IN THE COURT OF 8TH ADDL. SESSIONS JUDGE

AT SURAT

CRIMINAL APPEAL NO.254/2013

Appellant : Mr. Rahul Gandhi

Versus

Respondents : Mr. Purnesh Modi & Anr.

ORDER BELOW EXH.5

1. Present application is preferred by the Appellant - Original Accused Mr.Rahul Gandhi u/s.389 and 389(1) of the Code of Criminal Procedure, 1973 ('CrPC' for short) for staying the conviction imposed by the judgment and order dated 23/3/2023 by the Ld. Chief Judicial Magistrate, Surat in Criminal Case No.18712/2019.

2. The Ld. Senior Advocate Mr. R.S. Cheema with Ld. Advocate Mr. K.C. Panwala appeared on behalf of the Appellant and the Ld. Advocate Mr. Harshit S. Tolia with Ld. Advocate Mr. Ketan P. Reshamwala appeared for Respondent No.1 - Original Complainant and Ld. PP Mr. Nayan Sukhadwala appeared for the Respondent State.

3. The Ld. Advocates appearing for the parties are heard at length. I have thoroughly perused the application alongwith Memo of Appeal, Reply filed by Respondent vide Exh.8 and papers produced on record by both the parties.

Legal position with regard to Suspension of Order of Conviction

4. The Ld. Advocates for the parties have relied upon following pronouncements of Hon'ble Apex Court and Hon'ble Gujarat High Court with regard to the settled legal position for suspending the order of conviction.

(a) Rama Narang Vs. Ramesh Narang & Ors.; (1995) 2 SCC 513

"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. We are, therefore, of the opinion that the division bench of the High court of Bombay was not right in holding that the Delhi High court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate court. But while granting a stay of (sic or) suspension of the order of conviction the court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered

appropriate to protect the interest of the shareholders and the business of the company."

(b) K.C. Sareen Vs. CBI, Chandigard; (2001) 6 SCC 584

"11. 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 such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter.

12. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyze the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When 'a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that

would erode the already shrunk confidence of the people in such public institutions besides demoralizing the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction.

13. The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate Court or the revisional Court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision. "

(c) Navjot Singh Sidhu Vs. State of Punjab & Anr.;

(2007) 2 SCC 574

"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."

(d) Ravikant S. Patil Vs. Sarvabhouma S. Bagali; (2007)1 SCC 673

"14. This Court, however, clarified that 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; and that unless the attention of the court (is drawn-) to the specific consequences that are likely to fall upon conviction, the person convicted cannot obtain an order of stay of conviction. In fact, if such specific consequences are not brought to its notice, the court cannot be expected to grant stay of conviction or assign

reasons relevant for staying the conviction itself, instead of merely suspending the execution of the sentence. In that case, it was found on facts that the appellant therein had not specified the disqualification he was likely to incur under Section 267 of the Companies Act, if his conviction was not stayed. Therefore, this Court refused to infer that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted stay of conviction or the operation of the impugned judgment. Consequently, the order of stay was not construed as a stay of conviction.

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 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."

(e) State of Maharashtra Through CBI Vs. Balakrishna Dattatrya Kumbhar; (2012) 12 SCC 384

"15. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection 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. 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."

(f) Shyam Narain Pandey Vs. State of UP; (2014) 8 SCC 909

"5. It has been consistently held by this Court 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.

6. It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

(g) Lok Prahari through its General Secretary, S.N. Shukla Vs. Election Commission of India & Ors; (2018) 18 SCC 114

"16. 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 Cr.P.C., 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 subsections 1, 2 and 3 of Section 8."

(h) State of Gujarat Vs. Bhagabhai Dhanabhai Barad; 2019(3) GLR 2346

"25. From the law on the subject and the decisions which have been discussed hereinabove that section 389 of the Code since provides for suspension of the sentence so also the conviction by the appellate Court, it is the discretion on the part of the Court concerned to order the release of the convicted persons, where his sentence of imprisonment for a term does not exceed 03 years or where the offence or where the offence of which such person has been convicted is a bailable one and he is on bail. It is the appellate Court, which is obliged to give reasons at the time when the request is made by the convict and if the Court is satisfied that the person is intending to present an appeal, unless there are special reasons for refusing the appeal, the Court should afford sufficient time to present the appeal.

