Court No. - 78

Case :- CRIMINAL APPEAL No. - 6029 of 2023
Appellant :- Mukhtar Ansari
Respondent :- State of U.P.
Counsel for Appellant :- Upendra Upadhyay
Counsel for Respondent :- G.A.,Sudist Kumar

Hon'ble Raj Beer Singh,J.

1. This application has been filed by the appellant under section 389(1) Code of Criminal Procedure (hereinafter referred as CrPC), seeking following prayer:-

> "It is, therefore, Most Respectfully Prayed that this Hon'ble Court may graciously be pleased to allow the present application and suspend the sentence awarded by the impugned judgement and order dated 29.04.2023 passed by Additional Sessions Judge/Special Judge, M.P./M.L.A. Court, Ghazipur in Special S.T. No. 90 of 2012, (State Vs. Mukhtar Ansari), under Section 3(1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, arising out of case crime no. 1051 of 2007, under Section 3(1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, Police Station Mohammadabad, District Ghazipur and further be pleased to release the appellant on bail in the aforesaid case during pendency of present criminal appeal before this Hon'ble Court and it is also prayed that the judgement and order dated 29.04.2023 passed by Additional Sessions Judge/Special Judge, M.P./M.L.A. Court, Ghazipur in Special S.T. No. 90 of 2012, (State Vs. Mukhtar Ansari), under Section 3(1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986 should remain stayed during pendency of present appeal.
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> It is further prayed that the realization of fine should also be stayed by this Hon'ble Court during pendency of present appeal before this Hon'ble Court, otherwise, the Appellant shall suffer an irreparable loss and injury.
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> And or to Pass any such other or further order as this Hon'ble Court may deem fit and proper in the present facts and circumstances of the case."

2. Heard Sri Upendra Upadhyay, learned counsel for the appellant and Sri Manish Goyal, learned Additional Advocate General, along with Sri Rupak Chaubey learned AGA for the State.

3. The appellant has been convicted under section 3(1) of Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as Gangster Act) and sentenced to ten years rigorous imprisonment with fine of Rs. 5 lacs, vide judgment and order dated 29.04.2023, passed by the learned Additional Sessions Judge/Special Judge,

MP/MLA Court, Ghazipur in SST No. 90/2012, crime No. 1051/2007, P.S. Mohammadabad, District Ghazipur.

4. Learned counsel for the appellant submitted that the Trial Court has not appreciated evidence in correct perspective and there is no credible evidence that appellant is a member of any gang or that he falls within the ambit of Gangster under the Gangster Act. It was submitted that the appellant has been falsely implicated in this case due to political rivalry. The first information report of this case was lodged against three persons but case of appellant was given a separate crime number. In the gang chart, two cases being case crime no. 589 of 2005, under Sections 147, 148, 149, 302, 307, 404, 120-B IPC and Section 7 of Criminal Law Amendment Act, P.S. Kotwali, district Ghazipur and case crime no. 19 of 1997, under Sections 364A, 365, 120-B, 302 IPC, P.S. Bhelupur, district Varanasi were shown and in both the cases the appellant has already been acquitted. During trial, two public witnesses, namely, Mir Hasan (PW-5) and Mritunjay Singh (PW-6) have not supported the prosecution version and turned hostile. Referring to the statements of witnesses, recorded before the trial court, it was submitted that the trial court has not considered the defence evidence led by the appellant-accused before the trial court. It is submitted that the impugned judgment is against facts and law and thus, a case for suspension of sentence, is made out.

5. It is further submitted that the appellant has been sentenced to 10 years rigorous imprisonment along with fine of Rs five lacs, whereas, he has already served the sentence of more than 13 years and he is still being detained in this case. In view of period of detention already undergone by the appellant, his detention in this case is illegal. Even during trial, the appellant was granted bail by the trial court vide order dated 01.02.2022 on the ground that he is in judicial custody since 2010. Referring to the above facts, it was submitted that a case for suspension of sentence as well as to stay the effect and operation of impugned judgment and order, is made out.

