

(2013) 01 OHC CK 0016

In the Orissa High Court

Case No : CRLA No. 519/09 and Miscellaneous Case No. 308 of 2010

Sri Harihar Kharasudha Pattnaik

APPELLANT

Vs

The State of Orrisa

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389(1)
Penal Code, 1860 (IPC) — Section 34, 467, 477A
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2013) 115 CLT 1167 : (2013) CriLJ 3528

Hon'ble Judges : B.K. Nayak, J

Bench : Single Bench

Judgement

B.K. Nayak, J.—Heard Mr. J.R. Dash, Learned Counsel for the Appellant-Petitioner & Mr. S. Mohanty, Learned Standing Counsel (Vigilance). This is an application u/s 389(1) of the Cr.P.C. filed by the Appellant-Petitioner for staying the conviction of the Petitioner as recorded by the Learned Special Judge (Vigilance), Jeypore in GR Case No. 28/95 (V)/T.R. No. 81 of 2007).

2. The Petitioner & three others were tried in the aforesaid G.R. Case No. 28/95 M/(T.R. No. 81 of 2007) by the Learned Special Judge (Vigilance), Jeypore for charges u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act & Sections 467/477-A/34 of the I.P.C. for committing criminal misconduct as public servants by abusing their official position in manipulating result sheets of M.E. students with the intention of forging the said result sheets & thereby declared some failed students as passed in furtherance of their common intention during 04.07.1994. & onwards. The Petitioner was the Headmaster of the ME School at the relevant time.

3. The Trial Court convicted all the accused persons including the Petitioner for the charges framed against them & sentenced each of them to undergo RI. for two years & to pay a fine of Rs. 2,000, in default to undergo RI. for six months for the offence u/s 467 of the I.P.C. & RI. for one year & to pay a fine of Rs.

1,000 with default sentence on each count for the offence u/s 13(1)(d) of the Prevention of Corruption Act & Section 477-A of the I.P.C. The Petitioner has filed Criminal Appeal challenging the said order & the appeal has been admitted.

4. It is stated in the present petition that the Petitioner is a retired person & in the meantime & after his conviction, the Inspector of Schools, Jeypore Circle, Jeypore vide Order Dated 18.01.2010 intimated to the Petitioner that the provisional pension sanctioned in his favour has been withdrawn as per Rule 7 of the O.C.S. (Pension) Rules, 1992 in view of his conviction in the aforesaid case. The said order has been annexed as Annexure-1 to the petition. The order further reveals that it was passed as per the direction of the Government of Orissa, General Administration (Vigilance) Department vide their letter No. 7036/V Cr(N) dated 24.11.2009 communicated vide Memo No. IVSME/E(II) 252/09 229/SME dated 05.01.2010 of the Government of Orissa, School & Mass Education Department. The said order reveals that the Petitioner had been sanctioned with provisional pension by order of the Inspector of Schools dated 07.07.2008.

5. It is the submission of the Learned Counsel for the Petitioner that since the Petitioner is a retired Headmaster, he solely depends on his pensions on his pension for maintaining his family & has no other source of income & that unless the conviction is stayed, he would continue to suffer till the appeal is disposed of. He also submits that he has a good case on merits in the appeal. He relies upon decision of this Court reported in 2010 (Supp.-I) OLR-87: Harihar Mishra v. Republic of India (C.B.I., Bhubaneswar) & also the Judgment of the Apex Court reported in Rama Narang Vs. Ramesh Narang and Others,

6. The Learned Standing Counsel for the Vigilance Department, on the other hand, submits that the Petitioner, a public servant, having been convicted for misconduct as such public servant under the provisions of Prevention of Corruption Act, allowing his conviction to be stayed would enure to his benefit for avoiding the consequences of withdrawal of pension as provided under Rule 7 of the O.C.S. (Pension) Rules which would impair the morale of other public servants similarly situated & erode the confidence of the people in public institutions & have demoralizing effect on the honest public servants. He relies on the decisions of the Apex Court reported in K.C. Sareen Vs. C.B.I., Chandigarh, , Ravikant S. Patil Vs. Sarvabhouma S. Bagali, & State of Maharashtra through CBI, Anti Corruption Branch, Mumbai Vs. Balakrishna Dattatrya Kumbhar, .