26. It goes without saying that reasons are a must by the Court at the time of exercising its powers to suspend the sentence, much less while ordering suspension of conviction, which should be only in rare and exceptional circumstances only while recognizing such powers of the appellate Court, it has been contended that unless shown that such stay if not granted would

> result into injustice and irreversible consequences, no such exercise on a mere asking can be done. Again, since stay of conviction would mean that conviction is not operative from the day of its stay, its serious impact on the society shall need to be kept in view by the Court while suspending the conviction, particularly when the offence involved is against public policy or when the offence is of such a nature, proliferation of which increasingly is deleterious to the societal health, the Court should be wary in grant of suspension of conviction. It would not only send a wrong signal, but it would also shrunk the confidence of people in the system.
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> 26.1 These decisions also find the need of giving reasons, clear, cogent and substantiating under section 389 of the Code. Of course, a few decisions for some other provisions of law and under the administrative law would condone the non-speaking orders when application itself contain the details and its perusal gets reflected in the order or when there is hardly anything to be decided in the matter and the questions raised are the issues of law."

5. Based on the above preposition of law, the following tests are required to be established and satisfied by the Appellant.

(i) There should be a rare and exceptional case for the grant of stay against conviction.

(ii) There should be special and compelling circumstances in justifying the grant of stay against conviction.

(iii) There should be irreversible consequences leading to injustice and irretrievable damages in the event of non-granting of stay against conviction.

(iv) There should be no criminal antecedents barring the conviction in question.

(v) There should be prima-facie case on merits.

The Ld. Senior Advocate Mr. Cheema by relying upon decision of *Shyam Narain Pandey (Supra)* has submitted that the court would be reluctant is granting stay of conviction when (i) appellant fails to show

any exceptional circumstances (ii) if the sentence is of death or life imprisonment or of a period not less than ten years and (iii) there is no irreparable injury or loss. It is further submitted that in the case on hand all the above factors are successfully demonstrated by appellant and hence prayed to allow this application.

6. In view of the above, this court is required to see that whether Ld. Trial Court committed a grave error in considering the evidence against appellant and thereby imposing the sentence. It is also required to be looked into whether the court, at this stage, can evaluate the evidence by discussing the merits of the case?

7. The Hon'ble Apex Court in *Navjot Singh Sidhu (Supra)* observed in Para-10 as under:

"10. Though for the purpose of decision of the prayer made by the appellant for staying or suspending the order of conviction, it is not necessary to minutely examine the merits of the case, nevertheless we consider it proper to refer to the medical evidence, which has an important bearing on the nature of the offence alleged to have been committed by the appellant"

The Hon'ble Gujarat High Court in *Bhagabhai Dhanabhai Barad (Supra)* observed in para-31 that "while dealing with the matter at admission stage even recording of concise reasons dealing with the merit of the contentions raised before the Court may suffice."

Keeping in mind the above settled legal position, I proceed to discuss as under.

8. The Ld. Senior Advocate Mr. Cheema has raised objection with regard to maintainability of the complaint filed before the Ld. Trial Court.

(i) It is the case of prosecution that the Appellant during election campaign on 13/4/2019 at 12:30 pm addressed a gathering at Kunar, a village at a distance of about 100 Kms. from Bangalore, Karnataka. In his speech, he alleged against the Hon'ble Prima Minister Shri Narendra Modi and further alleged that "why all thieves are having surname of Modi?"

(ii) The Ld. Advocate Mr.Cheema drew the attention of the court to Section 199(1) of CrPC and submitted that the complainant cannot be termed as an 'aggrieved person' and hence was not authorized to file the complaint. It is further stated that the expression 'Modi' propounded by the complainant do not fall in the category of association or collection of persons as stipulated in Explanation 2 of Section 499 of IPC. It is submitted that the Ld. Trial Court has failed to appreciate the important ratio of the binding precedents in this regard.

