
(2021) 07 OHC CK 0035
In the Orissa High Court
Case No : Criminal Appeal No. 177 Of 2021

Pradeep Kumar Sahu

APPELLANT

Vs

State Of Odisha (Vigilance)

RESPONDENT

Date of Decision : 05-07-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 357(1), 357(2), 357(3), 389
Prevention of Corruption Act, 1988 — Section 13(1)(e), 13(2)
Prevention Of Corruption Act, 1947 — Section 5(1)(e), 5(2)

Citation : (2021) 07 OHC CK 0035

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

Bench : Single Bench

Advocate : Debasish Panda, Sanjay Kumar Das

Final Decision : Disposed Of

Judgement

S.K. Mishra, J

ORDER NO.Â I.A.NO.338 OF 2021 AND I.A. NO.339 OF 2021

1. Both the I.As. were heard on 23.06.2021.
2. Further hearing is taken up today through video conferencing.
3. Heard Mr. D. Panda, learned counsel for the appellant-petitioner and Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department.
4. Both the applications are filed under Section 389 of the Code by the appellant for suspension of substantive sentence and stay of fine.
5. The appellant has been convicted under Section 13(2) read with Section 13(1) (e) of the Prevention of Corruption Act, 1988 Â (for short â??the P.C. Actâ??) and sentenced to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs.28,57,338.22 paise, in default to

undergo imprisonment for six months, as per the judgment and order passed by the learned Special Judge (Vigilance), Bhawanipatna on 30.03.2021 in

T.R. Case No.20/2017, arising out of G.R.(Vigilance) Case No.19/2014.

6. Mr. D. Panda, learned counsel for the appellant argues that there is a good chance of the appeal being allowed and in such a situation, the sentence

should be suspended, fine should be stayed and the appellant should be released on bail upon appeal. He further contends that a fine to the tune of

Rs.28, 57, 338.22 paise cannot be paid by the appellant at this stage as all his properties have been attached by the Vigilance Department and it is still

under attachment. Meanwhile, he has been dismissed from service on being convicted under Sections 13(2) read with Section 13(1)(e) of the P. C.

Act. The appellant is not in a position to deposit the fine amount. Drawing attention to paragraph-9, page 22 and 23 of the impugned judgment, the

learned counsel for the appellant pointed out that there is an inherent defect in the sanction to prosecute the petitioner and the P.W.9 does not have

the authority to grant sanction. Therefore, he would argue that the sentence may be suspended, the appellant should be ordered to be released on bail

upon appeal and the fine amount be stayed.

7. Mr. S. Das, learned Standing Counsel for the Vigilance Department would argue that the Court do not have the jurisdiction to pass an order of stay

and fine. He relies upon the reported cases of Satyendra Kumar Mehra alias Satendera Kumar Mehra -Vrs.- State of Jharkhand, AIR 2018 SC

1587, N. Naveen Kumar & Ors. -Vrs.- State of Andhra Pradesh ,(2008) 41 OCR (SC) 843 and A mbi Ram -Vrs.- State of Uttarakhand, (2019) 74

OCR (SC) 20.

8. We have carefully examined the impugned judgment. It appears that the learned Special Judge has not considered the evidences of witnesses, who

have been examined to prove in a case of disproportionate asset against the petitioner, rather he has relied upon the evidence of only four witnesses,

as far as this aspect is concerned, i.e. P.Ws. 8, 9, 16 and 17. P.Ws. 16 and 17 happen to be two Investigating Officers of the case and P.W.8 is a

constable of the Vigilance Department. P.W.9 is the Principal in-charge of the College. In total, 19 witnesses have examined and, except the

discussion of the evidences of these four witnesses, there is no discussion of the other evidences, except at paragraph-4 of the impugned judgment,

where the witnesses were generally described by the learned Special Judge.

9. In that view of the matter, there appears to be a reasonable probability of the appeal being allowed in the ultimate analysis at the time of final disposal of the case.

10. It is also not disputed by the learned Standing Counsel for the Vigilance Department that all the properties, especially the Bank account of the petitioner, have been seized by the Vigilance and still under seizure as there is no direction by the learned Special Judge regarding their release. It is

also noted that the appellant has been dismissed from service in the meantime. The appellant is in judicial custody since the date of judgment i.e.

30.03.2021 and as a large number of cases are still pending before this Court in which convicts are in custody after being convicted by the learned trial

judges, there is no certainty that the appeal will be taken up for final disposal at an early date. Moreover, it is seen that the maximum punishment of

seven years and a fine of Rs.28,57,338.22 paise have been imposed by the learned Special Judge.

