BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Wednesday,the Twenty Seventh day of January Two Thousand and Twenty One

PRESENT

The Hon'ble Mr.Justice K.MURALI SHANKAR

CRL MP(MD) No.7711 of 2020
IN
CRL A(MD) No.382 of 2020

NIYAZKHAN @ ABDUL RAZACK
(NOW CONFINED IN CENTRAL PRISON MADURAI)
... PETITIONER/APPELLANT/ACCUSED

Vs

THE STATE REP. BY
THE INSPECTOR OF POLICE
SPE/C.B.I/EOW,
CHENNAI. ...RESPONDENT/RESPONDENT/COMPLAINANT

Petition filed praying that in the circumstances stated therein and in the petition filed therewith the High Court may be pleased to suspend the sentence imposed in C.C No.3/2006 passed by the Learned II Additional District Judge (C.B.I Cases) Madurai dated 15.12.2020 and enlarge the Petitioner on bail, pending disposal of the Criminal CRL A(MD) No.382 of 2020.

Prayer in CRL A(MD) NO.382/2020:
Criminal Appeal filed may be pleased to call for the records and set aside the conviction and sentence passed in C.C.No.3 of 2006 dated 15.12.2020 by the learned II Additional District Court for CBI Cases, Madurai against the appellant is concerned.

Order : This petition coming up for orders on this day, upon perusing the petition filed in support thereof and upon hearing the arguments of Mr.ARL.SUNDARESAN, Senior Counsel for Mr.G.SIVARAJA, Advocate for the petitioner and of Ms.L.VICTORIA GOWRI, Assistant Solicitor General of India for CBI Cases on behalf of the Respondent, the Court made the following order:-

Reserved on : 19.01.2021
Delivered on : 27.01.2021

The petitioner is the accused in C.C.No.3 of 2006 on the file of the learned II Additional District Court for CBI Cases, Madurai. After filing of the final report, the case was taken on file in C.C.No.9 of 2003 as against 7 accused and that since the present petitioner, who was the sixth accused therein remained absconding, the case as against him was ordered to be spilt up as C.C.No.3 of 2006 and that thereafter, the parent case in C.C.No.9 of 2003 was tried and disposed off on 12.12.2006.

2.The case of the prosecution is that the present petitioner and other accused entered into a criminal conspiracy during the year 2001 at Tuticorin, Tirunelveli and other places to commit a fraud and to cheat Canara bank, Beach Road Branch, Tuticorin and in pursuance of the criminal conspiracy with other accused persons, the Petitioner herein impersonated himself as Abdul Razack and introducing himself as owner of several industries at Mangalore, Bangalore and Trivandrum has approached Beach Road Branch of Canara Bank, Tuticorin, and wanted to open a Current Account in the name of M/s.A.P.N.International, a firm ventured into the manufacture of "Dry Flowers" which account has to be operated by his younger brother A1/Sri Raajkafur @ Mohd.Asmath, that A2/John Fernando was the introducer of the account, that A1 produced a rental agreement between himself and A3/Smt.Sharmila wife of A2, as proof of residence, that M/s.A.P.N. International is a fictitious firm with no business activity, that after the opening of C.A.No.2653, the petitioner has made deposits of various forged outstation cheques into the said current account in connivance with other accused posted forged Inter Branch Advices, (IBS's) corresponding to the forged outstation cheques to Canara Bank, Beach Road Branch, Tuticorin, that the said Inter Branch Advices were responded at the Branch and amounts were credited to Current Account No.2653 in the normal course and subsequently, the amounts were withdrawn by the first accused, that the third accused Sharmila, wife of the second accused opened a current account in the name of Maria Reals in UCO Bank, Tuticorin and amounts were transferred from the account of A.P.N.International to this account and withdrawn, that in pursuance of the said conspiracy, the Officer and Sub Staff in Canara Bank, who are the accused Nos4 and 5, removed the forged outstation cheques lodged in the branch by abusing their official position before the despatch and gave it to the first accused and the petitioner herein for the purpose of preparation of forged Inter Branch Advices to be posted to the branch for cheating Canara Bank, that the bank branches mentioned in the forged cheques were non existing and the outstation cheques presented in C.A.No.2653 were forged, that the above said Inter Branch Advices numbers were not issued from the respective Clearing Sections of Canara Bank, that in pursuance of the criminal conspiracy, the petitioner with other accused persons presented 20 forged OSC cheques in Current Account No.2653 for the total amount of Rs.1,17,69,751/- and attempted to cheat Canara Bank and withdrew the amount credited against 13 of such cheques and that due to the said acts of the accused, Canara Bank has incurred loss of Rs.76,58,751/- and corresponding wrongful gain to the accused.