(iii) It is further submitted that as per the complainant's assertion due to the defamatory speech by Appellant insult and humiliation has been caused to 13 crores people of Modi community. It is submitted that the association and collection of persons cannot embrace a large population of 13 crores persons, which is not a definite or identifiable group. The Ld. Senior Advocate by drawing attention towards evidence of complainant - Purnesh Modi (Exh.18), Niranjanbhai Rathod (Exh.60) and Manhar Lal (Exh.37) submitted that the complainant and witnesses have made certain admissions with regard to Modi community includes various surnames like Rathod, Taily, Modi and others, which demolishes the case of prosecution. It is submitted that from the evidence of above witnesses, the concept of expression 'Modi' being an association of persons becomes entirely unacceptable. It is submitted that the complaint was filed with a political motive.

(iv) The Ld. Senior Advocate Mr. Cheema has relied upon following pronouncements in support of his submissions:

(a) G. Narsimhan Vs. T.V. Chokkappa; (1972) 2 SCC 680

(b) Subramanian Swamy Vs. UOI; (2016) 7 SCC 221

(c) S. Khushboo Vs. Kanniammal; (2010) 5 SCC 600

(d) Narottamdas L. Shah Vs. Patel Maganbhai Revabhai; MANU/GJ.0106/1984

(e) Pradeep Madhvani, editor of Naubat daily & Ors. Vs. State of Gujarat; (2003) SCC OnLine Guj 232

(f) K.M. Mathew Vs. T.V. Balan; 1984 SCC OnLine Ker 156

(g) Smt. Aruna Asaf Ali & Ors. Vs. Purna Narayan Sinha; 1983 SCC OnLine Gau 35

(h) Sasikumar B. Menon Vs. S. Vijayan;l 1998 SCC OnLine Ker 437

(i) MP Narayana Pillai Vs. MP Chacko; 1986 CrLJ 2002

(j) Vishwa Nath Vs. Shambhu Nath; 1993 SCC OnLine All 354

(k) P. Karunakaran Vs. Sri. C. Jayasooryan; 1992 CrLJ 3540

I have gone through all the above referred pronouncements, wherein it is held that a collection of persons must be an identifiable body, so that it is possible to say with definiteness that a group of particular persons as distinguished from the rest of the community was defamed. Moreover, when identity of the collection of persons is not established so as to be relatable to defamatory words or imputations, the complaint is not maintainable. It is further held that there cannot be defamation against a community as such. Community as such may not have a reputation, but the reputation will only be of individual members. When the defamatory

matter affects each and every member of an ascertainable class or group each of them or all of them could set the law in motion.

(iv) As against which, the Ld. Advocate Mr. Harshit Tolia has stated that the Ld.Trial Court has appropriately dealt with this issue by observing that (a) there are several persons having surname 'Modi' in India, (b) the accused has compared the person known by 'Modi' surname with thieves and thereby has defamed the well-defined class of the society, which includes the complainant (c) after attributing defamatory statements against the Hon'ble Prime Minister Shri Narendra Modi, the accused did not stop there and further commented that 'why all thieves have the common surname of 'Modi'? It is submitted that the defamatory statements were made by the accused and he had the knowledge that it would harm the reputation of 'Modi' surname holders and such statements were made only with a view to earn political gain.

(v) I am mindful that at this stage if I deal with above issue in detail then it would cause prejudice to the parties at the time of final hearing of an appeal. However, looking to prima facie evidence and observations made by Ld. Trial Court in para 19.2 in impugned judgment it transpires that the Appellant had made certain derogatory remarks against the Hon'ble Prime Minister Shri Narendra Modi in general public and further compared the persons having 'Modi' surname with thieves and the complainant is also having surname of Modi. Moreover, the complainant is ex-minister and involved in public life and such defamatory remarks would have certainly harmed his reputation and caused him pain and agony in society. For such reasons, I do not agree with the objections raised by Mr. Cheema, Ld. Senior Advocate with regard to maintainability of the complaint.

