

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 19th MAY, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

I.A. No.09 of 2023 in Crl.A. No.40 of 2018

Petitioner : Trilochan Kapoor Sharma

versus

Respondent : State of Sikkim

Application under Section 389(3) read with
Section 482 of the Code of Criminal Procedure, 1973

Appearance

Mr. B. Sharma, Senior Advocate with Mr. Rajendra Upreti, Mr. Safal Sharma and Ms. Shreya Sharma, Advocates for the Petitioner.

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the Respondent.

O R D E R (ORAL)

Meenakshi Madan Rai, J.

1. This is to consider an application under Section 389(3) read with Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), filed by the Petitioner, who was convicted on 29-09-2018, in Sessions Trial (Vigilance) Case No.01 of 2017, by the Court of the Learned Special Judge, Prevention of Corruption Act, 1988, South Sikkim, at Namchi, which was upheld by this Court, in Crl.A. No.40 of 2018, by Judgment dated 02-05-2023.

2. Learned Senior Counsel submits that the Petitioner intends to prefer an Appeal before the Hon'ble Supreme Court against the Judgment of this Court, upholding the Judgment and Order on Sentence of the Learned Sessions Court, as detailed *supra*. That, in view of the said circumstance, the sentence may be suspended for at least three months and the Petitioner be

Trilochan Kapoor Sharma vs. State of Sikkim

allowed to continue on the same Bail Bonds. Relying on ***Popular Muthiah vs. State, represented by Inspector of Police***¹ Learned Senior Counsel submits that this Court can exercise its inherent power irrespective of the nature of the proceedings and it is not trammelled by procedural restrictions. That, the power can be exercised *suo moto* in the interest of justice and concurrently with the appellate or revisional jurisdiction for which no formal application is required. That, in ***R. P. Kapur vs. State of Punjab***² referred to in the said Judgment *supra*, the Supreme Court has observed that inherent power should be exercised by the High Court. Hence, in light of the said provisions although Section 389(3) of the Cr.P.C. may not be applicable to the facts and circumstances of the case, the Court may exercise its inherent powers to suspend the sentence to afford the Petitioner an opportunity to approach the Hon'ble Supreme Court, in the interest of justice.

3. Objecting to the petition, Learned Additional Public Prosecutor submits that in the first instance the provisions of Section 389(3) of the Cr.P.C. are not applicable to the instant matter. Secondly, the Supreme Court is not an appellate forum under Article 136 of the Constitution of India and in this view of the matter the question of filing an appeal before the Supreme Court against the impugned Judgment and Order on Sentence of this Court does not arise. To buttress his submissions, he has placed reliance on the decision of the Full Bench of the Hon'ble Kerala High Court in ***Mammooty and Others vs. Food Inspector and Others***³.

¹ (2006) 7 SCC 296

² AIR 1960 SC 866

³ AIR 1987 Kerala 270

4. I have heard the submissions of Learned Counsel *in extenso* and perused the citations relied upon by the parties.

5. To address the arguments of Learned Senior Counsel for the Petitioner, in the first instance the question of the Petitioner being allowed to continue in the same Bail Bonds furnished before this Court cannot be countenanced, as on his conviction being upheld his Bail Bonds stood cancelled and he was taken into judicial custody. Secondly, even if the provisions of Section 389(3) of the Cr.P.C. were to be applied then ninety days would obviously not be granted for filing an appeal, bearing in mind the laws of limitation.

6. Be that as it may, the Full Bench of the Kerala High Court while expounding the provisions of Section 389 of the Cr.P.C. and of Article 136 of the Constitution of India *inter alia* held that;

"12A. What exactly is the nature of an appeal by special leave? In *Durga Shankar Mehta v. Raghuraj Singh*, AIR 1954 SC 520, Mukherjea J., (as he then was) speaking for a Bench of five Judges observed that powers under Art. 136 are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law in cases where needs of justice demand interference by the Supreme Court of the land. Article 136 is worded in the widest term possible. It vests in the Supreme Court plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by a court or tribunal in any case or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws.
In *Arunachalam v. P.S.R. Setharathnam*, AIR 1979 SC 1284 : (1979 Cri LJ 875), the Court cautioned that the power vested in the Supreme Court under Art. 136 is not to be confused with ordinary appellate power exercised by appellate courts and tribunals under special statutes. It is plenary power exercisable outside the purview of ordinary law and meant to meet the pressures of demand of justice. It neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone invoking the jurisdiction of the Supreme Court. Power is vested in the Supreme Court but right to invoke the court's jurisdiction is vested in no one.

