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Court No. - 16

Case :- CRIMINAL APPEAL No. - 993 of 2023

Appellant :- Siddha Nath Pathak And Another

Respondent :- State Of U.P. Thru. Secy. Home Deptt., Lko. And Another

Counsel for Appellant :- Ayodhya Prasad Mishra A.P. Mishra,Alok Kr. Misra,Ayush Shukla,Badrish Kumar Tripathi,Jaylaxmi Upadhyay,Rituraj Mishra,Sanjay Mishra

Counsel for Respondent :- G.A.,Anand Mani Tripathi,Badrish Kumar Tripathi

Hon'ble Mohd. Faiz Alam Khan,J.

IA/6/2023

1. Heard Shri A.P. Mishra, learned counsel for the applicant-appellant no. 2- **Sanjay Kumar Pathak**, Shri Badrish Kumar Tripathi, learned counsel for the complainant/informant, as well as learned AGA for the State, and perused the record.

2. The instant applicant under Section 389(2) CrPC has been moved by the applicant-appellant no. 2 to stay judgment and order of the trial court, so far as the conviction of the applicant-appellant no. 2 is made vide impugned judgment and order dated 16.03.2023 passed by the Additional District and Sessions Judge, Court No. 12, Faizabad/Ayodhya in Sessions Trial No.288 of 2014, arising out of Case Crime No.0279 of 2014 lodged at police station Pura Kalander, district Faizabad/Ayodhya is concerned, whereby the applicant-appellant no. 2 and other appellants have been convicted for committing offences under sections 147, 148, 323, 308 and 452 IPC and have been sentenced for maximum term of five years imprisonment with fine stipulation with regard to section 308 IPC.

3. Learned counsel for the applicant-appellant no. 2, while drawing attention of this court towards the impugned judgment and order

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passed by the trial court, submits that the trial court has committed patent illegality in convicting the appellants as there was no clinching evidence against them and the impugned judgment and order passed by the trial court is based on surmises and conjectures. It is further submitted that the applicant-appellant no. 2 has been granted bail by a coordinate bench of this court and he is a practicing lawyer at Civil Courts, Faizabad/Ayodhya and with regard to conviction of the applicant-appellant no. 2 a relative of the informant of the instant case, namely, Shri Arjun Shukla has moved a complaint against the applicant-appellant no. 2 before the Chairman/Secretary, Bar Council of Uttar Pradesh for cancellation of his registration and upon the complaint of the above-mentioned Shri Arjun Shukla, the Bar Council of Uttar Pradesh has issued a notice to the applicant-appellant no. 2. Copies of the complaint and notice issued by the Bar Council of Uttar Pradesh have been placed on record as Annexure Nos. 1 and 2 to the affidavit enclosed with the instant application.

4. It is vehemently submitted that applicant-appellant no. 2 is a young lawyer and, if on the basis of complaint made by Shri Arjun Shukla registration of the applicant-appellant no. 2 is cancelled by the Bar Counsel of Uttar Pradesh then he will suffer irreparable financial loss as well as irreparable loss to his reputation. It is vehemently submitted that in the instant case no specific role has been assigned to the applicant-appellant no. 2 and general role of assault has been assigned to all the accused persons and, even if the case of the prosecution is taken on its face, no injury has been sustained by any injured person which may attract the ingredients of Section 308 IPC and, thus, *prima facie*, it is evident that the trial court has not appreciated the evidence available on record in right perspective. In this regard, learned counsel for the applicant-appellant no.2 has drawn attention of this court towards observations of the trial court made in para-30 of the judgment and order wherein it is stated that the offence of section 323

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IPC is emerging against the accused persons, but having regard to section 308 IPC, the infliction of a grievous injury is not a pre-condition or the infliction of any injury is not required at all and, without any supplementary report pertaining to any injury sustained by any injured person, has assumed the injury sustained by injured persons, Rajesh Kumar Mishra and Jitendra Mishra sufficient to attract the provisions of section 308 IPC which is totally against the law, as infliction of an injury is a pre-condition for attraction of provisions of section 308 IPC because it is the seat of injury and the weapon used which may attract the ingredients of section 308 IPC. It is further submitted that there was a cross-case of the instant case which was lodged on behalf of appellants' side wherein four persons from the side of the appellants have sustained injuries.

