
(2015) 04 AHC CK 0010

In the Allahabad High Court

Case No : Public Interest Litigation (PIL) No. 15249 of 2015

Prabhu Narayan Tiwari

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Constitution of India, 1950 — Article 191
Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1), 482
Penal Code, 1860 (IPC) — Section 353, 504, 506
Representation of the People Act, 1951 — Section 8, 8(3), 8(4)

Citation : (2015) 4 ADJ 222 : AIR 2015 All 157 : (2015) 110 ALR 857

Hon'ble Judges : D.Y. Chandrachud, C.J.; Manoj Kumar Gupta, J

Bench : Division Bench

Advocate : Manoj Mishra, for the Appellant; Bhoopendra Nath Singh, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the petitioner, learned Chief Standing Counsel appearing on behalf of the State-respondents, Sri B.N. Singh for respondents 2 and 3 and Sri L.K. Dwivedi who has filed his appearance on behalf of respondent No. 5.

2. The fifth respondent was elected as a member of the Legislative Assembly in Uttar Pradesh from the Mirzapur Sadar-396 seat. The fifth respondent was tried for offences under Sections 353, 504 and 506 of the Penal Code arising out of Case Crime No. 929 of 1995 of Police Station Kotwali Katara, District Mirzapur. The Chief Judicial Magistrate by a judgment and order dated 28 February, 2015 convicted the fifth respondent for offences under Sections 353, 504 and 506 of the Penal Code and sentenced him to imprisonment of three years and to a fine. The writ petition, which has been filed as a petition in the public interest, seeks a declaration that the fifth respondent stands disqualified as a member of the Legislative Assembly. A mandamus is sought for (i) withdrawing of all facilities provided to the fifth respondent as a state minister; (ii) declaring the seat vacant

in order to enable a bye-election to be held; and (iii) restraining the fifth respondent from functioning either as a member of the Legislative Assembly or as a state minister.

3. The Chief Judicial Magistrate, convicted the fifth respondent for offences under Sections 353, 504 and 506 of the Penal Code and sentenced him to imprisonment of two years under section 353 and to a fine of Rs. 2000/- (or in default to imprisonment of three months); to imprisonment in respect of the offence under section 504 for two years and to a fine of Rs. 2000/- (or in default to imprisonment of three months); and to imprisonment for three years (for an offence under Section 506) and a fine of Rs. 5000/- (or in default to imprisonment of six months). All the sentences were directed to run concurrently.

4. The appeal filed by the fifth respondent before the District and Sessions Judge, Mirzapur on 10 March, 2015 was admitted. While admitting the appeal on 10 March, 2015, the Sessions Judge, Mirzapur ordered the fifth respondent to be released on bail and directed that the execution of the sentence would remain suspended. The order dated 10 March 2015 reads as follows:-

5. The fifth respondent had on 10 March 2015 also sought suspension of sentence and conviction during the pendency of the criminal appeal. In doing so, the fifth respondent had stated that he was a Member of the Legislative Assembly from Mirzapur assembly constituency and that if the judgment and conviction were not stayed, he would incur a disqualification under section 8(4) of the Representation of People Act, 1951. This application was heard on the same day but orders were deferred for 13 March, 2015. The order of the District and Sessions Judge dated 10 March 2015 reads as under:-

6. In his order dated 13 March, 2015, the Sessions Judge referred to the submission of the fifth respondent that if the judgment of conviction was not stayed, he would incur a disqualification. The Sessions Judge also noted that the fifth respondent had already been released on bail by the previous order dated 10 March, 2015. After advertng to the submissions of the fifth respondent and of the district government counsel, the Sessions Judge referred to the decisions of the Supreme Court in Indian Council of Medical Research and Others Vs. K. Rajyalakshmi, (2007) 2 LLJ 228 : (2007) 2 SCALE 252 : (2007) 2 SCC 332 : (2007) 1 SCC(L&S) 627 : (2007) AIRSCW 6298 : (2007) AIRSCW 5941 : (2007) 6 Supreme 539 ; Lily Thomas Vs. Union of India (UOI) and Others, (2013) 6 ABR 236 : (2013) 10 AD 655 : AIR 2013 SC 2662 : (2014) 117 CLT 284 : (2013) 9 JT 419 : (2013) 3 RCR(Civil) 713 : (2013) 8 SCALE 469 : (2013) 7 SCC 653 : (2013) 7 SCC(L&S) 811 : (2013) AIRSCW 4204 and Lily Thomas Vs. Union of India (UOI) and Others, (2013) 6 ABR 236 : (2013) 10 AD 655 : AIR 2013 SC 2662 : (2014) 117 CLT 284 : (2013) 9 JT 419 : (2013) 3 RCR(Civil) 713 : (2013) 8 SCALE 469 : (2013) 7 SCC 653 : (2013) 7 SCC(L&S) 811 : (2013) AIRSCW 4204 and eventually passed the following order:-

