



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**CRIMINAL APPLICATION (APPLN) NO.9/2024
Amit Sitapati Verma**

..VS..

The State of Mah., thr.PSO PS Ganeshpeth, Nagpur

**WITH
CRIMINAL APPLICATION (APPLN) NO.11/2024
Nandkishore Shankarlal Trivedi**

..VS..

State of Mah., thr.PSO Ganeshpeth PS, Nagpur

**WITH
CRIMINAL APPLICATION (APPLN) NO.12/2024
Subodh s/o Chandayal Bhandari**

..VS..

State of Mah., thr.its PSO PS Ganeshpeth, District Nagpur

**WITH
CRIMINAL APPLICATION (APPLN) NO.13/2024
Ketan Kantilal Seth**

..VS..

State of Mah., thr.PSO Ganeshpeth PS, Nagpur

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

APPLN No.9/2024

Shri Akash Gupta, Counsel for the Applicant.

Shri Raja Thakare with Shri Ajay Misar, Special Public Prosecutors for the Non-applicant/State.

(APPLN) No.11/2024

Shri Anil S.Mardikar, Senior Counsel assisted by Shri Nazim Qureshi, Advocate for the Applicant.

Shri Raja Thakare with Shri Ajay Misar, Special Public Prosecutors for the Non-applicant/State.

(APPLN) No.12/2024

Shri Anil S.Mardikar, Senior Counsel assisted by Shri Kaustubh Deogade, Advocate for the Applicant.

Shri Raja Thakare with Shri Ajay Misar, Special Public Prosecutors for the Non-applicant/State.

(APPLN) NO.13/2024

Shri M.G.Bhangde, Senior Counsel assisted by Shri R.M.Tahaliyani, Shri Girish Purohit, and Ms.Ragini Swami, Advocates for the Applicant.

Shri Raja Thakare with Shri Ajay Misar, Special Public Prosecutors for the Non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 01/02/2024

PRONOUNCED ON : 08/02/2024

1. Heard learned Senior Counsel and learned counsel for respective applicants and learned Special Public Prosecutors for the State.

2. By these applications under Section 389(2) of the Code of Criminal Procedure, applicants seek suspension of sentence and grant of bail.

3. The applicants have challenged judgment and order of sentence and conviction passed by learned Additional Chief Judicial Magistrate, Nagpur in RCC No.147/2002 dated 22.12.2023 by preferring criminal appeals before learned Sessions Judge, Nagpur. The applicants have also preferred applications for suspension of sentence which were rejected by learned Additional Sessions Judge by orders dated 17.1.2024 and 25.1.2024 respectively.

4. Applicant Amit Sitapati Verma, who is accused No.7 in the criminal proceeding, had filed Criminal Application No.9/2024. The said applicant is Director of Syndicate

Management Services. As per contentions of the said applicant, on 25.4.2002, FIR was registered initially at the behest of accused No.1 Sunil Kedar against broker namely Home Trade Limited (HTL), Directors of Century Dealers, Directors of Giltage Management, Indramani Merchants, and Syndicate Management Services alleging that the Nagpur District Central Co-operative Bank (the NDCC Bank) had invested amount Rs.125.60 crores for purchasing government securities. The National Bank for Agriculture and Rural Development (NABARD) asked the NDCC Bank to supply original securities and, therefore, the bank requested its brokers to deliver original securities. However, the HTL has not delivered the same and supplied only photocopies and, therefore, co-accused Sunil Kedar lodged report alleging that funds of the bank have been misappropriated and the bank is duped by its brokers to the tune of Rs.125.60 crores. Thereafter, on 29.4.2002, another First Information Report was registered at the behest of Shri Bhaurao Aswar, the Special Auditor, Cooperative Societies, Nagpur against co-accused Sunil Kedar and present applicants and other co-accused. As per allegations, the applicant, who is director of Syndicate Management Services, in conspiracy with the co-accused, misappropriated the funds of the bank to the tune of Rs.117.51 crores under the pretext of investment made by the bank in the government securities through private