9. The Ld. Senior Advocate Mr. Cheema has further submitted that the Ld. Trial court erred in observing that the alleged speech of appellant was being proved. It is submitted that the complaint was filed based on a news paper cutting received on WhatsApp by the complainant and such news paper is never produced before the Ld. Trial Court. It is submitted that though there is presumption of genuineness envisaged in Section 81 of the Evidence Act, the complainant failed to produce and prove the same. Moreover, the pen drive - Exh.21, CDs - Exh.26 and DVD - Exh.126 are never proved before the Ld. Trial Court. Then also by accepting such evidence against Appellant, the Ld. Trial Court has committed grave error. It is submitted that the alleged speech is not being proved either by oral or documentary or electronic evidence. The detailed grounds are narrated by the Ld. Advocate for appellant from Page 37 to 54 in Appeal Memo.

In this regard, it would be relevant to note that upon going through the record, prima facie it reveals from the evidence of Mr. Ganeshbhai Manjunath Yaji (Exh.67) that he was present on 13/4/2019 in public gathering, which was addressed by the Appellant at Kolar and he has categorically stated in his evidence about the defamatory speech being given first against the Hon'ble Prime Minister and thereafter against all the persons having 'Modi' surname. As per the submission of Ld. Advocate Mr. Tolia during the deposition of Witness Yaji, he was shown the video of the speech and the CD was produced only to corroborate the version of witness and the CD was not required to be proved. It transpires at this juncture that the Ld. Trial Court had rightly relied upon evidence of Mr. Yaji as an eye witness and I believe that the discussion of admissibility and mode of proof of electronic evidence would be required to be made at the time of final hearing of appeal. Moreover, the evidence of complainant and witnesses viz. Niranjanbhai Rathod and

Manhar Lal is examined by me only for the purpose of deciding this application.

10. Ld. Senior Advocate Mr. Cheema has shown his **dissatisfaction about the appellant did not get the fair trial since inception of case and about lack of jurisdiction**.

(i) It is submitted on behalf of Appellant that the Appellant was resident of New Delhi and the Ld. Trial Court had no territorial jurisdiction to accept the complaint and issue summons without holding preliminary inquiry. It is submitted that there is violation of Section 202 of CrPC, as it provides mandatory enquiry before issuing summons.

(ii) It is further submitted that the complainant in strange manner rushed the Hon'ble High Court and obtained stay. Thereafter suddenly withdrew his petition stating that there was sufficient evidence against the Appellant, which has caused grave apprehension on the issue of fairness of the trial.

(iii) It is submitted that the incident occurred on 13/4/2019 at Kolar, which was reported on 14/4/2019. The complaint was filed on 15/4/2019 and verification was recorded on 16/4/2019. It is further submitted that till summoning, no evidence was produced by the complainant. It is submitted that the Ld. Trial Court has also committed an error by relying upon the F.S. of Appellant, as the same cannot be relied upon. Because the purpose of F.S. is to seek explanation of Appellant for the evidence brought on record, whereas, the electronic evidence was not made a part of F.S. It is submitted that the Ld. Trial Court has shown undue harshness in imposing the maximum sentence of 2 years. It is submitted that no reasons are given by Ld. Trial Court for inflicting maximum sentence and not granting benefit of Probation.

(iv) The Ld.Advocate Mr.Tolia has submitted that the Hon'ble Supreme Court had directed all the Ld. Trial Courts to expedite the matters of M.Ps and MLAs and hence the Ld. Trial Court did not do anything wrong in conducting the trial expeditiously.

(v) It is further submitted that the Appellant had never challenged the order of issuance of process and hence the ground of lack of territorial jurisdiction cannot be agitated at this stage and the trial could not be stated to be vitiated.

(vi) It appears that the Ld. Trial Court has appropriately dealt with this issue by relying upon pronouncements of Hon'ble Apex Court. It further appears that the verification of complainant was recorded on 16/4/2019 and thereafter on 2/5/2019 after going through the complaint, verifying the facts and after hearing the Ld. Advocate for the complainant upon primary satisfaction the summons was issued.

(vii) At this stage, it would be appropriate to refer following judgments.

(a) **Sunil Todi Vs. State of Gujarat; 2022 AIR (SC) 147**

> "45. In this backdrop, it becomes necessary now to advert to an order dated 16 April 2021 of a Constitution Bench in Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881. The Constitution Bench notes "the gargantuan pendency of complaints filed under Section 138" and the fact that the "situation has not improved as courts continue to struggle with the humongous pendency". The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under

Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:

> "10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005, made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors., Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.
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> 11. The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd & Anr. where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici."

46. Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with

effect from 2003 with the laudable object of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

47. In the present case, the Magistrate has adverted to: (i) The complaint; (ii) The affidavit filed by the complainant; (iii) The evidence as per evidence list and; and (iv) The submissions of the complainant."

(b) **Asr Systems Private Limited Versus Kimberly Clark Hygiene Products Private Limited; 2011 (0) AIJEL-MH 151056**

"4. The learned counsel for the petitioner raised several grounds challenging the issuance of process. Firstly, according to the learned counsel, process was issued without following mandatory provision of making enquiry under Section 202 of the Cr.P.C. when the accused are not situated outside the local jurisdiction of the Magistrate taking cognizance. According to him, in this case, both the accused persons are situated in Delhi while complaints were filed before J.M.F.C., Pune, therefore, it was mandatory to hold enquiry under Section 202 Cr.P.C. before the process could be issued. The learned Single Judge of this Court in Bansilal S. Kabra V/s. Global Trade Finance Ltd. 2010 (2) Bombay C.R. Criminal 754 held that provisions of section 202 about holding of enquiry before issuance of process when the accused is living outside the territorial jurisdiction of the Magistrate is directive and not mandatory. In another case, the learned Single Judge of this Court held that the provision is mandatory but that application was rejected by the learned judge on the ground that the accused had come to the High Court at a belated stage. The learned counsel pointed out that the question has been referred to the larger Bench in view of two conflicting decisions.

However, merely because question is referred to the larger bench, all the matters cannot be kept pending nor the proceedings can be stayed. The purpose of directing enquiry under Section 202 Cr. P.C. is to avoid unnecessary inconvenience and harassment to the accused persons, who may be living outside territorial jurisdiction of the Court. However, where the contents of the complaint, verification statement and other documents

> produced alongwith the complaint make out prima-facie case for issuance of process, perusal of such material itself is preliminary enquiry and if the Court is satisfied that prima-facie case is made out, process can be issued. Therefore, in my opinion, said provision in section 202 Cr.P.C. is directory in nature and merely because Magistrate has not recorded statements of several witnesses before issuing process, process can not be quashed. In the present case, complainant had produced relevant documents including original cheques, documents about return of the same as dishonoured by the drawee bank, notices issued by the complainant to the accused, documents showing receipt of the same by the accused and the verification statement to the effect that payment was not made in spite of notice. In my opinion, this was sufficient material for the learned Magistrate to issue process."

(viii) Based on above discussion and relying upon above position of law, it transpires that the Ld. Magistrate had after giving thoughtful consideration to the complaint, verification and documents produced therewith had issued the summons, which was never challenged by the Appellant at any stage and hence the objection taken by Appellant with regard to trial being vitiated due to lack of territorial jurisdiction cannot be accepted at this stage.

(ix) So far as imposing of maximum punishment is concerned, it would be worthwhile to observe that the Appellant was not an ordinary person and was sitting MP, connected with public life. Any word spoken by Appellant would have large impact in mind of common public. The alleged speech given by Appellant on 13/4/2019 was during election campaign. Moreover, high standard of morality is expected from a person like Appellant and the Ld. Trial Court had inflicted sentence, which was permissible in law. Further, it appears from record that all opportunities were accorded to Appellant for cross-examining the witnesses and hence I do not agree with the contentions of Ld. Senior Advocate Mr. Cheema about appellant being deprived of fair trial.

11. Whether Appellant succeeded in showing that he is having prima-facie case in his favour and if the order of conviction is not stayed then it would cause him irreparable and irreversible injury?

(a) The above question can be answered keeping in mind the legal position and tests with regard to staying of conviction order, as discussed in earlier part of this order.

(b) The Ld. Senior Advocate Mr. Cheema has raised various objections with regard to manner in which trial proceeded and the reasons cited by the Ld. Trial Court in convicting the Appellant. Such objections are appropriately dealt with by this court and upon going through the evidence of the case, *prima-facie* it is found that the impugned judgment passed by Ld. Trial Court is well reasoned and the same is passed after proper evaluation of evidence.

