

Reserved on 12.07.2023

Delivered on 24.07.2023

Court No. - 78

Case :- CRIMINAL APPEAL No. - 5295 of 2023

Appellant :- Afjal Ansari

Respondent :- State of U.P.

Counsel for Appellant :- Upendra Upadhyay, Ajay Srivastava

Counsel for Respondent :- G.A., Sudist Kumar

Hon'ble Raj Beer Singh, J.

Order on Criminal Misc. Application No. 01/2023, filed for suspension of sentence and to stay the effect and operation of impugned judgment and order

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 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. 980 of 2012, (State Vs. Afjal Ansari), under Section 3(1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, arising out of case crime no. 1052 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.

It is further prayed that this Hon'ble Court may be pleased to stay the effect and operation of the judgment 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. 980 of 2012, (State Vs. Afjal Ansari), under Section 3 (1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, arising out of case crime no. 1052 of 2007, under Section 3 (1) of The Uttar Pradesh Gangsters & Anti Social Activities (Prevention) Act, 1986, Police Station Mohammadabad, District Ghazipur.

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.

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 Shri G.S. Chaturvedi, learned Senior Advocate, assisted by Shri Upendra Upadhyay and Shri Ajay Srivastava, learned counsel for the appellant, Shri D.K. Singh, learned counsel for victim/P.W.-6 and Shri Manish Goyal, learned Additional Advocate General along with Shri A.K. Sand, learned G.A. 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 4 years imprisonment with fine of Rs. One lac, vide judgment and order dated 29.04.2023, passed by the learned Additional Sessions Judge / Special Judge, MP/MLA Court, Ghazipur in SST No. 980/2012, crime No. 1052/2007, P.S. Mohammadabad, District Ghazipur.

4. Shri G.S. Chaturvedi, learned Senior Advocate 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. The appellant has been Member of Legislative Assembly of Uttar Pradesh for 5 times and member of Parliament for two times. Presently, the appellant was member of Parliament from Ghazipur Constituency since 2019 , but now after the judgment of Trial Court, he has been disqualified from the membership. It was submitted that the appellant has been falsely implicated in this case due to political rivalry. Referring to the facts of matter, it was submitted that initially, appellant was named as an accused of conspiracy in a murder case registered as Case Crime No. 589 of 2005 under Sections 147, 148, 149, 307, 302, 404, 120-B I.P.C. on 29.11.2005 at Police Station-Bhanvar Kol, District-Ghazipur. Subsequently, that case was investigated by C.B.I. and the case was transferred to C.B.I. Court at Rowse Avenue, New Delhi and he has been acquitted by the court of Special Judge (P.C. Act)/C.B.I. Court No. 9/ M.P./M.L.A. Court, Rowse Avenue, New Delhi. Against the judgment of acquittal, an appeal has been filed by C.B.I., but so far no adverse order has been passed against the appellant. The provisions of Gangster Act were

invoked against the appellant on the basis aforesaid case only. A single gang chart was prepared in the matter. Neither any separate gang chart was prepared in the matter of appellant nor there was any separate approval by the District Magistrate for imposition of Gangster Act but despite that, the Trial Court proceeded with the matter after framing charges against the appellant.