brokers namely, HTL, Century Dealers, Giltage Management, Indramani Merchants, and Syndicate Management Services and the brokers in turn have misappropriated funds of the bank by not purchasing the government securities of the bank. As per allegations, the Syndicate Management services ltd was not registered with the SEBI and the applicant was knowing it and knowingly he entered into the contract with the NDCC Bank and received amount of Rs.16.00 crores for purchase of the government securities in favour of the bank, but instead of purchasing the government securities, the said amount was siphoned by the applicant by forwarding the same to the Century Dealers without permission of the NDCC Bank and duped the bank. Thus, the applicant who is Director of the Syndicate Management Services entered into the contract unauthorizedly under the guise of purchasing government securities and never purchased the same and siphoned the amount to the other companies. After completion of the investigation, chargesheet was filed against the applicant and the other co-accused on an allegation that the applicant being director of the company committed the offence of breach of trust. After filing of the chargesheet, 53 witnesses were examined by the prosecution. After appreciation of the evidence, learned Additional Chief Judicial Magistrate convicted the applicant and sentenced him to suffer rigorous

imprisonment for 5 years and to pay fine Rs.10.00 lacs of offence punishable under Section 409 read with Section 120-B of the Indian Penal Code. The applicant is further convicted for offence punishable under Section 406 read with Section 120-B of the Indian Penal Code, but no separate sentence is awarded. The applicant is also convicted of the offence punishable under Section 468 read with Section 120-B of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine Rs.2.00 lacs, in default, to suffer rigorous imprisonment for six months. The applicant is also convicted of the offence punishable under Section 471 read with Section 120-B of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine Rs.50,000/-, in default, to suffer rigorous imprisonment for three months. The judgment and order of sentence and conviction is challenged by the applicant by preferring a criminal appeal along with an application for suspension of sentence and for grant of bail which came to be rejected.

5. Criminal Application Nos.11 and 12/2024 are filed by employees of the HTL. As per contentions of applicants, they are arraigned as accused Nos.8 and 9 in criminal proceedings on an allegation that they have obtained amount Rs.117.51 crores under the pretext of investment of the bank for purchasing the government securities, but instead of purchasing the said

government securities, the amount was used for benefit of the company and the bank was duped and thereby committed the offence of criminal breach of trust. After filing of chargesheet, on the basis of evidence, learned Additional Chief Judicial Magistrate, Nagpur convicted applicants as the aforesaid. The judgment and order of sentence and conviction was challenged by applicants by filing criminal appeals along with applications for suspension of sentence and for grant of bail which were rejected.

6. Criminal Application No.13/2024 is filed by original accused No.4 Ketan Kantilal Seth who is Director of three companies namely EDIL, Giltage Management, and HTL against whom also similar allegations are made that the amount was obtained from the NDCC Bank to purchase the securities, but the said amount was siphoned and used for the benefit of HTL. Applicant Ketan Seth is also convicted as the aforesaid and, therefore, he preferred a criminal appeal along with an application for suspension of sentence and for grant of bail which was rejected.

7. Being aggrieved with orders passed by learned Additional Sessions Judge rejecting applications for suspension of sentence and grant of bail, the present applications are filed.

8. Learned counsel Shri Akash Gupta for applicant Amit Verma, submitted that being Director of Syndicate Management Services Limited, the company has received amount Rs.16.00 crores towards purchase of securities by deducting brokerage amount. The said amount was transferred to the Century Dealers. As far as applicant Amit Verma is concerned, the evidence shows that Syndicate Management Services only received brokerage amount of Rs.1,50,000/- and rest of the amount was transferred to the other company. On the same set of evidence, the co-accused is acquitted by the trial court. The prosecution examined co-director of the company Ameen (PW10), who explained the transactions in detail. The trial court failed to appreciate the evidence. The evidence of PW10 shows that the amount was transferred on the say of director of HTL. He invited my attention towards the cross examination of PW10 who stated that HTL company is recognized as authorized broker company authorized by the SEBI, NSE and BSE and the said company is authorized to enter into transactions of the government securities. The said company has a right to appoint sub brokers. Thus, the company of the applicant received the amount as a sub-broker. He further submitted that though the transactions are entered with the company, the company was not made an accused. He further invited my attention towards the cross examination of investigating officer and submitted