6. Learned Additional Advocate General appearing for State has opposed the application and argued that conviction of the appellant is based on evidence. The Trial Court has assigned cogent reasons while convicting the appellant. The appellant has long criminal history of 63 cases. As per the appellant, he has already undergone the sentence, awarded by the trial court, and thus, this application for suspension of sentence has become infructuous. It was submitted that at present appellant is serving sentence, awarded in crime no. 131 of 2003, under Sections 353, 504, 506 IPC, P.S. Alambagh, district Lucknow. The appellant has not deposited the fine imposed on him and that the sentence of one year awarded in default of payment of fine, will start only after completion of substantial sentences, awarded in other cases. The appellant is a dreaded criminal and he is having criminal history of 63 cases. In six criminal cases, he has already been convicted..

7. It was submitted that the sentence of one year, awarded to the appellant in default of payment of fine of Rs. 5 lacs, will commence after he has served entire substantial sentence, awarded in different cases. In this connection learned learned Additional Advocate General has relied on **Sharad Hiru Kolambe v. State of Maharashtra & Ors.**, (2019) 106 ACrC 667, wherein it was held as under:

> "9. Section 63 of IPC generally lays down that fine should not be excessive wherever no sum is expressed to which the fine may extend. Naturally, in cases where the concerned provision itself indicates a sum to which the fine may extend, or prescribes a minimum quantum of fine, such element may not apply. In cases covered by Section 64 of IPC the Court is competent to impose sentence of "imprisonment for non-payment of fine" and such sentence for non-payment of fine "shall be in excess of any imprisonment" to which the offender may have been sentenced or to which he may be liable under commutation of a sentence. Sections 30 and 429(2) of the Code also touch upon the principle that default sentence shall be in addition to substantive sentence. In terms of said Section 30(2) the default sentence awarded by a Magistrate is not to be counted while considering the maximum punishment that can be substantively awarded by the Magistrate, while under Section 429(2), in cases where two or more substantive sentences are to be undergone one after the other, the default sentence, if awarded, would not begin to run till the substantive sentences are over. Similarly, under Section 428 of the Code, the period undergone during investigation, inquiry or trial has to be set off against substantive sentence but not against default sentence. The idea is thus clear, that default sentence

> is not to be merged with or allowed to run concurrently with a substantive sentence. Thus, the sentence of imprisonment for non-payment of fine would be in excess of or in addition to the substantive sentence to which an offender may have been sentenced or to which he may be liable under commutation of a sentence.''

8. Learned Additional Advocate General submitted that as the appellant has not deposited the amount of fine and the sentence awarded for non-payment of fine is yet to commence and in view of the facts of the matter, no case grant of any relief under section 389(1) CrPC is made out and the application filed by the appellant is liable to be dismissed.

9. I have considered the rival submissions and perused the record.

10. Section 389 of the CrPC empowers the Court to suspend the sentence pending the appeal and for release of the appellant on bail. Section 389 CrPC so far relevant 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 he 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.
>
> Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:
>
> Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

11. In case of **Bhagwan Rama Shinde Gosai V State of Gujarat**, (1999) 4 SCC 421, the Hon'ble Apex Court has stated 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. The Court has observed :

> "3. 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."

12. In the case of **Suresh Kumar and Others Vs. State** (NCT of Delhi), (2001) 10 SCC 338, where the appellants had been convicted under Section 307 read with Section 34 of the Indian Penal Code and each was sentenced to imprisonment for a period of three years and to pay fine of Rs. 2000/-, when they moved an application under Section 389 of Code of Criminal Procedure for suspension of the sentence of imprisonment, the High Court had rejected the application. The Apex Court following the observations made in the case of Bhagwan Rama Shinde Gosai, while allowing the appeal filed by the convict, had kept in abeyance the order of conviction passed by the trial court till the disposal of the appeal filed by the convict and also had directed the release of the convict on bail.

13. In case of **Preet Pal Singh v State of U.P. and another (2020) 8 SCC 645**, the Apex Court held that as the discretion under Section 389(1) Cr.P.C. is to be exercised judicially, the appellate Court is obliged to consider whether any cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal. Section 389 of the Cr.P.C. deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. The appellate Court is duty bound to objectively assess the matter and to record reasons for the conclusion that the case warrants

suspension of execution of sentence and grant of bail. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail.

