

(2010) 10 GAU CK 0009

In the Gauhati High Court

Case No : Criminal M. Application No. 28 of 2010 in Criminal A. No.09 of 2010

Shri Dipak Ranjan Deb

APPELLANT

Vs

The Central Bureau of Investigation

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Companies Act, 1956 — Section 267
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1)
Evidence Act, 1872 — Section 62
Penal Code, 1860 (IPC) — Section 304B, 409, 467, 471, 477A
Press Council Act, 1978 — Section 13(2)
Representation of the People Act, 1951 — Section 8(3)

Citation : (2011) 3 Crimes 226 : (2011) 3 GLT 89

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : M. Mukherjee, B.N. Majumder, S. Lodh and T. Chakraborty, for the Appellant; A. Lodh, Asstt. S.G., for the Respondent

Judgement

U.B. Saha, J.—The instant application u/s 389 of the Code of Criminal Procedure (for short the "Code") is filed by the petitioner Shri Dipak Ranjan Deb, a convict in Case No. Special 01 of 1996, for staying the execution of the order of sentence dated 30.1.2010 passed by the learned Special Judge, Tripura, Agartala in the aforesaid Special Case wherein upon conviction the petitioner was sentenced to suffer rigorous imprisonment for ten years and also to pay a fine of Rs.1,00,000/-, in default to suffer further rigorous imprisonment for one year for the offence committed u/s 409 of the Indian Penal Code (for short "IPC").

2. Heard Mr. M.Mukherjee, learned counsel along with Mr. BN Majumder and Mr. S.Lodh, learned counsel for the petitioner and Mr. A.Lodh, learned Asstt. SG appearing for the respondent CBI.

3. The petitioner/convict pleaded in his petition for suspending the order of sentence mainly on the ground, inter alia, that though he preferred appeal

(Crl.Appeal No.09 of 2010) against the judgment passed by the learned Special Judge in the aforesaid special case but there is no possibility of hearing of the said appeal within a reasonable period. It is also urged therein that the whole conviction is based on inadmissible evidence and more so, the co-accused who were alleged to be directly involved with the alleged transaction were acquitted by the learned trial court whereas the present petitioner has been convicted relying on certain documents which are carbon copies which are not admissible in evidence and not only that the original of those carbon copies also were even not placed before the learned trial court. It is further pleaded that there is every possibility of acquittal of the present petitioner/convict from the charges leveled against him.

In support of his aforesaid contention learned counsel referred to the decision of the Apex Court in *Malay Kumar Ganguly v. Dr.Kunal Saha* AIR 2010 SCW 769.

4. Mr. Mukherjee while urging for suspension of sentence would contend that the petitioner/convict was all along on bail before the learned trial court prior to the order of conviction and awarding sentence and he never misused the bail granted to him, which itself is a good ground for suspending the order of sentence passed by the learned trial court. He further contended that the appeal being the statutory right of a convict, the trial court's verdict has to be considered not to attain finality and when an appeal is filed against the said verdict wherein an order of conviction is passed that has to be treated as non est in the eye of law. According to him, Section 389(1) of the Code is enacted by the legislature to protect the personal liberty of an accused who is convicted by the court so that he can prefer appeal and till the appeal is finally heard the accused/convict should be treated as an innocent one. Unless the court considers a convict innocent while hearing the appeal then the purpose of filing the appeal would be frustrated though learned counsel fairly submitted that mere filing of an appeal does not ipso facto entitle an accused/convict to get an order of suspension of sentence unless a prima facie case is made out, inter alia, that the judgment and order of conviction passed by the learned court below is based on no evidence. He further urged, inter alia, that no doubt corruption by public servant has now reached monstrous dimension, but that does not mean a person who is not involved in the corruption has to be convicted by a court of law on mere presumption. The learned special court was not considering the general corruption in the public life or public service while deciding the special case in which the petitioner was allegedly involved, rather it was the duty of the learned special court to consider whether the present petitioner was involved with the alleged corruption in any way or not.

5. In support of his aforesaid contention, Mr. Mukherjee relied upon a judgment of the Apex Court in the case of *K.C. Sareen v. CBI, Chandigarh*, reported in AIR 2001 SCW 3339 wherein the Apex Court while discussing about Section 389(1) of the Code stated, inter alia, "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 all 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 questions to what should be position the 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 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 a different matter."

