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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 449 OF 2016

Mahendra s/o Ashok Jaiswal,
Aged about : 51 years, Occu: Business,
R/o: Kirana Chawdi, Aurangabad ..PETITIONER

VERSUS

1. Dinkar s/o Shankarappa Wadkar,
Aged about: 60 years,
Occu: Medical Officer,
R/o: Behind Hotel Laxminarayan,
Khadkeshwar, Aurangabad
2. The State of Maharashtra ..RESPONDENTS

Mr V. I. Thole, Advocate for petitioner;
Mr Rahul G. Joshi, Advocate for respondent No. 1
Mr R. V. Dasalkar, Addl. Public Prosecutor for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 30th August, 2016

ORAL ORDER :

The petitioner is the original complainant to Summary Criminal Case No. 6114 of 2004 initiated before learned Judicial Magistrate, First Class (Court No. 5) Aurangabad for an offence punishable under Section 138 of the Negotiable Instruments Act. The said complaint came to be allowed against the present respondent by an order dated 20/12/2006 and the respondent was convicted for an offence punishable under Section 138 of the Negotiable Instruments Act and was directed to undergo rigorous imprisonment for one year and pay compensation of Rs.1,65,000/-. The said judgment and order of the learned Magistrate was

(2)

questioned by the respondent before learned Additional Sessions Judge-5, Aurangabad in Criminal Appeal No. 218 of 2008, which appeal came to be dismissed, by judgment and order dated 11/03/2016.

2. After the appeal came to be dismissed, the present respondent moved application stating that though he is convicted and his conviction is confirmed in an appeal, he was on bail throughout the trial and pendency of appeal. It is then claimed that since he want to take out the proceedings before the High Court, he be released on bail.

3. The petitioner objected the said prayer on the ground that the conduct of the respondent-accused was not proper, as he remained absent before learned Magistrate for quite long time. The application for extension of bail came to be allowed by an order dated 11/03/2016 passed by learned Sessions Judge, Aurangabad, who has dismissed the appeal against the conviction of the respondent-accused. It is observed by learned Sessions Judge that the right to prefer appeal before the High Court against the confirmation of conviction is constitutional right and the said right cannot be denied, hence ordered that he be released on fresh bail upon executing P.R. bond of Rs.15,000/-. It is this order, which is questioned in the present petition by the complainant. Learned Counsel for the petitioner would urge that the respondent-accused though was convicted in 2006 for dishonour of cheque of Rs.1,60,000/-, which was issued some time in 2004, till date, the respondent-accused has not deposited the amount of compensation as ordered. He would then submit

(3)

that against the order of conviction before learned Magistrate, an appeal was carried which was dismissed and as such, against the judgment of dismissal of appeal against conviction, revision lies to the High Court, which is a statutory remedy. He would then submit that once learned Sessions Judge dismissed the appeal, the only option left is, to ask the accused to surrender or remain present before the Court so as to execute the order of conviction. According to him, in absence of any power under Code of Criminal Procedure so as to order release of convicted accused by the appellate Court, who has dismissed the appeal against conviction, the order impugned is not sustainable. He would then add that once the appeal is dismissed, the appellate Court ceased to have any control over the same and as such, ought not to have ordered the release on bail in absence of statutory provision.

4. Learned Counsel for the respondent-accused would submit that so as to show *bona fides*, the accused has deposited Rs.40,000/- before the Court below. He would then submit that health of the respondent-accused has prompted him to move for bail before learned appellate Court and considering liberty guaranteed under Article 21 of the Constitution of India, the bail is granted in favour of respondent. He would then urge that in the revision preferred against conviction, separate application was moved for bail and it is always open for this Court to deal with the said bail application independent of the findings recorded by the Court below. According to him, he being a retired public servant not likely to run away from the prosecution and as such, submits that the petition be

(4)

rejected.

