

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.31202 of 2015

Arising Out of PS.Case No. -229 Year- 2014 Thana -MADHEPURA District- MADHEPURA

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Deepak Kumar son of Surendra Yadav, resident of village - Shri Nagar,
Police Station - Ghailardh, District - Madhepura.

.... Petitioner/s

Versus

The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Shekhar Kumar Singh, Advocate

For the Opposite Party/s : Mr. S.A.Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL ORDER

5 04-08-2015

In this application filed under section 389(2) of the Code of Criminal Procedure (for short “the Code”), the petitioner seeks bail in connection with Cr. Appeal No.12 of 2015 pending before the learned Sessions Judge, Madhepura.

2. The petitioner was made accused in Madhepura (Ghailardh) P.S. Case No.229 of 2014 dated 17.4.2014 registered under section 25(1-B)(a) of the Arms Act. On completion of investigation, the investigating officer submitted chargesheet against the petitioner under sections 25(1-B)(a) and 26(1) of the Arms Act pursuant to which the learned Chief Judicial Magistrate, Madhepura took cognizance of the offence and transferred the case to the court of Sub-Divisional Judicial Magistrate, Madhepura. Subsequently, charges were framed and on conclusion

of trial, the learned Sub-Divisional Judicial Magistrate, Madhepura vide judgment dated 28.4.2015 convicted the appellant under section 25(1-B)(a) of the Arms Act and sentenced him to undergo rigorous imprisonment for two years. However, the trial court acquitted the appellant for the charge under section 26(1) of the Arms Act.

3. Being aggrieved by the aforesaid judgment of conviction and order of sentence dated 28.4.2015, the petitioner filed an appeal vide Cr. Appeal No.12 of 2015 under sections 374 and 389(1) of the Code in the court of Sessions Judge, Madhepura. After hearing the parties, the learned Sessions Judge, Madhepura rejected the prayer of the petitioner made under section 389(1) of the Code for suspension of sentence and grant of bail vide order dated 20th May, 2015 and directed the appeal to be listed for hearing on merit on 16th June, 2015. Thereafter, the petitioner filed the present application under section 389(2) of the Code titled as “Criminal Miscellaneous” application.

4. While hearing the application, the first question which came to my mind is whether an application under section 389(2) of the Code could have been titled and registered as a “Criminal Miscellaneous” application or it ought to have been filed under the title “Criminal Appeal”.



5. When a specific query was made by the Court in this regard, learned counsel for the petitioner submitted that in the application filed under section 389(2) of the Code before this Court, the only prayer of the petitioner is for grant of bail in the appeal filed before the learned Sessions Judge, Madhepura and hence, there would be no difficulty in entertaining the application as “Criminal Miscellaneous” application as all applications for bail are being filed before this Court as “Criminal Miscellaneous” applications. He further submitted that the Registry also has not pointed out any defect. He contended that in a criminal application there is no concept of Second Appeal and since an appeal against the judgment of the learned Magistrate has already been filed before the Sessions Court, there cannot be a Second Appeal before this Court.

6. Learned counsel for the State has supported the contention made by the learned counsel for the petitioner. He has submitted that since long an application under section 389(2) of the Code is being titled and entertained as “Criminal Miscellaneous” application by the Registry of this Court.

7. I have the privilege of Mr. Shashi Anugrah Narain, learned Senior Counsel being present in the Court. I requested him to assist in the matter. He readily agreed. After going through the



provisions of section 389(1) and (2) of the Code, he has submitted that in order to entertain an application under section 389 of the Code, it is mandatory that an appeal ought to have been filed before a court subordinate to the High Court. He further contended that the power conferred under section 389(2) of the Code is nothing but an extension of the power conferred on an Appellate Court under section 389(1) of the Code to the High Court if the Appellate Court is subordinate to the High Court. He submitted that an application under section 389(2) of the Code can only be filed in a pending appeal and hence, such an application ought to be titled as “Criminal Appeal” and not as “Criminal Miscellaneous”.

8. In order to examine the issue, it would be appropriate to consider the relevant provisions of the Code dealing with filing of an appeal, suspension of sentence pending the appeal and release of appellant on bail.

9. Section 374 of the Code lays down the forum for filing an appeal by a convict against an order of conviction. Three different fora have been laid down in respect of the trials held by different courts. They are:

(1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the

Supreme Court;

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial may appeal to the High Court;

(3) Save as otherwise provided in Sub-section (2), any person –

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or

(b) sentenced under Section 325, or

(c) in respect of whom an order has been made or sentence has been passed under Section 360 by any Magistrate, may appeal to the court of sessions.”

10. Section 389 of the Code deals with powers of the appellate court regarding suspension of sentence pending the appeal and release of the appellant on bail. It reads as under:

“389. pending any appeal by a convicted person, the Appellant Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released 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.

(2)The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3)Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall, -

(i)Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii)Where the offence of which such person has been convicted is a bailable one, and he is on bail,

Order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section(1), and the sentence of

imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the terms for which he is so sentenced.

Amendment Act, 2005.- Clause 33 adds two provisos to sub-section (1) of section 389 of the Code to the effect that (i) the Appellate Court will give notice to the prosecution before releasing a convicted person on bail, if he was convicted on an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; and (ii) the prosecution should be permitted to move an application for cancellation of bail granted by the Appellate Court."

11. Section 389 is the only provision in the Code which refers to suspension of sentence and grant of bail to a convicted person. In the event of conviction of an accused, the appellate court alone can exercise the powers conferred under section 389(1) of the Code. For applicability of section 389 of the Code, there must be an appeal by the convict under section 374 of the Code. In absence of an appeal, the power conferred by section 389 of the Code cannot be exercised. In other words, a prayer for bail under section 389 of the Code is an integral part of the appeal

itself from which it cannot be divorced. In a proper case, the power conferred by section 389(1) of the Code on an appellate court may also be exercised by the High Court, if the appeal is filed before a court subordinate to the High Court.

12. In the case at hand, the petitioner has filed an appeal under section 374 of the Code before the Session Court. The application for bail of the petitioner has been rejected by the Appellate Court under section 389(1) of the Code. Hence, he has filed the present application under section 389(2) of the Code seeking suspension of sentence and grant of bail in the pending appeal before the Sessions Court. In my view, such an application has to be titled as “Criminal Appeal” and not as “Criminal Miscellaneous”

13. In that view of the matter, this application in the form of “Criminal Miscellaneous” application is dismissed as not maintainable. The petitioner would be at liberty to file an appropriate “Criminal Appeal” under section 389(2) of the Code before this Court.

14. At this stage, learned counsel for the petitioner submits that the certified copy of the impugned order passed by the Court below may be returned to him so that he may file an appropriate application titled as “Criminal Appeal”. Regard being

had to the request made by the learned counsel for the petitioner, in case the petitioner submits a Xerox copy of the order impugned passed by the learned Sessions Judge, Madhepura, the Registry shall return him the certified copy of the order impugned after retaining the Xerox copy on record.

(Ashwani Kumar Singh, J)

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