

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.744 OF 2019
in
CRIMINAL APPEAL NO.1392 OF 2019

Ashvin Chinubhai Shah	]	..	Applicant
vs.			
State of Maharashtra & Anr.	]	..	Respondents

Mr.Manish Bohra i/b M/s.A.S. Khan & Associates for the Applicant.

Ms.P.N. Dabholkar, APPA for the State-Respondent No.1.

Mr.S.K. Halwasia a/w Vijay Hiremath for SEBI-Respondent No.2.

CORAM : BHARATI DANGRE, J

RESERVED ON : 2nd May, 2023

PRONOUNCED ON : 8th June, 2023

P.C.

1] The present Interim Application is filed by the Applicant, who stand convicted for the offence under Section 15HA, punishable under Section 24(2) of the Securities and Exchange Board of India Act, 1992, by the Judgment of the SEBI Special Judge, delivered on 24.09.2019.

By the impugned Judgment, on being convicted, the applicant is sentenced to pay fine of Rs.5,00,000/-, in default to undergo Simple Imprisonment for six months.

The judgment direct the amount of fine to be distributed as under :-

“2. Out of total fine amount of Rs.5,00,000/-, the accused shall

pay Rs.4,50,000/- (Rupees Four Lakhs Fifty Thousand only) to SEBI as compensation, by a Demand Draft or Pay Order, and an amount of Rs.50,000/- (Rupees Fifty Thousand only) shall be deposited in the Court towards fine.”

2] The Applicant has preferred an Appeal against the said conviction under Section 374 of the Cr.P.C. alongwith an Application for seeking suspension of the sentence.

Since the Appeal is filed within the period of limitation, the same is admitted.

3] The Interim Application seek suspension of the sentence, while the Appeal is pending for adjudication before this Court.

Heard the learned counsel Mr.Manish Bohra for the Applicant and bared Prosecutor Mr.S.K. Halwasia alongwith Mr.Vijay Hiremath for SEBI,Respondent No.2, which is a contesting party.

Heard the learned APP Ms.P.N. Dabholkar representing the State, a formal party to the proceedings.

4] The learned counsel Mr.Halwasia for SEBI would assertively submit that the sentence delivered by the SEBI Special Court has two components, i.e. an amount of compensation of Rs.4,50,000/- (payable to SEBI) and fine amount of Rs.50,000/-, to be deposited in the Court.

Mr.Halwasia would raise a question for consideration, as to whether the part of the sentence which was awarded as compensation can be suspended under Section 389 of the Cr.P.C.

He would submit that Section 357 of the Cr.P.C. is a provision relating to the order to pay compensation, which is distinct from Section 389 which is a power conferred in an Appellate Court for suspension of sentence, pending an Appeal.

The submission advanced is, the amount, payment of which is sought to be suspended is in the nature of compensation and, therefore, the standard for suspension of fine cannot apply and the suspension of compensation is permitted in exceptional circumstances, with certain conditions being imposed.

5] Mr.Halwasia would place reliance upon the decision of this Court in the case of ***Rahul Kisan Khande vs. Samir Salim Shaikh***,¹; ***Jayesh Waghela vs. SEBI*** ², and ***Satkivelu vs. Inspector of Police, NIB CID Tiruchirapalli***³ .

Relying upon the aforesaid authorities, he would submit that Section 389(1) Cr.P.C. contemplates suspension of sentence pending the Appeal and imposition of fine cannot be suspended.

6] For answering the question posed before me, it is necessary to refer to the relevant provisions contained in Code of Criminal Procedure.

The term ‘sentence’ is not defined in the Code, but Chapter III of the IPC provide for the punishments to be imposed on being convicted for committing an offence under the Code, through Section 53 and it prescribe as under :

“Punishments – The punishments to which offenders are liable under the provisions of this Code are -

First – Death;

[Secondly – Imprisonment for life;]

[***]

Fourthly – Imprisonment, which is of two descriptions, namely:-\

(1) Rigorous, that is, with hard labour;

(2) Simple;

1 2019 SCC OnLine Bom 834

2 2018 SCC OnLine Bom 5713

3 1998 1 MWN (Cr.275)

Fifthly – Forfeiture of property;
Sixthly – Fine.”