3.The trial Court has framed the charges under Section 120(B) r/w 419, 467, 468, 471, 420 IPC; 420 r/w 511 IPC and u/s 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988, under Section 419, 467, 468, 471, 420 of IPC and u/s 420 r/w 511 IPC. After conducting trial, by examining 19 witness and by exhibiting 141 documents, the learned trial Judge came to the conclusion that the petitioner was guilty of charges framed against him, convicted and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for 6 months for the offence under Section 120-B r/w 419, 467, 468, 471, 420 IPC and Section 420 r/w 511 IPC and Section 13(2) r/w 13(1) (d) of Prevention of Corruption Act, 1988; to undergo Rigorous Imprisonment for three years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for 6 months for the offence under Section 419 IPC; to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for 6 months for the offence under Section 467 IPC; to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for 6 months for the offence under Section 468 IPC; to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for six months for offence under Section 471 IPC; to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for six months for offence under Section 420 IPC and to undergo Rigorous Imprisonment for three years and to pay a fine of Rs.5,00,000/- in default to undergo Rigorous Imprisonment for six months for the offence under Section 420 r/w 511 IPC. Aggrieved by the said judgment of conviction, the petitioner has come forward with the present appeal and the above application for suspension of sentence.

4.The learned trial Judge has imposed total fine of Rs.35,00,000/-, but admittedly, the same is not paid. The learned Senior Counsel would contend that the petitioner undertakes to deposit the entire fine amount, if any conditional order is passed by this Court, while granting appeal bail. But the fact remains that the petitioner has not paid any amount towards fine till now.

5.The learned Senior Counsel would contend that two of the accused were acquitted by the trial Court in the main case in C.C.No.9 of 2003 and two other accused were acquitted by this Court in the appeal and that therefore, the conviction recorded by the trial Court under composite charge of conspiracy is unsustainable. He would further contend that though the prosecution has stated that the petitioner was introduced by the 6th accused Mohan to the fourth accused Arumugam, the said accused Mohan and Arumugam have already been acquitted by the trial Court and this Court respectively and therefore there is absolutely no material available to implicate the petitioner in the said case, that the prosecution has failed to establish the connection between the petitioner and the first accused, who is said to have opened the current account, that the petitioner's identity was not at all established, that identification parade was not at all conducted to prove the identity of the accused, that though forgery of cheques were alleged, machineries and equipments used for forging the documents were not at all recovered, and that the conviction rendered by the trial Court is illegal and contrary to law.

6.The respondent filed the counter statement raising serious objections and whereunder, it is alleged that the prosecution has proved its case against the petitioner, that the evidence has proved that the petitioner had participated in the commission of the actual crime i.e.,criminal conspiracy, cheating by personation, forgery of cheques, forgery for the purpose of cheating, using forges documents as genuine documents and cheating, that the petitioner impersonated himself as Abdul Razack, opened a bank account in the name of 'M/s.A.P.N.International, operated by his brother, that witnesses P.W.2 and P.W.9 had identified the accused before the trial Court, that the petitioner had absconded at relevant point of time and that is why, the case was split up from the main case, that the petitioner was also continuously absent during the course of trial proceedings, that the petitioner committed the fraud in a preplanned manner and causes wrongful loss to the Bank to the tune of more than Rs.76,58,751/- in the year 2002 and that therefore, the above petition is liable to be dismissed.

7.Heard the learned Senior Counsel appearing for the petitioner and the learned Assistant Solicitor General appearing for the respondent. Perused the records.

8.The only point that arises for consideration is as to whether the sentence imposed on the petitioner/accused is to be suspended and is to be granted appeal bail.?