7. The submission, which has been urged on behalf of the petitioner is that by

the order of the Sessions Judge dated 13 March, 2015, the implementation of the judgment of the trial court has been suspended. In the submission of learned counsel, the order of the Sessions Judge does not stay the conviction as such and hence, the fifth respondent would be deemed to have incurred a disqualification under Section 8(3) of the Representation of the People Act, 1951. Section 8(3) reads as follows:-

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release."

8. The learned Chief Standing Counsel has submitted that (i) the issue as to whether the fifth respondent has incurred a disqualification must await the decision of the Governor under Article 191 of the Constitution; (ii) an application for disqualification was moved before the Governor by one Dr. Nutan Thakur on 1 March, 2015 and she has since filed a writ petition before Lucknow Bench seeking a writ of quo warranto against the fifth respondent in respect of his holding the office of Minister in the State Government. It has been submitted on behalf of the fifth respondent by learned Senior Counsel that the fifth respondent was initially granted bail by an order dated 10 March, 2015 when the execution of the sentence was suspended. Thereafter, acting on the application filed by the fifth respondent specifically seeking a stay of the order of conviction on the ground that the fifth respondent would otherwise incur a disqualification, the Sessions Judge, by an order dated 13 March, 2015, suspended the operation and implementation of the judgment pending the disposal of the appeal. Hence, it is submitted that there can be no doubt about the position that the conviction has also been suspended as a result of which the disqualification under Section 8(3) of the Act would not stand attracted.

9. The learned counsel appearing on behalf of the Election Commission of India has placed on the record, the instructions received by him in the form of two letters dated 10 April, 2015 and 20 April, 2015.

10. Under Section 389 of the Code of Criminal Procedure, 1973, the appellate court is empowered, pending an appeal by a convicted person and for reasons to be recorded in writing to order that the execution of a sentence or order appealed against, be suspended. In the decision in Rama Narang Vs. Ramesh Narang and Others, (1995) 83 CompCas 194 : (1995) 1 JT 515 : (1995) 1 SCALE 276 : (1995) 2 SCC 513 : (1995) 1 SCR 456 the Supreme Court examined the issue as to whether the power under Section 389(1) could be invoked to suspend the conviction. The Supreme Court ruled that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, 1973 but in certain situations, it can become executable in a limited sense upon it resulting in a disqualification under other enactments. Hence, in such case, it was permissible to invoke the power under Section 389(1) to stay the conviction as well. This position was reiterated by a Bench of three learned Judges of the

Supreme Court in Ravikant S. Patil Vs. Sarvabhouma S. Bagali, (2007) 2 CTC 349 : (2006) 10 JT 578 : (2006) 12 SCALE 295 : (2007) 1 SCC 673 : (2006) 8 SCR 1156 Supp , where it was held as follows:-

"It deserves to be clarified that 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. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction."