that the evidence of investigating officer shows that it reveals to him during the investigation that no documents are forged by the applicant. He admitted that during investigation it reveals to him that from 16.57 crores, the Syndicate Management Services received Rs.1,50,000/- and rest of the amount was transferred to Century Dealers Private Limited. The evidence further shows that no other amount was received by the company or misappropriated the same. The investigating officer further admitted that it nowhere reveals to him that the present applicant has used the amount for his personal use. He submitted that thus the evidence which came before the court sufficiently shows that the applicant is not involved either in misappropriation of the amount or forgery of the documents. The trial court has not considered these aspect and erroneously convicted the applicant. Learned Additional Sessions Judge has also not considered this evidence and erroneously rejected the application. He further invited my attention towards the impugned judgment and submitted that as far as the present applicant is concerned, in paragraph No.133, it is observed that the involvement of the present applicant is revealed and they have entered into contract illegally and obtained money. Paragraph No.136 shows that the applicant is one of directors of Syndicate Management Services and authorized signatory of that company. He executed the confirmation letter thereby

confirmed the transactions of purchase of the government securities. This was done by accused No.7 despite knowing that the Syndicate is not authorized by the SEBI to deal in government securities and trade on WDM segment of NSE. He has not disputed his signature on confirmation letter. He submitted that the entire observations of the trial court showing the role of the applicant are contrary to the evidence.

9. Learned Senior Counsel Shri Anil S.Mardikar for applicants Nandkishore Shankarlal Trivedi and Subodh Bhandari, submitted that both applicants are employees of HTL. Applicant Nandkishore Trivedi is an Advocate. Whereas, applicant Subodh Bhandari is Chartered Accountant. They signed documents on the directions of the directors. Accused Sanjay Agrawal is sole authority and present applicants were signatories. In fact, all documents are signed by co-accused who is accused No.10 Kanan Mewawala. He invited my attention towards the documents which are resolutions which show that applicant Subodh Bhandari is Senior Vice-President and by resolution dated 2.1.2001 he was authorized to sign all agreements, contracts, and documents as required in the usual course of business on behalf of the company and all such documents are signed by him. He also invited my attention towards cross examination of the investigating officer who admitted that accused Nos.8 and 9 both are employees of the company which

revealed to him during investigation. The evidence further shows that all contracts bear signatures of accused No.10 Kanan Mewawala. He also admitted that the designation of Subodh Bhandari is mentioned as Senior Vice-President and the said designation shows that he is employee of the company. The cross examination further shows applicant Nandkishore has signed cheques Exhibits-1370, 1370/7 and 1370/14 which are honoured. He submitted that thus it reveals that these applicants have signed documents as employees of the company after signatures of directors. Thus, the transactions were approved by the directors. The judgment impugned also shows that accused No.8 was Senior Vice President and authorized signatory. Whereas, accused No.9 was executive director. He submitted that it is well settled law that if commits an offence involving mens rea, it is cardinal principle of criminal jurisprudence that there is no vicarious liability unless statute specifically provides therefor, by specifically incorporating such a provision. In support of his contentions, he placed reliance on following decisions:

Shiv Kumar Jatia vs. State of NCT of Delhi, reported in (2019)17 SCC 193;

Sushil Sethi and anr vs. State of Arunachal Pradesh, reported in (2020)3 SCC 240;

Sharad Kumar Sanghi vs. Sangita Rane, reported in (2015)12 SCC 781, and

Criminal Application No.555/2003 (Subodh s/o Chanddayal Bhandari vs. The State of Mah. and anr) decided by this court at Aurangabad Bench on 22.4.2003.

Subodh Bhandari, who is applicant in Criminal Application No.555/2003 *supra* is applicant in present Criminal Application No.12/2024, was released on bail observing that so far as charges under Sections 406, 409, and 420 of the Indian Penal Code are concerned, the present applicant was employee or part and parcel of HTL and may be liable to face charge under Section 406 of the Indian Penal Code, if there is a *prima facie* material to make out a case of criminal breach of trust against him not being a public servant as defined by Section 21 of the Indian Penal Code he may not face charge under Section 409 of the Indian Penal Code.

