

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

**CRIMINAL APPLICATION NO. 465 OF 2017
IN
CRIMINAL APPEAL NO.86/2002.**

Kashinath s/o Pandharinath Katkade. **..APPLICANT.**

versus

The State of Maharashtra.

..RESPONDENT.

...
Advocate for Applicants : Mr.Jadhav Satej S.
APP for Respondents/State: Mr.A.A. Jagatkar.
...

CORAM : V.L. ACHLIYA, J.

1st February, 2017.

PER COURT:

1. The applicant – appellant No.5 has moved this application seeking stay to the conviction awarded in Sessions Case No.14 of 1999 vide judgment and order dated 7.2.2002, for the reasons set out in detail in the application.
2. Heard the learned Counsel for the applicant and APP for the State, and perused the record & proceedings.

3. The applicant was tried along with other eighteen persons for committing offences punishable under Sections 147, 148, 341, 427, 452 r.w. 149 and 395 of IPC. On conclusion of the trial, vide judgment dated 7.2.2002, the applicant – appellant No.5 along with fourteen persons were held guilty of the offences punishable under Sections 148 and 452 r.w. Section 149 of IPC. For committing offence under Section 148 IPC, the applicant is sentenced to suffer R.I. for two years and to pay a fine of Rs.1000/-; and for committing offence punishable under Section 452 of IPC, the applicant is sentenced to suffer R.I. for five years and to pay a fine of Rs.2000/-. Being aggrieved, the appellant along with co-accused, preferred appeal, which is registered as Criminal Appeal No.86/2002. Vide order dated 18th February, 2002 the appeal came to be admitted. By the order dated 21st February, 2002 passed in Criminal Application No.323 of 2002 the execution of substantive sentence has been suspended and applicant along with co-accused has been released on bail during pendency of appeal.

4. Mr. Satej Jadhav, learned Counsel for the applicant submits that the applicant is a man of reputation and

highly respected by the people from his village and surrounding villages due to development work he has carried out in that area. He further submits that the offence in question was registered against the applicant way back in the year, 1998 when he was 21 years of age. In the case set up by the prosecution and presented in the form of charge-sheet, there are no allegations that the applicant had assaulted anybody or taken active part in the commission of the offence. By referring the copy of the FIR and the testimony of the complainant and other witnesses, it is pointed out that the role attributed to the applicant confines to his presence on the spot along with the co-accused. He has been convicted only for the reason that he was found to be a member of unlawful assembly.

5. It is contended that since 2002 the appeal is pending. The applicant has no past record of involvement in criminal activities. The offence in question is the sole offence registered against him. Since the year, 1998 onwards, till this date, no other offence has been registered against the applicant. He further submits that the applicant is now desirous to contest the election as a member of Zilla Parishad, Beed. The election programme is already notified

by the Election Commission vide notification dated 21st January, 2017. As per the programme notified, the process of accepting nomination form has started from 27th January, 2017 and the last date for submission of nomination form is 1st February, 2017. He submits that in view of the judgment and order of conviction operating against the applicant – appellant No.5, the applicant is debarred from contesting the election in view of provisions of Section 16(1)(b) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. He, therefore, urged to stay / suspend the conviction pending disposal of appeal or for such period as this Court may deem fit and proper so as to enable the applicant to participate in the process of election. He further submits that in case, the effect and operation of order of conviction is not stayed, the statutory right of the applicant to contest the election will be defeated and may cause irreversible damage to the applicant.

6. By referring the impugned judgment, the learned Counsel for the applicant urged that the applicant has fair chances to succeed in appeal. It is further pointed that the complaint in question came to be registered due to political rivalry in the village and the applicant was falsely implicated

in the case. After the incident, peace has been restored in the village and the villagers have decided to bury their disputes. Out of the understanding arrived at in the village, it was decided to compound the offence and accordingly, the accused and the complainant in the case had approached this Court. Criminal Application No.1799 of 2004 along with Criminal Application No.1800 of 2004 came to be filed before this Court. Those applications were disposed of vide order dated 31.3.2006 by observing that the offences under Sections 148 and 452 of IPC are not compoundable. In this background,, the learned Counsel urged that a case of exceptional nature has been made out so as to invoke the jurisdiction of this Court under Section 389(1) r/w Sec.482 of Cr.P.C. to suspend / stay the conviction operating against the applicant - accused No.5.

7. The learned APP has opposed the application with the contention that section 16(1)(b) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 has been incorporated with an object to prevent criminalization of the politics. He submits that based upon the evidence adduced in the matter, the trial Court has convicted the applicant. The complainant and other witnesses have specifically

named the applicant as the person present along with the co-accused and part of the unlawful assembly formed in furtherance of common object to assault the complainant and his family members. There is evidence to the effect that the applicant had entered into the house of the complainant with an intention to assault the complainant and his family members. In this view, the learned APP submits that the application may be rejected.

