

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CRA No. 34/2018

Reserved On: 18th of August, 2022.
Pronounced On: 26th of August, 2022.

Mushtaq Ahmad Peer

... Appellant(s)

Through: -

Mr Z. A. Qurashi, Senior Advocate with
Mr Mir Naveed Gul and Ms Razia Amin, Advocates.

V/s

State of Jammu and Kashmir

... Respondent(s)

Through: -

Mr D. C. Raina, Advocate General with
Mr Sajjad Ashraf Mir, Government Advocate.

CORAM:

**Hon'ble Mr Justice Ali Mohammad Magrey, Judge
Hon'ble Mr Justice Mohd. Akram Chowdhary, Judge**

(ORDER)

Magrey-J:

01. Continuation of hearing of this Criminal conviction appeal filed against the Judgment dated 25th of April, 2018 passed by the Court of learned Special Judge Anti-Corruption, Srinagar bearing file No. 41-B and FIR No. 24 of 2013 registered in Police Station Crime Branch Kashmir, Srinagar for the commission of offences punishable under Sections 420, 406, 201, 120-B of the erstwhile Ranbir Penal Code (RPC) and Section 5(1) (d) read with 5 (2) of the Prevention of Corruption Act is objected by Mr Z. A. Qurashi, the learned Senior Counsel appearing on behalf of the Appellant in view of the application of Rule 29 of the Jammu and Kashmir

High Court Rules, 1999 (for short “the Rules of 1999”). To buttress this argument, Mr Qurashi submitted that the Registry, on the filing of the appeal, had rightly listed the same for consideration before the learned Single Judge of this Court in view of the mandate of Section 410 of the Criminal Procedure Code (hereafter referred to as “the Code”) inasmuch as the sentence of punishment awarded to the Appellant in all the offences is less than 10 years. It is pleaded that the learned Single Judge, however, without detailing out the reasons, has directed the Registry to list appeal before the Division Bench of this Court with reference to applicability of Rule 29 of the Rules of 1999. To further clarify the issue, Mr Qurashi has invited the attention of the Court to the Judgment and Order of sentence passed by the learned trial Court and submitted that the Appellant has been sentenced to undergo rigorous imprisonment for five years for the offence punishable under Section 5(1)(d) read with 5 (2) of the Prevention of Corruption Act; three years rigorous imprisonment for the commission of offence under Section 409 RPC; seven years rigorous imprisonment for the offence punishable under Section 420 RPC; one year rigorous imprisonment for the offence punishable under Section 120-B RPC, which amounts to a total of 16 years with further direction that all these sentences shall run consecutively. It is argued that since the learned trial Court has sentenced the Appellant to undergo rigorous imprisonment for several offences separately which have to run consecutively and that no order of sentence of imprisonment is for more than seven years, therefore, by application of Clause (b) of Sub-Rule 9 of Rule 29 of the Rules of 1999, the

appeal, in this case, would lie to the Single Judge of this Court. The learned Senior Counsel has laid much emphasis on the language of the phrases 'sentence of imprisonment' and 'term exceeding ten years' in Clause (b) of Sub-Rule 9 of Rule 29 of the Rules of 1999 to demonstrate that the conviction appeal against the impugned Judgment of the trial Court where no sentence exceeds ten years is to be competently heard by the single Bench of this Court. The next contention of the learned Senior Counsel is that the right of appeal is available to the Appellant in terms of Section 410 of the Code inasmuch as the Appellant is a convict on a trial held by a Sessions Judge before the High Court.

02. In order to ensure proper interpretation of the Rule position on the subject of jurisdiction of the Bench of this Court to hear this appeal, as raised by the learned Senior Counsel for the Appellant, it had become necessary to seek assistance of the learned Advocate General. Accordingly, Mr D. C. Raina, the learned Advocate General appeared before the Court and submitted that the import and purport of Rule 29 of the Rules of 1999 is further to be read with the mandate of other provisions of the Rules and the law which are in force for the time being. In this behalf, the learned Advocate General has invited the attention of the Court to the language used in the said Rule 29 of the Rules of 1999 and submitted that the Rules of 1999 are only meant for regulating the judicial business of the High Court with reference to assignment of the matters primarily under the powers of Hon'ble the Chief Justice and that these Rules are framed to

facilitate smooth working of the High Court. That apart, the learned Advocate General has also made reference to Sub-Section 3 of Section 35 of the Code to canvass that the sentence of imprisonment awarded to the Appellant in all the offences is to run consecutively as the learned trial Court has sentenced the convict/ Appellant for imprisonment at one trial and, therefore, the same is required to be treated as a single sentence amounting to more than ten years, 16 years to be precise.

