

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

CRIMINAL WRIT PETITION NO. 741 OF 2021

- 1) Asaram s/o Dalsingh Lodhawal,
Age 60 years, Occ. Retired,
R/o. Plot No. 4/3, N-6, CIDCO,
Aurangabad.
- 2) Arjun s/o Ambarsingh Jangale,
Age 35 years, Occ. Govt. Service.
r/o. Pachpirwadi, Tq. Gangapur,
District Aurangabad.
- 3) Pawan s/o Ambarsingh Jangale,
Age 30 years, Occ. Dismissed
from Service, R/o. Pachpirwadi,
Tq. Gangapur, Dist. Aurangabad.
- 4) Gopal Kacharu Bamnawat,
Age 30 years, Occ. Terminated
From service, R/o. Pachpirwadi,
Tq. Gangapur, Dist. Aurangabad.

... **Petitioners.**

VERSUS.

The State of Maharashtra,
Through its Superintendent of
Police, Aurangabad.
(Shillegaon Police Station, Gangapur)

... **Respondent.**

...

Advocate for the Petitioners : J. P. Legal Associates.
APP for the Respondent/State : Mrs. R.P. Gaur.

CORAM : **MANGESH S. PATIL, J.**
DATE : **08.07.2021.**

ORAL JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of

admission.

2. The petitioners have been convicted under Section 248(2) of the Code of Criminal Procedure for the offences punishable under Section 143, 147, 148, 326 read with Section 149 of the Indian Penal Code by this judgment and order dated 12.03.2021. Instead of awarding any sentence they were extended a benefit under Section 4 of the Probation of Offenders Act. Being aggrieved and dissatisfied with the conviction they have preferred Criminal Appeal No. 1/2021 before the Sessions Court. By submitting an application under Section 389 of the Code of Criminal Procedure they made following prayer :

“b) That the impugned Judgment and order of Dated 12-03-2021 in RCC No. 103/2016 delivered by Learned J.M.F.C., Gangapur at Aurangabad may kindly be stayed and suspended and obliged.”

The learned Appellate Court passed the following order :

“The sentenced awarded by ld JMFC in RCC No. 103/2016 dt 12-03-2021 is suspended till decision of this appeal. Each Accused to furnish PR & SB of Rs. 5000/- in likewise amount. Inform concern ld. JMFC.”

3. It appears that since the petitioners are the Public Servants and there has been an apprehension of they being dismissed from service on the ground of their such conviction, they submitted an application (Exhibit 20) and tried to point out to the Appellate Court that even the operation of the judgment was sought to be stayed by the earlier application and was necessary. They requested the learned Appellate Court to reconsider the matter with a following prayer :

“B) Application for modification in order as per prayer clause dated 25.03.2021 considering the above said reason

the order may kindly be modifies as per the prayer clause of appellant in the interest of justice and obliged.”

4. By the impugned order the learned Appellate Court rejected the application (Exhibit 20) with following observations in paragraph No. 5 :

“05. By way of this application, applicant prayed to modify this order, but nowhere in the application prayer clause has mentioned what modification he intended. It is submitted that, judgment and order is stayed have to be mentioned, but after gone through the provision of section 389 of Cr.PC. It is nowhere mentioned about stay of judgment, only mentioned the execution of sentence of order appeal be suspended and appellant be released on bail. My learned predecessor by order dated 25.03.2021 suspended the sentence as per the provision. Therefore the question of modification of said order will not arise. Hence, there is no merit in the present application. I proceed to pass the following order.”

5. Being aggrieved and dissatisfied the petitioners are before this Court with the same prayers.

6. The learned advocate for the petitioners would point out as to how one could have easily discerned the relief being claimed by the petitioners if the entire application (Exhibit 20) was considered and not only the prayers. He would submit that there could be some error and it would be a matter of ill-drafting but one could easily gather that the facts and circumstances were such that the petitioners were praying for suspension of operation of the judgment convicting them for the offences. He would therefore submit that the learned Judge of the Appellate Court has committed gross illegality in refusing to decide the application on its own merits.