5. Having considered the rival submissions of the parties, it is required to be noted that the present respondent was convicted by learned Magistrate for an offence punishable under Section 138 of the Negotiable Instruments Act in exercise of powers under Section 255(2) of the Code of Criminal Procedure.

6. Against the said order of conviction, the present respondent preferred an appeal to learned Sessions Judge pursuant to the provisions of Section 380, in which the conviction was upheld that he was on bail during the trial and pendency of the appeal.

7. Against the order of dismissal, an appeal against conviction, Code of Criminal Procedure does not provide for any further appeal but only for revision against the conviction.

8. In view of above, it is required to be noted that once having noted from the scheme of Code of Criminal Procedure that no second appeal against the order of dismissal of appeal by the Sessions Judge against the judgment of conviction of the Magistrate is provided, the remedy is only revision under Section 397 of Code Criminal Procedure. In case, such revision is preferred by the convicted accused, it is required to be noted that before doing so, he is required to surrender to his bail bonds before learned Sessions Judge so as to invoke right of revision against the

(5)

conviction. It is to be noted that learned Sessions Judge once decides appeal, he, hardly can remain in control of the proceedings or liberty of the accused whose conviction was already ordered by it. Apart from, the fact remains that right of appeal or revision is statutory right.

9. As observed herein above, learned Magistrate convicted the present respondent-accused for an offence punishable under Section 138 of the Negotiable Instruments Act, which was confirmed in appeal. Against the conviction of the respondent by the Magistrate and confirmed in appeal, the remedy of revision is available before this Court and not the appeal. As the appeal is a statutory right, which is not provided to the respondent in above eventuality, before this Court. It is to be noted that the powers of revision cannot be treated at par with that of power of appellate Court, as the powers of the revisional Court are exercised by the superior Courts over the inferior Courts, whereas the appellate Court is required to reappreciate the entire evidence. In the scheme of Code of Criminal Procedure, there are no powers, which could be spelt out with the first appellate Court, who has confirmed the conviction, to suspend the sentence and release of the accused person. Section 389 of the Code of Criminal Procedure provides for suspension of sentence pending the appeal and release of the appellant on bail. The powers thereunder are required to be exercised by the appellate Court and such powers are not in an express terms conferred by the statute on revisional Court to extend the said relief.

(6)

10. Leave apart above, sub section (3) of Section 389 of the Code of Criminal Procedure provides for right of convicted person to claim release on bail provided he satisfies the Court, which has convicted him, that he intend to present an appeal. In the present case, the said provision i.e. sub section (3) of Section 389 of the Code of Criminal Procedure is not attracted, particularly when the conviction of the respondent by the trial Court is already upheld by learned Sessions Judge in an appeal and only remedy lies with the present respondent-accused against the conviction is preferring of revision before this Court. The first appellate Court, as such, in my opinion, has no power to order suspension of sentence or extending bail of the accused person.

11. Least that was expected by learned Sessions Judge was to state provision under which he is exercising power for grant of bail after rejection of appeal of the accused against conviction. Apart from, it is to be noted that the order of grant of bail is without any statutory power and also lacks any reason/application of mind.

12. As such, in my opinion, the order of grant of bail passed by learned Sessions Judge after dismissing the appeal against conviction is not sustainable and is liable to be set aside. Appropriate support can be drawn from the provisions of Criminal Manual so as to infer that the respondent is duty bound to surrender after his conviction was confirmed in appeal before learned Sessions Judge.

(7)

13. As such, for the reasons stated herein above, present criminal writ petition stands allowed. The order of bail granted by learned Sessions Judge, Aurangabad to the respondent-accused on 11/03/2016 is hereby set aside. It is made clear that the respondent-accused, who is convicted by learned Judicial Magistrate, First Class, Aurangabad and confirmed in appeal, is required to be surrendered before learned Magistrate pursuant to the order of conviction passed against him.

14. Criminal Writ Petition No. 449 of 2016 stands allowed in above terms.

(N.W. SAMBRE, J.)

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