5. Referring to evidence, learned Senior Advocate submitted that on the basis of evidence adduced before the Trial Court, no offence under Gangster Act, is made out against the appellant and he has been wrongly convicted by the Trial Court. The Trial Court has failed to appreciate the evidence in accordance with law. Besides the case shown in gang chart, the appellant has been falsely implicated in 6 more cases, out of them, one Case Crime No. 607 of 2009 is under Section 171, 188 I.P.C. for alleged violation of Model Code of Conduct during Election period and appellant has never been summoned in that case. In second case, being Case Crime No. 18 of 2014 under Representation of People's Act, the appellant has already been granted bail. In third case, Crime No. 28 of 1998, under Section 171-F I.P.C. and Section 135(2) Representation of People's Act, the appellant has never been summoned by the investigating officer or the Court. That matter pertains to alleged violation of Model Code of Conduct during election period. Fourth case is Case Crime No. 260 of 2001 under Sections 147, 148, 353 I.P.C. and Section 3 of Prevention of Public Properties from Damages Act along with Section 7 of Criminal Law Amendment Act and in that matter, appellant has already been granted bail. In fifth case, Case Crime No. 493/2005 under Sections 302, 506, 120-B I.P.C., appellant was nominated as a conspirator but the name of the appellant was expunged by the investigating officer and no charge-sheet was filed against the appellant. Sixth case is Case Crime No. 1051/ 2007 under Sections 302, 120-B, 436, 427 I.P.C. and Section 3,4,5 of Explosive Act and Section 7 Criminal Law Amendment Act and in that case also, the name of the appellant was expunged by the investigating officer and appellant was neither charge-sheeted nor summoned by the Court. It was submitted that only two cases were registered against the appellant after the

present case of the Gangster Act and both the said cases are regarding violation of Model Code of Conduct and said cases were registered due to political enmity. Referring to statements of prosecution witnesses recorded before the trial court, it was submitted that conviction of appellant is based on sole testimony of PW 1 Ramdarash Yadav, which is highly unreliable. The Trial did not attach the required weight to the defence evidence adduced before it. The appellant is a senior citizen and political person and that during trial, he has been on bail and he has never misused the liberty of bail. It was further submitted that the appellant is aged about 70 years and he is suffering from several ailments.

6. 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. The appellant has been a Member of Parliament for two times and there is no possibility that he would abscond or will tamper with evidence. Further, the appellant is languishing in jail since 29.04.2023 and thus, he has already undergone the custody for sufficient period. Referring to above stated facts of the matter, it was submitted that the sentence awarded by the Trial Court may be suspended and the appellant may be granted bail during pendency of appeal and that the effect and operation of impugned judgment and order may also be stayed during pendency of the case.

7. 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 may have a long political career but he is a hardened criminal. Though, during trial the appellant was on bail but he has misused his liberty of bail. In crime number 589/05 (case mentioned in gang chart), the appellant was one of the accused and in that case public witnesses were compelled to turn hostile due to fear of the appellant. It was submitted that the appellant has criminal history of several cases. In crime number 589/05, the accused persons were acquitted on the ground that the witnesses have

turned hostile. In the judgment of that case, the trial court has observed that the case of prosecution is failing due to hostile witnesses and if the witnesses had benefit of Witness Protection Scheme during trial, the result may have been different. The said observation is sufficient to demonstrate that material witnesses in that case turned hostile due to fear of accused persons, including the appellant. The appeal against the said judgment of acquittal is pending before the Hon'ble Delhi High Court. It was submitted that the appellant as well as his brother Mukhtar Ansari have terror in the public at large and no one from public dare to depose against them.

8. It is further submitted that on the basis of solitary case, provisions of section 3(1) of Gangster Act can be invoked. The S.H.O. concerned has recommended for initiation of proceedings under Gangster Act and the gang chart was duly approved by the authorities concerned. It is well settled that provisions of Gangster Act can be invoked on the basis of a solitary criminal case. Mere irregularities in proceedings before or during trial do not vitiate prosecution unless the accused is prejudiced by such irregularities. It was submitted that the S.H.O. has recommended initiation of proceedings under Gangster Act against 7 persons but the concerned authorities i.e. S.P., Ghazipur and District Magistrate, Ghazipur have recommended and sanctioned the prosecution of three accused persons, including appellant. The name of appellant is mentioned in the gang chart, duly approved by the District Magistrate, Ghazipur, though on a single Tehreer of first informant, three separate crime numbers were allotted. This act may be irregular but it does not affect the prosecution and proceedings of case. Further, that issue has already been considered in the application under Section 482 Cr.P.C., which was filed by the appellant earlier against framing of charges. During trial of the case, all the prosecution witnesses have supported prosecution version. The evidence adduced in defence, was considered by the Trial Court but the same was not found credible.