14. Thus, it is clear that the discretion under Section 389(1) Cr.P.C. is to be exercised judicially and the appellate Court has to consider whether any cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal. The appellate Court has to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. From perusal of Section 389 of the CrPC, it is evident that save and except the matter falling under the category of sub-section 3 neither any specific principle of law is laid down nor any criteria has been fixed for consideration of the prayer of the convict. It apparent that provisions of section 389(1) CrPC empower 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 this provision is the execution of the sentence or the execution of the order, which is capable of execution. The appellate Court has to consider whether any cogent ground has been disclosed giving rise to substantial doubts about the validity of conviction. Likelihood of unreasonable delay in disposal of appeal is also a relevant factor.

15. Keeping in view the aforesaid position of law, in the instant case, so far the prayer for suspension of sentence is concerned, it may be observed that the appellant has been convicted under section 3(1) of the Gangster Act and he was sentenced to ten years rigorous imprisonment along with fine of Rs. five lacs and in default of payment of fine, he has to undergo one year rigorous imprisonment. As per the detention certificate, the appellant has already undergone the substantial sentence of imprisonment and that the

sentence awarded to the appellant in default of payment of fine, will commence after he serves the sentences, awarded in other cases. However, it is not clear that if the sentence awarded to the appellant in lieu of default of fine is yet to be commenced, then how he can be kept in custody for more than 13 years in this very case. In the detention certificate, the Superintendent of Jail, district Banda has not clarified on which date the substantial sentence of 10 years, awarded by the trial court, has been completed. However, it is apparent from the detention certificate that the appellant has already undergone the substantial sentence of 10 years, awarded by the trial court. As per the prosecution, the appellant is being detained in other cases and that the sentence awarded to him in default of fine will commence after he completes the sentence awarded in other cases. It may be seen that the prosecution has not come up with a clear case whether the appellant is in custody in this case or not. It would be interesting to note that on the one hand it is being stated on behalf of the prosecution that if as per the appellant, he has served the entire sentence, this application for grant of bail has become infrutous but on the other hand the prayer of suspension of sentence is being opposed. Learned counsel for the appellant submits that appellant is still in custody in this very case.

16. Thus, as per the prosecution version the appellant has already served the sentence of 10 years rigorous imprisonment awarded by the trial court and presently he is undergoing the sentence awarded in another case but as the appellant has not deposited amount of fine and the sentence awarded in default of payment of fine is yet to be commence. However, there is no such categorical version of the State that whether the appellant is still in custody in this case or not. Be that as it may, in view of the aforesaid facts, particularly, considering the fact that the appellant has already served imprisonment of more than 13 years in this very case, this ground alone is sufficient to allow the prayer of appellant under Section 389(1) Cr.P.C. for suspension of sentence and grant of bail during pendency of appeal, otherwise the very purpose of this appeal would stand frustrated.

17. On merits of the matter, it was shown that in the gang chart, two cases ie crime no. 589 of 2005, under Sections 147, 148, 149, 302, 307, 404, 120-B IPC and Section 7 of Criminal Law Amendment Act, P.S. Kotwali, district Ghazipur and case crime no. 19 of 1997, under Sections 364A, 365, 120-B, 302 IPC, P.S. Bhelupur, district Varanasi were shown and in both the cases the appellant has already been acquitted. During trial, two public witnesses, namely, Mir Hasan (PW-5) and Mritunjay Singh (PW-6) have not supported the prosecution version and turned hostile. It would also be pertinent to mention that the appellant has been awarded maximum sentence provided under section 3(1) of the Gangster Act. In view of all these facts, coupled with the sentence already undergone by the appellant, a case for suspension of sentence and grant of bail during pendency of the appeal is made out.

18. However, so far the question of staying the effect and operation of impugned judgment and order is concerned, the parameters and legal position on that issue are on different footing. It is well-settled that stay of conviction is not a rule but an exception to be resorted to in rare cases. No doubt in certain situations the order of conviction can be executable, in the sense it may incur a disqualification as in the instant case and in such a case the power under Section 389(1) CrPC could be invoked but 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 under Section 389(1) CrPC it is under an obligation to support its order for reasons to be recorded by it in writing. The appellate court in an exceptional case may put the conviction in abeyance along with the sentence, but such power has to be exercised with great circumspection and caution. The appellant must satisfy the court as regards the consequences that are likely to befall him, if the said conviction is not suspended. The court has to consider all the facts and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The power to stay of conviction has to be resorted in a rare case only.