6. Learned counsel further contended that there is a difference between the conviction and sentence. Conviction is nothing but a proof of the guilt for an offence and sentence is the mode of punishment and according to him it is not always necessary to keep a convict in the jail when he preferred an appeal. Here the petitioner is not praying for suspending the conviction, rather he is praying for suspending the sentence, he contended.

7. He further contended that if this court is of the opinion that the sentence cannot be suspended being the petitioner was convicted under Sections 467, 471, 477A and 409 of the IPC along with Section 13(2) of the PC Act, 1988 then also this court has the power to consider the prayer of the petitioner for bail.

8. In support of his aforesaid contention of bail, Mr. Mukherjee placed reliance on the decision of the Apex Court in the case of Shailendra Kumar Vs. State of Delhi, (2) wherein the Apex Court taking note of the facts of that case, inter alia, that this is a petition for being released on bail while the appellant-applicant's appeal against his conviction under Sections 304B and 498A, I.P.C. is pending in the High Court of Delhi and that the appellant-applicant has been sentenced to 7 years rigorous imprisonment u/s 304B and two years rigorous imprisonment u/s 498A, I.P.C. noted thus -

Having heard the learned counsel for the parties and taking into account the fact that the appellant-applicant is in custody for more than three years and there is no likelihood of appeal being heard early, we direct that the appellant-applicant be released on bail to the satisfaction of the Additional Sessions Judge, New Delhi.

9. While placing reliance on the aforesaid law report, Mr. Mukherjee would contend that the present petitioner is in custody for about ten months after the order of his conviction and sentence and he was also in custody at the trial stage and there is no possibility of hearing the appeal within a reasonable period. Therefore, it would be proper for this court either to suspend the order of

sentence or to release the petitioner on bail.

10. He also placed reliance on the case of Bhagwan Rama Shinde Gosai and others vrs State of Gujarat, reported in 1999 SCC 553 wherein the Apex Court while considering the appeal of the appellant of that case took note of Section 389 of the Code and held that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter of suspending the sentence so as to make the appeal right, meaningful and effective. Of course appellate courts can impose similar conditions when bail is granted.

11. Learned counsel also contended that to have speedy justice is a fundamental right, which flows from Article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused confers a right upon him to apply for bail.

In support of his aforesaid contention, he placed reliance on the decision of the Apex court Smt. Akhtari Bi Vs. State of M.P., He also referred to the decision of the Apex Court in Suresh Kumar and Ors. v. State (NCT of Delhi) 2002 SCC 1043 wherein the Apex Court relied upon its earlier decision in Bhagwan Rama Shinde Gosai (supra).

12. Per contra, Mr. Lodh, learned Asstt. SG while resisting the contention of Mr. Mukherjee submitted that a court should not pass an order relating to suspension of sentence as a routine manner only considering the fact that the appellant-applicant was on bail during the trial and he has not misused the liberty granted to him by the learned trial court and preferred an appeal against the order of conviction and sentence. He further submitted that in a case of corruption, particularly when it is proved in trial, the court should not suspend the sentence.

In support of his aforesaid contention Mr. Lodh placed reliance on the decision of the Apex Court in State of Punjab v. Navraj Singh, reported in AIR2008 SCW 4986, particularly paragraphs 11, 12 and 13, which are reproduced herein below :

11. In State of Haryana Vs. Hasmat, it was noted as follows :

6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction

between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

12. It is to be noted that learned single Judge while directing suspension of conviction indicated no reasons.

13. Above being the position the order of the learned Single Judge, directing the suspension/stay of the conviction as well as the order refusing to recall the said order cannot stand and are set aside.

He further placed reliance on the case of Sanjay Dutt Vs. State of Maharashtra Tr. CBI, Bombay, in support of his contention that in a case of serious offences as in this case, court should not suspend conviction and sentence.

13. He also contended that a carbon copy of the document can be treated as a primary evidence for the purpose of conviction. In support of his aforesaid contention, he relied upon a Division Bench decision of this court in Gouranga Das and etc. Vs. The State of Tripura, wherein this court after taking note of Prithi Chand Vs. State of Himachal Pradesh, stated "There cannot also be any question regarding the authenticity of the contents of Exbt.P/7 inasmuch as the Doctor (PW-12) is found to have put his original signature in ink on the document. In our considered opinion, there was no illegality on the part of the Trial Judge in allowing the prosecution to admit the exhibit the said Exbt.P/7".