03. In rebuttal, Mr Qurashi has averred that Sub-Section 3 of Section 35 of the Code has no application on the appeal which is admittedly filed under Section 410 of the Code. While explaining the argument, it is submitted that the application of Sub-Section 3 of Section 35 of the Code is only available to a convict whose sentence of imprisonment is running consecutively for several offences at one trial for the purpose of filing appeal. The learned Senior Advocate submitted that the right of appeal to the Appellant/ convict has accrued in terms of Section 410 of the Code to be filed before this Court, but Section 35 (3) does not, in any eventuality, determine the hearing of appeal by a single Judge or Division Bench of this Court. He further submitted that the application of Section 35(3) is only available in such cases where the conviction made in a criminal trial in which the accused/s are sentenced for more than one term with direction of sentence of imprisonment to run consecutively to be treated as a one single sentence in a single trial. To elaborate further, it is submitted that in terms of Sections 411 to 413 of the Code, there is no right of appeal to a convict

in petty and summary trial matters, unless the term of sentence of imprisonment exceeds the permissible limit. It is pleaded that the benefit of right of appeal is available to a convict when the sentence of imprisonment goes beyond one year and runs consecutively. In this context, Mr Qurashi has referred to and relied upon the Judgment rendered by the Calcutta High Court reported as '**AIR 1954 Calcutta 301**'.

04. We have heard the learned Counsel for the parties on the aforesaid aspect of jurisdiction of the Bench to hear this appeal, perused the pleadings on record and have considered the matter.

05. The issue as raised by the learned appearing Counsel for the parties *viz.* whether an appeal shall lie against the Order of conviction and sentence passed by the Court of learned Sessions Judge before the Division Bench or Single Bench of the High Court needs to be considered in the context of Rule 29 of the Rules of 1999. Admittedly, the appeal in the present case against the conviction of the Appellant by the Sessions Court lies before the High Court under Section 410 of the Code. The question, however, that arises for our consideration, at this stage, is whether this appeal is to be heard and decided by a Judge of this Court sitting singly or by the Division Bench. The question so formulated is to be answered on the basis of a conjoint reading of Sub-Rule 9 of Rule 29 of the Rules of 1999 read with the mandate of Section 35 (3) and Section 410 of the Code. In this

context, it has become necessary to go through Sub-Rule 9 of Rule 29 of the Rules of 1999 as well as Sections 35 (3) and 410 of the Code hereunder:

“Rule 9 of the Rules of 1999: A criminal appeal, application or reference except –

- (a) An appeal or reference in a case in which a sentence of death or imprisonment for life has been passed;
- (b) An appeal in a case in which a sentence of imprisonment for a term exceeding ten years has been passed;
- (c) An appeal under Section 417(2) of the Code of Criminal Procedure, 1989 (1933 A. D.) from an order of acquittal;
- (d) A case submitted under Section 307 or Section 432 of the Code of Criminal Procedure, 1989 (1933 A.D.);
- (e) A case in which notice has already been issued under Section 439 of the Code of Criminal Procedure, 1989 (1933 A. D.) to a person accused of an offence punishable with death, life imprisonment or imprisonment not less than 10 years to appear and show cause why his sentence should not be enhanced;

“35 (3) of the Code: For the purpose of appeal, the aggregate of consecutive sentence passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

410 of the Code: Appeal from sentence of Court of Session: Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.”

A bare perusal of the aforesaid provisions of law, when appreciated conjointly, makes it unambiguously clear that: (i) any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court; (ii) a criminal appeal shall lie to the single Bench of the High Court in a case in which a sentence of imprisonment for a term not exceeding ten years has been passed; and (iii)

for purpose of appeal, the aggregate of consecutive sentences passed in case of convictions for several offences at one trial shall be deemed to be a single sentence. In other words, what emerges from the above legal position is that the hearing of a criminal appeal in case in which a sentence of imprisonment for a term exceeding 10 years has been passed is to be heard and decided by the Division Bench of this Court.