19. In **State of Maharashtra v Balakrishna Dattatrya Kumbhar,** (2012)12 SCC 384, it has been held 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 and 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 and examine whether the facts and 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. In **State of Maharashtra v. Gajanan,** (2003) 12 SCC 432, the Apex Court had to deal with specific situation of loss of job and it has been held that it is not one of exceptional cases for staying the conviction.

20. In the case of **Ravikant S. Patil v. Sarvabhouma S. Bagali,** (2007)1 SCC 673, it was held that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases. It was observed as under;

> "15. 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 the 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. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction."

21. Same view was reiterated in the case of **Navjot Singh Sidhu v. State of Punjab & Anr.,** (2007) 2 SCC 574 and it was held that grant of stay of

conviction can be resorted to in rare cases. In Para 6 it has been held as follows:

> "6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

22. The Apex Court in the case of **Shyam Narain Pandey v. State of U.P.** (2014)8 SCC 909, held that unless there are exceptional circumstances, the appellate court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances. In the case of **Lok Prahari v. Election Commission of India** (2018) 18 SCC 114, Hon'ble Apex Court has again reiterated that the power to stay a conviction is by way of an exception.

23. In case of **K.C. Sareen v. State (2001)6 SCC 584**, Hon'ble Apex Court summarized the legal position and held:

> "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 question as to what should be the position 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 unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the

> offence under the PC Act, de hors the sentence of imprisonment as a sequel thereto, is a different matter."

24. Thus, it is apparent 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 the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. The appellate court can suspend or grant stay of order of conviction, but the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case but such power must be exercised with great circumspection and caution. Only in an exceptional case, the appellate court may put the conviction in abeyance along with the sentence.

25. In the instant matter, in affidavit filed in support of the application, there is absolutely nothing that what consequences are likely to fall if the conviction of the appellant is not stayed. The appellant has been convicted for the offence under section 3(1) of Gangster Act. This section provides punishment for a Gangster, as defined under Act. The said Act aims at curbing the danger of organized crimes and anti-social activities in the State of Uttar Pradesh and was enacted to maintain public order. There is long criminal history of appellant. After giving thoughtful consideration to all attending facts of the case, nature of offence of which the appellant has been convicted and the aforesaid position of law, I am of considered view that the instant case does not fall within the ambit of such rare case so as to warrant the stay of conviction of appellant and thus, no case for stay of conviction of appellant is made out. It is correct that this Court is allowing the prayer of suspension of sentence during pendency of appeal, but as stated above, the legal position and parameters for stay of conviction are quite different.

26. In view of aforesaid, the prayer for stay of conviction of the appellant is refused and hereby rejected.

27. As noted earlier, the prayer for suspension of execution of sentence and grant of bail during pendency of appeal is allowed.

28. Let the appellant **Mukhtar Ansari** convicted and sentenced in Special S.T. No. 90 of 2012, (State Vs. Mukhtar Ansari), arising out of case crime no. 1051 of 2007, under Section 3(1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, Police Station Mohammadabad, District Ghazipur be released on bail during pendency of the appeal, subject to furnishing a personal bond and two sureties of like amount to the satisfaction of the Trial Court concerned, with following conditions:

(i) that the appellant shall not indulge in any criminal activity and shall not misuse the liberty of bail;

(ii) that the appellant shall not leave India without the previous permission of the court;

29. It is directed that realisation of amount of the fine imposed by the Trial Court shall remain stayed during pendency of this appeal.

30. Before parting with this order it may be observed that in disposal of this application, this Court has not examined the contention of the learned counsel for the appellant that the appellant has been detained in custody in this case more than the sentence awarded by the trial court. If the appellant has any such grievance, in that connection he may file a separate application.

31. The application of appellant under section 389(1) CrPC stands **disposed of** accordingly.

32. Appeal be listed in the month of November, 2023.

Order Date :- 25.9.2023
Anand