10. Learned Senior Counsel Shri M.G.Bhangde for the accused No.4 Ketan Seth, submitted that the applicant was director of EDIL, Giltage Management Services Limited and HTL. On 15.9.2000, the NDCC Bank advanced loan of Rs.40.00 crores to EDIL in the form of investment in share and on buy back basis. The trial court dealt this point and observed that amount Rs.40.00 crores was in the nature of loan which was repaid by the EDIL. The NDCC Bank on 7.1.2002 paid sum of Rs.11,22,989/- to Giltage Management Services Limited for purchase of Mahajiwani Pradhikaran Bonds of face value in the

sum of Rs.10.00 crores. Regarding HTL, no specific amount is alleged to have been paid to accused No.1 Ketan Seth. There is no charge framed against accused No.4 specifically. All five charges are relating to investment in government securities and admitted that this amount was not paid for investment in government securities. The EDIL has paid back the amount of Rs.40.00 crores with interest of Rs.10,95,890/- on 19.3.2001 vide account statements at Exhibits-1472/2 and 1472/3 to the NDCC Bank. Thus, there was no wrongful gain to the EDIL and no wrongful loss is to the NDCC Bank. Regarding the payment of Rs.11,22,9589.04 by NDCC Bank to Giltage Management Services, the evidence of PW23 shows that the said amount is paid to the Giltage Management on 7.1.2002 and returned to the NDCC Bank on 10.1.2002 through cheque issued by HTL. The evidence of the investigating officer also shows that the amount which was paid to the Giltage Management Services is received by the bank. He also admitted that nothing was revealed to him during investigation to show that the present applicant is involved in preparation of forged documents. His evidence further shows that in annual report of HTL of year 2000-2001 name of Ketan Seth is not appearing as director. It also shows that on 15.5.2001 he had tendered his resignation. The evidence further shows that prior to 15.5.2001, whatever transactions are taken place with the HTL, none of documents

being signed by applicant Ketan Seth. The investigating officer further admitted letter dated 15.5.2001 and submitted that whatever transactions entered by the HTL, none of documents bear signatures of the present applicant. Thus, his submission is that in the light of the above evidence, the observation of the trial court showing involvement of the present applicant and reasoning mentioned are completely absurd. He submitted that the trial court has observed in paragraph No.123 that since unauthorizedly investing in the shares of EDIL in September 2000 of which admittedly the accused Nos.3, 4 and 9 were directors and immediately thereafter from February 2001 commencing of transaction with HTL absolutely is an illegal manner and is contrary to the evidence as the investigating officer specifically admitted that the name of the applicant was not appearing as director in the annual report of year 2000-2001. None of documents bear signature of the present applicant. He adopted the argument of learned Senior Counsel Shri Anil S.Mardikar as regards the company is not made an accused and, therefore, the prosecution against the applicants is illegal.

11. *Per contra*, learned Special Public Public Prosecutor Shri Raja Thakare for the State submitted that the amount invested is the public money. The NDCC Bank is established for the welfare of poor agriculturists. The definition of criminal

breach of trust in view of Section 405 of the Indian Penal Code shows that when a person with whom the property is entrusted or having any dominion over property is dishonestly or converted to its own use in violation of any directions of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he has made touching the discharge of such trust or willfully suffers any other person so to do commits criminal breach of trust. He submitted that securities are shown to be purchased but it was never purchased. The evidence of Rodridgues (PW25) shows that various circulars issued by RBI are contravened. The prosecution has also examined Anita Mangesh Kenkre who is Chief General Manager of the SEBI who also stated that Giltage Management Services, Syndicate Management Services, Indramani Merchants Private Limited and Century Dealers were never registered as brokers or sub brokers with the SEBI. Thus, it is apparent that the transactions are entered into with the private brokers without following due process of law. He further submitted that as far as contention of learned counsel for the applicants that the company is not made an accused and, therefore, the entire prosecution vitiates is not sustainable as vicarious liability is unknown to the criminal law. The entity which was not registered with the SEBI entered into the transaction illegally and it is not mere an irregularity and money

is returned cannot be ground and the transaction itself is void as *ab initio*.

12. Learned Special Public Prosecutor for the State submitted that the Honourable Apex Court, while considering the scope of Section 389 of the Code of Criminal Procedure in the case of **Omprakash Sahni vs. Jai Shankar Chaudhary and anr, reported in (2023)6 SCC 123**, held that bearing in mind the principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not re-appreciate the

evidence at the stage of Section 389 of the Code of Criminal Procedure and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

He submitted that in view of the principles laid down by the Honourable Apex Court, the applicant has no case to release him on bail by suspending the sentence and the application deserves to be rejected.