06. Admittedly, the Code, with the application of Section 410, only provides a remedy of appeal against the conviction where the sentence is awarded by the Sessions Court before the High Court and does not prescribe whether such an appeal will lie before the Single Bench or Division Bench. In these circumstances, this aspect is required to be regulated by the mandate of the Rules of 1999 which, in terms of Sub-Rule 9(b) of Rule 29, in no uncertain terms, stipulates that an appeal in a case in which a sentence of imprisonment for a term not exceeding ten years has been passed is to be heard and decided by a Judge sitting alone. Applying the above legal position to the facts of the case in hand, the primary and main governing factor relating to the jurisdiction to hear the instant appeal either by the Single Bench or the Division Bench revolves round the criterion as to whether the term of sentence of imprisonment awarded to the Appellant herein by the learned trial Court exceeds the limit of ten years or not. To put it in simple words, in case the sentence of imprisonment of the Appellant awarded by the learned trial Court exceeds the term of ten years, then, in such eventuality, the appeal is to be heard and decided by the

Division Bench, whilst, in the alternative, if the term of sentence amounts to a period of less than ten years, then the appeal is to be heard and decided by the Single Judge. The language chosen by the learned trial Court, while dealing with the sentence of imprisonment of the Appellant, has reference to the word 'consecutively' as the learned trial Court, after detailing out the sentences awarded to the Appellant in various offences, has clearly observed that all the sentences so awarded to the Appellant shall run consecutively, that too with respect to a single trial. The plain meaning of word 'consecutively' enjoins that the sentences of imprisonment for various offences have to run successively, one after another and not in parallel/ simultaneous/ concurrent to each other. Going by this interpretation, the sentences of imprisonment awarded to the Appellant in the instant case, if read consecutively as held by the learned trial Court, safely amount to more than ten years, viz. 16 years, passed in a single Sessions trial. This interpretation is further substantiated with the application of the mandate of Sub-Section 3 of Section 35 of the Code which quite clearly declares that, for purpose of appeal, the aggregate of consecutive sentences passed in case of convictions for several offences at one trial shall be deemed to be a single sentence. It is not disputed that the sentences awarded to the Appellant under various offences by the learned trial Court have been passed on a single trial and, thus have to be read as a single sentence. In that view of the matter, the irrefutable conclusion that we arrive upon is that the sentences of imprisonment awarded to the Appellant exceeds the limit of

ten years, and, thus is required to be listed before the Division Bench, as rightly held by the Single Bench.

07. As regards the contention raised by Mr Qurashi, the learned Senior Counsel, relating to the application of Section 35(3) of the Code read with the Judgment of the Calcutta High Court, we are of the considered view that the facts of the case in the decision before the Calcutta High Court were altogether different having reference to seeking admission of an appeal against the Order of a Presidency Magistrate made under Section 323 of the Code involving sentence of rigorous imprisonment for one month as also conviction made under Section 354 of the Code with further sentence of rigorous imprisonment of one month along with fine of Rs. 50. The sentences aforesaid were to run concurrently and, therefore, the said High Court took a view that the application of Section 35(3) of the Code is not applicable to the issue of seeking permission to file appeal as the interpretation of Section 35(3) does not make any scope for filing any such appeal when the two sentences of imprisonment were to run concurrently. In that view of the matter, we are of the view that the aforesaid Judgment, as referred to by the learned Senior Counsel, is not applicable to the facts and circumstances of the present case.

08. Having regard to the above discussion, the question formulated hereinabove *qua* listing of the instant appeal before the appropriate Bench is replied accordingly to the effect that the appeal is required to be heard and

decided by the Division Bench of this Court. Consequently, we direct the Registry to list this appeal before the Division Bench as per Roster on 26th of September, 2022.

(Mohd. Akram Chowdhary)
Judge

(Ali Mohammad Magrey)
Judge

SRINAGAR

August 26th, 2022

"TAHIR"

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| i. | <i>Whether the Order is speaking?</i> | <i>Yes/ No.</i> |
| ii. | <i>Whether the Order is reportable?</i> | <i>Yes/ No.</i> |

