
(2008) 02 MP CK 0041
In the Madhya Pradesh High Court

Umashankar Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 374, 389, 482
Prevention of Corruption Act, 1988 — Section 13

Citation : (2008) ILR (MP) 1360 : (2008) 2 MPHT 425

Hon'ble Judges : Prakash Shrivastava, J; Dipak Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dipak Misra, J.—In invocation of the jurisdiction u/s 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the pregnability of the order dated 22-11-2007 passed by the learned Single Judge in Writ Petition No. 2151/2007 (S) is called in question in this writ appeal.

2. The facts which are imperative to be exposited are that the appellant-petitioner (hereinafter referred to as "the petitioner") challenged the issuance of notice to show cause 25/31-1-2007 invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India. The show-cause notice was to the effect that why the services of the appellant should not be dispensed with inasmuch as he had been convicted u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 in Special Case No. 3/2005. It was brought to the notice of the learned Single Judge that after being convicted on 29-9-2005 the petitioner has preferred an appeal before this Court forming the subject matter of Cr.A. No. 1895/2006 wherein this Court admitting the appeal directed suspension of sentence and granted bail to the appellant therein.

3. It was contended before the learned Single Judge when the appellant had been convicted and thereafter enlarged on bail, the respondents were not justified in issuing the notice to show cause for the purpose of termination from

service. Learned Single Judge placed reliance on the decision rendered in the cases of Laxmi Narayan Hayaran Vs. State of Madhya Pradesh and Another, , Union of India and others Vs. Ramesh Kum, , Jamna Prasad Vs. State of M.P. and Others, and K.C. Sareen Vs. C.B.I., Chandigarh, and expressed the opinion that the issue of show-cause notice to the appellant was within the parameters of law and did not warrant interference. We have heard Mr. K.C. Ghildyal, learned Counsel for the appellant and Mr. Dharmendra Sharma, learned Counsel for the respondents.

4. It is submitted by Mr. Ghildyal that when the criminal appeal has been admitted pending and there has been suspension of sentence, the petitioner should not have been issued notice to show cause for imposition of major penalty as that would frustrate the criminal appeal. It is urged by him that the appellant is entitled to continue in service till the criminal appeal is finally disposed of inasmuch as the sentence has been stayed and he has been enlarged on bail. It is urged by him that the learned Single Judge has failed to appreciate the factual matrix in proper perspective and, therefore, the order passed by him is pregnable.

5. Mr. Dharmendra Sharma, learned Counsel appearing for the respondents, per contra, has submitted that the order passed by the learned Single Judge is absolutely defensible and flawless and there is no warrant for any interference in this appeal. It is contended by him that passing of an order keeping the sentence in abeyance in exercise of power conferred u/s 389 of the Code of Criminal Procedure would not enure to the benefit of the petitioner for the purpose of being retained in service and on that ground the notice to show cause is not to be criticised.

6. At the out set we may state that the factum of conviction, suspension of sentence and issuance of notice to show cause are not disputed before us. What is contended by Mr. Ghildyal is that there has been stay of the operation of the sentence and grant of bail and under these circumstances the issuance of notice proposing removal of the petitioner from service is not sustainable. It is worth appreciating that there is distinction between an order of stay of conviction and an order pertaining to keeping the sentence in abeyance.

7. In Rama Narang Vs. Ramesh Narang and Others, , the Apex Court has observed that Section 389(1) of the Code of Criminal Procedure empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under the said provision is the execution of the sentence or the execution of the order. The order referred to in Section 389(1) has to have character of an order capable of execution. 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 hence, they are to be suspended to avoid execution. In such a case power u/s 389(1) of the Code of Criminal Procedure can be invoked. When an appeal is preferred u/s 374 of

the Code the appeal is against both the conviction and sentence and the Court has jurisdiction to grant stay of order of conviction, but while granting stay of order of conviction it must examine pros and cons and it may do so imposing conditions. Similar view has been expressed in Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, .

8. In Ramesh Kumar (supra), the Apex Court while drawing distinction between the suspension of sentence and stay of conviction has expressed the view as under:

Against a Govt. servant on the ground of misconduct which has led to his conviction on a criminal charges. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Govt. servant has to be treated under suspension till disposal of appeal by the Appellate Court. The rules also do not provide the Disciplinary Authority to await disposal of the appeal by the Appellate Court filed by a Govt. servant for taking action against him on the ground of misconduct which has led to his conviction by a Competent Court of law. Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a Competent Court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. u/s 389 of the Code of Criminal Procedure, the Appellate Court has power to suspend the execution of sentence and to release an accused on bail. When the Appellate Court suspends the execution of sentence, and grants bail to an accused the effect of the order is that sentence based on conviction is "for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence u/s 389, Cr.PC an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Govt. servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the Appellate Court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of Criminal Appeal by the High Court.

9. In Jamna Prasad (supra), it has been held as follows:

What emerges out of the aforesaid discussion is that, Appellate Court and Revisional Court can, in exercise of power under Sections 389(1)/482, Code of Criminal Procedure, 1973, stay the execution of sentence or order capable of execution but stay of conviction can be passed in exceptional cases after Court carefully examines the conduct of accused, facts of the case and possible

ramifications or avoiding irretrievable consequences. However, in both the cases, the conviction and sentence can not be effaced. It is the irretrievable consequence in the former case and execution of sentence in the latter case which can be stayed. With regard to Government servant, Competent Authority can terminate the services after conviction by Criminal Court. Stay of execution of sentence will not debar it from doing so unless conviction is also stayed in exercise of power in light of principles laid down by the Apex Court in K.C. Sareen's case (supra). Further, on termination order having been passed, master and servant relationship terminates and filing of appeal and stay of execution of sentence do not revive it. He can not be taken to be under suspension from the date of termination following conviction by Trial Court till the date of judgment by the Appellate Court. Therefore, he would not be entitled to claim subsistence allowance for this period.

10. In K.C. Sareen (supra), the Apex Court expressed the view that order of conviction under the provisions of Prevention of Corruption Act, 1988 should not be suspended though sentence of imprisonment may be suspended till disposal of the appeal. We have referred to the aforesaid decisions only to highlight that there is distinction between stay of operation of conviction and suspension of sentence. We have also referred to the decision in K.C. Sareen (supra), to highlight how Their Lordships of the Apex Court have seriously taken note of the factum of conviction under the provisions of the Prevention of Corruption Act, 1988. In the case at hand, the appellant has preferred a criminal appeal and there is an order of suspension of sentence as contemplated u/s 389(1) of the Code of Criminal Procedure but the aforesaid order, by no stretch of imagination, can be said to an order of stay of conviction. Thus, the judgment operates otherwise barring the sentence. A show-cause notice has been issued to the appellant why a major penalty should not be imposed. He had been given time to explain his stand. The appellant is entitled under the law to file the show cause on whatever grounds possible. Issuance of show cause, we are disposed to think, cannot be flawed, as the employer is entitled under law to issue show cause after the appellant has been visited with the judgment of conviction specially u/s 13(1) (d) read with Section 13(2) of Prevention of Corruption Act, 1988. In the result, we do not perceive any merit in this appeal and accordingly it is dismissed without any order as to costs.