14. He further submitted that there is no room for having doubt about the authenticity of the carbon copies of the documents relied upon by the prosecution in the trial court as those are the copies of the originals and in view of Section 62 of the Evidence Act, the said carbon copy is a primary evidence, which can be relied on for the purpose of conviction.

15. Mr. Lodh finally submitted that it would not be proper of this court to allow a corrupt officer like the appellant-applicant to hold a public office only on the ground that he has preferred an appeal against the judgment and order of his conviction and sentence.

16. Having heard the learned counsel for the parties and after going through the relevant records as available as well as the law reports cited by the learned counsel for the parties, the question needed to be answered by this court is whether an order of sentence passed by the learned trial court can be suspended when there is no possibility of taking up the appeal for hearing within a reasonable period, more so out of turn, particularly when the appellant is convicted and sentenced for alleged corruption u/s 13(2) of the PC Act along with

other provisions of the Penal Code.

17. In *KC Sareen* (supra) the Apex Court has elaborately considered the scope and ambit of the powers of the appellate court u/s 389 of the Code after taking note of its earlier decisions, particularly in *Rama Narang Vs. Ramesh Narang and Others*, wherein Ahmadi, CJ, the then who authored the judgment for the three Judges" Bench said that what can be suspended u/s 389(1) of the Code is the execution of the sentence or execution of the order and obviously the "order" referred to in the sub-section must be an order which is capable of execution. Learned Chief Justice the then also observed thus :

An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities. Since the order of conviction does not on the mere filing of an appeal disappear it is difficult to accept the submission that Section 267 of the Companies Act must be read to apply only to a "final" order of conviction. Such an interpretation may defeat the very object and purpose for which it came to be enacted.

18. The three Judges" Bench while considering the aforesaid provision of Section 389(1) of the Code in *Rama Narang* (supra) also noted that in certain situation the order of conviction can be executable and in such a case the power u/s 389(1) of the Code could be invoked. The ratio of the judgment in *Rama Narang* (supra) as noted by the Apex Court is extracted thus :

In certain situations, the order of conviction can be executable, in the sense it may incur a disqualification as in the instant case. In such a case the power u/s 389(1) of the Code could be invoked. In such situations the attention of the appellate Court must be specifically invited to the consequences which are likely to fall to enable it to apply its mind to the issue since u/s 389(1) it is under an obligation to support its order for reasons to be recorded by it in writing If the attention of the court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate.

19. Corruption by public servants has now reached a monstrous dimension in the country, but that itself is not a ground to reject the prayer for suspension of sentence in a case unless it is established that the order of conviction of committing corruption is based on the basis of the valid evidence. There is no doubt that when a public servant was found guilty of corruption after a judicial adjudicatory process in a criminal trial then only he should be treated as corrupt until he is exonerated by a superior Court. In the instant case, as the appellantapplicant was convicted for an offence of corruption, it cannot be said

that he is totally innocent. But at the same time, when an appeal is preferred against the order of conviction and sentence, the appellant is entitled to get the benefit of Section 389(1) of the Code since the appeal is the continuation of the original trial and there is no possibility of early hearing of the appeal.

20. In view of the judgment of the Apex Court in K.C. Sareen (supra), particularly para 10 of the said law report, which has been relied upon by Mr. Mukherjee and the submissions made by him which has already been noted by this court in the foregoing paragraphs of this order, it can be easily said that when the appellate court admits the appeal filed in challenge of the order of conviction and sentence involving an 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 such appeal could be heard soon after the filing of the appeal. But fact remains that in the instant case the appeal could not be taken up for final hearing within a reasonable period as the appeals filed by the other persons prior to the present appellant-applicant are in the queue for hearing and this court is not in a position to take up the appeal of the present appellantapplicant immediately for hearing depriving the other appellants who are in the queue. Moreso, prolonged delay in disposal of the appeal for no fault of the accused confers a right upon him if not for suspension of sentence but for bail also. Therefore, this court has no hesitation to note that the submissions of Mr. Mukherjee have some force.