8. Before appreciating the submissions advanced, it is necessary to consider the legal position as crystallized by the Apex Court through various decisions in the matter of suspension of conviction. Sub-section (1) of Section 389 of Cr.P.C. vests powers with the appellate Court to suspend the execution of sentence or order appealed against during pendency of the appeal. The question of scope and ambit of powers of appellate Court, as envisaged under Section 389 of Cr.P.C., duly considered by the Apex Court in the case of ***Rama Narang vs. Ramesh Narang***¹. While dealing with the scope and ambit of exercise of powers under Section 389 of Cr.P.C., the Apex Court has held that suspension of conviction very much falls within the scope and ambit of

¹ 1995(2) SCC 513;

exercise of powers under Section 389(1) of Cr.P.C. In para 19 of the said judgment, the Apex Court has observed, as under:

“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 in 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 persons 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 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.”

9. In the case of ***State of Maharashtra through CBI, Anti Corruption Branch, Mumbai vs. Balakrishna Dattatrya Kumbhar***² while reiterating the legal position that power to stay conviction to be exercised in exceptional circumstances, the Apex Court observed that the powers of

² (2012) 12 SCC 384;

suspension of conviction must be exercised with a bit circumspection and caution. In order to suspend the conviction, the applicant must satisfy the Court of the evil that is likely to befall if the said conviction is not suspended. In para 15 of the judgment, the Apex Court observed, as under:

“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.”

10. Thus, if we take survey of the precedents of law on this issue, then it leads to draw following conclusions:

(1) The appellate Court can exercise powers under Section 389(1) of Cr.P.C. to suspend / stay conviction if the case of exceptional nature is made out.

(2) The provisions of section 389(1) of Cr.P.C. may be invoked in a case of exceptional circumstances, if the Court is satisfied based upon the facts and circumstances of the case the refusal to stay / suspend the conviction would lead to injustice and irreversible damage.

(3) The powers to stay the conviction should be exercised with great circumspection and caution and only in the event the applicant satisfies the Court as to the evil that's likely to befall upon him if the conviction is not suspended.

11. In the case of ***Rama Narang vs. Ramesh Narang*** (supra), the Apex Court has observed that in an appropriate 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 certain disqualification provided for in any other statute, it may exercise the power as otherwise the damage done cannot be undone.

12. In my view, in the instant case the applicant has

made out the case to exercise powers under Section 389(1) of Cr.P.C. to stay / suspend the conviction so as to enable him to exercise his statutory right to contest the election. As discussed in the foregoing paras, the applicant has no criminal record as such to brand him as a criminal. Except the case in question, which was registered way back in the year, 1998 and that too, when he was of the age of 21 years, no other case stands to his record. As per the direction of the Court, the learned APP has verified this fact from the concerned Police Station and filed the report dated 30.1.2017 which fortify the stand of applicant that except CR No.53/1998, no other case is registered or pending against him.

13. Section 16(1)(b) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 and the identical provisions in other statutes including the Representation of the Peoples Act, were introduced with the object to prevent the criminals to enter the politics and make the criminalization of politics. No doubt, the applicant has been tried and held guilty of offences punishable under Sections 148 and 452 of IPC and ordered to undergo the sentence as stated above. But, the conviction against the applicant is

not final and it is subject to the decision in appeal.

14. In order to ascertain the role of the applicant in the commission of offence, I have perused the record and proceedings. Perusal of FIR and the testimony of the complainant and other witnesses, *prima facie*, shows that the applicant has been held guilty of the offences for the reason that he was found to be the member of the unlawful assembly formed to commit the offence in question. No specific role has been attributed to the applicant. The complainant and other witnesses have stated that the applicant was one amongst the persons who entered into the house of the complainant and caused damage to his house. So also, the prosecution has not attributed any role of personally assaulting any person.

15. The appeal is pending since the year 2002 i.e. more than 15 years. The applicant was 21 years of age at the time of commission of offence. Therefore, delay in disposal of appeal should not defeat the statutory right of the applicant to participate in the election process. In case, the application is not allowed and the impugned conviction is not stayed, then the applicant will be debarred from

contesting the election in view of the disqualification provided under Section 16(1)(b) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 which provides that the person having been convicted by a court in India of any offence and sentenced to imprisonment for one year and more is not entitled to contest the election for a period of five years from the date of release after undergoing the sentence. In case, the impugned conviction is not stayed / suspended, there is every likelihood that irreversible damage may be caused to the applicant. I am, therefore, inclined to allow the application for a limited period of three months to enable the applicant to participate in the process of election of Zilla Parishad which has commenced vide notification dated 21.1.2017, subject to the outcome of appeal with further directions to expedite the hearing of the appeal. The appeal has already ripened up for hearing and is already listed on monthly Board for final hearing. Hence, the following order:

ORDER

“In the result, Criminal Application No.465 of 2017 is allowed in terms of prayer clause (B). The order of suspension / stay to the conviction shall remain in operation for a period of six months from

the date of this order or decision of the appeal, whichever is earlier. The order of stay / suspension of the conviction is passed subject to outcome of the appeal. In case of dismissal of appeal, the consequences as contemplated in Section 16 of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 shall follow immediately. Hearing of the appeal is expedited. The appeal be listed for final hearing on 27th February, 2017, and the same be shown high on Board. The criminal application is disposed of, accordingly.”

[V.L. ACHLIYA, J]

Kadam.