7. Learned advocate Mr. Joshi would further point out that there are few judgments of the Supreme Court taking a consistent view as to how though Section 389 of the Code of Criminal Procedure only speaks about suspension of sentence, in the facts and circumstances even the judgment and order of conviction can be suspended pending appeal. He would refer to the decision in the case of **Rama Narang Vs. Ramesh Narang; (1995) 2 Supreme Court Cases 513,** and **Ravikant S. Patil Vs. Sarvabhuma Bangali; 2006 A.I.R. Supreme Court weekly 6365.** The learned advocate would also point out the order of this Court passed in the matter of **Santosh Jagannath Nikumbe Vs. The State of Maharashtra; Criminal Application No. 1773/2012 in Criminal Appeal No. 91/2011 dated 05.05.2012.**

8. Lastly, the learned advocate would submit that since the petitioners are invoking the powers of this Court not only under Article 227 of the Constitution of India but even under Section 482 of the Code of Criminal Procedure, this Court may now decide the application (Exhibit 20) on its own merits and can grant appropriate relief.

9. Learned A.P.P. submits that no error can be found with the observations and conclusions by the learned Judge of the Appellate Court when he has taken a plausible view that once earlier application for suspension of sentence was decided on its own merits the order could not be modified. She would further submit that it is only under exceptional circumstances that even the conviction can be suspended but there are no such exceptional circumstances obtaining in the matter in hand.

10. As can be appreciated, by moving first application dated 19.03.2021 the petitioners had specifically prayed for staying the judgment and order convicting them. Without expressing any opinion and assigning any reason, their such prayer was apparently not considered and instead an order directing suspension of sentence was passed albeit admittedly, they were not ordered to undergo any sentence but were granted a benefit under the

Probation of Offenders Act.

11. It is to be borne in mind that the contents of the application along with the prayer are expected to be considered and not only the prayers simplicitor. The purport of the prayer in the context of the contents of the application has to be understood. This is where the learned Appellate Court seems to have erred while passing the impugned order. Though it is a case of ill-drafting, the petitioners in their application (Exhibit 20) had specifically made it clear as to why for were they filing the application. It was specifically mentioned in paragraph No. 3 that they were seeking modification for staying the judgment impugned in the appeal which prayer was not granted while passing the order dated 25.03.2021. Though in the prayer clause no such specific sentence regarding stay of judgment and order was made, the learned Judge could have applied his mind to the earlier portion and the contents of the application (Exhibit 20). Had he done so he would have realised that the petitioners were in fact seeking a modification so that even the operation of the impugned judgment and order could be stayed/suspended. Instead of considering these aspects the learned Judge simply refused to exercise the jurisdiction vested in him and to consider the application (Exhibit 20) on its own merits. The observations and conclusions are certainly perverse, arbitrary and capricious. It is quite apparent that he has rejected the application (Exhibit 20) on technicalities rather than on merits.

12. Since the learned Judge of the Appellate Court has not decided the application (Exhibit 20) on its own merits, it would not be appropriate for this Court to sit in appeal and decide the application on its own merits. It would rather be appropriate to allow the learned Judge of the Appellate Court to exercise the jurisdiction vested in him instead of deciding that application on its own merits here.

13. It would, in the facts and circumstances be appropriate to quash and

set aside the impugned order and remand the matter back to the Appellate Court with a request to decide the application (Exhibit 20) afresh on its own merits.

14. The Writ Petition is partly allowed. The impugned order is quashed and set aside. The matter is remanded back to the Court of Additional Sessions Judge Vaijapur who shall now decide the application of the petitioners (Exhibit 20) on its own merits by extending an opportunity to both the sides to make submissions in the light of observations made herein above. He shall decide the application (Exhibit 20) as early as possible.

15. The Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

mkd/-