(c) The Ld. Senior Advocate Mr. Cheema has further submitted that the appellant has strong prima-facie case and the appeal is most likely to succeed in view of the grounds raised by Appellant.

(d) It is submitted that the Hon'ble Apex Court in *Shyam Narain Pandey (Supra)* held that the cases where as sentence of death or life imprisonment or imprisonment less than ten years has not been awarded, constitute a different category. It is submitted that this has been held to be a valid criteria for determining whether sufficient grounds exists in to exercise the jurisdiction in favour of the Appellant. It is further submitted that the case against the appellant neither falls under the Prevention of Corruption Act nor it is a case involving moral turpitude and hence prayed to grant the relief in favour of Appellant.

(e) It is submitted that the Appellant was liable to suffer disqualification as Member of Parliament and stands disqualified as a

Member of Parliament from Wayanad Parliamentary Constituency in Kerala. It is submitted that the Appellant was elected to the said constituency with a record margin of 4,31,770 votes. It is duly noticed in various judgments that the act of setting aside of an election has the effect of overriding the choice and aspirations of the electorate. It is also recorded in various judgments that the consequential act of holding a by-election entails a burden on the public exchequer. Based on above submissions, it is stated that the Appellant would suffer an irreparable loss if an order of suspension of conviction is not passed and the injury suffered by him would be irreversible.

(f) The Ld. Senior Advocate for appellant has submitted that out of 12 offences mentioned in reply Exh.8 against the Appellant before the different Courts of India, in one offence, registered at CJM Division Patna Sardar - Criminal Case Complaint (P) No. 382/2019, no process has been issued. In offence registered at CJM Court, Haridwar bearing CC No. 1606/2023, the Appellant has not received any summons. The offences registered at CJM Court, Ranchi bearing CC No. 1993/2019 and CJM Court, Patna Sardar bearing No. 1551/2019 are with respect to same speech. Based on which, it is submitted that the wider prospective is required to be seen.

(g) The Ld. Senior Advocate Mr. Cheema, in support of his submissions, has relied upon following pronouncements.

1. Indira Kapoor Vs State of H.P. ; 2022 SCC Online HP 5017
2. Mohammed Moquin Vs. State of Odisha (Vigilance); CRLA No.880 of 2020 Order dated 19/10/2022
3. Sayed Mohammed Nooral Ameer and others Vs. U.T. Administration of Lakshadweep; 2023 SCC Online Kerala 604.

4. Shakuntala Khatik Vs. State of M.P.; 2020 SCC Online MP 4570

5. Sheela Kushwah Vs. State of M.P.; CRA No. 11606 of 2022, Order dated 09.01.2023.

6. Prahlal Lodhi Vs. State of M.P.; Cr. A. No. 9444/ 2019
Order dated 06.11.2019.

7. Nehru C. Olekar Vs. State of Karnataka; CRL.A. 390/2023
Order dated 05.04.2023

By relying upon above pronouncements, the Ld. Senior Advocate Mr.Cheema has submitted that various Hon'ble High Courts have considered the circumstance of depriving the candidates from conducting election of MLA/M.P would fall in the category of an exceptional case and such circumstance can be termed as irreparable and irreversible loss.

(h) As against which, Ld. Advocate Mr. Tolia has relied upon Judgment of Hon'ble Apex Court in case of **Jyoti Basu & Ors. Vs. Debi Ghosal & Ors.** reported in **(1982) 1 SCC 691**, wherein the Hon'ble Apex Court held that;

> "8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election."

The Ld. Advocate Mr. Tolia has heavily relied upon the Judgment of Hon'ble Gujarat High Court in the case of **Naranbhai Bhikhabhai Kachhadia Vs. State of Gujarat** reported in **(2017) 2 GLR 130** wherein, the Hon'ble High Court has observed as under-

> 21. Therefore, a public servant losing his job which is necessary for his survival has also not to be considered as a ground for exercise of such discretion for stay of the conviction. Disqualification earned as a Member of Parliament

could not be a justification for exercise of such discretion. The Hon'ble Apex Court has considered various relevant aspects including the observations made in the judgment in the case of K.C. Sareen v. CBI [(2001) 6 SC 584] as well as in another case reported in (2003) 12 SCC 434 in the case of Union of India v. Atar Singh. The consistent broad guidelines which have been laid down by the Hon'ble Apex Court clearly provide that an order of conviction should not be suspended merely on the ground that non-suspension of such conviction may entail the consequences like removal of a government servant from service or, as it is stated in the facts of the case, disqualification as a Member of Parliament. It has also been observed that such power should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences.

