

(2006) 06 GAU CK 0084

In the Gauhati High Court

Case No : Criminal Miscellaneous Case No. 190 of 2006

Pradip Kr. Jain and Another

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 23-06-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1), 389(3), 433, 482
Essential Commodities Act, 1955 — Section 7(1)

Citation : (2006) 3 GLT 300

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : S.P. Roy, for the Appellant; B. Sinha, for the Respondent

Judgement

I.A. Ansari, J.—The Petitioners herein were tried, in Special Case No. 05/96, on accusation of having committed offences u/s 7(1)(a)(ii) of the Essential Commodities Act, 1955, for contravening the provisions of Clause (3) of the Assam Trade Articles (Licensing and Control) Order, 1982. The trial ended in their conviction and the learned Sessions Judge, Kamrup, sentenced the Petitioners to undergo, rigorous imprisonment for three years and pay fine of Rs. 5,000/- each and, in default of payment of fine, suffer rigorous imprisonment for a further period of six months, the case of the prosecution being, in brief, is that the Petitioners were found to have kept stored for sale 45 quintals of Tata iodised salt without having licence therefor. An appeal preferred by the Petitioners against their conviction and the sentence passed against them gave rise to Criminal Appeal No 164/98. By judgment and order dated 08.05.2006, passed by this Court, conviction of the accused Appellants was maintained, but the sentence was reduced to simple imprisonment for a period of one year with fine of Rs. 1,000/- and, in default of payment of fine, suffer simple imprisonment for a period of one month.

2. After the appeal stood disposed of, the Petitioners have made this application, under Sub-section (3) of Section 389 of the Code of Criminal Procedure praying

for suspending or keeping in abeyance the operation of the judgment and order, dated 08.05.2006, passed by this Court in Criminal Appeal No. 164/98 aforementioned, their case being that they have applied, u/s 433(d) Code of Criminal Procedure, to the Government of Assam for commutation of the sentence of simple imprisonment passed against them, into fine.

3. I have heard Mr. SP Roy, learned Counsel, appearing on behalf of the Petitioners, and Mr. B. Sinha, learned Addl. Public Prosecutor, Assam.

4. For the purpose of appreciating the question as to whether the Petitioners' application made u/s 389(3) Code of Criminal Procedure is maintainable or not, appropriate it is to take note of Section 389 Code of Criminal Procedure, which, I may point out, reads as follows:

389. Suspension of sentence pending the appeal; release of Appellant on bail (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the court shall:

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or-

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under Sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the Appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

5. From a bare reading of Sub-section (3) of Section 389 Code of Criminal Procedure, it clearly transpires that under the provisions of Sub-section (3) of Section 389 Code of Criminal Procedure, the sentence can be suspended by the Court, which has convicted the accused, and, secondly, the sentence can be suspended, u/s 389(3) Code of Criminal Procedure, only when the Court, which has convicted the accused person, is satisfied that the convicted person intends to present an appeal.

6. In the present case, provisions of Section 389(3) Code of Criminal Procedure

are ex facie not applicable inasmuch as this Court neither convicted the Petitioners nor is the present one is a case, where the accused intends to present an appeal, for, an appeal was already preferred and the same stands disposed of as indicated hereinabove.

7. I may also point out that even the provisions of Sub-section (1) of Section 389 Code of Criminal Procedure are not applicable to the facts of the present case inasmuch as sentence can be suspended by an appellate Court during the pendency of the appeal by a convicted person. Hence, when an appeal already stands disposed of, as in the present case, provisions of Sub-section (1) of Section 389 Code of Criminal Procedure are not attracted.

8. Coupled with the above, Section 433 Code of Criminal Procedure, which deals with commutation of sentence, reads as follows:

433. Power to commute sentence. The appropriate Government may without the consent of the person sentenced commute.

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

9. From a bare reading of Section 433 Code of Criminal Procedure, as a whole, it clearly transpires that it is for the appropriate Government to commute the sentence passed against a convicted person. In no uncertain words, the Apex Court made it clear, in Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal, that the right to exercise the power of commutation of sentence lies with the appropriate Government u/s 433 Code of Criminal Procedure and that such powers shall be exercised by the Government in accordance with the rules and established principles. In short thus it is for the State Government to decide u/s 433(d) Code of Criminal Procedure if a sentence of simple imprisonment, passed against a convicted person, should or should not be commuted for fine. The High Court cannot commute the sentence passed against a convicted person.

10. The question, now, is as to whether an appellate Court, particularly, when the appellate Court is the High Court, can keep the sentence of imprisonment in abeyance and enable the convicted person to make an application for commutation of sentence to the Government.