9. It is further submitted that besides the case shown in the Gang Chart, the appellant has criminal history of six more criminal cases, details of

which are as given below:

(i) Case Crime No. 18/2014 under Sections 171-ञ, 188 I.P.C. and Section 121(2) Representation of People's Act, P.S. Chakarghatta, District Chandauli.

(ii) Case Crime No. 28/1998 under Sections 171 I.P.C. and Section 135(2) Representation of People's Act, P.S. Nonahara, District Chandauli.

(iii) Case Crime No. 260/2001 under Sections 147, 148, 353 I.P.C. and Section 03 of P.P. Act and Section 7 Criminal Law Amendment Act, P.S. Mohamdabad, District Ghazipur.

(iv) Case Crime No. 493/2005 under Sections 302, 506, 120-B I.P.C. P.S. Mohamdabad, District Ghazipur.

(v) Case Crime No. 1051/2007 under Sections 302, 120-B, 436, 427 I.P.C. and Sections 3, 4, 5 of Explosive Act and Section 7 Criminal Law Amendment Act, P.S. Kotwali, District Ghazipur.

(vi) Case Crime No. 1052/2007 under Section 3(1) of U.P. Gangster Act, P.S. Mohamdabad, District Ghazipur.

10. It was pointed out that two criminal cases have been registered against the appellant after registration of the case in question. Referring to above above stated facts and evidence adduced before the Trial Court, it was submitted that no case for suspension of sentence of appellant is made out. The conviction of appellant is based on evidence. The Trial court has properly appreciated the evidence and convicted the appellant. In case the appellant is granted bail during pendency of the appeal, he may abscond and tamper the evidence of other cases pending against him and he will misuse the liberty of bail.

11. Regarding prayer for stay of effect and operation of impugned judgment, it was submitted by the learned Additional Advocate General that the operation of impugned judgment of conviction can be stayed only under exceptional circumstances. In the instant matter, in view of attending facts and circumstances of the matter, no case for staying the operation and effect of impugned judgment and order is made out. Referring to Case Crime No. 589 of 2005, it was submitted that evidence of PW-6 Ram Narayan is not hit by rule of 'estoppel'. Further, the appellant has not disclosed the consequences that may arise if conviction is stayed. The appellant has been

convicted for the offence under section 3(1) Gangster Act and in view of nature of offence, the stay of conviction will have serious impact on public perception. It was submitted that appellant has been convicted on the basis of credible evidence and that no case for suspension of sentence or for stay of effect and operation of impugned judgement and order is made out.

12. In support of his contentions, learned Additional Advocate General has placed reliance upon following cases:

- (i) Ravikant S. Patil Vs. Sarvabhuma S. Bagali (2007)1 SCC 673
- (ii) Shyam Narain Pandey Vs. State of Uttar Pradesh (2014) 8 SCC 909
- (iii) Lok Prahari Vs. Election Commission of India (2018) 18 SCC 114
- (iv) State of Maharashtra Vs. Gajanan (2003)12 SCC 432
- (v) K.C. Sareen Vs. State (2001)6 SCC 584
- (vi) State of Maharashtra Vs. Balakrishna Dattatrya Kumbhar (2012)12 SCC 384
- (vii) Sidhartha Vashisht alias Manu Sharma Vs. State of NCT of Delhi (2008) 5 SCC 230
- (viii) State of Haryana Vs. Hasmat (2004)6 SCC 175
- (ix) Kishori Lal Vs. Rupa and others (2004) 7 SCC 638
- (x) Preet Pal Singh Vs. State of U.P. and another (2020) 8 SCC 645
- (xi) Vikram Singh Saini @ Vikar Saini Vs. State of U.P., Criminal Appeal No. 8461/2022
- (xii) Rahul Gandhi Vs. Purnesh Ishwerbhai Modi, R/Criminal Revision Appl. No. 521/2023