22. Much emphasis by learned Sr. Counsel Shri Nanavati on this aspect of irreversible situation being created causing damage to the applicant is also required to be considered with reference to the public interest. If such a representative of people or a public servant is allowed to behave in such fashion, it would also not be in the public interest and the court cannot absolve pending the appeal such a conduct at this stage exercising discretion under sec. 389 of CrPC. As observed, though the discretion is vested with the court, it has to be exercised rarely and with circumspection only in some circumstances which justify exercise of such power. The background of facts as stated do not justify exercise of such discretion as it cannot be said to be an exceptional case. The submissions which have been made referring to the irreversible situation being created causing damage to the career or prejudice to the applicant could be said to be a consequence of the act amounting to the offence which every accused is bound to suffer at the conclusion of the trial.

23. xxx

24. Therefore, when it is talked about good governance, it must reflect upon the democracy and rule of law which in turn has been provided in the Representation of People Act, 1951 providing for disqualification. In other words, while exercising power under sec. 389, the courts have to have regard to the underlying philosophy of the Constitution and democracy which is sought to be achieved through the Representation of People Act, 1951 which in turn has made the provision for disqualification.

25. A useful reference can also be made to the observations made by the Hon'ble Apex Court in a judgment reported in AIR 2005 SC 688 in the case of K. Prabhakaran v. P. Jayarajan with Ramesh Singh Dalal v. Nafe Singh and ors., where the discussion has been made referring to sec. 8 of the Representation of the People Act that those who break the law should not make the law and

> the purpose which is sought to be achieved by enacting disqualification on conviction.

(i) It is submitted that the above order passed in *Naranbhai Bhikhabhai Khachhadia (Supra)* was challenged before the Hon'ble Supreme Court by way of **Criminal Appeal no. 481/2016** and considering facts that the appellant was acquitted of a more serious offence under the Schedule caste and Schedule Tribe Act, 1989 and a compromise entered between the parties and the unconditional offer of compensation by the Appellant to the victim and the unqualified acceptance of the condition by the appellant of submitting a bond of good behaviour, the Hon'ble Apex Court allowed the appeal. It is further submitted that the Hon'ble Apex Court while allowing appeal had not disturbed or quashed the finding of Hon'ble Gujarat High Court but the appeal was allowed based on the above circumstances.

(j) The Ld. Advocate Mr. Tolia has also relied upon judgment of Hon'ble Apex Court in case of **Kanaka Rekha Naik Vs. Manoj Kumar Pradhan** & Anr. reported in **(2011) 4 SCC 596** wherein, it is held as under;

> 13. There is no dispute that the respondent herein is involved in more than one case of similar nature of rioting etc. This fact has not been taken into consideration at all by the High Court. The High Court did not even suspend the execution of the sentence awarded by the trial Court but directed his release on bail. The High Court was obviously impressed by the singular fact that the respondent is a sitting M.L.A. The High Court did not record even a single reason confining the relief of releasing on bail only to the respondent, though there are two appellants in the appeal preferred challenging the judgment of the trial Court. What are the reasons for confining the relief only to the respondent herein and directing his release- The only reason appears to be the fact that the respondent is a sitting M.L.A. The law does not make any

> distinction between the representatives of the people and others, accused of criminal offences. Neither they can claim any privilege nor can it be granted by any Court. The law treats all equally.
>
> 14. In our considered opinion, the High Court ought to have taken the serious nature of allegations, the findings recorded by the trial Court and the alleged involvement of the respondent in more than one case, for deciding as to whether it is a fit case for suspending the sentence awarded by the trial Court and his release on bail during the pendency of the appeal. The impugned order does not record any reason whatsoever except vague observation that nature of allegations have been taken into consideration. The order clearly reflects that the High Court was mainly impressed by the fact that the respondent is a sitting M.L.A. In the circumstances, we find it difficult to sustain the order.