13. Before advertng to the evidence to ascertain, whether the applicant has made out a case for suspension of sentence, it is necessary to see the legal position.

14. Section 389(1) of the Code of Criminal, enjoins upon the appellate court the power to issue an order for the suspension of the sentence or an order of conviction during the pendency of an appeal. The said Section is reproduced below:

“389. Suspension of sentence pending the appeal; release of appellant on bail. - (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give

opportunity to the Public Prosecutor for showing cause in writing against such release;

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

15. Thus, the suspension describes postponement or temporarily preventing a state of affairs from continuing. Thus, when we talk about the suspension of sentence, the concept is to differ or postpone the execution of sentence.

16. The Honourable Apex Court in the case of **Afjal Ansari vs. State of U.P., reported in 2023(16) SCALE 775**, while considering the scope of Section 389 of the Code of Criminal Procedure, observed that "it becomes manifestly evident from the plain language of the provision, that the Appellate Court is unambiguously vested with the power to suspend implementation of the sentence or the order of conviction under appeal and grant bail to the incarcerated convict, for which it is imperative to assign the reasons in writing. This Court has undertaken a comprehensive examination of this issue on multiple occasions, laying down the broad parameters to be appraised for the suspension of a conviction under Section 389(1) of the Code of Criminal Procedure. There is no gainsaying that in order to suspend the conviction of an individual, the primary factors that are to be

looked into, would be the peculiar facts and circumstances of that specific case, where the failure to stay such a conviction would lead to injustice or irreversible consequences. The very notion of irreversible consequences is centered on factors, including the individual's criminal antecedents, the gravity of the offence, and its wider social impact, while simultaneously considering the facts and circumstances of the case." The Honourable Apex Court, in paragraph No.15 of the said decision, observed that, "this Court has on several occasions opined that there is no reason to interpret Section 389(1) of the CrPC in a narrow manner, in the context of a stay on an order of conviction, when there are irreversible consequences. Undoubtedly, **Ravikant Patil vs. Sarvabhuma S.Bagali, reported in (2007)1 SCC 673**, holds that an order granting a stay of conviction should not be the rule but an exception and should be resorted to in rare cases depending upon the facts of a case. However, where conviction, if allowed to operate would lead to irreparable damage and where the convict cannot be compensated in any monetary terms or otherwise, if he is acquitted later on, that by itself carves out an exceptional situation."

17. In **Kashmira Singh vs. The State of Punjab, reported in (1977)4 SCC 291**, the Honourable Apex Court held that,"it would indeed be a travesty of justice to keep a

person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has

been granted to the accused to appeal against his conviction and sentence”.

18. In the case of **Bhagwan Rama Shinde Gosai and ors vs. State of Gujarat, reported in (1999)4 SCC 421**, the appellants were convicted by the trial court against which the appeal was pending before the High Court. The High Court successively rejected the prayer for grant of bail, till the pendency of appeal after suspending the sentence. Thus, it has been held that, “when a convicted person is sentenced to fixed period of sentence and when he files appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when motion for expeditious hearing the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter suspending

the sentence, so as to make the appeal right meaningful and effective. Of course appellate courts can impose similar conditions when bail is granted.”

19. The similar ratio is laid down in the cases of **Kiran Kumar vs. State of M.P., reported in (2001)9 SCC 211** and **Suresh Kumar and ors vs. State (NCT of Delhi), reported in (2001)10 SCC 338** by referring the judgment of **Bhagwan Rama Shinde Gosai and ors vs. State of Gujarat** *supra* holding that when a person is convicted and sentenced to a short term imprisonment, the normal rule is that when his appeal is pending, the sentence should be suspended.

20. In the background of the above well settled law and turning to cases in hand, it reveals that applicant Ketan Seth, who is accused No.4, was the director of EDIL, Giltage Management Services Limited and HTL. Applicant Subodh Bhandari, who is accused No.8, and applicant Nandkishore Trivedi were employees of HTL. Whereas, accused No.7 Amit Verma is the director of Syndicate Management Services. In paragraph No.74 of the judgment impugned following irregularities and discrepancies are noted by the trial court:

(a) The Board has delegated powers to the Chairman vide resolution No.14(6) dated 16/05/1999

(Exhs.1193/3158) for purchase and sale of securities only through MSCB under SGL(II) with the RBI.