5. It is further submitted that the trial court has neither convicted the appellants with the help of section 34 IPC nor with the help of section 149 IPC and, without discussing the role of each & every accused persons, has convicted them all. It is further submitted that the Disciplinary Committee of the Bar Council of Uttar Pradesh has cancelled the licence of the son of appellant no.1-Siddha Nath Pathak, namely, Dhananjay Kumar Pathak, on the complaint made by the same complainant, namely, Shri Arjun Shukla. It is further submitted that one Kalika Prasad Mishra, who had been the President of Bar Association, Faizabad/Ayodhya, is the main source on the instigation of whom false criminal cases are being lodged against the family members of the appellant no. 1 and appellant no. 1 and he (Kalika Prasad Mishra) is having criminal history of various cases. It is vehemently submitted that if the licence of the applicant-appellant no. 2 is cancelled by the Bar Council of Uttar Pradesh, he will suffer irreparable loss of irreversible character and, therefore, the order pertaining to the conviction of the applicant-appellant no. 2 be stayed. It is further stated that the criminal history of the applicant-appellant

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no. 2 has been explained in para-20 of the affidavit enclosed with the bail application dated 27.03.2023.

6. Shri Badrish Kumar Tripathi, learned counsel for the complainant/informant, as well as learned AGA vehemently opposes the submissions made by the learned counsel for the applicant-appellant no. 2 on the ground that the applicant-appellant no. 2 has actively participated in the *maar-peeet* and there is no illegality, so far as conviction and sentencing of applicant-appellant no. 2 is concerned. The applicant-appellant no. 2 is also having criminal history of four cases. It is further submitted that there is a difference in suspension and stay of conviction and the applicant-appellant no. 2 is not going to face any irreparable loss and only on the basis of apprehension the conviction could not be stayed when the appeal could itself be decided with the promptness and, thus, the application moved by the applicant-appellant no. 2 for stay of his conviction is liable to be dismissed/rejected.

7. Having heard learned counsel for the parties and having perused the record, it is reflected that the applicant-appellant no.2 has been convicted and sentenced by the trial court for committing the offence under sections 147, 148, 323, 308 and 452 IPC and maximum imprisonment of five years has been awarded with regard to offence under section 308 IPC. It is also evident that on filing the appeal, the applicant-appellant no. 2 has been released on bail vide order dated 16.06.22023 passed by a coordinate bench of this court in Criminal Appeal No. 993 of 2023 (Crl. Misc. Application No.1 of 2023) and that order has been passed after taking into cognizance the criminal history of the instant applicant-appellant no. 1. There may not be any doubt that no specific role has been assigned to the instant applicant-appellant no. 2 or any other convict and general role of assault with *lathi* and *danda* has been attributed to all the appellants. The doctor before the trial court has deposed that injuries sustained by the injured

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persons were of simple in nature and no supplementary report in this regard was prepared and this aspect of the matter has been dealt by the trial court in para-30 of the impugned judgment and order. However, the trial court was of the opinion that infliction of an injury is not at all required for attracting the offence under section 308 IPC and having regard to an injury sustained by injured- Rajesh Kumar Mishra on his head, beneath which subdural hematoma was found, was of the view that the conviction of the accused persons may be made under section 308 IPC. This observation made by the trial court has been vehemently assailed by the learned counsel for the applicant-appellant no. 2 in order to show that even if the case of the prosecution is taken on its face, the ingredients of section 308 IPC may not attract. It appears to be an admitted situation that the applicant-appellant no. 2 is a practicing lawyer and, though he is having criminal history of four cases, but he is not a convict and he appears to have been granted bail in all these four cases.

8. The law, with regard to the manner in which an application for stay of conviction would be dealt with, is now no more *resintegra* and has been set at rest by the Hon'ble Supreme Court in Catena of Judgments.

9. Hon'ble Supreme Court in ***Rahul Gandhi Vs Purnesh Ishwarbhai Modi and Others reported in MANU/SCOR/94244/2023***, opined as under :-

*"5-Insofar as grant of stay of conviction is concerned, we have considered certain factors. The sentence for an offence punishable under Section 499 of the Indian Penal Code, 1860 (for short "IPC") is simple imprisonment for two years or fine or both. The learned Trial Judge, in the order passed by him, has awarded the maximum sentence of imprisonment for two years. Except the admonition given to the appellant by this Court in contempt proceedings [Contempt Petition (Crl) No.3/2019 in Yashwant Sinha and Others v. Central Bureau of Investigation through its Director and another, reported in (2020) 2 SCC 338] no other reason has been assigned by the learned Trial Judge while imposing the maximum sentence of two years. **It is to be noted that it is only on account of the maximum sentence of***

two years imposed by the learned Trial Judge, the provisions of sub-section (3) of Section 8 of the Representation of the People Act, 1950 (for short, "the Act") have come into play. Had the sentence been even a day lesser, the provisions of sub-section (3) of Section 8 of the Act would not have been attracted.