(k) The Ld. Advocate Mr. Tolia has further submitted that the Appellant has miserably failed to show that the Judgment of Ld. trial Court is so perverse due to which, exceptional case is made out in his favour. It is further submitted that when a person like Appellant commits any offence in his public life, then it will have more gravity than the offence committed in personal life. It is also submitted that though the Ld. Advocate for the Appellant has stated that the Appellant won with record margin 4,31,770 votes from Wayanad constituency, however, the Appellant had also lost his seat from Amethi Constituency. Therefore, winning with record margin votes would not create any special circumstance in favour of Appellant.

(l) It is further submitted by Mr. Tolia that the Appellant in the capacity of number of Parliament and President of Second largest political party of the country, committed the offence by delivering defamatory speech in huge public gathering during the general elections. It is submitted that either MLA or MP or any elected representative are at par with any other ordinary citizen and cannot claim any special

privilege. On the contrary, the public representative like Appellant is expected and need to be more careful for any action or inaction. It is submitted that the right of Accused to suspension of the sentence or conviction is at the best based on the judicial discretion of the Court within four corners of the statute only. It is submitted that the right to apply for the suspension of conviction pending appeal does not have a force of mandate but is merely a statutorily provided discretionary right present with the Court. It is submitted that the accused therefore, cannot claim the right to suspension of conviction as a right of enforceability. It is lastly submitted that there are around 12 offences of similar nature registered and pending against the Appellant. Based on which, it is submitted that Appellant is in the habit of making such defamatory and irresponsible statements.

(m) It is not disputed fact that the Appellant was the Member of Parliament and President of the second largest political party and looking to such stature of Appellant he should have been more careful with his words, which would have large impact on the mind of people. Any defamatory words coming from the mouth of Appellant are sufficient enough to cause mental agony to aggrieved person. In this case, by uttering defamatory words viz. comparing persons having surname 'Modi' with thieves would definitely have caused mental agony and harm the reputation of complainant, who is socially active and dealing in public.

(n) Moreover, considering the juxtaposition of law with regard to considering criteria of disqualification as enumerated in Section 8(3) of Representation of the People Act, 1951, I hold, based on the above

discussion, that removal or disqualification as Member of Parliament cannot be termed as irreversible or irreparable loss or damage to the Appellant, as envisaged by Hon'ble Gujarat High Court in *Naranbhai Bhikhabhai Kachhadia's* case.

(o) The Ld. Senior Advocate Mr. Cheema has also submitted to consider the criteria and broad features of *Navjot Singh Sidhu's* case. It would be relevant to note that in said case the incident was not correlated with the public life of appellant. Moreover, in that case the Hon'ble Apex Court had appreciated that the appellant had chosen to adopt a moral path and had set high standards in public life by resigning from his seat. Whereas, in present case, the facts are totally different and hence the said judgment would not be helpful to Appellant.

12. Based on above discussion, I hold that the Ld. Counsel for the appellant has failed in demonstrating that by not staying the conviction and denying an opportunity to contest the election on account of disqualification u/s. 8(3) of the Representation of the People Act, 1951 an irreversible and irrevocable damage is likely to be caused to the Appellant. The Hon'ble Apex Court has held in numbers of pronouncements that the powers accorded under section 389(1) of CrPC to suspend/stay the conviction is required to be exercised with caution and circumspection and if such power is exercised in a casual and mechanical manner, the same would have serious impact on the public perception on the justice delivery systems and such order will shake public confidence in judiciary. Hence, I am of the opinion that the Appellant has not made out any case to suspend the conviction recorded against him. Accordingly, I pass the following order.

ORDER

An application Exh.5 - preferred by Appellant Mr. Rahul Gandhi u/s.389 and 389(1) of the Code of Criminal Procedure, 1973 for staying the conviction imposed by the judgment and order dated 23/3/2023 by the Ld. Chief Judicial Magistrate, Surat in Criminal Case No.18712/2019 is hereby dismissed.

Pronounced in open court today on this **20th April, 2023** at Surat.

SURAT
Dt: 20/04/2023

(Robin P. Mogera)
8th Addl. Sessions Judge
Surat
Code: GJ01539