(b) The Board had not taken any policy decision for transacting through the brokers nor had approved the panel of brokers for the purpose.

(c) Market quotations were not being called for and the rate provided by the broker in the contract were not verified and compared with the prices quoted in the market.

(d) Though, the bank had maintained SGL(II) account through MSCB the transactions were routed only through five brokers viz. HTL and 4 other broker companies.

(e) As there was no delivery of securities book entries at the bank level were passed on the basis of contract notes received through the brokers. Brokers had only sent photo copies of certificates of securities purchased during 2000-2001 which were endorsed in the name of broker firm.

(f) No agreements entered into between NDCC Bank and the respective brokers for the purpose of trading in securities in the secondary market.

(g) Though on the reverse side of the contract notes issued by HTL indicate that brokerage had been charged at rates not exceeding the official scale of brokerage, respective column to show actual

amount of brokerage charged were left unfilled in the contract notes. The contract notes issued by the other brokers also did not indicate brokerage, if any, paid to them.

(h) The counter party involved in the purchase and sale of securities was not indicated in the contract notes issued by the HTL and four other brokers (i.e. 4 other broker companies).

(i) Payments to the broker firms were realized on settlement dates without getting delivery of the securities.

(j) No fixed internal investment policy and procedures were laid down by the board of directors nor were there half yearly reviews of the bank's investment port-folio by the bank's board of directors. Even though, as per part 'V' of the RBI RPCD Circular No.RF.BC-17/A-4/92-93 dated 4th September, 1992 such reviews should be conducted and copies of the review notes to be forwarded to the NABARD and RBI.

(i) Valuation of the securities to be done on quarterly basis as per guidelines issued by the RBI vide circular RPCD No.154/07:02:08/94-95 dated 23rd May, 1995 was not being made. The securities were also not valued (at cost or market price whichever was lower) as on 31/03/2001.

(k) As on 31/03/2001 the total premium paid aggregated Rs.408.75 lakhs and the same has been capitalized as required.

(l) The bank has resorted to continuous process of sale and purchase of securities. As per the contract notes, the sales were effected at rates higher than the cost price and the difference between sale price and purchase price was being transferred to P and L account as income from time to time. These incomes cannot be considered real as the bank had not ascertained at any point of time whether the broker had really made any efforts to get unsold securities (i.e. securities belonging to the bank and lying with the brokers) in the name of the bank.

(m) The bank had been utilizing sale proceeds of securities for fresh purchase made on the same dates. As a result inflow of funds to the bank was very minimum. Most of the times the bank was paying additional amounts to cover cost of fresh purchase switch were mostly at high premiums. As on 05/02/2002, the date of transaction (till date of completion of present inspection) amount of premium paid against outstanding securities aggregated Rs.2901.26 lakhs as against Rs.408.75 lakhs of premium paid in securities outstanding as on 31/03/2001. This represents 709.79% increase in premium as against 120.78% growth in the total value of outstanding securities of these two dates.

(n) The risk involved in security transaction was increasing trend since the bank has not adopted system for classification of securities under “held for trading”, “available for sale” and “held to maturity” and the entire securities portfolio under SGL-II with MSCB and under physical mode with the aforesaid brokers were to be under continuous trading.

(n) No well defined account procedure/manual had been prepared by the NDCC bank to ascertain profitability of security transactions realistically.

(o) Based on average cost-yield analysis of investment portfolio during 2000-2001 trading in GOI securities fetched 9.74% as compared to other investments like Fixed Deposits with MSCB fetching average return of 12%. If unadjusted interest which was actually paid on purchase of securities, but shown as receivable in the B/S as on 31/03/2001 was taken into account, the average return from the securities’ trading would come down to 7.18%. As against this, average cost of mobilizing terms deposit comprising FD, Re-investment Deposit and deposits and deposits mobilized from Urban Bank etc. works out 12.80%, 13% and 13.83% respectively. So, the bank had been incurring losses in its trading activities.