11. We have carefully examined the precedence cited by the learned Standing Counsel for the Vigilance Department. In the case of N. Naveen

Kumar & others (supra), in a proceeding of prosecution, the predecessors of interest of the appellant in that case was convicted under Section 5(1)(e)

read with Section 5(2) of the P.C. Act, 1947 i.e. the old Act and sentenced to undergo simple imprisonment for one year and pay fine of Rs.20,000/-in

default to suffer simple imprisonment for three months. The learned Special Judge also directed that item Nos.1 to 4 of the assets shall be sold in

public auction and the sale proceed shall be confiscated to the State. The predecessor in interest of the appellant preferred an appeal to the High

Court and the High Court dismissed the appeal. Hence, the sentence of imprisonment stood abated against the convict. The appellants further prayed

to allow them to deposit the entire amount of Rs.6,37,850/-, approximately, or such sum as may be considered appropriate in lieu of the confiscation of

item Nos. 1 to 4. The Honâ??ble Supreme Court refused to interfere in the matter holding that the High Court has rightly noted that it is present

value of the property, which is of relevance and not value of the asset at the relevant point of time. This Court does not find any relevancy of this ratio

to the present case.

12. In the case of Satyendra Kumar Mehra alias Satendera Kumar Mehra (supra), the Honâ??ble Apex Court examined whether sub-section (2)

of Section 357 of the Code will automatically stay of realization of fine even if there is no order of payment of compensation. At paragraph-37 of the

aforesaid case, the Honâ??ble Apex Court held that Section 357(2) of the Code was not attracted in that case since there was no direction of

payment of any compensation out of the fine imposed by the trial court as a part of sentence. Section 357 (2) of the Code comes into only where any

order of payment of compensation utilizing the fine imposed as a sentence under Section 357(1) of the Code or compensation as directed under

Section 357(3) of the Code is made. In a case involving conviction under the Prevention of Corruption Act, neither Section 357(1) of the Code nor

Section 357(3) of the Code is applicable and therefore, sub-Section (2) of Section 357 of the Code is clearly not applicable. Hence, the Honâ??ble

Supreme Court dismissed the appeal.

13. In the reported case of Ambi Ram (supra), wherein the sentence imposed by the learned trial judge and upheld by the High Court was reduced the

period already undergone i.e. one month 10 days and the fine was enhanced Rs.3,000/- to Rs.5,000/-. At present, the ratio decided in the aforesaid

case is not relevant to this case. But, it can be noted that in that case also the appellant was convicted under the provisions of old Prevention of

Corruption Act. He was sentenced only for a period of one month and few days and fine of Rs. 10,000/-. Coming to this particular case, this Court

finds that the contention of Mr. Panda that the learned Standing Counsel or the Special Prosecutor of the Vigilance Department is not entitled to be

heard in the matter in view of the 1st proviso of Section 389 of the Code. The said proviso is applicable where the punishment is 10 years or more and

in that case a prosecutor is given an opportunity of showing cause in writing. In this case, the Vigilance Department has only filed citations. The

Vigilance Department has not filed counter affidavit or written show cause. Even though the Vigilance Department is not entitled to file written

counter, it is duty of the Court to hear the counsel appearing for the Vigilance Department. The contention of the learned counsel for the appellant that

the Standing Counsel of the Vigilance Department has no LOCUS STANDI to oppose the application under Section 389 of the Code is not

acceptable.

14. However, this Court comes to the conclusion that the other considerations like the imposition of maximum penalty without a discussion about the reasons, a reasonable probability of the appeal being allowed in ultimate analysis, the attachment of all properties of the appellant by the Vigilance Department, he being dismissed from service, he being a permanent resident of Dharamgarh, P.S. Dharamgarh, Dist. Kalahandi, which precludes any reasonable apprehension of his absconding from the process of justice, he being on bail during course of trial and there is no allegation that he misused the liberty granted to him while on bail, absence of certainty of appeal being taken up for final disposal in the near future and in view of the observation of the learned Special Judge that P.W.9, who granted sanction had no authority to grant sanction (clearly mentioned at the end of paragraph-9 at page 24 of the impugned judgment), this Court is inclined to allow the application under Section 389 of the Code and suspend the sentence.

15. Accordingly, the applications are allowed. The sentence of imprisonment for seven years and pay fine, as directed above in the aforesaid case, by the learned Special Judge is hereby suspended. Let the appellant be released on bail, upon appeal, on suitable terms and conditions as deemed just and proper by the learned Special Judge (Vigilance), Bhawanipatna in the aforesaid case. There shall be stay of realization of fine as directed by the learned Special Judge in the aforesaid case till disposal of the appeal.

16. Both the I.As. are disposed of.

17. As the restrictions due to resurgence of COVID-19 are continuing, learned counsel for the parties may utilize a printout copy of this order available in the High Court's website, at par with certified copy, subject to attestation by Mr. D. Panda, Advocate along with his seal in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020 as modified by Court's Notice No.4798, dated 15.04.2021.

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