IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 201 of 2023
IN
CRIMINAL APPEAL NO. 1216 OF 2022

Toufiq Haji Gaffar .. Applicant

Versus

The State of Maharashtra & Anr .. Respondents

…

Mr. Aabad Ponda, Sr. Advocate i/b Samir Pradhan for the applicant.
Ms.P.N. Dabholkar APP for the State.
Mr.Shriram Shirsat with Amardeep Singh Sra for respondent no.2 CBI.

CORAM: BHARATI DANGRE, J.
DATED : 20th MARCH 2023

P.C:-

1 The Appeal being admitted, the present Application is taken out for suspension of sentence and release of the applicant who has been convicted by the impugned judgment dated 2/11/2022 passed by the learned Special Judge, CBI (Bombay) in Special Case No.24/2005.

2 The present applicant being charged and tried as accused no.1, has been found to be guilty of committing an

offence punishable u/s.420 r/w 120B IPC, 467 r/w 120B of IPC, 468 r/w 120B IPC and 471 r/w 120B of the IPC.

On the finding of guilt being recorded, he has been punished to undergo a sentence, as directed in the operative portion of the order and cumulatively, the effect of the sentences is to undergo Simple Imprisonment for 7 years and fine of Rs.5 crores 20 lakhs, on failure to undergo sentence.

3 Heard the learned senior counsel Mr.Ponda for the applicant and learned counsel Mr.Shirsat for the respondent no.2 CBI.

With their able assistance, I have perused the impugned judgment as well as the deposition of the witnesses that are placed on record.

4 Accused nos.1 to 6, 9, 10, 12 and 13 came to be charged and tried for the offence punishable u/s.467, 468, 471 read with Section 120-B of the IPC, whereas the other co-accused in the same trial were tried u/s.13(1)(d) and 13(2) of the Prevention of Corruption Act.

The subject C.R in which the applicant was tried and convicted, came to be registered when the complainant, Additional Commissioner of Customs, Special Investigation and Investigation Branch, placed up a written statement on 27/6/2003 to the Superintendent of Police, CBI, Export Oriented Unit (EOU) where he alleged that fraud is committed in regard to the custom duty exemption to the extent of Rs.4,25,90,109/- in the name of M/s.Rama Syntex Pvt.Ltd, a Company registered under the Companies Act, having its registered office in Baroda. It was alleged that the Company is non-existent and the persons who were projected as Directors were fictitious persons and it was alleged that they were put up by the applicant, Toufiq Haji Gaffar, resident of Surat, to perpetrate the fraud. It is in this background the C.R was registered against 13 persons with the applicant.

In order to bring home the guilt, prosecution examined 66 witnesses and even the statement of the accused persons were recorded u/s.313 of Cr.P.C.

5 The applicant/accused no.1 himself examined as a defence witness in order to falsify the prosecution case, where he was alleged to be a kingpin in the whole episode, by floating a Company under the fictitious name. On being subjected to trial, the learned Judge, on appreciation of the evidence, arrived at a conclusion that it is the applicant who is the mastermind of instant fraud which was committed with the aid and assistance of accused nos.2, 4 and 6 and one of the approver. It was also categorically concluded that he is the ultimate beneficiary of the Import duty free consignments which were availed by illegal means in the whopping sum of Rs.4.20 crores.

A finding is also recorded that he had executed documents which were used to commit fraud and he used with the aid of his employees and accused nos.2, 4 and 6 being his own employees, had conspired with him so that the benefit of the crime proceeds in the sum of Rs.4.20 crores was enjoyed by them.

6 The learned Judge, however, while concluding, record that this amount as on today, is computed to be Rs.22 crores by considering by applying Simple Interest, and this was considered to be the magnitude of the economic offence which has hampered the financial wealth of the country, which resulted in conviction of the present applicant and he being sentenced to suffer imprisonment for 7 years.

7 In the Appeal, the Appellant has raised various grounds, justifying the exercise of the appellate jurisdiction of this Court, by specifically raising a ground about a perverse finding being recorded in the impugned judgment. Apart from this, in the Appeal, a specific ground is raised to the effect that the accused did not avail his right u/s.313 Cr.P.C, since the barrage of questions put to him, did not satisfy the requirement of Section 313, being of putting every incriminating circumstance to an accused.

Apart from this, non-compliance of mandatory provision in form of Section 317 of Cr.P.C, is also raised as a prominent ground by submitting that PW 1 and PW 3 were examined in absence of the present applicant, but while recording his statement under Section 313, the evidence which had come on record through these witnesses have been specifically put to him and the Court expected him to respond to the said evidence, though recorded in his absence.