9.The learned counsel for the respondent would strongly contend that the above petition itself is not maintainable as the suspension of conviction is unknown to the cases involving corruption and relied upon the judgment of the Hon'ble Apex Court in State of Maharashtra through CBI ACB, Mumbai Vs. Balakrishnan Dattatrya Kumbhar (Crl.A.No.1648 of 2012, dated 15.10.2012:)

> “14. ..... Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights violation in itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee / respondent if ultimately succeeds, could claim all consequential benefits. The submission made on behalf of the respondent, that this Court should not interfere with the impugned order at such

a belated stage, has no merit for the reason that this Court, vide order dated 09.07.2009 has already stayed the operation of the said impugned order."

In the said case, the accused has approached the High Court, challenging the judgment of conviction by filing an appeal and application under Section 389(1) Cr.P.C, seeking orders for suspension of conviction and that the High Court has allowed the application and suspended the conviction itself, vide order dated 08.04.2008. When the said order of High Court was challenged before the Hon'ble Supreme Court, by observing that in the exceptional cases, conviction may be suspended 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, has set aside the impugned order dated 08.04.2008. In the case on hand, as rightly contended by the learned Senior Counsel for the petitioner, the petitioner has only prayed for the relief of suspending the sentence and not the conviction.

10.No doubt, as rightly contended by the learned counsel for the petitioner, this Court is having ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of nature of the offence, manner in which occurrence had taken place, whether in any manner bail granted earlier had been misused. No doubt, there is no straight jacket formula that can be applied in exercising the discretion and the facts and circumstances of each cases, will govern the exercise of judicial discretion, while deciding the application under Section 389 of Cr.P.C.

11.According to the prosecution, the petitioner and other accused had caused the loss to the tune of Rs.76,58,751/- to the Canara Bank and obtained corresponding wrongful gain to themselves. It is pertinent to mention that the money alleged to have been looted by the petitioner and other accused is Public Money. Admittedly, there were charges of impersonation, forgery, using forged documents as genuine documents and cheating. No doubt, considering the judgment of the trial Court and the contentions raised by the petitioner in the appeal memorandum, this Court is of the view that certain arguable points are involved in the criminal appeal and this court is also aware of the fact that the above appeal will take some time for disposal, but the above aspects by themselves cannot be considered as valid reasons or grounds sufficient enough to suspend the sentence imposed on the petitioner.

12.One other important point to be noted is that the trial Court has passed the impugned judgment of conviction only on 15.12.2020 and hardly five weeks have elapsed. The learned Senior Counsel would contend that in a similar case in C.C.No.4 of 2006, this Court in all the six appeals preferred against the judgment of conviction dated 17.03.2017, passed by the learned II Additional District Judge for CBI Cases, Madurai has granted appeal bail and suspended the substantial sentence vide common order dated 23.01.2018. As rightly pointed out by the learned counsel for the respondent, those six accused were granted appeal bail only after ten months.

13.According to the prosecution, the present petitioner is the kingpin of the case and the trial Court in its judgment has referred the petitioner as the master mind behind the offence. The planning, manner and the mode, in which the public money was allegedly swindled is very much shocking and appalling It is pertinent to mention that since the petitioner had remained absconding, the case was ordered to be split up and the main case was proceeded and disposed of. After securing the petitioner, the present case in C.C.No.3 of 2006 was tried.

14.Considering the nature and seriousness of the charges allegedly levelled and proved, the quantum of the amount involved and the period of imprisonment undergone and also the fact that the petitioner is shown as the kingpin and master mind behind the entire transactions by the prosecution as well as the trial Court and also the abscondingness at the relevant point of time, this Court is of the view that this is not a fit case to grant the suspension of sentence and enlarge the petitioner on bail and the above point is answered accordingly.

15.In this result, this Criminal Miscellaneous petition is dismissed.

sd/-
27/01/2021

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/ /2021
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

Note : In view of the present lock down owing to COVID – 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

TO

1. THE II ADDITIONAL DISTRICT JUDGE(CBI CASES),
   MADURAI.

2. THE SUPERINTENDENT,
   CENTRAL PRISON,
   MADURAI.

3. THE INSPECTOR OF POLICE
   SPE/CBI/EOW,
   CHENNAI.

4. THE SPECIAL PUBLIC PROSECUTOR FOR CBI CASES,
   MADURAI BENCH OF MADRAS HIGH COURT,
   MADURAI.

ORDER
IN
CRL MP(MD) No.7711 of 2020 IN
CRL A(MD) No.382 of 2020
Date :27/01/2021

DAS
SRS/JC/SAR-II/02.02.2021/7P/5C