11. While considering the above aspect of the matter, what needs to be noted is that an appellate Court, including the High Court, has not been specifically empowered, under the scheme of the Code of Criminal Procedure, to either suspend the sentence passed against a convicted person or to keep such

sentence in abeyance to enable such a convicted person to make to the appropriate Government an application u/s 433 Code of Criminal Procedure and/or until the decision is taken by the appropriate Government on such an application, the High Court, however, stands, as an appellate Court or in the capacity of the High Court, on a different footing inasmuch as it enjoys the inherent powers u/s 482 Code of Criminal Procedure. There may be a case, wherein The High Court finds that notwithstanding the sentence passed against a convicted person, the convicted person has a case, which is fit for the Government to exercise powers u/s 433 Code of Criminal Procedure and commute the sentence, particularly, the sentence of simple imprisonment into fine. For instance, when the convicted person is in advanced state of cancer and has been diagnosed as a terminal case. In such a case, where the appeal was heard and decided by the High Court or by a Court subordinate thereto, it would be unreasonable to hold that the High Court will not be able to suspend the sentence, in exercise of its powers u/s 482 Code of Criminal Procedure, if an application is intended to be made by a convicted person to the appropriate Government for commutation of his sentence, for, not suspending the sentence, in a given case, in exercise of powers u/s 482 Code of Criminal Procedure, may render, in such a case, the right available to a convicted person, u/s 433 Code of Criminal Procedure, meaningless and otiose. To give meaningful existence to the powers u/s 433 Code of Criminal Procedure, it may be appropriate or even necessary, in a given case, for the High Court to take resort to the provisions of Section 482 Code of Criminal Procedure for suspending or keeping in abeyance a sentence of imprisonment so as to enable a convicted person to make application for commutation of sentence to the appropriate Government and for the Government to consider and dispose of the application either allowing such an application or rejecting the same. If such a power is not held to exist u/s 482 Code of Criminal Procedure, it may frustrate the application of Section 433 Code of Criminal Procedure, for in a given case, the convicted person may be directed by the Court to surrender forthwith in order to serve the sentence of simple imprisonment of say one month passed against him and at the time, when such direction is given, the Court may not be aware of the fact that the accused is a terminal case of cancer.

12. I must, however, hasten to add that the power u/s 482 Code of Criminal Procedure must be exercised in exceptional and extra-ordinary circumstances and cannot be a routine exercise of powers. To put it differently, High Court must be satisfied that the convicted person has been able to make out a prima facie case, wherein exercise of powers u/s 482 Code of Criminal Procedure, for the purpose of obtaining directions suspending the sentence, passed against the convicted person, is warranted.

13. In the case at hand, though the Petitioners have made an application u/s 389 Code of Criminal Procedure seeking suspension of the sentence passed against them, the fact remains that the label under which an application is made is strictly speaking, not material, what is material is whether the application

made by a person can be tracked to any particular provisions of law. Notwithstanding, therefore, the fact that the present application, made u/s 389(3) Code of Criminal Procedure, is misconceived in law, the power to suspend sentence can be traced to this Court's powers u/s 482 Code of Criminal Procedure. In short, thus, if the present petition discloses a case, wherein exercise of powers u/s 482 Code of Criminal Procedure for suspension of sentence is warranted, this Court may do so.

14. In the present case, however, the Petitioners have merely stated that they have applied for communication of sentence to the Government u/s 433(d) Code of Criminal Procedure and are hopeful of favourable consideration by the Government, because the gravity of the ailments, economic hardship and social obstructions, which the Petitioners may suffer, if the sentence of simple imprisonment is carried out. The present petition is, thus, wholly vague. Be that as it may, the present petition discloses that the Petitioners have already made their application to the Government for commutation of their sentence u/s 433(d) Code of Criminal Procedure as far back as on 24.05.2006 and are awaiting result thereof.

15. Considering, therefore, the fact that the Petitioners have already made their application, u/s 433(d) Code of Criminal Procedure, to the State Government on 24.05.2006, it is hereby directed that the sentence passed, on 08.05.2006, against the Petitioners, in Criminal Appeal No. 164/98, shall remain suspended for a period of two months with effect from 08.05.2005. If no order is passed by the state Government within the period as mentioned hereinbefore, the Petitioners shall surrender in the Court of Chief Judicial Magistrate, Kamrup, to undergo the sentence of imprisonment passed against them.

16. With the above observations and directions, this appeal shall stand disposed of.