Apart from this, the right to equality as enshrined in Article 14 of the Constitution is also pressed into service, by comparing his case against accused no.2 Maqsood, who has been charged for preparing and giving false instructions, which ultimately has been led to the commission of the offence.

8 The learned senior counsel has reiterated all these grounds while pressing his Interim Application filed seeking suspension of sentence and seeking his release on bail.

Reliance is placed upon the decision of *Kiran Kumar Vs. State of Andhra Pradesh (2001) 9 SCC 211*, wherein the earlier decision in case of Apex court in case of *Bhagwan Ramashinde Gosai vs. State of Gujarat, (1999) 4 SCC 420,* has been cited with approval to the effect, that when the Appeal is pending, the sentence should be suspended, is the normal rule and rejection can only be by way of exception and according to the learned senior counsel, unless and until this exceptional case is made out in the light of the specific grounds raised in the Appeal, through which he has demonstrated extreme prejudice in conduct of the trial and thereby vitiating the finding of conviction and resultantly the sentence imposed, the burden according to him, has to be discharged by the prosecution in bringing the case, as an exceptional one.

9 In support of the ground to the effect that the manner in which incriminating circumstances were put to the applicant, reliance is placed upon the latest decision of the Apex Court in case of *Kalicharan and ors vs. State of U.P, 2022 SCC Online SC 1718* as well as the decision in case of *Jaiprakash Tiwari vs. State of Madhya Pradesh, 2022 SCC Online, 966.* To bolster the submission, that if the incriminating circumstance is not specifically put to an accused, it cannot be said that there is due compliance of section 313 which has been held, not to be an empty formality.

10 Perusal of the aforesaid decision would clearly reveal the purpose of Section 313 of Cr.P.C, being to afford a reasonable opportunity to the accused to explain each and every adverse circumstance, which has emerged through the witnesses during the course of the trial, which necessarily contemplate putting each and every adverse evidence in form of questions, so as to give opportunity to the accused to articulate his defence and offer an explanation.

11 In the wake of the aforesaid authoritative pronouncement, when the statement of the applicant recorded u/s.313 is perused, I cannot desist from observing that the learned

Judge has only completed the procedural formality of recording the statement of the applicant u/s.313, as if when I looked at the composite circumstances which are put to the applicant, with his response received, 'either do not know' or 'not aware', itself is indicative of the fact that the circumstance put to the accused was not capable of being understood and therefore, responded accordingly.

This is one of the point which would deserve a deeper consideration at the time of hearing of the Appeal.

Apart from this, another important facet, being the testimony of PW 1 and PW3 being recorded in absence of accused no.1, who was on bail, has further prima facie created a dent in the prosecution case as all those circumstances which were brought on record through these two witnesses have been put to the applicant/accused in his 313 statement, when he was not privy to the statement being recorded, as he was not present in the Court.

12 In any case, the offence being registered under Section 120B, section 420, 467, 468 of IPC, is in respect of evasion of customs duty, by creating a forged entity and misusing of the EOU scheme by using forged documents, creating entitlement to import duty free raw material and subsequently, diverting it for unauthorized purpose. This misuse of Custom Department Oriented Unit has to be necessarily investigated at

the departmental level and when Mr.Shirsat is specifically asked to ascertain whether any adjudication process was ever initiated, he is unable to answer in the positive.

13 In the wake of the aforesaid facts which have been brought before me through the application and which is a matter of consideration in Appeal and since the appellant has been convicted for a sentence of 7 years RI, in the wake of decision of the Apex court in case of Kiran Kumar (supra), since no exceptional case has been made out why the sentence cannot be suspended, being in form of imprisonment for a period of 7 years, I deem it appropriate to grant the Application by suspending the sentence to release the applicant on bail.

The release of bail shall be ensured by furnishing P.R bond in the sum of Rs.50,000/- with one or more sureties in the like amount.

The applicant is permitted to be released on furnishing cash bail for a period of six weeks.

14 Though Mr.Shirsat is insistent upon deposit of the fine amount, I am not inclined to grant the said prayer, since for the aforesaid reasons, when I deem it appropriate to suspend the sentence, it would necessarily include the imposition of fine.

Though Mr.Shirsat would place reliance upon the order releasing Vinay Kumar, accused no.13 on bail, where the payment of fine was not stayed, in my considered opinion, the case of the said accused stand on different footing as he was tried u/s.13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, being a public servant and was convicted under the P.C Act.

15 The case of the present applicant being to the effect that the prosecution has utterly failed to establish charge against him, particularly as regards the allegation of forging the documents i.e. u/s.420B IPC along with Section 467 and 468 IPC, if at all the Appeal is dismissed, the appellant shall be made liable to pay the fine, if not, he will undergo the Rigorous Imprisonment, provided in case of the default.

(SMT. BHARATI DANGRE, J.)