose only the portion of evidence of the prosecution to be utilized against the petitioner and discarded the rest evidence in favour of the petitioner without any justifiable reason. It was further argued that the deposition of the witnesses of the prosecution during the cross-examination was not taken into account. He further argued that the prosecution having led no evidence whatsoever to show that there was any prior demand of bribe by the petitioner to issue instructions to the R.I., Kulihari to demarcate the lands and show undue favour to P.W.5, the finding of the learned trial Court that prosecution has been able to establish the charge of demand and acceptance of bribe against the petitioner is wholly misconceived. He further argued that no work of P.W.5 was pending with the petitioner for which he could have demanded the alleged money as bribe and rather the evidence of P.W.5 established the petitioner’s plea that money was required to be deposited towards arrears of rent and for demarcation fees. He further argued that the P.W.5 himself has disowned the fact of demand and when the prosecution has not examined any other witnesses being present at the time of occurrence to prove that the money was paid as per the demand then the offence is not proved and the learned trial Court has erroneously come to a illogical conclusion. He further argued that had the learned trial Court considered the evidence on record in favour of the petitioner and not ignored the same, the impugned order of conviction would not have come into existence. The finding recorded by the learned trial Court is out and out perverse and without any application of its judicial mind and therefore, the impugned judgment is bad in the eye of law. He further submitted that the apprehension of losing the job might not be the sole criteria for granting stay of conviction, but the exceptional and special circumstances which exist in the facts of the case sufficiently indicate that the present litigation is luxury litigation on the part of the prosecution at the cost of the petitioner. He argued that the petitioner has already been dismissed from government service and facing financial hardship and there is no chance of early hearing of the appeal on merit and therefore, when the prosecution has not proved the guilt of the petitioner to the hilt, this Court may be pleased to pass an order of stay of conviction.

Mr. Sanjaya Kumar Das, learned Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay of conviction and also filed his objection to such petition. It was contended that the learned trial Court after going though the evidence on record has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in his favour. It is further contended that besides getting legal remuneration, demanding and accepting bribe has come a ‘MANTRA’ in the public institutions by the public servants. It has become a contagious disease in the society, which needed social reforms and judicial inference to get rid of the same. He further submitted that so far as the contentions of suspension/stay of conviction and sentence of the petitioner is concerned, the interim application is liable to be dismissed because of his conviction and sentence for committing the offence under the Prevention of Corruption Act and being held to be a corrupt public servant by accepting illegal gratification as a 'motive'. He further submitted that as the law is equal to all and to be judged impartially, the petitioner does not stand in a different footing to be considered in any special circumstances, when he has been found guilty for adopting corruption by thinking it to be his official act. He further contended that the petitioner ought to have thought of the consequences regarding demand and acceptance of bribe money against discharging the official duties. He also contended that in the event, the petitioner succeeds in the criminal appeal preferred by him before this Court, he would be at liberty to claim all of his consequential benefits from the Government and in view of the above, the I.A. should be dismissed.

5. First, let me deal with the ambit and scope of section 389(1) of Cr.P.C. relating to stay of judgment and order of conviction by the appellate Court as were placed by the learned Standing Counsel for the vigilance department.

In the case of K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in (2001) 6 Supreme Court Cases 584, it is held as follows:-

"11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at tall aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is different matter.

12. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functions of the public offices, through strong legislative, executive as well as judicial exercises, the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic policy. Proliferation of corrupt public servants could garner

momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate Court or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction."

In the case of State of Maharastra through C.B.I. -Vrs.- Balakrishna Dattatrya Kumbhar reported in (2012) 53 Orissa Criminal Reports (SC) 1233, it is held as follows:-

"12. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

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14. The aforesaid order is therefore, certainly not sustainable in law if examined in light of the aforementioned judgments of this Court. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to

systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/Respondent if ultimately succeeds, could claim all consequential benefits. The submission made on behalf of the Respondent, that this Court should not interfere with the impugned order at such a belated stage, has no merit for the reason that this Court, vide order dated 9.7.2009 has already stayed the operation of the said impugned order."

In the case of State of Punjab -Vrs.- Deepak Mattu reported in A.I.R. 2008 Supreme Court 35, it is held as follows:-

"7. While passing the said Order, the High Court did not assign any special reasons. Possible delay in disposal of the appeal and there are arguable points by itself may not be sufficient to grant suspension of a sentence. The High Court while passing the said Order merely noticed some points which could be raised in the appeal. The grounds so taken do not suggest that the Respondent was proceeded against by the State, mala fide or any bad faith…."

In the case of Pruthwiraj Lenka -Vrs.- State of Odisha (Vigilance) reported in (2022) 85 Orissa Criminal Reports 667, it is held that law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative.

In the case of Om Prakash Sahani -Vrs.- Jai Shankar Chaudhary and another etc. reported in (2023) 91 Orissa Criminal Reports (SC) 84, it is held as follows:-

"33.…The Appellate Court should not reappreciate the evidence at the stage of section 389 of the Cr.P.C. and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

34. In the case on hand, what the High Court has done is something impermissible. High Court has gone into the issues like political rivalry, delay in lodging the F.I.R., some over-writings in the First Information Report etc. All these aspect, will have to be looked into at the time of the final hearing of the appeals filed by the convicts. Upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour….."