13. Learned counsel appearing for PW-6 Ram Narayan (informant of the case shown in gang chart) submitted that appellant has been convicted on the basis of evidence and no case for suspension of sentence or for stay of impugned judgment and order is made out. It was submitted that PW-6 Ram Narayan is informant of Case Crime No. 589 of 2005, shown in the gang chart. In that matter, the case has resulted into acquittal as the witnesses turned hostile. There is so much terror and fear of appellant in public at large that no one dares to depose against him. The appellant and co-accused

persons were instrumental in turning the witnesses hostile in that case. Further, an appeal has already been filed against the judgment of acquittal in Case Crime No. 589 of 2005. Learned counsel has referred evidence adduced before the trial court and submitted that conviction of the appellant is based on credible evidence. Learned counsel has placed reliance upon case of Om Prakash Sahai Vs. Jai Shankar Chaudhary (Criminal Appeal No. 1331/2023), (SC) decided on 02.05.2023 and Lok Prahari Vs. Election Commission of India (2018) 18 SCC 114

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

15. 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."

16. In the case of **Preet Pal Singh (supra)**, relied by learned A.A.G., 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, as held by this Court in *Kashmira Singh Vs. State of Punjab* and *Babu Singh Vs. State of U.P.*

17. In case of **Kishori Lal (supra)**, the Court held:

“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.

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. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.

The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. 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. The High Court does not seem to have kept the correct principle in view.”

18. In **Sidhartha Vashisth alias Manu Sharma (supra)**, the Court had the occasion to consider the rival submissions as well as various judicial pronouncements referred to by both the sides over the prayer for bail and held as under:-

“30. ...In the above cases, it has been observed that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in *Vijay Kumar [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195 : JT 2002 Sup (1) SC 60]* that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such

cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.”

19. In case of **Hasmat (supra)**, the Apex Court observed that Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant 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.

20. Recently, in case of **Om Prakash Sahai (supra)**, it was observed as under:-

“23. The principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified.

24. 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 and further, having a judgment of conviction erasing the presumption leaning in favour of the accused regarding innocence till contrary recorded by the court of the competent jurisdiction, and in the aforesaid background, there happens to be a fine distinction between the prayer for bail at the pre-conviction as well as the post-conviction stage, viz Sections 437, 438, 439 and 389(1) of the CrPC.”

21. From aforesaid, it is 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 discretion under section 389(1) CrPC is to be exercised judicially. 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, as referred in case of Preet Pal Singh (supra). 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) Cr.P.C. could be invoked but 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) Cr.P.C. it is under an obligation to support its order 'for reasons to be recorded by it in writing'. One of the essential ingredients of Section 389(1) Cr.P.C. is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed against. 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. The mere fact that during the trial, he was granted bail and there was no allegation of misuse of liberty, is not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The main consideration is whether reasons existed to suspend the execution of sentence and thereafter grant bail.

22. Keeping the aforesaid legal position in view, in the instant matter so far the prayer of suspension of sentence during appeal is concerned, it may be stated that the appellant has been convicted by the Trial Court under section 3(1) of Gangster Act and sentenced to four years imprisonment along with fine of Rs. one lac. In gang chart only case i.e. crime No. 589/2005, under section 147/148/302/307/404/120-B IPC and section 7 Criminal Law Amendment Act, PS Bhawarkol, Ghazipur was shown and in that case the appellant has already been acquitted on 03.07.2019. Only two cases were registered against the appellant after the present case of the Gangster Act, which pertain to violation of Model Code of Conduct during election period.