21. The judgment of the trial court further shows that the prosecution examined PW25 Rodridgues who is officer of RBI who proved and confirmed various circulars and resolutions

issued by the RBI from time to time in respect of investment in the government securities. Existence and issuance of all circulars are also proved by PW48 Shri Deshmukh. The observation of the trial court shows that the entire transactions relating to investment entered by the office bearers of the NDCC Bank are in contravention of the said circulars. Sum and substance of the observation of the trial court is that crores of rupees were transferred to HTL under the guise purchasing government securities which were never purchased for the NDCC Bank and when no such securities were ever purchased, there is no question of sale. Learned Senior Counsel for applicants has taken me through the evidence. As far as accused No.4 Ketan Seth is concerned, the evidence of PW23 pointed by learned Senior Counsel shows that amount of Rs.16.57 crores is received by Syndicate Management Services for purchase of power grid bonds and was transferred to Century Dealers Limited for purchase of government securities as the NDCC Bank refused to purchase the said bonds. Her evidence further shows that the amount of Rs.16.54 crores were transferred to NDCC Bank by HTL. The investigating officer has also admitted during his cross examination that the name of accused No.4 was not appearing in the annual report of the HTL as director. He further admitted that none of documents prior to 15.5.2001 and after 15.5.2001 executed in respect of the

government securities are signed by the present applicants. Learned Senior Counsel also invited my attention towards the chart prepared by the trial court which shows that only one document bears the signature of applicant which is in the nature of confirmation letter. In paragraph No.28 of the judgment impugned, it is observed that the amount of Rs.40.00 crores was given to the EDIL against hypothecation of shares. The judgment further shows that the said amount was returned to the NDCC Bank which is also admitted by the investigating officer. The observation of the trial court shows that the receipt of these amounts are admitted by the accused Nos.4 to 7. It is further observed that unauthorized investment in the shares of EDIL in September 2000 of which admittedly accused Nos.3 4 and 9 were directors and immediately thereafter from February 2001 commencing of transactions with HTL absolutely is in an illegal manner. Learned Senior Counsel submitted that this observation is against the evidence.

22. Learned Senior Counsel Shri Anil S.Mardikar, also invited my attention towards cross examination of the investigating officer and submitted that it reveals from the cross examination of the investigating officer that both applicants are employees of the company and they signed documents as employees of the company. The company is not made an accused. The evidence on record shows that it was accused

No.10 who approved the transaction and, thereafter, the present applicants signed the same. With the help of the decision of the Honourable Apex Court in the case of **Shiv Kumar Jatia vs. State of NCT of Delhi**, he submitted that the Honourable Apex Court has observed in paragraph No.19 that “the liability of the Directors /the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal vs. Central Bureau of Investigation, reported in (2015)4 SCC 609**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the Statute specifically provides for. It is held that an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be

implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

23. The Honourable Apex Court further by referring the ratio laid down in the case of Sunil Bharti Mittal supra held that it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of **Maksud Saiyed vs. State of Gujarat and ors, reported in (2008) 5 SCC 668** this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a Company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute. It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite

allegations which would attract the provisions constituting vicarious liability.

24. Learned Senior Counsel further placed reliance on the decision in the case of **Sushil Sethi and anr vs. State of Arunachal Pradesh** *supra* wherein also by referring judgment in the case of the **Sharad Kumar Sanghi vs. Sangita Rane** *supra* the Honourable Apex Court observed that this Court had an occasion to consider the initiation of criminal proceedings against the Managing Director or any officer of a company where company had not been arrayed as a party to the complaint. In the aforesaid decision, it is observed and held by this Court that in the absence of specific allegation against the Managing Director of vicarious liability, in the absence of company being arrayed as a party, no proceedings can be initiated against such Managing Director or any officer of a company. It is further observed and held that when a complainant intends to rope a Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability. He submitted that admittedly the transactions are entered with the company. Even if the applicants are directors or employees, they cannot be said to have committed offence under Section 406 unless the company is made an accused. In absence of any provision laid down,

directors or any employees cannot be held for any offence committed by the company itself.

25. In the light of the observations made by the Honourable Apex Court, if facts of the present case are taken into consideration, admittedly, the NDCC Bank entered into an agreement with various broker companies to purchase the government securities. Admittedly, none companies were chargesheeted for the offence. The allegations against the applicants are that they signed various documents in the capacity of directors or employees. The evidence of the investigating officer shows that none of applicants have received any personal benefit or received any amounts in their favour. The company has not been arraigned as an accused.

26. Learned counsels submitted as, admittedly, the entire transaction took place between the NDCC Bank and relevant brokerage companies, even if the applicants are directors or employees, they cannot be said to have committed any offence in view of the observations of the Hon'ble Apex Court..