6. Particularly, when an offence is non-cognizable, bailable and compoundable, the least that the Trial Judge was expected to do was to give some reasons as to why, in the facts and circumstances, he found it necessary to impose the maximum sentence of two years.

9. We are of the considered view that the ramification of sub-section (3) of Section 8 of the Act are wide-ranging. They not only affect the right of the appellant to continue in public life but also affect the right of the electorate, who have elected him, to represent their constituency."

10. Hon'ble Supreme Court in the case of **Lok Prahari vs. Election Commission of India and Ors.**, MANU/SC/1056/2018 has considered the scope of the power of Court to stay the conviction of a convict and opined as under :-

*"10. Section 389 of the Code of Criminal Procedure, 1973, empowers the appellate court, pending an appeal by a convicted person and for reasons to be recorded in writing to order that the execution of a sentence or order appealed against, be suspended. In the decision in **Rama Narang v. Ramesh Narang** MANU/SC/0623/1995 : (1995) 2 SCC 513, a Bench of three judges of this Court examined the issue as to whether the court has the power to suspend a conviction Under Section 389 (1). This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, 1973. But in certain situations, it can become executable in a limited sense upon it resulting in a disqualification under other enactments. Hence, in such a case, it was permissible to invoke the power Under Section 389 (1) to stay the conviction as well. This Court held:*

19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal Under Section 374 is essentially against the order of conviction because

the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred Under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction Under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code.”

11. In *Navjot Singh Sidhu v. State of Punjab* MANU/SC/0648/2007 : AIR 2007 SC 1003 a Bench of two learned judges of this Court held that a stay of the order of conviction by an appellate court is an exception, to be resorted to in a rare case, after the attention of the appellate court is drawn to the consequences which may ensue if the conviction is not stayed. The court held:

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.”

12. The above position was reiterated by a Bench of three judges of this Court in *Ravikant S. Patil v. Sarvabhuma S. Bagali* MANU/SC/8600/2006 : (2007) 1 SCC 673 , after adverting to the earlier decisions on the issue, viz. *Rama Narang v. Ramesh Narang (supra)*, *State of Tamil Nadu v. A. Jaganathan* MANU/SC/0620/1996 : (1996) 5 SCC 329, *K.C. Sareen v. CBI, Chandigarh* MANU/SC/0409/2001 : (2001) 6 SCC 584, *B.R. Kapur v. State of T.N. (supra)* and *State of Maharashtra v. Gajanan* MANU/SC/1077/2003 : (2003) 12 SCC 432. This Court concluded as follows:

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. As 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 that 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.”

13. In Lily Thomas’s case (supra), it was urged that in the absence of Section 8(4), a Member of Parliament or of the State Legislature would be left without a remedy even if the conviction was "frivolous". Rejecting the submission, this Court held (relying on Ravi Kant Patil (supra):

“In the aforesaid case, a contention was raised by the Respondents that the Appellant was disqualified from contesting the election to the Legislative Assembly Under Sub-section (3) of Section 8 of the Act as he had been convicted for an offence punishable Under Sections 366 and 376 of the Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification Under Sub-sections (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the appellate court Under Section 389 of the Code or the High Court Under Section 482 of the Code.”

14. These decisions have settled the position on the effect of an order of an appellate court staying a conviction pending the appeal. Upon the stay of a conviction Under Section 389 of the Code of Criminal Procedure, the disqualification Under Section 8 will not operate. The decisions in Ravi Kant Patil and Lily Thomas conclude the issue. Since the decision in Rama Narang, it has been well-settled that the appellate court has the power, in an appropriate case, to stay the conviction Under Section 389 besides suspending the sentence. The power to stay a conviction is by way of an exception. Before it is exercised, the appellate court must be made aware of the consequence which will ensue if the conviction were not to be stayed. Once the conviction has been stayed by the appellate court, the disqualification Under Sub-sections 1, 2 and 3 of Section 8 of the Representation of the People Act 1951 will not operate. Under Article 102(1)(e) and Article 191(1)(e), the disqualification operates by or under any law made by Parliament. Disqualification under the above