7. The Supreme Court in the case of Balakrishna Dattatrya Kumbhar (supra) have taken into consideration all previous decision of the Apex Court including the decision in the case of Rama Narang (Supra) & Ravikant S. Patil (Supra) & observed as follows in paragraphs-6 & 10:

6. In Rama Narang Vs. Ramesh Narang and Others, this Court dealt with the said issue elaborately & held that if, in a befitting case, the High Court feels satisfied

that the order of conviction needs to be suspended, or stayed, so that the convicted person does not have to suffer from a certain disqualification, provided for by some other statute, it may exercise its power in this regard because otherwise, the damage done cannot be undone. However, while granting such stay of conviction, the Court must examine all the pros & cons & then, only if it feels satisfied that a case has in fact been made out for grant of such an order, it may proceed to do so & even while doing so, it may, if so consider it appropriate, impose such conditions as are deemed appropriate, to protect the interests of the other parties. Further, it is the duty of the applicant to specifically invite the attention of the Appellate Court as regards the consequences, which are likely to follow, upon grant of such stay, so as to enable it to apply its mind fully to the issue, since u/s 389(1) Cr.P.C., the Court is under an obligation to support its order in a manner provided therein, the same being, for the reasons to be recorded by it in writing.

10. In Ravikant S. Patil Vs. Sarvabhouma S. Bagali, , this Court held as under:-

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 conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non operative. All these decisions, while recognizing the power to stay conviction, have cautioned & clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice, & irreversible consequences.

8. In summing up, the Apex Court in paragraph-12 of the Judgment in the case of Balakrishna Dattatrya Kumbhar (Supra) observed 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 & 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 & examined whether the facts & 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.

9. This Court in the case of Harihar Mishra (Supra) after taking note of several decision summed up the scope of power u/s 389(1) of the Cr.P.C. in paragraph-10 of the order as follows:

10. From the discussion as aforesaid, five broad principles emerge, which, in my considered view, is a guide so far as exercise by discretion u/s 389(1), Cr.P.C. in

relation to stay/suspension of conviction is concerned. They may be called the "Panchasheel" for exercise of discretion u/s 389(1) Cr.P.C. for suspension of an order of conviction. They are.

(i) The Appellant, who seeks interference of the Appellate Court u/s 389(1), Cr.P.C. so far as the order of conviction is concerned, must come with clean hands, & with the frankness & fairness specifically draw attention of the Appellate Court to the specific consequences he is going to suffer, if discretion by the Court is not exercised in his favour.

(ii) Such discretion by the Appellate Court may be exercised in favour of the Appellant only in rare & exceptional cases depending upon the special facts of the case & not as a matter of course.

(iii) Such discretion may be exercised only where failure to stay the conviction would lead to injustice & irreversible consequences. The Court has to examine carefully on the basis of materials supplied & materials available on record as to whether the consequences sought to visit the Appellant at present or on a future date is/are real.

(iv) While exercising the discretion, the Appellate Court has a duty to look at all the aspects including ramification of keeping the conviction in abeyance, & it is under further obligation to support its order for reasons to a recorded by it in writing.

(v) In case of public servants convicted of corruption charges, the discretion should not be exercised.

Rule 7 of the Orissa Civil Service (Pension) Rules, 1992 reserves the right with the Government to withhold or withdraw pension in full or in part, whether permanently or for a specified period, if in any departmental proceeding or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service.

Apparently the power under Rule 7 of O.C.S. (Pension) Rules has been exercised by the State Government directing withdrawal of the provisional Pension sanctioned in favour of the Petitioner. As has been seen from the decisions of the Apex Court that the power to stay conviction in terms of Section 389(1), Cr.P.C. should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice & irreversible consequences. Withdrawal of pension does not amount to an irreversible consequence, inasmuch as in the event the conviction is set aside in appeal, the Petitioner would be entitled to all arrears of pension. Though the Learned Counsel for the Petitioner has relied upon the case of Harihar Mishra (supra), which was not a case under the P.C. Act, even going by 5th principle of "Panchasheel" summed up in paragraph-10 of the said Judgment, the Petitioner is not entitled to relief of stay of conviction as he has been convicted for corruption charges under the provisions of the Prevention of Corruption Act.

In the aforesaid scenario, I find no merit in the petition, which is accordingly dismissed.