11. In the present case, as record before the Court indicates initially, by an order dated 10 March, 2015 the fifth respondent was enlarged on bail and the execution of the sentence or was suspended. The order of the Sessions Judge dated 10 March, 2015 specifically notes that an application had been filed by the fifth respondent stating that he was a sitting member of the Legislative Assembly and would incur a disqualification if the conviction was not stayed. An application for stay of the conviction and sentence was moved by the fifth respondent on 10 March, 2015 specifically drawing the attention of the Sessions court to the legal position. Upon hearing the application, the Sessions Judge by a separate order dated 13 March, 2015 directed that the implementation of the judgment under challenge would stand suspended pending the disposal of the appeal. There was no occasion for the Sessions Judge, Mirzapur to pass this order if the conviction, as prayed, was not being stayed. The execution of the sentence had already been suspended by the previous order dated 10 March, 2015 and if the application for stay of the order of the conviction was to be rejected, the Sessions Judge would have proceeded to pass an order of rejection of the application. On the contrary, the order of the Sessions Judge would indicate that the implementation of the entire judgment under appeal was suspended pending the disposal of the appeal and the application was accordingly disposed of. Having regard to the this background and the plain terms of the order dated 13 March, 2015 we are unable to accept the submission of the petitioner that what was stayed, was only the implementation of the order, resulting only in a suspension of the sentence. The record and the plain terminology of the order would indicate to the contrary.

12. The entire edifice of the case of the petitioner is sought to be built up on the basis of information disclosed by the office of the Sessions court and which is

now sought to be relied upon in a supplementary affidavit. The effect of the judicial order of the Sessions court dated 13 March, 2015 has to be construed by this Court and cannot be made dependent on the information which has been furnished to the petitioner by the ministerial office. We may also note the position of the Election Commission of India in the instructions dated 10 April, 2015 to learned standing counsel, in the following terms:-

"It is to state here that an unsigned representation dated 18.03.2015 was received in the Commission from Shri Prabhu Narayan Tiwari (copy enclosed) on 24.03.2015 regarding disqualification of Shri Kailash Nath Chaurasiya, who was elected from 396-Mirzapur A.C. In view of the (i) order dated 10.03.2015 passed by the Sessions Judge Mirzapur in Crl. Appeal No. 15 of 2015 staying the Order dated 28.02.2015 passed by the Chief Judicial Magistrate Mirzapur in the matter of Crime Case No. 347 of 1996 (State of U.P. Vs. Kailash Chaurasia and Ors.) and (ii) Sessions Judge, Mirzapur's further Order dated 13.03.2015 staying the operation of the impugned Judgment and Order of the Chief Judicial Magistrate till the disposal of the Appeal, the Commission has not taken any action on the said unsigned representation.

The question of conducting bye-election in respect of the aforesaid Assembly Constituency will arise only if and when, the seat of Shri Chaurasia is declared vacant by the Uttar Pradesh Legislative Assembly Secretariat depending upon the outcome of his aforesaid Appeal by the Sessions Judge, Mirzapur. The Commission's instructions in the letter No. 509/127/2005-RCC, dated 7.08.2013 issued in pursuance of the Hon'ble Supreme Court's Judgment dated 10.07.2013 passed in W.P. (C) Nos. 490 of 2005 and 231 of 2005 is also enclosed herewith."

(emphasis supplied)

The subsequent communication of the Election Commission of India dated 20 April, 2015 records that if there is a clarification by the Court that the stay was only on the execution of the sentence and not on conviction, then the implication would be that fifth respondent stands disqualified, in view of the judgment of the Supreme Court in Lily Thomas (supra). The Supreme Court held in Lily Thomas that the provisions of Section 8(4) of the Representation of the People Act, 1951 is ultra-vires in so far as it deferred the date on which the disqualification would take effect until three months had elapsed from the date of conviction and thereafter, if an appeal or revision is filed within that period, until the appeal or revision is disposed of by the Court. Dealing with a stay of conviction, the Supreme Court has held as follows:-

"Therefore, the disqualification under sub-section (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the Appellate Court under Section 389 of the Code or the High Court under Section 482 of the Code".

Hence the disqualification under Section 8(3) would not be attracted once the

Sessions Judge stayed the conviction on 13 March, 2015.

13. For the reasons, which we have indicated, we hold that the order of the Sessions Court dated 13 March, 2015 amounted to a suspension of the judgment of conviction, appealed against, pending disposal of the appeal. Therefore, there is no merit in the writ petition.

14. The petition shall accordingly, stand dismissed.

1 The Act