Trilochan Kapoor Sharma vs. State of Sikkim

13. Supreme Court under Art. 134 of the Constitution or Ss. 374(1) and 379 of the Code is an appellate court. However, Supreme Court, exercising discretionary power under Art. 136 of the Constitution is not a court exercising ordinary appellate power. Hence it follows that Supreme Court exercising jurisdiction under Art. 136 of the Constitution is not an appellate court as contemplated in sub-s. (1) of S. 389 of the Code. Sub-sections (1) and (3) of S. 389 are part of a scheme; sub-section (1) enables the appellate court to suspend sentence and grant bail in all cases, though for reasons to be recorded in writing while sub-s. (3) confers on the convicting court a limited power in a narrower field to grant bail to a convicted person to afford him an opportunity to present an appeal and obtain orders of the Appellate Court. Sub-section (3) takes colour from sub-s. (1). If a case does not attract provisions of sub-s. (1), it cannot attract provisions of sub-s. (3). Cases covered by sub-s. (3) will fall under sub-s. (1) though all cases falling under sub-s. (1) may not attract sub-s. (3). If in these cases sub-s. (1) is not attracted, and we are of the opinion that it is not attracted, sub-s. (3) also cannot have any operation. Hence petitioners cannot seek bail under sub-s. (3) of S. 389 of the Code.

14. Sub-section (3) of S. 389 of the Code requires the convicted person to satisfy the court by which he is convicted that "he intends to present an appeal". The purpose of conferring on the convicting court the power to grant bail is to "afford sufficient time to present an appeal and obtain orders of the Appellate Court under sub-s. (1)". Petitioners have no right of appeal. They can only move the Supreme Court for special leave to appeal under Art. 136 of the Constitution. Learned counsel for the petitioners would contend that the words "present an appeal" do not presuppose the existence of a right of appeal and that existence of a provision for appeal would be sufficient. They also rely on the reasoning in Abdulla Haji's case (1986 Cri LJ 1193) based on the change of language in the provision compared to the parallel provision in the old Code. The words "intention to present an appeal", in their ordinary grammatical sense would mean that the person has a right of appeal and intends to present an appeal. A person cannot intend to present an appeal if he has no right of appeal. He may move the Supreme Court for special leave to appeal and when special leave is granted it can be said that there is an appeal by him. In the words of Krishna Iyer, J. in Arunachalam's case (AIR 1979 SC 1284) "after leave appeal is born". From this it does not follow that what a person originally presents as a special leave petition is actually an appeal or memorandum of appeal. The birth of the appeal takes place on the grant of special leave. Special leave petition, on leave being granted, is treated as an appeal. He has to satisfy the Supreme Court that it is a fit case for grant

Trilochan Kapoor Sharma vs. State of Sikkim

of special leave and then only urge his appeal before the Court. Power under Art. 136 is a discretionary and extraordinary power outside the purview of ordinary law and has no resemblance to an ordinary appellate power. The Supreme Court exercising jurisdiction under Art. 136 is not a regular court of appeal. It cannot be said that there is no difference between "presenting an appeal" and "presenting a special leave petition"."

7. The matter has been expounded with clarity in the above ratio and requires no further elucidation. I am in respectful agreement with the above extracted observations. The circumstances in the present case are squarely covered by the discussions and observations made in **Mammooty** (*supra*).

8. In view of the above legal position and considering the facts and circumstances of the instant case, the petition deserves no consideration and is accordingly dismissed.

(**Meenakshi Madan Rai**)
Judge
19-05-2023

Approved for reporting : **Yes**

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