In the case of A.B. Bhaskara Rao -Vrs.- Inspector of Police, CBI, Visakhapatnam reported in A.I.R. 2011 Supreme Court 3845, it is held as follows:-

"19. From the analysis of the above decisions and the concerned provisions with which we are concerned, the following principles emerge:

a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.

b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.

c) In a case of corruption by public servant, quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.

d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence."

The appreciation of evidence in detail at the final stage of hearing of criminal appeal is not to be adopted at the stage of dealing with interim application for stay of judgment and order of conviction inasmuch any finding on the merits of the case by way of appreciation of evidence at the stage of consideration of interim application for stay of conviction is likely to prejudice either of the parties.

There is no doubt that in view of settled position of law, the appellant has to make out a rare and exceptional case for the grant of stay against conviction under section 389 of Cr.P.C. There must be special and compelling circumstances in justification for the grant of such stay against conviction. There should be irreversible consequences leading to injustice and irretrievable damages in the event of non-grant of stay against conviction. The impugned judgment of conviction should be based on no evidence or against the weight of evidence, which must prima facie appear on the face of it without conducting a detailed analysis into the merit of the case. Possible delay in disposal of the appeal and that there are arguable points by itself may not be sufficient to grant stay of conviction.

6. In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether the petitioner has made out a very rare and exceptional case for grant of stay of order of conviction. What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed' Whether failure to stay the order of conviction would lead to injustice and irreversible consequences'

P.W.5 has supported the prosecution case to a great extent and has stated about demand, acceptance and recovery of tainted money from the appellant. He stated that when he met the petitioner, the latter informed him that the petitioner had to pay a sum of Rs.500/- arrear rent and further informed that P.W.5 was to meet some other expenditure. He stated about participating in the preparation of trap and producing five numbers of hundred rupee notes during such preparation which were used as tainted money and he also stated to have proceeded to Junagarh Tahasil Office with P.W.1 and handed over the money to the petitioner. He further stated that when the vigilance team asked the petitioner to return the five numbers of hundred rupee notes taken as bribe, the petitioner refunded the same. Of course, P.W.5 has been declared hostile by the prosecution, but in the cross-examination by the Special P.P., he has stated that the petitioner told him that if he (P.W.5) paid a sum of Rs.500/-, the demarcation would be carried out and that he had met the petitioner twice prior to the lodging of F.I.R. and both times, the petitioner told him that a sum of Rs.500/- would be necessary to meet the expenditure. The law is well settled that the evidence of a witness who has been declared hostile can be relied upon if there are some other materials on the basis of which said evidence can be corroborated. More so, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile. (Ref: Devraj -Vrs.- State of Chhattisgarh : (2016) 13 Supreme Court Cases 366).

P.W.1 acting as overhearing witness has corroborated the evidence of P.W.5 and has stated that while he was standing at a distance from the petitioner and P.W.5 in Junagarh Tahasil Ofiice, P.W.5 paid the bribe money of Rs.500/- to the petitioner and the petitioner received the same in his hand and counted it with his both hands and kept it in his left side shirt pocket. P.W.1 also stated about the hand wash of the petitioner being taken in his presence and recovery of tainted money from the possession of the petitioner. P.W.3 and P.W.6 have also stated about the hand wash of the petitioner being taken in their presence and recovery of tainted money from the possession of the petitioner. Apart from the oral evidence, the documentary evidence also indicates about recovery of tainted notes from the possession of the petitioner. The hand wash of the petitioner so also his shirt pocket wash which were marked as Exts.C, D and E on chemical analysis indicates presence of phenolphthalein. The petitioner in his accused statement has pleaded that P.W.5 forcibly thrust the money in his hand as he refused to pass any order in his case. No defence witness has been examined.

7. After carefully and meticulously analyzing the finding of the learned trial Court, the submission made by the learned counsel for the respective parties and the evidence on record, I am of the humble view that at this stage, it cannot be said that it is a case of no evidence against the petitioner. Whether the evidence available on record would be sufficient to uphold the impugned judgment and order of conviction of the petitioner or on the basis of points raised by the learned counsel for the petitioner, benefit of doubt is to be extended to the petitioner is to be adjudicated at the final stage when the appeal would be heard on merit. Giving any finding on the merits of the case is likely to cause prejudice

to either of the parties. This Court will certainly have a duty to make deeper scrutiny of the evidence and decide the acceptability or creditworthiness of the evidence of witnesses at the final stage of hearing of the appeal on merit. At this stage, reappreciation of evidence by conducting detailed analysis and trying to pick up lacunas or loopholes in the case of the prosecution is not permissible. No extraordinary circumstance/material is shown to this Court for granting the desired relief to the petitioner. The fact that the petitioner has been dismissed from the government service by the order of the Collector & Disciplinary Authority, Kalahandi and that he is likely to face financial hardship and there is no chance of early hearing of the appeal are not the grounds for granting the reliefs sought for.

Therefore, I am of the humble view that for the limited purpose of ascertaining whether stay of order of conviction be granted or not, I find that the petitioner has failed to make out a very exceptional case or special reasons for keeping the conviction in abeyance and as such, in the facts and circumstances of the case, the relief sought for by the petitioner for staying the order of conviction cannot be granted.

8. Accordingly, the interim application being devoid of merits, stands dismissed.

By way of abundant caution, I would like to place it on record that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for staying the order of conviction of the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done at the final stage of the hearing of the criminal appeal on merit.

Urgent certified copy be granted on proper application.

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