21. The decision in Navraj Singh (supra) as relied upon by Mr. Lodh is distinguishable though in the said case also the Apex Court took note of K.C. Sareen (supra). In that case, the Apex Court negated the prayer for suspension/ stay of the conviction as the question of suspension of sentence was not the subject matter for decision before their Lordships. We cannot forget that there is a difference between conviction and sentence. Mr. Mukherjee rightly stated that conviction is proof of the guilt and sentence is the mode of punishment and it is not always necessary to keep a convict in the jail when he preferred an appeal challenging the order of conviction and sentence. In Jalal Ahmed Mazumdar Vs. State of Assam, this court while rejecting the prayer for suspension of conviction noted that suspension of sentence is not equivalent to suspension of conviction. While suspension of sentence permits liberty of physical movement to an appellant subject to such conditions as the appellate court may impose, suspension of order of conviction removes the constraints arising out of the order of conviction. This court is also of considered opinion that if the sentence awarded against a convict is suffered by him during pendency of appeal then nothing will remain there for decision in the appeal except to give a seal of court setting aside the order of conviction. This court is of further opinion that during pendency of appeal a sentence has to be suspended for the interest of justice and in exceptional cases the convict should be allowed to remain in custody and the court should refrain itself from exercising its power u/s 389(1) of the Code.

22. The case of Malay Kumar Ganguly (supra), as referred to by Mr. Mukherjee

undoubtedly requires some consideration regarding the evidentiary value of a document, but it would not be proper for this court either to discuss the submission of Mr. Mukherjee or Mr. Lodh regarding the admissibility of documents at this stage of hearing an application relating to suspension of sentence as that would affect the merit of the case. Hence this court has restrained itself from expressing any opinion regarding those contention.

23. In Sanjay Dutt (supra) the Apex Court while considering the prayer for suspension of conviction and sentence noted in para 14, inter alia, "In view of the serious offence for which he has been convicted by the Special Judge, we are not inclined to suspend the conviction and sentence awarded by the Special Judge in the present case. We make it clear that we do not express any opinion on the merits and, if any of the observations made in this order, even if it has remote possibility to prejudice either parties, we state that the same is only made for the purpose of disposal of Criminal Miscellaneous Petition No.4087 of 2009- application for suspension/stay of conviction." meaning thereby Their Lordships also in the case of Sanjay Dutt (supra) mainly dealt with suspension of conviction and not suspension of sentence. Therefore, the case of Sanjay Dutt (supra) is totally different from the case in hand. In that case the petitioner Sanjay Dutt was convicted by a TADA Court under various sections of the Terrorist and Disruptive Activities (Prevention) Act, 1987, but here the appellant-petitioner was convicted u/s 409 as well as Sections 467, 471 and 477A of the IPC and Section 13(2) of the PC Act, 1988. Therefore, the offences proved in the trial court in Sanjay Dutt (supra) and the present one are not same and not only that in Sanjay Dutt (supra) the contention advanced by the petitioner therein was that the conviction and sentence passed by the learned TADA Court could be used against Shri Dutt as a bar u/s 8(3) of the Representation of the People Act, 1951. But there Lordships while dealing with the contention advanced on behalf of the petitioner Shri Dutt, inter alia, that u/s 8(3) of the RP Act, 1951, any person who has been convicted of any offence and sentenced to imprisonment not less than two years, except 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 observed that the power of the court u/s 389 of the Code shall be exercised only under exceptional circumstances. The aforesaid fact also clearly shows that the case of Sanjay Dutt (supra) is totally different from the case in hand. More so, it is the admitted position that the present appellant-petitioner is in custody after the order of conviction and sentence for about ten months. Therefore, according to this court, it is a fit case where the order of sentence should be suspended.

24. Accordingly, it is ordered that the order of sentence dated 30.1.2010 passed by the learned Special Judge, Tripura, Agartala in Case No. Special 01 of 1996 shall remain suspended till the disposal of the Criminal Appeal No.09 of 2010 and the appellant-petitioner shall be released on bail on his furnishing a personal bond of Rs.50,000/- with two sureties of the like amount to the satisfaction of the learned Special Judge, Tripura, Agartala on further condition that he shall not

leave the country without prior permission of this court and he shall appear in the court of learned Special Judge, Tripura, Agartala once in two months and if he fails to appear, as ordered, then the learned Special Judge is at liberty to pass necessary order for his appearance.

25. With the above observations and directions, this Crl. M. Application is disposed of.