27. Upon careful consideration of the judgment of the trial court, it appears to me that it suggests that transactions are entered by violating the norms of RBI and NABARD. The observations of the trial court show that the applicants signed

documents either as directors or employees of the company. The specific evidence of the investigating officer, suggesting that nothing revealed to him that applicants have received any personal benefits. It further shows that none of applicants are involved in preparing forged documents. As far as accused No.4 is concerned, the evidence specifically shows that his name was not appearing as director in the annual report of HTL during 2000-2001. The observation of the trial court, as referred in the earlier part of this order, shows that the applicants have signed various documents and the documents are forged and fabricated one.

28. The submissions of learned Senior Counsel for respective parties are to be considered in the light of observations of the Honourable Apex Court in the case of **Omprakash Sahni vs. Jai Shankar Chaudhary and anr** *supra* wherein the the Honourable Apex Court held that "Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this

Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not re-appreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.”

29. The Honourable Apex Court in the case of **Satender Kumar Antil vs. Central Bureau of Investigation and anr, reported in 2022 LiveLaw (SC) 577**, while considering the scope of Section 389, observed that Section 389 of the Code concerns itself with circumstances pending appeal leading to the release of the appellant on bail. The power exercisable under Section 389 is different from that of the one either under Section 437 or under Section 439 of the Code, pending trial. A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available under Section 436A would also be

considered, the Courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the appellant.

30. Thus, in view of various points raised by learned Senior Counsel and learned counsel for respective parties, it is to be seen, whether any “palpable” discrepancies are pointed out by applicants to consider their applications for suspension of sentence and for grant of bail.

31. Word “**Palpable**”, as per the “Oxford Dictionary”, means, “**that is easily noticed by the mind or the senses**”, and as per the “Cambridge Dictionary” means, “**so obvious that it can easily be seen or known, or (of a feeling) so strong that it seems as if it can be touched or physically felt**”.

32. Considering the well settled law and the issues pointed out by learned Senior Counsel and learned counsel for respective parties, the prayer of suspension of sentence deserves to be considered in view of observations of the Honourable Apex Court liberally unless there are any statutory restrictions. Even, if parameters laid down by the Honourable Apex Court in the case of **Omprakash Sahni vs. Jai**

Shankar Chaudhary and anr *supra*, are taken into consideration, applicants have made out a case for suspension of sentence.

33. Considering the scope of Section 389 of the Code, powers exercisable under the said Section, admittedly, are different than that of under Sections 437 and 439 of the Code. A suspension of sentence is an act of keeping the sentence in abeyance pending the final adjudication. Though delay is certainly favorable under Section 436A, the same would also be considered. The courts will have to see relevant factors. When it is so apparent that the appeal are not disposed of, the delay would certainly be factor in favour of the appellant. The denial of suspension of sentence and allowing to operate can lead to irreparable loss if the appellant succeeds in the appeal.

34. Recently, the Honourable Apex Court in Criminal Appeal No.579/2024 (**Atul @ Ashutosh vs. State of Madhya Pradesh**) decided on 2.2.2024 observed that, “before parting with order, we must note here that notwithstanding several decisions of this Court holding that when there is a fixed term sentence and especially when the appeal is not likely to be heard before completing entire

period of sentence, normally suspension of sentence and bail should be granted. We find that in several deserving cases, bail is being denied. Such cases should never be required to be brought before this court". The Honourable Apex Court allowed the said appeal and directed the trial court to grant bail to the appellant.

35. In this view of the matter, the applications deserve to be allowed, as per order below:

ORDER

(1) The applications for suspension of sentence are **allowed.**

(2) The execution of the substantive jail sentence imposed by the trial court shall stand suspended, till disposal of appeals before the first appellate court.

(3) The applicants be released on bail on their executing a P.R. Bond of Rs.1,00,000/- (Rupees One Lac Only) by each of them with one solvent surety of the like amount by each of them.

(4) The applicants shall attend the appellate court regularly and shall not seek any exemption, unless there are exceptional circumstances.

(5) The applicants shall not leave the India without prior permission of the said Court.

(6) **Hamdast** is granted.

The applications stand **disposed** of.

In view of disposal of the main criminal application, criminal application(s) pending, if any, also stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!