Thus, in terms of Section 53 of the IPC, imposition of fine can be one of the punishment imposed upon an offender. Section 60 of the IPC provide that, in every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court to direct that in the sentence so imposed, part of such imprisonment shall be rigorous and rest simple.

The term ‘sentence’ is used in Section 54, 55 and 60, as a substitute for ‘punishment’ to be imposed, which can be of death or imprisonment of life.

It is permissible for a Court to impose sentence in form of imprisonment and or fine. It is also permissible for a particular statute to provide for punishment which shall be only in terms of “fine”. Upon the fine being imposed, it is also permissible to impose a sentence of fixed term, in lieu of the fine not being paid/deposited.

7] Section 357 contained in Chapter XXVIII under the caption “Judgment” empowers the Court to issue a direction to pay compensation and Section 357 contemplates that when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing Judgment, order the whole or any part of the fine recovered to be applied, in the manner prescribed therein :

Sub-section (2) and (3) of Section 357 of the Cr.P.C. which is very peculiar reads thus :

357 Order to pay compensation -

(1).....

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the

decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

8] The scheme of Section 357 of the Cr.P.C., thus, contemplates a situation where the Court imposes a sentence of fine or any sentence of which fine forms a part, then it is permissible for the Court to issue a direction for appropriating the fine, either for the purpose of defraying the expenses incurred in the prosecution or to be paid by way of compensation to a person who suffer loss, or to compensate him for loss of any property.

The purpose and intent of the said Section, is to pay some amount by way of compensation to the victim, or it shall be paid towards defraying the expenses incurred in prosecution of the case.

9] Sub-section (2) of Section 357, however, impose an embargo by providing, that payment of such compensation shall not be made till the period of appeal allowed by trial Court has elapsed or if the Appeal is filed, till the same is decided.

The intention of the legislature in incorporating the said restrain appear to be manifestly clear that if the compensation paid is utilised and thereafter the Appeal is filed, wherein the direction to pay compensation is reversed, it may be difficult or rather impossible to recover the fine from the victim, to whom the compensation is paid.

Sub-section (2) is a provision which, therefore, defers the utilization of the amount of compensation awarded till the limitation of Appeal elapse or when the Appeal is filed, till it is decided.

10] In contrast, when one turn to Section 389 of the Cr.P.C., which deals with the subject of “Suspension of sentence pending the appeal; release of appellant on bail”, it is apparent that this provision empowers the Appellate Court to suspend execution of the sentence imposed, pending the appeal and to release the accused on bail if he is in confinement.

By this specific provision, powers are conferred upon the Appellate Court, which shall be exercised for the reasons to be recorded in writing and the sentence or order appealed against shall stand suspended.

Sub-section (1) of Section 389 permits suspension of execution of ‘sentence’ or ‘order’ appealed against.

Necessarily sentence would include the sentence of imprisonment or imposition of fine, imposed upon the accused being convicted for committing a particular offence under the Penal Code.

The submission of Mr.Halwasia that Section 389 of the Cr.P.C. only covers the sentence of imprisonment and not fine, in my considered opinion, would be amount to restricting the scope of the provision, as when the Judgment is delivered by a criminal Court on conclusion of trial, the Court may punish the offender by imposing punishment as prescribed in Section 53 of the IPC, which may be either imprisonment or it may be fine. Hence, necessarily the term “sentence” in Section 389(1) of the Code include “fine”.

Section 424 of the code also makes it clear that an offender can be punished i.e. sentenced by imposing fine only and he can be directed to undergo imprisonment, in default of payment of fine. The said provision contemplate a situation where such fine is not paid forthwith then the Court may order the fine to be paid in a manner prescribed thereunder and suspend the execution of sentence of

imprisonment and release the offender on executing a bond with or without surety, which would ensure his appearance before the Court as and when required.

11] The cumulative reading of the aforesaid provisions in the Code would make it apparently clear that the two provisions operate in two distinct fields; Section 357 coming into picture when there is direction by the Court to pay compensation and it do not deal with the suspension of sentence, whereas, Section 389 of the Cr.P.C. is provision for suspension of sentence including sentence of imposition of fine.