provisions of Section 8 follows upon a conviction for one of the listed offences. Once the conviction has been stayed during the pendency of an appeal, the disqualification which operates as a consequence of the conviction cannot take or remain in effect. In view of the consistent statement of the legal position in Rama Narang and in decisions which followed, there is no merit in the submission that the power conferred on the appellate court Under Section 389 does not include the power, in an appropriate case, to stay the conviction. Clearly, the appellate court does possess such a power. Moreover, it is untenable that the disqualification which ensues from a conviction will operate despite the appellate court having granted a stay of the conviction. The authority vested in the appellate court to stay a conviction ensures that a conviction on untenable or frivolous grounds does not operate to cause serious prejudice. As the decision in Lily Thomas has clarified, a stay of the conviction would relieve the individual from suffering the consequence inter alia of a disqualification relatable to the provisions of Sub-sections 1, 2 and 3 of Section 8."

11. In this regard observation of Hon'ble Supreme Court in **Rama Narang vs. Ramesh Narang and Ors., MANU/SC/0623/1995** are also important and the same are placed below :-

"15. Under the provisions of the Code to which we have already referred there are two stages in a criminal trial before a Sessions Court, the stage upto the recording of a conviction and the stage post-conviction upto the imposition of sentence.

A judgment becomes complete after both these stages are covered.

Under Section 374(2) of the Code any person convicted on a Trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court. Section 384 provides for summary dismissal of appeal if the Appellate Court does not find sufficient ground to entertain the appeal. If, however, the appeal is not summarily dismissed, the Court must cause notice to issue as to the time and place at which such appeal will be heard. Section 389(1) 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 this provision is the execution of the sentence or the execution of the order. Does 'Order' in Section 389(1) mean order of conviction or an order similar to the one under Sections 357 or 360 of the Code? Obviously the order referred to in Section 389(1) must be 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 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.

It is, therefore, fallacious to contend that on the admission of the appeal by the Delhi High Court the order of conviction had ceased to exist. If that be so why seek a stay or suspension of the Order?

16. 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 under Section 389(1) of the Code could be invoked. In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since under Section 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 ceased to operate."

Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in a suitable case of exceptional nature, 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 examined 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.

12. In *Afjal Ansari vs. State of U.P. (14.12.2023 - SC) : MANU/SC/1340/202311*, Hon'ble Supreme Court while, considering the parameter for stay of conviction, has opined as under:-

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"It becomes manifestly evident from the plain language of the provision, that the Appellate Court is unambiguously vested with the power to suspend implementation of the sentence or the order of conviction under appeal and grant bail to the incarcerated convict, for which it is imperative to assign the reasons in writing. This Court has undertaken a comprehensive examination of this issue on multiple occasions, laying down the broad parameters to be appraised for the suspension of a conviction Under Section 389(1) of the Code of Criminal Procedure. There is no gainsaying that in order to suspend the conviction of an individual, the primary factors that are to be looked into, would be the peculiar facts and circumstances of that specific case, where the failure to stay such a conviction would lead to injustice or irreversible consequences.² The very notion of irreversible consequences is centered on factors, including the individual's criminal antecedents, the gravity of the offence, and its wider social impact, while simultaneously considering the facts and circumstances of the case."

13. Perusal of the factual position of the instant case, in the background of the above stated legal position, would reveal that in an appropriate case the court can stay the conviction, if the conviction is going to cause such an irreparable injury to the convict which could not be reversed. The suspension of licence of the applicant-appellant no. 2, who is shown to be a practicing lawyer at Civil Court, Faizabad/Ayodhya would certainly be a circumstance which may adversely affect him financially as well as socially and would certainly cause an injury of the nature of irreparable character as suspension of his licence to practice law would certainly affect his clientage/profession as well as reputation. The record of the trial court is available and the appeal is expected to be decided in near future. Thus, having regard to all the above facts and circumstances of the case, it is provided that the conviction of the applicant- appellant no. 2, namely, **Sanjay Kumar Pathak** as recorded by the impugned judgment and order passed dated 16.03.2023 passed by the Additional District and Sessions Judge, Court No. 12, Faizabad/Ayodhya in Sessions Trial No.288 of 2014, arising out of Case Crime No.0279 of 2014 lodged at police station Pura Kalander, district

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Faizabad/Ayodhya shall remain stayed/suspended till the next date of listing.

On Memo

1. Let the appeal be listed along with connected appeal on 29.05.2024 for final hearing.

2. It is clarified that the appellants would not be allowed any adjournment on the next date of listing.

Order Date :- 14.5.2024

MVS/-