23. During trial of the instant case under Gangster Act, the prosecution has examined 7 witnesses. PW 1 Inspector Ramdarash Yadav is complainant of the case, PW 2 Surya Prakash Yadav has conducted initial investigation, PW 4 and PW 5 Om Praksh Singh are investigating officers of case crime No. 589/2005, which was shown in the Gang chart. PW 6 Ramnarayan Rai is complainant of crime No. 589/2005. PW 3 Ramdular Yadav and PW 7 Omprakash are formal witness. In his statement, PW 1 Inspector Ramdarash Yadav has stated that on 19.11.2007 while he was posted at police station Kotwali, Muhammedabad, Ghazipur, he received an information that there is a gang run by Mukhtar Ansari, which often indulges in anti-social activities and crimes like murder, ransom and also indulges in criminal acts for political gains and that due to terror of the gang, no person from public dares to lodge any case against the gang members. On this information, a gang chart was prepared and it was approved by the Additional S.P., the S.P. Ghazipur and the District Magistrate, Ghazipur on the same day and thereafter, the first information report was registered on the same day at 22:30 hrs. under Section 3(1) of Gangster Act. In his cross-examination, he has stated that when the incident of Crime No. 589 of 2005 took place in the year 2005, he was posted at C.B.C.I.D. head office, Lucknow. The gang leader of the said gang was Mukhtar Ansari. In his cross-examination, he has further stated that except the case relating to murder of Krishna Rai, M.L.A., no other case was registered against the accused Afjal Ansari at Police Station Mohammadabad. In his cross-examination, he has accepted that while he was posted at Police Station Mohammadabad, he has not received any written or oral complaint against Afjal Ansari. He has further stated that no fact regarding commission of any offence under chapter 16, 17, 22 of I.P.C. by accused came into his knowledge and that he has registered the case on the basis of hearsay material. Interestingly, he has also admitted that he was directed by the higher officials for initiating proceedings under Gangster Act against Mukhtar Ansari, Afjal Ansari and Ajaj-ul-haq. PW-2 Inspector-Surya Prakash Yadav, who has partly investigated the case, stated in his cross-examination that no fact regarding commission of any offence

under chapter 16, 17, 22 of I.P.C. by accused Afjal Ansari came into his knowledge. PW-6 Ram Narayan Rai has stated that his brother Krishna Nand Rai was murdered on 29.11.2009 and that as per his knowledge, accused Afjal Ansari was involved in conspiracy of the murder of his brother. Accused Afjal Ansari and Mukhtar Ansari are having a gang and there are about 50-60 more members in the gang and gang leader is Afjal Ansari. In defence evidence, three witnesses, namely, DW 1 Retd. Captain Heera Lal Singh Yadav, DW 2 Shankar Dayal Rai, a retired Principal and DW 3 Baliram Patel, an ex village Pradhan, have been examined, who have inter-alia stated that accused Afjal Ansari is a popular person in the area and he is not member of any gang and that he has been falsely implicated due to political rivalry.

24. It may thus be seen that except the incident of case crime number 589/2005, no other specific incident of any such crime has been mentioned by PW 1 Inspector Ramdarash Yadav to show that the appellant has been indulging in anti-social activities and crimes like murder, ransom etc.. In FIR, one more incident of abduction was shown but there is nothing on record to show that appellant was involved in that incident. That incident was of year 1997, which took place in Varanasi district. Thus, the statement of PW 1 Inspector Ramdarash Yadav that the appellant is member of gang and he indulges in anti-social activities and crimes like murder and ransom, is quite general in nature. Except the statement of PW 1 Inspector Ramdarash Yadav, only other evidence shown against the appellant is of PW 6 Ramnarayan Rai, who is complainant of crime No. 589/2005, who has simply stated that he has lodged first information report of that case. There is no corroboration of the testimony of PW-1 Inspector Ramdarash Yadav from any other evidence. It was shown that in that case (crime No. 589/2005), as per the prosecution, the role of appellant was shown in criminal conspiracy and that case has already been resulted in to acquittal. No doubt while acquitting the accused persons in that case, the Trial court observed that the case of prosecution is failing due to hostility of witnesses and if the witnesses had benefit of Witness Protection Scheme during trial, the result