Section 357 was construed by the Hon'ble Apex Court in the case of **Satyendra Kumar Mehra @ Satendera Kumar Mewhra vs. State of Jharkhand**⁴ where, their Lordships recorded the aim and purpose of the said Section in the following words :

“13. All the circumstances in sub-section (1) of Section 357 refer to direction to pay compensation out of the fine imposed. Thus, all the circumstances are circumstances where fine imposed and recovered is to be applied in the above circumstances.

14. The fine is thus contemplated to be utilised for compensating different circumstances as enumerated in Section 357(1) Cr.P.C. Sub-section (2) of Section 357 Cr.P.C. has been engrafted in reference to what was stated in sub-Section (1) of Section 357 Cr.P.C. Crucial words used in sub-section (2) of Section 357 Cr.P.C. are “no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal”. Thus, what is prohibited under Section 357(2) Cr.P.C. is that payment of compensation utilising the fine be not paid till the period allowed for presenting the appeal has elapsed, or if an appeal is filed then before the decision of the appeal. It does not involve any concept of stay of sentence.”

It has been held that, Section 357 of the Cr.P.C. is only attracted when the Court orders payment of compensation and it is not attracted in any other case.

4 2018 (3) SCC 532

12] As against this, while dealing with the scope of a provision contained in form of Section 389 of the Code, the Hon'ble Supreme Court referred to its decision in the case of ***Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & Anr***⁵, wherein, it was categorically held as under :

“51. Section 389 does not deal with exactly a similar situation. Section 389 of the Code is to be read with Section 387 thereof, suspension of a sentence and enlarging an appellant on bail, who is convicted and realisation of fine has been dealt with by Parliament under different provisions of the Code. The power of the court, thus, to suspend a sentence in regard to realisation of compensation may be different from that of a direction in realisation of fine.”

13] The Apex Court while interpreting sub-Section (2) of Section 357 categorically held that the word “payment” contained thereunder, does not refer to deposit of compensation or fine amount by an accused in pursuance to order passed by the Appellate Court while suspending the sentence imposed on an accused and the word “payment” refers to the payment to be made to the person, who is ordered to be paid compensation and not the fine amount, inclusive of compensation amount to be deposited by the accused. It is categorically held that the stay granted in the said provision of law is with reference to “payment” of such amount earlier to the expiry of the appeal period or, where the Appeal has been preferred, during the pendency of such appeal, and, therefore, Section 357 need not and cannot be read with Section 389, as the two provisions contemplate different contingencies.

It is categorically held that the purpose of sub section (2) of Section 357 as indicated is different and it never contemplate sentence

5 (2007) 6 SCC 528

of fine imposed on the accused.

14] The pertinent observation in Para 34 of the said law report would be sufficient to dispel the the contention of Mr.Halwasia and the said observation reads thus :

“34. We, however, make it clear that Appellate Court while exercising power under Section 389 Cr.P.C. can suspend the sentence of imprisonment as well as of fine without any condition or with conditions. There are no fetters on the power of the Appellate Court while exercising jurisdiction under Section 389 Cr.P.C. The Appellate Court could have suspended the sentence and fine both or could have directed for deposit of fine or part of fine.”

15] In the light of the authoritative pronouncements from the Apex Court, it can be clearly concluded that sentence of fine can be suspended in exercise of power under Sub-Section (1) of Section 389 of the Cr.P.C.

16] It is informed by the learned counsel for the Applicant that he has already paid the amount of fine to the tune of Rs.50,000/- in the Court. As far as amount of Rs.4,50,000/- is concerned, since it comes by way of compensation, it is covered under Section 357(1) of the Cr.P.C. to be paid to the prosecution, and sub-section (2) of Section 357 of the Cr.P.C. shall come into operation, as Appeal has been filed by the accused being aggrieved by imposition of sentence of fine of Rs.5,00,000/- out of which Rs.4,50,000/- has been directed to be paid as compensation to Respondent No.2.

In the wake of sub-section (2) of Section 357 of the Cr.P.C., the payment of fine deserve to be defrayed till the Appeal is decided and even this Court is competent, as an Appellate Court, to suspend the sentence which include imposition of fine.

The direction in the impugned judgment for payment of compensation of Rs.4,50,000/- is directed to be kept in abeyance and the same need not be deposited by the Applicant.

In the wake of above, Interim Application is allowed in terms of prayer clause (a).

[BHARATI DANGRE, J]