may have been different, but there is no such specific evidence that appellant was instrumental in turning the witnesses hostile. Only a general statement has been made that the appellant was instrumental in turning the witnesses hostile. No such evidence was led before the Trial Court in the instant case under Gangster Act that how the appellant was instrumental in turning the witnesses hostile in case crime number 589/2005. No such specific instance has been shown that in relation to that case that the appellant has ever threatened or otherwise influenced any witness. In criminal history of appellant, it was shown that earlier he was named in two murder cases but it could not be disputed that in said both cases he was exonerated by the police during investigation and no charge sheet was filed against him and thus, no adverse inference could be drawn on that count. Some of the cases were relating to violation of Model Code of conduct during election period. Thus, the nature of evidence shown against the appellant makes out a case for suspension of sentence. Further, the appellant is stated a senior citizen, aged about 70 years, and that he has already undergone the detention of about three months and that in view of huge pendency of cases there is little possibility that appeal could be heard soon and thus, the refusal of suspension of sentence may render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal.

25. In view of aforesaid, particularly considering nature of evidence adduced before the trial court, quantum of sentence awarded by the trial court, the period already undergone by the appellant, age of appellant, likelihood of unreasonable delay in disposal of the appeal and all attending facts and circumstances of the case, this court is of view that a case for suspension of sentence and grant of bail during pendency of the appeal is made out.

26. 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 to in a rare case only.

27. In **State of Maharashtra V. Balakrishna Dattatrya Kumbhar (supra)**, 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 (supra)**, 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.

28. In the case of **Ravikant S. Patil (supra)**, 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 7 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.”

29. Same view was reiterated in the case of **Navjot Singh Sidhu (supra)** 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.”

30. The Apex Court in the case of **Shyam Narain Pandey (supra)**, 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 (supra)**, Hon'ble Apex Court has again reiterated that the power to stay a conviction is by way of an exception. After considering several case laws of Hon'ble Apex Court, same view has been followed in case of **Rahul Gandhi (supra)** and it observed that it is well-

settled principle of law that stay of conviction is not a rule but an exception to be resorted to in rare cases. Same view has been reiterated by this court in case of **Vikram Singh Saini** (supra)

31. In case of **K.C. Sareen** (supra), 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.”

32. 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.

33. Insofar as the present case is concerned, it was stated that the appellant was a sitting member of Parliament from Ghazipur constituency since 2019 but now after the judgment of Trial Court, he has been since disqualified from the membership of Parliament. The only contention raised in this connection is that if the effect and operation of impugned judgment and order is not stayed, the appellant will remain disqualified under the Representation of Peoples Act, 1951. Except that no other specific consequence which is likely to fall upon conviction, has been shown. In the affidavit filed in support of the application, there is absolutely nothing that what consequences are likely to fall upon conviction. It would be relevant to mention that 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. Section 8 of the Representation of the People Act, 1951 stipulates the disqualification on conviction for certain offences. It appears that though offence enumerated under Section 3(1) of Gangster Act is not provided sub-section (1) or sub-section (2)] of section 8 of Act of 1951, but sub-section (3) provides a person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] of section 8 of the Act 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, subject to the conditions mentioned therein. 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, this Court is of considered view that the instant case does not fall within the ambit of such rare case so as to warrant suspension of conviction of appellant and thus, no case for suspension or 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.

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

35. As noted earlier, the prayer for suspension of execution of sentence during pendency of appeal is allowed.

36. Let the appellant **Afjal Ansari** convicted and sentenced in aforesaid case 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, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the cases pending against him.

(ii) that the appellant shall not tamper with the evidence in any case pending against him and that the appellant shall not pressurize/ intimidate the prosecution witness;

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

37. It is directed that realisation of 50% amount of the fine imposed by the Trial Court shall remain stayed during pendency of this appeal.

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

39. Appeal be listed on 11.09.2023.

Order Date:-24.07.2023

Suraj